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Rome II Regulation

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Volume III
Rome II Regulation
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edited by
Ulrich Magnus
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Preface

Together with its sister, the Rome I Regulation, the Rome II Regulation, is the core of European private international law. To emphasise its imminence would be tantamount to carrying owls to Athens. It has found its place in the hearts and minds of practitioners and academics alike all over Europe. Its inception marked the start of EU legislation on conflict of laws. It premiered and pioneered since it was the first codificatory project of the EU in the field of PIL to see the light.

The effort of completing a truly pan-European commentary mirrors the pan-European nature of its fascinating object. This commentary for the first time assembles a team of very prominent and renowned authors from total Europe. The authors' geographical provenience stretches from the Netherlands to the Czech Republic and Poland, and from Italy, Spain and Portugal to Sweden. The time has been definitely ripe to start such a venture already for quite a while.

This commentary is the first full scale article-by-article commentary on the Rome II Regulation in English by a pan-European team, to address. It is truly European in nature and style. It provides thorough and succinct in-depth analysis of every single Article and offers most valuable guidance for lawyers, judges and academics throughout Europe. It is an indispensable working tool for all practitioners involved in this field of law.

Everyone who has ever undertaken the venture to edit a multi-author work only too well knows about the absolute necessity of competent assistance. The editors thus are absolutely grateful and cannot remotely express the thanks and accolades due to our backing team at Hamburg in a proper fashion. Without them it would have been virtually impossible to complete this commentary. Naemi Czempiel and Helen Loose with sheer and utter indefatigability undertook the burdensome task of compiling the index and the Table of Cases of decisions by the ECJ and the CJEU. The list of Abbreviations was prepared by Professor Mankowski. Secretarial support was rendered by Primrose Holders. Very special thanks are due to the division of Otto Schmidt that formerly was Sellier European Law Publishers, in person Andreas Pittrich and Anna Rosch. Apart from being incredibly patient and well-minded they kept the faith in this project (what was not the easiest task at times).

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List of Abbreviations

AA	Ars Aequi
AC	The Law Reports, Appeal Cases
Act. Dr.	Actualités de droit
AdvBl	Advocatenblad
AEDIPr	Anuario Español de Derecho Internacional Privado
AfP	Archiv für Presserecht
Afr. J. Int. Comp. L.	African Journal of International and Comparative Law
A-G	Advocate General (EU)
A-G	Attorney-General (Commonwealth)
A-G	Advocaat-Generaal (Netherlands)
AG	Amtsgericht
AG	Die Aktiengesellschaft
AIDA	Annali italiani de diritto d'autore, della Cultura e dello spettaculo
AJ	Actualités juridiques
AJT	Allgemeen Juridisch Tijdschrift
Akron L. Rev.	Akron Law Review
AktG	Aktiengesetz
All ER	The All England Law Reports
All ER (Comm.)	The All England Law Reports (Commercial Cases)
Am. Econ. Rev.	American Economic Review
Am. J. Comp. L.	American Journal of Comparative Law
Am. J. Int´l. L.	American Journal of International Law
Am. L. & Econ. Rev.	American Law and Economics Review
An. Der. Mar.	Anuario de derecho maritimo
Anh.	Anhang
Anm.	Anmerkung
Ann. Inst. dr. int.	Annales de l'Institute de droit international
AnwBl	Anwaltsblatt
AP	Arbeitsrechtliche Praxis
App.	Corte di appello (or: d'appello)
App. Cogn. Psych.	Applied Cognitive Psychology
ArA	Arbeidsrechtelijke Annotaties
Arb. Int.	Arbitration International
ArbG	Arbeitsgericht
Arch. phil. dr.	Archive de philosophie du droit
Arm.	Armenopoulos
Arr. Cass.	Arresten van het Hof van Cassatie
Arr.Rb.	Arrondissementsrechtbank
Art.	Article
Aud. Prov.	Audiencia Provincial
AVAG	Anerkennungs- und Vollstreckungsausführungsgesetz
AWD	Außenwirtschaftsdienst des Betriebsberaters

BAG	Bundesarbeitsgericht
BAGE	Amtliche Sammlung der Entscheidungen des Bundesarbeitsgerichts
BayObLG	Bayerisches Oberstes Landesgericht
BayObLGZ	Amtliche Sammlung der Entscheidungen des Bayerischen Obersten Landesgerichts in Zivilsachen
BayVBl	Bayerisches Verwaltungsblatt
BB	Betriebs-Berater
B2B	Business-to-Business
BBGS	*Bülow*/*Böckstiegel*/*Geimer*/*Schütze*, Internationaler Rechtsverkehr in Zivil- und Handelssachen (looseleaf München 1954-ongoing)
BC	Brussels Convention
B2C	Business-to-Consumer
BerDGesVR	Berichte der Deutschen Gesellschaft für Völkerrecht
BerDGfIR	Berichte der Deutschen Gesellschaft für Internationales Recht
Berkeley J. Int'l. L.	Berkeley Journal of International Law
BG	Bundesgericht
BGB	Bürgerliches Gesetzbuch
BGBl.	Bundesgesetzblatt
BGE	Entscheidungen des Schweizerischen Bundesgerichts – Amtliche Sammlung
BGH	Bundesgerichtshof
BGH-Report	Schnelldienst zur Zivilrechtsprechung des Bundesgerichtshofs
BGHZ	Amtliche Sammlung der Entscheidungen des Bundesgerichtshofs in Zivilsachen
BIMCO	Baltic and International Maritime Council
BKR	Zeitschrift für Bank- und Kapitalmarktrecht
Bl.	Blatt
BOE	Bolétin Oficiál Español
BR-Drs.	Deutscher Bundesrat – Drucksachen
Brooklyn J. Int'l. L.	Brooklyn Journal of International Law
BT-Drs.	Deutscher Bundestag – Drucksachen
Bull. civ.	Bulletin des arrêts civiles
Bull. dr. banq.	Bulletin de droit et banque
B. U. L. Rev.	Boston University Law Review
Bus. & Leg. Prac.	Business and Legal Practice
BYIL	British Yearbook of International Law
CA	Cour d´appel
C.A.	Court of Appeal
Cah. dr. entrepr.	Cahies de droit de l'entreprise
Cal. L. Rev.	California Law Review
Cambridge L. J.	Cambridge Law Journal
Cambridge Yb. Eur. L.	Cambridge Yearbook of European Law
Cass.	Cour de Cassation
Cassaz.	Corte di Cassazione
CB	Convenio de Bruselas
CC	Code civil (France), Codice civile (Italy), Codigó Civil (Spain)
CCC	Contrats concurrence consummation

C. com.	Code de commerce
CDE	Cahiers de droit européen
cf.	*confer* [compare]
Ch.	Chapter
Ch. D.	Chancery Division
Chron.	Chronique
CID	Chronika Idiotikou Dikaiou
Cir.	US Court of Appeals for the Circuit
CISG	United Nations Convention on the International Sale of Goods
Civ. Just. Q.	Civil Justice Quarterly
C. J.	Chief Justice
cl.	clause
CLC	Company Law Cases
Clunet	Journal du droit international, fondée par *E. Clunet*
C. M.L. Rev.	Common Market Law Review
Co.	Company
col.	columna
Col. J. Eur. L.	Columbia Journal of European Law
Col. J. Trans. L.	Columbia Journal of Transnational Law
Col. Jur.	Colectânea de Jurisprudência
Col. L. Rev.	Columbia Law Review
COM	Document of the Commission
Colo. L. Rev.	Colorado Law Review
Cornell Int'l. L. J.	Cornell International Law Journal
Cornell L. Rev.	Cornell Law Review
Corr. giur.	Corriere giuridico
Cour sup.	Cour superieure
CPR	Rules of Civil Procedure
CR	Computer und Recht
Ct.	Court
Cuad. der. trans.	Cuadernos de derecho transnacional
Czech Yb. Int. L.	Czech Yearbook of International Law
D.	Recueil Dalloz Sirey
DAVorm	Der Amtsvormund
DB	Der Betrieb
D.C.	District of Columbia
DEE	Dikaio Epicheirisseon kai Etairion
Digest	Digest of case-law relating to the European Communities, Series D: Convention of 27 September 1968
DIN	Deutsche Industrie-Norm
Dir. comm. int.	Diritto del commercio internazionale
Dir. com. scambi int.	Diritto comunitario e degli scambi internazionali
Dir. e giur.	Diritto e giurisprudenza
Dir. ind.	Diritto industriale
Dir. mar.	Diritto marittimo
Dir. scambi int.	Diritto comunitario e degli scambi internazionali
Div. Act.	Divorce: actualité juridique, sociale et fiscale

DMF	Droit maritime français
DNotZ	Deutsche Notar-Zeitschrift
Doc. Dir. Comp.	Documentação e Direito Comparado (Boletim do Ministério da Justiça)
D. R.	European Commission of Human Rights Decisions & Reports
Dr. & Patr.	Droit et Patrimoine
Dr. aff.	Droit des affaires
Dr. soc.	Droit social
Dr. sociétés	Droit des sociétés
DStR	Deutsches Steuerrecht
DVBl	Deutsches Verwaltungsblatt
DWW	Deutsche Wohnungswirtschaft
DZWiR	Deutsche Zeitschrift für Wirtschaftsrecht
DZWIR	Deutsche Zeitschrift für Wirtschafts- und Insolvenzrecht
ead.	eadem (the same, female)
EAS	Europäisches Arbeits- und Sozialrecht
EBLR	European Business Law Review
EBOR	European Business Organization Law Review
EC	European Community
ECHR	European Court on Human Rights
ECJ	European Court of Justice
ECR	Reports of Judgments of the European Court of Justice
ed.	edition
ed.	Editor
éd.	éditeur
Edinburgh L. Rev.	Edinburgh Law Review
eds.	Editors
éds.	Éditeurs
EEZ	Exclusive Economic Zone
EF-Z	Zeitschrift für Ehe- und Familienrecht
EHRC	European Human Rights Convention
EHRR	European Human Rights Reports
EIPR	European Intellectual Property Right
EJCCL	European Journal of Commercial Contract Law
Ell. Dik.	Elleniki Dikaiossyni
ELLJ	European Labour Law Journal
Emory Int'l. L. Rev.	Emory International Law Review
END	Epitheorissi Naftiliakou Dikaiou
ERCL	European Review of Contract Law
ERPL	European Review of Private Law
et al.	et alii
ETL	European Transport Law
ETS	European Treaty Series
EuGVÜ	Brussels Convention
EuLF	European Legal Forum
Eur. J. L. & Econ.	European Journal of Law and Economics
Eur. J. L. Reform	European Journal of Law Reform

Eur. Lawyer	The European Lawyer
Eur. L. Rev.	European Law Review
Eur. L. Rptr.	European Law Reporter
Europa e dir. priv.	Europa e diritto privato
Europe	Juris-Classeur Europe
Eur. Rev. Publ. L.	European Review of Public Law
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
EvBl	Evidenzblatt
EWCA	England and Wales Court of Appeal
EWHC	England and Wales High Court
EWiR	Entscheidungen zum Wirtschaftsrecht
EWS	Europäisches Wirtschafts- und Steuerrecht
F. 2d	Federal Reporter, Second Series
Fam. L.	Family Law
FamPra.ch	Die Praxis des Familienrechts
FamRZ	Zeitschrift für das gesamte Familienrecht
fasc.	fascicule
FCR	Family Court Reports
F.D.	Family Division
FG	Festgabe
FGPrax	Praxis der freiwilligen Gerichtsbarkeit
FLR	Family Law Reports
fn.	footnote
Foro it.	Foro italiano
FPR	Familie Partnerschaft Recht
FRC	Fundamental Rights Charter
FS	Festschrift
F.S.R.	Fleet Street Reports
FuR	Familie und Recht
GATS	General Agreement on Trade in Services
Ga. L. Rev.	Georgia Law Review
Gaz. Pal.	Gazette du Palais
Geb.	Geburtstag (anniversary)
gen. ed.	general editor
gen. eds.	general editors
Geo. L.J.	Georgetown Law Journal
Giur. it.	Giurisprudenza italiana
Giur. mer.	Giurisprudenza di merito
Giust. civ.	Giustizia civile
GmbH	Gesellschaft mit beschränkter Haftung
GmbHG	Gesetz betreffend die Gesellschaften mit beschränkter Haftung
GmbHR	GmbH-Rundschau
GPR	Zeitschrift für Gemeinschaftsprivatrecht
GRUR	Gewerblicher Rechtsschutz und Urheberrecht
GRUR Int.	Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil

GRUR-Prax	Gewerblicher Rechtsschutz und Urheberrecht Praxis im Immaterialgüter- und Wettbewerbsrecht
GRUR-RR	Gewerblicher Rechtsschutz und Urheberrecht Rechtsprechungs-Report
GS	Gedächtnisschrift
GWR	Gesellschafts- und Wirtschaftsrecht
Harv. J. Int'l. L.	Harvard Journal of International Law
HAVE	Haftung und Versicherung
H. C.	High Court
HD	Højesterets Domme (Denmark) or Högsta Domstolen (Sweden)
HG	Handelsgericht
HGB	Handelsgesetzbuch
H. L.	House of Lords
Hof	Gerechtshof (Netherlands) or Hof van Beroep (Belgium)
Hof van Cass.	Hof van Cassatie
ibid.	ibidem
ICC	International Chamber of Commerce
Icclr	International Company and Commercial Law Law
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
id.	idem (the same, masculine; also plural)
IGKK/IACPIL	Interdisziplinäre Studien zur Komparatistik und zum Kollisionsrecht/Interdisciplinary Studies of Comparative and Private International Law
IHR	Internationales Handelsrecht
IIC	International Review of Industrial Property and Copyright Law
ILM	International Legal Materials
I.L.Pr.	International Litigation Procedure
ILRM	Irish Law Reports Monthly
ILT	Irish Law Times
Inc.	Incorporated
Indiana J. Global Leg. Stud.	Indiana Journal of Global Legal Studies
Indiana L. Rev.	Indiana Law Review
InsO	Insolvenzordnung
InstGE	Entscheidungen der Instanzgerichte zum Geistigen Eigentum
Int. J. L. & Info. Tech.	International Journal of Law and Information Technology
Int'l. Bus. Law.	The International Business Lawyer
Int'l. Lawyer	The International Lawyer
Int'l. Lis	International lis
Int. Rev. L. & Econ.	International Review of Law and Economics
InVo	Insolvenz & Vollstreckung
IPR	Internationales Privatrecht
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts
IPRE	Entscheidungen zum Internationalen Privatrecht (Austria)

IPRspr.	Deutsche Rechtsprechung auf dem Gebiete des Internationalen Privatrechts
IR	Informations rapides
I. R.	Irish Reports
ITF	International Transport Workers' Federation
J.	Justice
JA	Juristische Arbeitsblätter
J. App. Soc. Psych.	Journal of Applied Social Psychology
JBl	Juristische Blätter
JBL	Journal of Business Law
JbPraxSch	Jahrbuch für die Praxis der Schiedsgerichtsbarkeit
J-Cl.	Juris-Classeur (répertoire)
JCP	Juris-Classeur Périodique, La Sémaine Juridique
J. Empir. Leg. Stud.	Journal of Empirical Legal Studies
J. Finance	Journal of Finance
J. Fin. Econ.	Journal of Financial Economics
JIBFL	Journal of International Banking and Financial Law
JIML	Journal of International Maritime Law
J. Int. Arb.	Journal of International Arbitration
J. Corp. L.	Journal of Corporate Law
J. Econ. Behav. & Org.	Journal of Economic Behavior and Organizations
J. L. & Com.	Journal of Law and Commerce
J. L., Econ. & Org.	Journal of Law, Economics and Organization
J. Leg. Stud.	Journal of Legal Studies
JMLB	Jurisprudence de Mons, Liège et Bruxelles
JMLC	Journal of Maritime Law and Commerce
J. Personality & Soc. Psych.	Journal of Personality and Social Psychology
J. Pol. Econ.	Journal of Political Economy
JR	Juristische Rundschau
J. Risk & Uncert.	Journal of Risk and Uncertainty
JT	Juridisk Tidskrift vid Stockholms Universitet
J. trib.	Journal des tribunaux
J. trib. dr. eur.	Journal des tribunaux de droit européen
Jura	Juristische Ausbildung
JurisPR-ITR	juris PraxisReport IT-Recht
JurisPR-ZivilR	juris PraxisReport Zivilrecht
Jur. Rev.	Juridical Review
JutD	Juridisch up to Date
JZ	Juristenzeitung
KantonsG	Kantonsgericht
KapMuG	Kapitalanlage-Musterverfahrensgesetz
KG	Kammergericht
King's Coll. L.J.	King's College Law Journal
K & R	Kommunikation und Recht

LAG	Landesarbeitsgericht
LAGE	Entscheidungen der Landesarbeitsgerichte
L. & Contemp. Prbls.	Law and Contemporary Problems
LG	Landgericht (Germany), Landesgericht (Austria)
LIEI	Legal Issues of Economic Integration
lit.	littera
L. J.	Lord Justice
Lloyd's IR	Lloyd's Insurance Law Reports
Lloyd's Rep.	Lloyd's Law Reports
LLP	Limited Liability Partnership
LM	*Lindenmaier*, *Fritz*/*Möhring*, *Philipp*, Nachschlagewerk des Bundesgerichtshofs – Entscheidungen in Zivilsachen mit Leitsätzen, Sachverhalt und Gründen (München 1951 *et seq.*)
LMCLQ	Lloyd's Maritime and Commercial Law Quarterly
LMK	Lindenmaier/Möhring Kommentierte Rechtsprechung
LMLN	Lloyd's Maritime Law Newsletter
loc. cit.	loco citato
L. Q.Rev.	Law Quarterly Review
LRLR	Lloyd's Reinsurance Law Reports
Ltd.	Limited
Maastricht J. Eur. & Comp. L.	Maastricht Journal of European and Comparative Law
Mass.	Massimario
M. B.	Moniteur belge
MDR	Monatsschrift für deutsches Recht
Melbourne U. L. Rev.	Melbourne University Law Review
Mich. J. Int´l. L.	Michigan Journal of International Law
MittBayNot	Mitteilungen für das Bayerische Notariat
MittPat	Mitteilungen der Deutschen Patentanwälte
MMR	Multimedia und Recht
Mod. L. Rev.	Modern Law Review
M.R.	Master of the Rolls
n.	numero
NB	Nomiko Vima
ncpc	Nouveau Code de Procedure Civile
NGCC	Nuova giurisprudenza civile commentata
NILR	Netherlands International Law Review
NIPR	Nederlands Internationaal Privaatrecht
NJ	Nederlandse Jurisprudentie (Netherlands), Neue Justiz (Germany)
NJA	Nytt Juridisk Arkiv
NJOZ	Neue Juristische Online-Zeitschrift
NJW	Neue Juristische Wochenschrift
NJW-RR	NJW-Rechtsprechungsreport Zivilrecht
NLCC	Le nuove leggi civili commentate
no.	number (English) or numéro (French)
nr.	number

n. r.	not reported
Nr.	Nummer
NRt	Norsk Retstidende
NSW	New South Wales
NTBR	Nederlands Tijdschrift voor Burgerlijk Recht
NTHR	Nederlands Tijdschrift voor Handelsrecht
NTIR	Nordisk Tidskrift for International Ret
Nw. U. L. Rev.	Northwestern University Law Review
NVwZ	Neue Zeitschrift für Verwaltungsrecht
nyr	not yet reported
NZA	Neue Zeitschrift für Arbeitsrecht
NZA-RR	Neue Zeitschrift für Arbeitsrecht, Rechtsprechungs-Report
NZBau	Neue Zeitschrift für Baurecht
NZG	Neue Zeitschrift für Gesellschaftsrecht
NZI	Neue Zeitschrift für Insolvenz und Sanierung
NZM	Neue Zeitschrift für Miet- und Wohnungsrecht
ObG	Obergericht
öAnwBl	Österreichisches Anwaltsblatt
ÖBA	Österreichisches Bank-Archiv
ÖBl	Österreichische Blätter für gewerblichen Rechtsschutz und Urheberrecht
ÖJZ	Österreichische Juristenzeitung
ÖJZ-LSK	Österreichische Juristenzeitung – Leitsatz-Kartei
ØLD	Østre Landsrets Domme
ØLK	Østre Landsrets Kendelse
OGH	Österreichischer Oberster Gerichtshof
O. H.	Court of Sessions, Outer House
OJ	Official Journal of the European Community (or, since 2003, European Union)
OLG	Oberlandesgericht
OLG-NL	OLG-Rechtsprechung Neue Länder
OLG-Report	Schnelldienst zur Zivilrechtsprechung der Oberlandesgerichte (regional editions)
OLGZ	Rechtsprechung der Oberlandesgerichte in Zivilsachen
op. cit.	opere citato
Org. Behav. & Hum. Decision	Organization, Behavior and Human Decision
p.	pagina
para.	Paragraph
Pas. belge	Pasicrisie belge
Pas. lux.	Pasicrisie luxembourgeoise
PHI	Produkt-Haftpflicht International
P&I	Protection and Indemnity
PIL	Private International Law
pp.	paginae (pages)
Pres.	President

Pret.	Pretore
Psych. Rev.	Psychological Review
QB	The Law Reports, Queen's Bench Division
Q.B.D.	Queen's Bench Division
Q.C.	Queen's Counsel
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
Rassegna dir. civ.	Rassegna di diritto civile
Rb.	Rechtbank
RBDI	Revue belge de droit international
Rb. Kh.	Rechtbank voor Koophandel
RCDIP	Revue critique de droit international privé
RdA	Recht der Arbeit (Germany)
RDAI	Revue des affaires internationales
RDC	Revue des contrats
RDIPP	Rivista di diritto internazionale privato e processuale
RdTW	Recht der Transportwirtschaft
RDV	Recht der Datenverarbeitung
RdW	Recht der Wirtschaft (Austria)
Rec.	Recueil
Rec. des Cours	Recueil des Cours de l'Académie de Droit International de La Haye
REDI	Revista Española de Derecho Internacional
Rel.	Tribunal da Relação
Rép.	Répertoire
Rev. Chil. Der.	Revista chilena de derecho
Rev. der. com. eur.	Revista de derecho comunitario europeo
Rev. dr. aff. int.	Revue de droit des affaires internationales
Rev. dr. comm. belge	Revue de droit commercial belge
Rev. dr. transp.	Revue du droit des transports et de la mobilité
Rev. dr. ULB	Revue de droit de l´Université Libre de Bruxelles
Rev. electr. met. e hist. der.	Revista electrónica de metodología e historia del derecho
Rev. Fac. Dir. Univ. Lisboa	Revista da Faculdade de Direito da Universidade de Lisboa
Rev. héll. dr. int.	Revue héllenique de droit international
Rev. int. dr. écon.	Revue international de droit économique
Rev. jur. comm.	Revue de jurisprudence commerciale
Rev. Lamy dr. aff.	Revue Lamy droit des affaires
Rev. not. belge	Revue du notariat belge
Rev. Scapel	Revue du droit maritime, fondée par Scapel
RGDC	Revue génerale du droit civil
Riv. dir. ind.	Rivista di diritto industriale
Riv. dir. int.	Rivista di diritto internazionale
Riv. dir. proc.	Rivista di diritto processuale
Riv. not.	Rivista notarile
RIW	Recht der Internationalen Wirtschaft
RJC	Revista juridica de Cataluña

RRa	ReiseRecht aktuell
r+s	Recht und Schaden
RSC	Rules of the Supreme Court
Rt.	Retstidning
RTD civ.	Revue trimestrielle de droit civil
RTD com.	Revue trimestrielle de droit commercial
RTDE	Revue trimestrielle de droit européen
RTDF	Revue trimestrielle de droit financier
RTD fam.	Revue trimestrielle de droit familial
RvdW	Rechtspraak van de Week
R. W.	Rechtskundig Weekblad
S. C.	Supreme Court (United Kingdom or Ireland)
SchiedsVZ	Zeitschrift für Schiedsverfahren
sec.	section
seq.	sequens (if singular), sequentes (if plural)
sess.	session
S. I.	Statutory Instrument
sic!	Schweizerische Zeitschrift für Immaterialgüterrecht
SJZ	Schweizerische Juristen-Zeitung
SLT	Scots Law Times
SLT (Sh Ct)	Scots Law Times (Sheriff Court)
SME	Small and Medium Enterprise
somm.	sommaires commentées
S & S	Schip en Schade
Stan. L. Rev.	Stanford Law Review
StAZ	Das Standesamt – Zeitschrift für das gesamte Standesamtswesen
STJ	Supremo Tribunal de Justiça
sup.	superieur
Sup. Ct.	Supreme Court (USA)
SvJT	Svensk Juristtidning
SZ	Sammlung in Zivilsachen (Austria)
SZIER	Schweizerische Zeitschrift für internationales und europäisches Recht
SZW	Schweizerische Zeitschrift für Wirtschaftsrecht
SZZP	Schweizerische Zeitschrift für Zivilprozessrecht
TBH	Tijdschrift voor Belgisch Handelsrecht/Revue de droit commercial belge
TGI	Tribunal de grande instance
TranspR	Transportrecht
Trib.	Tribunale
Trib. arr.	Tribunal d'arrondissement
Trib. civ.	Tribunal civil
Trib. comm.	Tribunal de commerce
TS	Tribunal Supremo
Trust L.J.	Trust Law Journal

Tulane J. Int'l. & Comp. L.	Tulane Journal of International and Comparative Law
TvA	Tijdschrift voor Arbitrage
TVR	Tijdschrift Vervoer en Recht
U. Chi. L. Rev.	University of Chicago Law Review
UCLA L. Rev.	University of California Los Angeles Law Review
UfR	Ugeskrift for Retsvæsen
U. Ill. L. Rev.	University of Illinois Law Review
U. Kan. L. Rev.	University of Kansas Law Review
UKSC	United Kingdom Supreme Court
U. N. Br. L.J.	University of New Brunswick Law Journal
UNCLOS	United Nations Convention on the Law of the Sea
UNIDROIT	International Institute for the Unification of Private Law
Unif. L. Rev.	Uniform Law Review
U. Penn. J. Int'l. Econ. L.	University of Pennsylvania Journal of International Economic Law
US	United States Reporter
v.	versus
Va. J. Int'l. L.	Virginia Journal of International Law
Va. L. Rev.	Virginia Law Review
Vand. J. Transnat'l. L.	Vanderbilt Journal of Transnational Law
V-C	Vice-Chancellor
VersR	Versicherungsrecht
VOB/B	Verdingungsordnung für Bauleistungen Part B
vol.	volume
VOL	Verdingungsordnung für Leistungen
VuR	Verbraucher und Recht
VVG	Versicherungsvertragsgesetz (German or Austrian Insurance Contracts Act)
Vzngr.	Voorzieningenrechter
Wash. U. L. Q.	Washington University Law Quarterly
wbl	Wirtschaftsrechtliche Blätter
WCAM	Wet Collectieve Afwikkeling Massaschaden
WiB	Wirtschaftsrechtliche Beratung
WiRO	Wirtschaft und Recht in Osteuropa
WLR	The Weekly Law Reports
WM	Wertpapier-Mitteilungen
WPNR	Weekblad voor Privaatrecht, Notariaat en Registratie
WRP	Wettbewerb in Recht und Praxis
WuB	Entscheidungen zum Wirtschafts- und Bankrecht
Yale L.J.	Yale Law Journal
Yb. Eur. L.	Yearbook of European Law
Yb. PIL	Yearbook for Private International Law

ZEuP	Zeitschrift für Europäisches Privatrecht
ZEuS	Zeitschrift für Europäische Studien
ZfJ	Zentralblatt für Jugendrecht
ZfRV	Zeitschrift für Rechtsvergleichung
ZfS	Zeitschrift für Schadensrecht
ZGE	Zeitschrift für Geistiges Eigentum
ZGR	Zeitschrift für Unternehmens- und Gesellschaftsrecht
ZGS	Zeitschrift für das gesamte Schuldrecht
ZHR	Zeitschrift für das gesamte Handels- und Wirtschaftsrecht
ZInsO	Zeitschrift für das gesamte Insolvenzrecht
ZIP	Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis
ZLR	Zeitschrift für Lebensmittelrecht
ZPO	Zivilprozessordnung
ZR	Blätter für Zürcherische Rechtsprechung
ZSR	Zeitschrift für schweizerisches Recht
ZUM	Zeitschrift für Urheber- und Medienrecht
ZVertriebsR	Zeitschrift für Vertriebsrecht
ZVglRWiss	Zeitschrift für vergleichende Rechtswissenschaft
ZVR	Zeitschrift für Verkehrsrecht
ZWeR	Zeitschrift für Wettbewerbsrecht (Journal for Competition Law)
ZZP	Zeitschrift für Zivilprozess
ZZP Int.	Zeitschrift für Zivilprozess International
ZZZ	Schweizerische Zeitschrift für Zivilprozess- und Zwangsvollstreckungsrecht

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)

Official Journal no. L 199/40, 31 July 2007, p. 1–10

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty establishing the European Community, and in particular Articles 61(c) and 67 thereof,
Having regard to the proposal from the Commission,
Having regard to the opinion of the European Economic and Social Committee,[1]
Acting in accordance with the procedure laid down in Article 251 of the Treaty in the light of the joint text approved by the Conciliation Committee on 25 June 2007,[2]
Whereas:

(1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice. For the progressive establishment of such an area, the Community is to adopt measures relating to judicial cooperation in civil matters with a cross-border impact to the extent necessary for the proper functioning of the internal market.

(2) According to Article 65(b) of the Treaty, these measures are to include those promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction.

(3) The European Council meeting in Tampere on 15 and 16 October 1999 endorsed the principle of mutual recognition of judgments and other decisions of judicial authorities as the cornerstone of judicial cooperation in civil matters and invited the Council and the Commission to adopt a programme of measures to implement the principle of mutual recognition.

(4) On 30 November 2000, the Council adopted a joint Commission and Council programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters.[3] The programme identifies measures relating to the harmonisation of conflict-of-law rules as those facilitating the mutual recognition of judgments.

(5) The Hague Programme,[4] adopted by the European Council on 5 November 2004, called for work to be pursued actively on the rules of conflict of laws regarding non-contractual obligations (Rome II).

(6) The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought.

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1 OJ C 241, 28.9.2004, p. 1.

2 Opinion of the European Parliament of 6 July 2005 (OJ C 157 E, 6.7.2006, p. 371), Council Common Position of 25 September 2006 (OJ C 289 E, 28.11.2006, p. 68) and Position of the European Parliament of 18 January 2007 (not yet published in the Official Journal). European Parliament Legislative Resolution of 10 July 2007 and Council Decision of 28 June 2007.

3 OJ C 12, 15.1.2001, p. 1.

4 OJ C 53, 3.3.2005, p. 1.

(7) The substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[5] (Brussels I) and the instruments dealing with the law applicable to contractual obligations.

(8) This Regulation should apply irrespective of the nature of the court or tribunal seised.

(9) Claims arising out of acta iure imperii should include claims against officials who act on behalf of the State and liability for acts of public authorities, including liability of publicly appointed office-holders. Therefore, these matters should be excluded from the scope of this Regulation.

(10) Family relationships should cover parentage, marriage, affinity and collateral relatives. The reference in Article 1(2) to relationships having comparable effects to marriage and other family relationships should be interpreted in accordance with the law of the Member State in which the court is seised.

(11) The concept of a non-contractual obligation varies from one Member State to another. Therefore for the purposes of this Regulation non-contractual obligation should be understood as an autonomous concept. The conflict-of-law rules set out in this Regulation should also cover non-contractual obligations arising out of strict liability.

(12) The law applicable should also govern the question of the capacity to incur liability in tort/delict.

(13) Uniform rules applied irrespective of the law they designate may avert the risk of distortions of competition between Community litigants.

(14) The requirement of legal certainty and the need to do justice in individual cases are essential elements of an area of justice. This Regulation provides for the connecting factors which are the most appropriate to achieve these objectives. Therefore, this Regulation provides for a general rule but also for specific rules and, in certain provisions, for an 'escape clause' which allows a departure from these rules where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country. This set of rules thus creates a flexible framework of conflict-of-law rules. Equally, it enables the court seised to treat individual cases in an appropriate manner.

(15) The principle of the lex loci delicti commissi is the basic solution for non-contractual obligations in virtually all the Member States, but the practical application of the principle where the component factors of the case are spread over several countries varies. This situation engenders uncertainty as to the law applicable.

(16) Uniform rules should enhance the foreseeability of court decisions and ensure a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage. A connection with the country where the direct damage occurred (lex loci damni) strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage, and also reflects the modern approach to civil liability and the development of systems of strict liability.

(17) The law applicable should be determined on the basis of where the damage occurs, regardless of the country or countries in which the indirect consequences could occur. Accordingly, in cases of personal injury or damage to property, the country in which the damage occurs should be the country where the injury was sustained or the property was damaged respectively.

(18) The general rule in this Regulation should be the lex loci damni provided for in Article 4(1). Article 4(2) should be seen as an exception to this general principle, creating a special connection where the parties have their habitual residence in the same country. Article 4(3) should be understood as an 'escape clause' from Article 4(1) and (2), where it is clear from all the circum-

[5] OJ L 12, 16.1.2001, p. 1. Regulation as last amended by Regulation (EC) No. 1791/2006 (OJ L 363, 20.12. 2006, p. 1).

stances of the case that the tort/delict is manifestly more closely connected with another country.

(19) Specific rules should be laid down for special torts/delicts where the general rule does not allow a reasonable balance to be struck between the interests at stake.

(20) The conflict-of-law rule in matters of product liability should meet the objectives of fairly spreading the risks inherent in a modern high-technology society, protecting consumers' health, stimulating innovation, securing undistorted competition and facilitating trade. Creation of a cascade system of connecting factors, together with a foreseeability clause, is a balanced solution in regard to these objectives. The first element to be taken into account is the law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred, if the product was marketed in that country. The other elements of the cascade are triggered if the product was not marketed in that country, without prejudice to Article 4(2) and to the possibility of a manifestly closer connection to another country.

(21) The special rule in Article 6 is not an exception to the general rule in Article 4(1) but rather a clarification of it. In matters of unfair competition, the conflict-of-law rule should protect competitors, consumers and the general public and ensure that the market economy functions properly. The connection to the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected generally satisfies these objectives.

(22) The non-contractual obligations arising out of restrictions of competition in Article 6(3) should cover infringements of both national and Community competition law. The law applicable to such non-contractual obligations should be the law of the country where the market is, or is likely to be, affected. In cases where the market is, or is likely to be, affected in more than one country, the claimant should be able in certain circumstances to choose to base his or her claim on the law of the court seised.

(23) For the purposes of this Regulation, the concept of restriction of competition should cover prohibitions on agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition within a Member State or within the internal market, as well as prohibitions on the abuse of a dominant position within a Member State or within the internal market, where such agreements, decisions, concerted practices or abuses are prohibited by Articles 81 and 82 of the Treaty or by the law of a Member State.

(24) 'Environmental damage' should be understood as meaning adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms.

(25) Regarding environmental damage, Article 174 of the Treaty, which provides that there should be a high level of protection based on the precautionary principle and the principle that preventive action should be taken, the principle of priority for corrective action at source and the principle that the polluter pays, fully justifies the use of the principle of discriminating in favour of the person sustaining the damage. The question of when the person seeking compensation can make the choice of the law applicable should be determined in accordance with the law of the Member State in which the court is seised.

(26) Regarding infringements of intellectual property rights, the universally acknowledged principle of the lex loci protectionis should be preserved. For the purposes of this Regulation, the term 'intellectual property rights' should be interpreted as meaning, for instance, copyright, related rights, the sui generis right for the protection of databases and industrial property rights.

(27) The exact concept of industrial action, such as strike action or lock-out, varies from one Member State to another and is governed by each Member State's internal rules. Therefore, this Regu-

lation assumes as a general principle that the law of the country where the industrial action was taken should apply, with the aim of protecting the rights and obligations of workers and employers.

(28) The special rule on industrial action in Article 9 is without prejudice to the conditions relating to the exercise of such action in accordance with national law and without prejudice to the legal status of trade unions or of the representative organisations of workers as provided for in the law of the Member States.

(29) Provision should be made for special rules where damage is caused by an act other than a tort/delict, such as unjust enrichment, negotiorum gestio and culpa in contrahendo.

(30) Culpa in contrahendo for the purposes of this Regulation is an autonomous concept and should not necessarily be interpreted within the meaning of national law. It should include the violation of the duty of disclosure and the breakdown of contractual negotiations. Article 12 covers only non-contractual obligations presenting a direct link with the dealings prior to the conclusion of a contract. This means that if, while a contract is being negotiated, a person suffers personal injury, Article 4 or other relevant provisions of this Regulation should apply.

(31) To respect the principle of party autonomy and to enhance legal certainty, the parties should be allowed to make a choice as to the law applicable to a non-contractual obligation. This choice should be expressed or demonstrated with reasonable certainty by the circumstances of the case. Where establishing the existence of the agreement, the court has to respect the intentions of the parties. Protection should be given to weaker parties by imposing certain conditions on the choice.

(32) Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. In particular, the application of a provision of the law designated by this Regulation which would have the effect of causing non-compensatory exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the court seised, be regarded as being contrary to the public policy (ordre public) of the forum.

(33) According to the current national rules on compensation awarded to victims of road traffic accidents, when quantifying damages for personal injury in cases in which the accident takes place in a State other than that of the habitual residence of the victim, the court seised should take into account all the relevant actual circumstances of the specific victim, including in particular the actual losses and costs of after-care and medical attention.

(34) In order to strike a reasonable balance between the parties, account must be taken, in so far as appropriate, of the rules of safety and conduct in operation in the country in which the harmful act was committed, even where the non-contractual obligation is governed by the law of another country. The term 'rules of safety and conduct' should be interpreted as referring to all regulations having any relation to safety and conduct, including, for example, road safety rules in the case of an accident.

(35) A situation where conflict-of-law rules are dispersed among several instruments and where there are differences between those rules should be avoided. This Regulation, however, does not exclude the possibility of inclusion of conflict-of-law rules relating to non-contractual obligations in provisions of Community law with regard to particular matters.

This Regulation should not prejudice the application of other instruments laying down provisions designed to contribute to the proper functioning of the internal market in so far as they cannot be applied in conjunction with the law designated by the rules of this Regulation. The application of provisions of the applicable law designated by the rules of this Regulation should not restrict the free movement of goods and services as regulated by Community instruments,

such as Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).[6]

(36) Respect for international commitments entered into by the Member States means that this Regulation should not affect international conventions to which one or more Member States are parties at the time this Regulation is adopted. To make the rules more accessible, the Commission should publish the list of the relevant conventions in the Official Journal of the European Union on the basis of information supplied by the Member States.

(37) The Commission will make a proposal to the European Parliament and the Council concerning the procedures and conditions according to which Member States would be entitled to negotiate and conclude on their own behalf agreements with third countries in individual and exceptional cases, concerning sectoral matters, containing provisions on the law applicable to non-contractual obligations.

(38) Since the objective of this Regulation cannot be sufficiently achieved by the Member States, and can therefore, by reason of the scale and effects of this Regulation, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity set out in Article 5 of the Treaty. In accordance with the principle of proportionality set out in that Article, this Regulation does not go beyond what is necessary to attain that objective.

(39) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom and Ireland are taking part in the adoption and application of this Regulation.

(40) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark does not take part in the adoption of this Regulation, and is not bound by it or subject to its application,

HAVE ADOPTED THIS REGULATION:

Introduction

6 OJ L 178, 17.7.2000, p. 1.

I. The purposes and objectives of the Regulation

1 The Rome II Regulation is an important part of the unification of Private International (PIL) in the EU and its Member States. It pursues a number of purposes. Its objectives are enshrined in its Recitals if only partially. Overarching objectives are supplemented by specific objectives of the single rules. The list comprises predictability of the outcome litigation, certainty as to the law applicable, the free movement of judgments (all Recital (6)), legal certainty, the need to do justice in individual cases (both Recital (14)), foreseeability of court

decisions, and ensuring a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage (both Recital (16)).

Primarily, the present Regulation as a whole intends to avoid forum shopping.[1] This serves the need described in Recital (6): to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments. Therefore the conflict-of-law rules in the Member States shall designate the same national law irrespective of the country of the court in which the action is brought (Recital (6)). The unified conflict-of-laws regime allows the parties to confine themselves to studying a single set of conflict rules, thus reducing the cost of dispute resolution and augmenting the foreseeability of solutions and certainty of law.[2] This is a sound and modern basic economic rationale, and Recital (6) captures it succinctly.[3] **2**

The fight against forum shopping has been the fundamental aim underpinning the harmonisation and unification of PIL in Europe from its very beginnings. It motivated already the creation of the Rome Convention,[4] the "grandfather" of European PIL. Uniform conflicts rules are necessary to supplement uniform rules on jurisdiction and the free movement of judgments. A regime catering only to the latter two would hardly be sensible and definitely not complete.[5] The Brussels I*bis* Regulation, formerly the Brussels Convention and the Brussels I Regulation, must not be a stand-alone regime for that would open up ample opportunity for unwarranted forum shopping. The Rome regimes are to complement the Brussels regimes. Without uniform conflicts rules accompanying them the Brussels I regimes would threaten to become plaintiff's paradise and defendant's doom. **3**

Predictability and foreseeability which law is to be applied by a certain court reduces legal uncertainty. Legal certainty is enhanced by the very existence of uniform conflicts rules.[6] International decisional harmony reduces the incentives for the plaintiff to shop forum.[7] This holds true regardless of the content, or of the origin, of the law applied.[8] **4**

By contrast, forum shopping would permit the plaintiff indirectly to influence which law would be applied, and thus to engage in ex post opportunism.[9] Forum shopping would turn law shopping on top.[10] The plaintiff's role would gain supremacy, beyond the opportunities already offered to him by selecting from a menu of heads of general and special jurisdictions. An insightful future defendant might feel tempted to reverse roles and to file a pre-emptive **5**

1 See only Explanatory Memorandum, COM (2003) 427 final p. 3; *Calvo Caravaca*/*Carrascosa González* pp. 64–65; *von Hein*, RabelsZ 73 (2009), 461 (466–467).

2 Explanatory Memorandum, COM (2003) 427 final p. 5.

3 *von Hein*, RabelsZ 73 (2009), 461 (466).

4 Report *Giuliano*/*Lagarde*, OJ EEC 1980 C 282/5; Commission's Comment on the Draft Convention on the law applicable to contractual obligations (17 March 1980), OJ 1980 C 94/39.

5 *Calliess*, in: Calliess, Introduction Rome Regulations note 12.

6 *Calvo Caravaca*/*Carrascosa González* p. 65; *Unberath*/*Cziupka*, in: Rauscher, Einl. Rom II-VO note 1.

7 *Calliess*, in: Calliess, Introduction Rome Regulations note 14.

8 *Unberath*/*Cziupka*, in: Rauscher, Einl. Rom II-VO note 2.

9 *Calliess*, in: Calliess, Introduction Rome Regulations note 13.

10 *Vischer*, Mélanges Alfred E. von Overbeck (Fribourg 1990), p. 349, 350; *Hau*, Positive Kompetenzkonflikte im Internationalen Zivilprozessrecht (1996), pp. 31–32.

strike by way of negative declaratory action (if the law of the respective forum knows such instrument). Competing applications in different fora would ensue, and striking first would be tantamount to gaining the jurisdictional edge. Forum running has become quite a common feature. Conflicts law should not support and even less encourage it. Forum shopping must be averted in order to avert law shopping.

6 Forum shopping in general is advantageous to the plaintiff and detrimental to the defendant, in most instances subjecting the latter to an "away game" whereas the plaintiff goes for a "home game".[11] From a more general perspective forum shopping displays a tendency to enhance costs. Procedurally, it raises the probability that parties might invest more in the fight for the preliminary issue of jurisdiction.[12] As to law shopping, provident and cautious parties might invest in gaining information about all laws which could be held applicable in the different possible fora. Pre-emptive strikes might lead to battles being fought which would never have been considered without the threat of forum shopping.[13]

7 Unification of PIL (ideally) leads to the same law applied in all possible fora in all States participating in that unification. This significantly reduces the need for the parties to consider a multiplicity of contingencies and to invest into taking advice and gaining information about a range of laws possibly to be applied.[14] Unification of PIL erases one of the main reasons for forum shopping.[15]

8 Insofar as uniform PIL introduces the option to choose the applicable law (like Art. 14 Rome II Regulation does) it guarantees to the parties an instrument for contingency planning and reduces uncertainty even further.[16] Legal certainty is enhanced by a guarantee of choice of law, which ought to be uniformly applied in all Member States. Recital (31) Rome II Regulation emphasises this.[17] Party autonomy is a doctrine of convenience and efficiency.[18]

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11 See in detail *Mankowski*, IPRax 2006, 454 (456–458).

12 *Whincop/Keyes*, (1998) 22 Melbourne U. L. Rev. 370, 378; *K.A. Moore*, 79 N.C. L. Rev. 889, 925 (2001); *Mankowski*, in: Claus Ott/Hans-Bernd Schäfer (eds.), Vereinheitlichung und Diversität des Zivilrechts in transnationalen Wirtschaftsräumen (2002), p. 118, 123.

13 *Parisi/O'Hara*, in: Peter Newman (ed.), The New Palgrave Dictionary of Economics and the Law, vol. I (2nd ed. London 1998), p. 347, 349; *Mankowski*, in: Claus Ott/Hans-Bernd Schäfer (eds.), Vereinheitlichung und Diversität des Zivilrechts in transnationalen Wirtschaftsräumen (2002), p. 118, 124.

14 *von Wilmowsky*, Europäisches Kreditsicherungsrecht (1996) p. 44; *Mankowski*, in: Claus Ott/Hans-Bernd Schäfer (eds.), Vereinheitlichung und Diversität des Zivilrechts in transnationalen Wirtschaftsräumen (2002), p. 118, 125.

15 *Basedow*, in: FS Hans Stoll (2001), p. 405, 413; *Mankowski*, in: Claus Ott/Hans-Bernd Schäfer (eds.), Vereinheitlichung und Diversität des Zivilrechts in transnationalen Wirtschaftsräumen (2002), p. 118, 125.

16 *Mankowski*, in: Claus Ott/Hans-Bernd Schäfer (eds.), Vereinheitlichung und Diversität des Zivilrechts in transnationalen Wirtschaftsräumen (2002), p. 118, 124–126; *Mankowski*, RabelsZ 74 (2010), 182 (190); see also *McConnaughay*, 39 Columb. J. Trans. L. 595, 611 (2001).

17 Likewise *Mankowski*, RabelsZ 74 (2010), 182; *von Hein*, in: Calliess, Art. 14 Rome II Regulation note 2; *Boele-Woelki*, in: FS Ingeborg Schwenzer (2011), p. 191.

18 *Werner Lorenz*, Vertragsschluss und Parteiwille im internationalen Obligationenrecht (1957) p. 154; *Junker*, IPRax 1993, 1 (2) *et seq.*; *Diedrich*, RIW 2009, 378 (379); *Marc-Philippe Weller*, IPRax 2011, 429 (433).

If PIL aims at fostering private interests, prevalence for party autonomy is the natural consequence.[19] In the realm of non contractual obligations, party autonomy might still foster solutions suiting the parties whilst conforming with market structures, albeit to a more limited extend than in the realm of contracts.[20]

Transcending forum shopping and resorting to a more institutional analysis, one might identify two wider perspectives emerging from Recitals (1) and (6) respectively:[21] first, a normative, human rights based rationale which is implied by the reference to establishing of an area of freedom, security and justice in Recital (1); second, a more functional or utilitarian rationale which in turn is reflected in the reference to the proper functioning of the internal market in Recital (6). Both perspectives converge in the EU engaging in the creation of effective institutions for the enforcement of rights and obligations in civil and commercial matters also in the cross-border dimension.[22] The harmonisation and unification of PIL is an essential and crucial element in this process. **9**

To a certain extent, the unification particularly of the PIL of non contractual obligations indirectly eradicates obstacles to the free movement of persons, to the freedom of establishment and to the transfer of productive resources within the EU: Persons and resources can move cross-border relying that the same law will govern their liability once they do not shift their activities, too.[23] **10**

II. Historical and genetical background of the Rome II Regulation

Unlike the Rome I Regulation the Rome II Regulation did not have any Convention as its direct predecessor but is a genuine European first in its field. Whereas the Rome Convention proceeded to the Rome I Regulation (and preserved the number I spot for the Rome I Regulation despite the latter being of later date than the Rome II Regulation) there has never been any Rome II Convention. The Rome II Regulation is the result of a decade-long,[24] protracted development stirring quite some controversy. **11**

Yet the earliest phase of the genesis[25] dates back already to 1967. Enticed by steps of the Hague Conference on Private International Law to develop conflict rules for specific kinds of torts which commenced in the 1960s and eventually resulted in the two respective Hague Conventions of 1971 and 1973, during the closing stage of the negotiations of the original Brussels Convention the Benelux States invited the Commission to organize a collaborative **12**

19 *Flessner*, Interessenjurisprudenz im Internationalen Privatrecht (1990) p. 99; supported by *Diedrich*, RIW 2009, 378 (379).

20 *Rühl*, Statut und Effizienz (2011) pp. 600–601.

21 *Calliess*, in: Calliess, Introduction Rome Regulations note 2.

22 *Calliess*, in: Calliess, Introduction Rome Regulations note 2.

23 *Calvo Caravaca/Carrascosa González* p. 65.

24 See Editorial Comment, Sometimes it takes thirty years and even more …, (2007) 44 C. M. L. Rev. 1567.

25 *Dickinson* paras. 1.44–1.96 describes "The road to Rome II" comprehensively and in minute detail, with an additional chronology at pp. A5–764 to A5–770.

project between the Member States on the PIL of all kinds of obligations,[26] by a letter dated 8 September 1967 and written by the permanent representative of Belgium to the EEC, *Joseph van der Meulen*.

13 Consequentially, the Commission set up a Working Group charged with inquiring and considering possibilities of developing a common PIL of obligations for the Member States of the EEC. The opening meeting took place from 26–28 February 1969.[27] After setting an agenda the Working Group got a continuing mandate from the Committee of Permanent Representatives in October 1970.

14 The ensuing Draft[28] of June 1972 duly provided for such general Convention on the PIL of obligations encompassing both contractual and non-contractual obligations. The Draft was accompanied by a Report[29] and discussed in particular[30] on the occasion of the famous Copenhagen symposium of April 29 and 30, 1974.[31] What later-on became Rome I and Rome II was merged in a single project in these old days.

15 The split between the two subject matters occurred as early as 1978 when the Working Group decided to focus its work on the PIL on contractual obligations and to leave any steps towards the PIL on non-contractual obligations to a later day. It had transpired that non-contractual obligations would be too hot and too controversial an issue in order to reach consensus whereas unanimity in the field of contractual obligations appeared feasible. Hence, the road to the Rome Convention limited to contractual obligations was taken which was concluded on 19 June 1980 and entered into force on 1 April 1991. The Rome Convention was eventually superseded by the Rome I Regulation as of 17 December 2009.

16 In European terms, the PIL of non-contractual obligations became a dormant beauty for almost two decades. It only reappeared on the agenda in 1996.[32] The Commission circulated a questionnaire amongst Member States asking for a survey of their respective national rules and got appropriate replies[33] as the basis for further steps.[34] The Groupe Européen de Droit International Privé became active as of its own motion and presented a proposal for a

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26 See Report *Jenard*, OJ EEC 1979 C 59/3.

27 See Minutes of the meeting experts 26–28 February 1969, Report *Giuliano/Lagarde*, OJ EEC 1980 C 282/4, in particular the opening address by the Commission's representative, *T. Vogelaar*.

28 Doc. XIV/398/72; also published in: RabelsZ 38 (1974), 211. See also SEK (72) 4429.

29 Report *Giuliano/Lagarde/van Sasse van Ysselt*, Doc. XIV/408/72.

30 See also *Foyer*, Clunet 103 (1976), 555; *Iglesias Buhigues*, in: Homenaje al professor Miaja de la Muele (1979), p. 1123; *Bourel*, in: L'influence des Communautés Européennes sur le droit internacional privé des États membres (Bruxelles 1981), p. 97; *di Marco*, in: Studi in memoria di Mario Giuliano (1989), p. 399.

31 See the conference volume *Lando/von Hoffmann/Siehr* (eds.), The European Private International Law of Obligations (Tübingen 1975).

32 OJ EC 1996 C 319/1 para. 3.1 (c).

33 Doc. 12544/98.

34 See Doc. 9755/98.

Convention[35] in June 1998.[36] In October 1998, the Council's Vienna Action Plan made a legal instrument on the PIL of non contractual obligations a priority measure.[37]

The Treaty of Amsterdam, entering into force on 1 May 1999, in its Art. 65 EC Treaty introduced the competence of the then EC to take legislative steps in PIL. Accordingly, the Convention project formally vanished but was substantially re-enlivened as a Regulation project. The shape switched, but ambition and substance remained virtually unaltered. Within the Council Working Group, the basic features of the later Rome II Regulation saw the light as early as 9 December 1999.[38] But the Commission was paralyzed by internal power struggles between the different Directorates General (particularly DG Justice and Home Affairs and DG Health and Consumers [SANCO] on the one side, and DG Internal Market and Services [Markt] on the other side) concerning the weight to be given to the country of origin-principle.[39] A Green Paper was announced,[40] but never published. **17**

On 3 May 2002 the Commission deepened discussion by publishing a first draft of a Regulation proposal on the PIL of non-contractual obligations,[41] yet without an Explanatory Report. A public consultation triggered some 80 responses from all quarters of the legal professions including businesses and academia.[42] The consultation culminated in a public hearing on 7 January 2003. The comments by the Hamburg Group on Private International Law[43] deserve specific mention for they either laid out future courses or provoke questions (and even justifications) why a course they had proposed was not followed afterwards.[44] On 22 July 2003 the Commission presented its initial Proposal.[45] It stirred a vivid discussion at all possible levels. Amongst the opinions rendered, the comments by the House of Lords' Select Committee[46] deserve particular mention since they also proved particularly influential for later developments. **18**

Henceforth the European Parliament entered the stage called upon under the co-decision procedure established by Arts. 61 lit. c; 67; 251 EC Treaty. Its Committee on Legal Affairs submitted a very thoughtful and engaged Report. The mastermind and driving force behind **19**

35 Groupe Européen de Droit International Privé, Proposal for a European Convention on the law applicable to non-contractual obligations http://www.gedip-egpil.eu/documents/gedip-documents-8pf.html, also published in: NILR 1998, 465. Thereon *Borrás Rodríguez*, REDI 1998–2, 298; *Fallon*, ERPL 1999, 45; *Marín López*, RCEA 2000, 379.

36 Used as an interpretative means by A-G *Szpunar*, Opinion of 20 May 2015 in Case C-240/14, ECLI:EU:C:2015:325 para. 82.

37 OJ EC 1998 C 19/10.

38 Doc. 11982/99; see also Doc. 10231/99.

39 See in detail *Dickinson* paras. 1.59–1.61.

40 Doc. 79/75/00.

41 http://ec.europa.eu/justice_home/news/consulting_public/rome_ii/news_hearing_rome2.en.htm.

42 http://ec.europa.eu/justice_home/news/consulting_public/rome_ii/news_summary_rome2.en.htm.

43 Hamburg Group on Private International Law, RabelsZ 67 (2003), 1.

44 See also *Fernández Masiá*, A.C. 34 (2003), 907; *Nourissat/Treppoz*, Clunet 130 (2003), 7; *Palao Moreno*, in: Palao Moreno/Prats Albentosa/Reyes López (coords.), Derecho patrimonial europeo (2003), p. 271.

45 COM (2003) 427 final.

46 House of Lords' Select Committee, Final Report "The Rome II Regulation", 8th Report of Session 2003–2004 (HL Paper 66) http://www.publications.parliament.uk/pa/ld200304/ldselect/ldeucom/66/6602.htm.

that Report was the Rapporteur, the English Liberal Democrat *Diana Wallis* MEP. In the meantime the European Economic and Social Committee delivered its opinion greatly in favour of the Commission's Proposal.[47]

20 Ms *Wallis* developed a very special relationship with, and affinity towards, American approaches. Expert meetings in Brussels[48] let star a prominent number of law professors from the USA.[49] Not surprisingly, the Committee Report recommended to skip the Commission's proposals addressing specific torts and to resort to rather vague and general rules. It favoured flexibility over predictability and legal certainty. Judicial discretion became some kind of dish of the day, hard and fast rules combined with escape clauses were not to the Committee's likening. Furthermore, governmental interest analysis ranked high in terms of methodology.[50] Ms *Wallis* and her Committee were able to convince the majority of the European Parliament, and accordingly the European Parliament's position of 6 July 2005[51] was an almost complete reversal of the Commission Proposal.

21 But the Commission took its stand and rejected the Parliament's suggestions. Its amended Proposal of 21 February 2006 reaffirmed the general approach taken in the initial Proposal. Modifications concerned detail not general policy. Amendments reflected some points of criticism mounted towards specific rules. In its rejection of the Parliament's position, the Commission was joined by the Council. The Council's Common Position of 25 September 2006[52] reached after compromise proposals by the then Austria presidency[53] and political agreement in the Justice and Home Affairs Council[54] confirmed orthodoxy. It generally approved the Commission's amended Proposal in general whereas it implemented a number of alterations in detail, to some extent reflecting specific concerns expressed by the European Parliament.

22 The Commission accepted the Council's Common Position.[55] But the European Parliament in its 2nd reading did not.[56] Rather unsurprisingly, it tried its luck again after Ms *Wallis* had submitted a further report.[57]

23 The next step resulting formally from the clash between the Council on one side and the Parliament on the other side was a conciliation process milling and moulding the still

47 Opinion of the European Economic and Social Committee, OJ EC 2004 C 241/1.

48 See PE 349.977v02–00 (23–29 March 2005).

49 Compare *Symeonides*, in: FS Erik Jayme (2004), p. 935; *Weintraub*, in: Liber Amicorum Peter Hay (Frankfurt 2005), p. 451; *Weintraub*, 43 Texas Int'l. L.J. 401 (2008) and other references (*Borchers*) under http://www.dianawallismep.org.uk/pages/Rome-II-seminars.html.

50 *Dickinson* para. 1.75.

51 OJ EC 2005 C 157E/371.

52 OJ 2006 C 289E/68.

53 Docs. 5864/06 and 6165/06.

54 Docs. 9033/06 and 9417/06.

55 Commission Communication concerning the Council's Common Position, COM (2006) 566 final.

56 European Parliament Legislative Resolution on the Council's Common Position, OJ 2007 C 244E/194.

57 PE 378.852v01–00 (8 November 2006). But see also the differing Recommendation of the Committee on Legal Affairs, A6–0481/2006 final. At this occasion any allegiance to governmental interest analysis at the overall Committee's level died a silent death; *Dickinson* p. 55 fn. 379.

controversial aspects.[58] The conciliation procedure was also used in order to discuss remaining issues between the Member States.[59] The most burning issue which at some point of time threatened to topple the entire project related to the infringement of personality rights, particularly by the press and other media. Insofar, lobbying by a certain industry group reached a level previously unknown in European PIL. The UK Government to a remarkable degree allied with the English yellow press, popularly coined Fleet Street. Eventually, Member States amongst each other and the European Parliament agreed to disagree on this issue, and the result was excluding the matter from the final Regulation by virtue of Art. 1 (2) (g). This came at the price of a revision clause in Art. 30 (which afterwards was neglected by the Commission as matters turned out when the agreed time had come).

24 The final compromise was reached in the Conciliation Committee meeting on 15 May 2007[60] after extensive preparatory work in the previous months.[61] On 25 June 2007, it was confirmed by the co-chairmen of the Conciliation Committee.[62] Majorities both in the European Parliament (after another Report by the Committee on Legal Affairs[63]) and in the Council approved the package. In the council, Latvia and Estonia voted against it due to objections against Art. 9 on industrial action.[64]

25 The final approval by the European Parliaments dates from 10 July 2007. The last act in the genesis of the Rome II Regulation was finalised on 11 July 2007 when the Presidents of the European Parliament and of the Council signed it.[65]

III. The Rome II Regulation as part of a European PIL of obligations

26 The Rome II Regulation is by no means a stand-alone or a solitaire. Conversely, it forms significant part of a package of at least three, namely the Rome I, Rome II, and Brussels I(bis) Regulations. If nothing else Recital (7) and its companion, Recital (7) Rome I Regulation, would be more than an indication but a strong reminder of this context.

27 The bird's eye view beyond the confines of obligations also identifies the Successions, Maintenance, and Brussels II*bis* Regulations plus the Rome III Regulation and the Property Regimes Regulations (the last three are results of Enhanced Cooperations between certain Member States only) as completing the overall picture of European PIL (in the wider sense). But these Regulations do not exert relevant influence on the interpretation of the Rome II Regulation for their subjects are too remote from the perspective of the Rome II Regulation

58 *Rolf Wagner*, in: FS Jan Kropholler (2008), p. 715, 717 emphasises that this was the first occasion when the newly introduced instrument of conciliation process was used.

59 For a detailed report on the negotiations and their content *Rolf Wagner*, in: FS Jan Kropholler (2008), p. 715.

60 Doc. 9713/07.

61 In particular Docs. DS 94/07, 6309/07, 7318/07, 8215/07, 8241/07, 8408/07, 8552/07, SN 2494/07, 9137/07, and 9457/07.

62 PE-CONS 3619/07.

63 A6–2057/2007.

64 Doc. 11313/07. Both States had explained their position previously before voting already against the Common Position; Doc. 12219/06 ADD 1.

65 *Rolf Wagner*, in: FS Jan Kropholler (2008), p. 715, 718.

and one cannot sensibly imagine many instances where family law and the law of non contractual obligations are intertwined with each other. Art. 1 (2) (b) and (c) on the one hand and ascertaining the habitual residence of a private person acting outside the course of any business and thus falling out of Art. 23 (2), by way of recourse to the yardsticks developed in international family law[66] are the only exceptions which come to mind in this regard.

IV. The Rome II Regulation as EU law

1. Direct applicability

28 The Regulation constitutes secondary EU law. In contrast to Directives every Regulation is directly applicable and needs no further implementation into national law (Art. 288 subpara. 2 TFEU). As far as the Rome II Regulation reaches, all Member States (except Denmark) are now immediately bound by it and have to apply it without any modification. This is also true for Croatia who joined the EU in 2013 when the Rome II Regulation had already entered into force. From the date her accession became effective (1 January 2013) the Regulation is directly applicable also before Croatian courts.

29 The Regulation takes precedence over all non-conforming national law. Any contradicting rule of national law (of the Regulation Member States) cannot be applied any longer. It does not matter whether the conflicting national law has been enacted before or after the entering into force of the Regulation in the respective Member State.

2. EU external competence

30 Where the EU possesses an internal competence it disposes as well over an implied external competence as far as necessary for the effective use of the internal competence.[67] This implied power of the EU concerns in particular the conclusion of treaties with third states on matters for which an internal competence exists. If the EU has made use of its internal competence its implied external competence to conclude respective treaties may become even an exclusive competence.[68]

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66 See *Briggs* para. 8.17.

67 *Commission of the European Communities* v. *Council of the European Communities* (AETR) (Case 22/70), [1971] ECR 263, 275 para. 28; *Cornelis Kramer* (Joined Cases 3, 4 & 6/76), [1976] ECR 1279, 1311 paras. 30–33*; Draft Agreement establishing a European laying-up fund for inland waterway vessels* (Opinion 1/76), [1977] ECR 741, 756 para. 5; *Convention No. 170 of the International Labour Organization concerning safety in the use of chemicals at work* (Opinion 2/91), [1993] ECR I-1061, I-1079 para. 18; *Competence of the Union to conclude international agreements concerning services and the protection of intellectual property*, (Opinion 1/94) [1994] ECR I-5267, I-5411 para. 76, I-5413 para. 82 *et seq*., I-5416 para. 95; *Competence of the Union or one of its institutions to participate in the Third Revised Decision of the OECD on national treatment* (Opinion 2/92), [1995] ECR I-521, I-559 paras. 31–33; *Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* (Opinion 2/94), [1996] ECR I-1759, I-1787 paras. 25–27; *Cartagena Protocol* (Opinion 2/00), [2001] ECR I-9713, I-9764 para. 45; *Commission of the European Communities v. Kingdom of Denmark (Open Skies)* (Case C-467/98), [2002] ECR I-9519, I-9556 para. 82.

68 See *Oppermann/Classen/Nettesheim*, Europarecht (7. Aufl. 2016) § 30 note 21.

With respect to the Rome II Regulation (and the Rome I Regulation) the Member States are now no longer entitled to conclude, or accede to, international treaties which concern matters regulated in Rome II (or Rome I) without the authorisation of the EU. In a Common Declaration of 14. December 2000 to the Brussels I Regulation the Council and the Commission expressly adopted such view for the first time and stated that that Regulation does not hinder a Member State to conclude international treaties on matters falling within the scope of the Regulation as long as the treaties leave the Regulation untouched.[69] Later on the very same principle was endorsed with regard to the Rome II Regulation in express and specific legislation: A separate Regulation provides for a special procedure of the negotiation and conclusion of such treaties in the field of Rome I and Rome II.[70] **31**

V. The scope of application of the Regulation

1. International or personal scope of application

Quite unlike the Brussels I*bis* Regulation, the Rome II Regulation does not define any international scope of application or scope *ratione loci.* The sole prerequisite for its applicability in the international arena is that an adjudicator in a Member State is called upon. Art. 3, declaring the Rome II Regulation to be a *loi uniforme* and impliedly rejecting any notion of reciprocity, strongly demands so. If international law requires a genuine link or at least some minimum contacts for jurisdiction it is for the rules on court jurisdiction to cater for such link in terms of jurisdiction to adjudicate and for primary law on external competence to cater for such link in terms of jurisdiction to legislate. **32**

Hence, it would be not only a frustrated effort but even misleading if one asked in a concrete case as a preliminary issue whether the Rome II Regulation would be "internationally" or "spatially" applicable. **33**

There is nothing like a personal scope of application, either. The applicability of the Rome II Regulation does not depend on the creditor or the debtor being resident in a Member State or being a national of a Member State. Nor is the Regulation limited to commercial parties or parties acting in a specific capacity. **34**

2. Territorial scope of the Regulation

a) Generalities

The territorial scope of application of the Regulation corresponds regularly to that of EU law in general. Subject to the exceptions provided for by Art. 52 TEU (ex Art. 299 EC Treaty) the Regulation applies in the territory of all 26 present Member States now bound by the Regulation. This follows from Art. 52 TEU (ex Art. 299 (1) EC Treaty) for the Member **35**

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69 See Common Declaration Sched. I no. 5 (German text published in: IPRax 2001, 259 [261]).

70 Regulation (EC) No. 662/2009 of the European Parliament and of the Council of 13 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries on particular matters concerning the law applicable to contractual and non-contractual obligations, OJ EC 2009 L 200/25.

States listed by that provision (except Denmark). The EU secondary legislation draws the necessary conclusions from the imperative primary EU Law.

36 The preliminary issue whether a certain place belongs to the territory[71] of a Member State is not determined by the Regulation or the TFEU but by the principles of public international law.[72] Therefore if the continental shelf before the coast line of a Member State still belongs to the territory of this state must be decided in conformity with the respective international treaties and, in their absence, with general principles of public international law.[73] The same applies to the Exclusive Economic Zone.[74] Theoretically, even though ships can not be regarded as *territoires ou îles flottants*[75] and are not territory in the strict sense,[76] they may be attributed to their respective flag state via Art. 87 (1) (a) UN Convention on the Law of the Sea.[77] Yet such questions are rather theoretical only since the question whether courts sitting over the continental shelf, in the EEZ, or on-board ships would be bound by the Rome II Regulation, is rather futile. Such courts do simply not exist.

37 A special case is posed by the so-called Cyprus Problem. As is well known, the Northern part of Cyprus is occupied by Turkish forces and declared itself an independent Turkish Republic of Northern Cyprus which has not been recognised by any EU Member State under international law. Howsoever, the Government of the Republic of Cyprus does not exercise effective control in these areas. This is reflected in Art. 1 (1) of Protocol No. 10 of the Treaty of Accession of the Republic of Cyprus which reads: "The application of the acquis shall be suspended in those areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control." This has to be interpreted restrictively,

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71 On the notion of territory in the context of the Rome I and Rome II Regulations comprehensively *Dickinson*, [2013] LMCLQ 86.

72 See *Herbert Weber v. Universal Ogden Services Ltd.* (Case C-37/00) [2002] ECR I-2013.

73 *Herbert Weber v. Universal Ogden Services Ltd.* (Case C-37/00) [2002] ECR I-2013 (cook working on an oil drilling platform on the continental shelf in front of the Dutch coast = habitual place of employment under Art. 5(1) Brussels Convention in the Netherlands).

74 *Dickinson*, [2013] LMCLQ 86, 126.

75 But to this avail *S.S. "Lotus"* C.P.J. Séries A (1927), 4, 25 (CPIJ); RGSt 23, 266, 267; BAGE 26, 242 (252–253); BSGE 39, 276 (278); BSGE 64, 145 (149); BFHE 111, 416; BFH/NV 1988, 298 (299).

76 See only *Chung Chi Cheung v. The King* [1939] AC 169, 167 (P.C., per Lord *Atkin*); *Old Dominion Steamship Co. v. Primus Gilmore* 207 US 398, 403–404 = 28 S.Ct. 133, 134 (1907, per *Holmes* J.); *Cunard Steamship Co. Ltd. v. Mellon* 262 US 100, 123 = $3 S.Ct. 504, 507 (1907; per *van Devanter* J.); *Colombos*, The International Law of the Sea (6th ed. 1967) § 307; *Verdross/Simma*, Universelles Völkerrecht (3rd ed. 1984) § 1206; *Hasselmann*, Die Freiheit der Handelsschiffahrt (1987) p. 9; *Dörr*, ArchVR 26 (1988), 366, 375; *Caron*, in: Encyclopedia of Public International Law, Instalment 11 (1989), pp. 289–290; *Núñez-Müller*, Die Staatszugehörigkeit von Schiffen im Völkerrecht (1994) pp. 83–84; *Mankowski*, Seerechtliche Vertragsverhältnisse im Internationalen Privatrecht (1995) pp. 472–474; *Rainer Lagoni*, Anwendbarkeit der Arbeitsschutzvorschriften und Zuständigkeiten der Arbeitsschutzbehörden auf Seeschiffen unter fremder Flagge (2009) pp. 26–27.

77 See only *Mankowski*, Seerechtliche Vertragsverhältnisse im Internationalen Privatrecht (1995) pp. 477–481; *Junker*, RIW 2006, 401 (405); Max Planck Institute for comparative and private international law, RabelsZ 71 (2007), 225 (296); *Wurmnest*, in: Basedow/Magnus/Wolfrum (eds.), The Hamburg Lectures on Maritime Affairs 2009 & 2010 (Heidelberg etc. 2012), p. 113, 127; *Dickinson*, [2013] LMCLQ 86, 127–128; Ringbom (ed.), Jurisdiction over Ships (Leiden/Boston 2015).

though, insofar as courts sitting in the Government-controlled area adjudicate the case regardless where the substrate of the lawsuit ought to be located.[78]

The Rome II Regulation is directly applicable without any additional considerations being necessary in: Austria; Belgium; Bulgaria; the Czech Republic; Croatia; Estonia; Germany; Hungary; Italy; Latvia; Lithuania; Luxembourg; Malta; the Netherlands; Poland; Romania; Slovakia; Slovenia; Spain; Sweden plus Cyprus[79] and the mainland territories of Finland, France, the Netherlands, and Portugal. **38**

b) United Kingdom and Republic of Ireland

The United Kingdom and the Republic of Ireland reserved themselves a special position with regard to the Schengen chapter of the Treaty of Amsterdam which in turn comprises i. a. unification of PIL. This position is enshrined and fortified in the Protocol on the Position of the United Kingdom and the Republic of Ireland (now Protocol No. 20 to the TFEU). Each of them generally stays out of legislative measures based on now Arts. 67–89 TFEU, but has the opportunity to opt-in with regard to specific measures of secondary legislation. More specifically, there are two different rights to opt-in: the first relates to participating in the negotiations, the second to a final result. **39**

The United Kingdom and the Republic of Ireland both chose to participate in the negotiations and to become Member States of the Rome II Regulation. Recital (39) duly acknowledges the former fact. **40**

c) Denmark

Denmark is not a Member State of the Regulation although she is a Member State of the EU.[80] Denmark abstained from the communitarisation of the measures under Title V of Part III of the TFEU, Art. 67 *et seq* (ex Title IV of Part III of the EC Treaty, Arts. 61 *et seq.*). This was enshrined in the Protocol on the Position of Denmark (now Protocol No. 20 to the TFEU) in the version in force in 2007. Art. 1 of the Protocol states that Denmark does not participate in such measures and Art. 2 provides that such EU measures are "not applicable nor binding" for Denmark. For the purposes of the Rome II Regulation, Denmark's abstention is specifically fortified in Art. 1 (4) and Recital (40). A limited exception is made by Art. 14 (3). **41**

Arguably, Art. 4 Annex to the Protocol on the Position of Denmark (Protocol No. 20 to the TFEU) as amended by the Treaty of Lisbon opens the door for Denmark to opt-in in favour of Acts under the Schengen chapter. But Denmark has not opted into the Rome II Regulation since that Art. 4 might apply only to new Acts implemented after the Treaty of Lisbon became effective. **42**

Denmark has not ventured to conclude a bilateral Agreement with the EU extending the Rome II Regulation in substance to Denmark, either. Such route as had been successfully **43**

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78 *Meletis Apostolides v. David Charles Orams and Linda Elizabeth Orams* (Case C-420/07), [2009] ECR I-3571 paras. 37–38; *Dickinson*, [2013] LMCLQ 86, 89–90, 107.

79 With the qualifying remarks in the preceding note.

80 See in greater detail Art. 1 notes 187–192 (*Mankowski*).

established with regard to the Brussels I and the Service Regulations[81] (and in substance also deemed to cover the Maintenance Regulation[82] and the Brussels I*bis* Regulation[83]) has not been taken with regard to PIL. Since universally applicable PIL lacks any element of reciprocity, there might not have been any pressing need to invest into the dire negotiating and ratification processes of a Convention. Another possible reason might be that continuing the way of bilateral EU-Denmark Agreements is feared to undermine and prejudice the Protocol on the Position of Denmark.[84] Yet, following the European leader on its own, autonomous motion, Denmark could have unilaterally adopted the Rome II Regulation by transferring its content into an Act of national Danish legislation. But this has not happened, either.

44 Art. 3 providing for a universal application of the Rome II Regulation in its Member States does not make special provision for Denmark but treats her indiscriminately as a non-Member State and not even as a special case amongst Third States.

d) Special cases

45 In general the Regulation applies in the entire territory of the respective Member State and also in those autonomous parts in Europe for whose external relations a Member State is responsible (Art. 355 TFEU). However, some of the EU Member States own separate territories located outside Europe, for whose international relations the Member State is also responsible; in certain cases the Regulation applies even there. This depends on whether or not the territorial unit is listed in Annex II to the TFEU to which Art. 355 (2) TFEU refers. Overseas territories listed there are not governed by EU law in its entirety but by the special association system provided for by Part IV of the TFEU (Arts. 198–204). The Regulation does not apply in the listed territories.

aa) Finland: Åland Islands

46 The Åland Islands, part of Finland, are subject to EU law pursuant to Art. 355 (4) TFEU but for some provisions as contained in Protocol 2 to the Act of Accession of Austria, Finland and Sweden to the then EC.[85] Accordingly, courts on the Åland Islands have to apply the Rome II Regulation.[86]

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81 Agreement between the European Community and the Kingdom of Denmark of 19 October 2005 on jurisdiction and the recognition and enforcement of decisions in civil and commercial matters, OJ EC 2005 L 299/62; Agreement between the European Community and the Kingdom of Denmark of 19 October 2005 on the service of judicial and extrajudicial documents in civil an commercial matters, OJ EC 2005 L 300/53.

82 Danish administrative measures, implemented by the Ministry of Justice of the Kingdom of Denmark, effective as of 30 January 2009, based on §9 stk. 2 Lov nr. 1563 af 20. december 2006 om Bruxelles I-forordningen m.v.; see OJ EU 2009 L 149/80 and also Notifying Letters by the Kingdom of Denmark to the Commission of 9 March 2011, 11 January 2012, and 20 February 2013, see OJ EU 2013 L 195/1 and L 251/1. In detail *Mankowski*, NZFam 2015, 346, 347–348.

83 Notifying Letter by the Kingdom of Denmark of 20 December 2012, see OJ EU 2013 L 79/4. In detail *Mankowski*, NZFam 2015, 346, 348.

84 *Mansel/Thorn/Rolf Wagner*, IPRax 2016, 1 (3).

85 In detail *Fagerlund*, in: Hannikainen (ed.), Autonomy and Demilitarisation in Internationale Law (1997), p. 13.

86 *von Hein*, in: Rauscher, Art. 24 Rom I-VO note 5.

bb) France: départements d'outre mer and territoires d'outre mer

According to Art. 355 (1) TFEU EU Law and thus the Regulation applies to the French overseas departments (*départements d'outre mer*), too These departments comprise Guadeloupe, French Guiana, Martinique and Réunion but not the French overseas territories (*territoires d'outre mer*), namely New Caledonia, French Polynesia, Mayotte, the Wassis and Futuna Islands, St. Pierre and Miquelon, the French Southern Antarctic territories. The latter territories fall under the regime of Art. 355 (2) TFEU in conjunction with Annex II of the Treaty; they are governed by the specific association rules of Part IV of the Treaty, Arts. 198–204 TFEU. The Regulation does not apply there.[87] **47**

cc) The Netherlands: Aruba and Curacao

Pursuant to Art. 355 (2) subpara. 1 in conjunction with Annex II TFEU, Aruba is not subject to Union legislation but to the special association system of Arts. 198–204 TFEU. For this reason the Regulation is not in force for Aruba, either.[88] The same applies to Curacao.[89] **48**

dd) Portugal: Azores and Madeira

The Regulation is directly applicable in Portugal and, due to the express provision of Art. 355 (1) TFEU EC Treaty, also on the Azores and Madeira.[90] The proviso in Art. 355 (1) TFEU (ex Art. 299 (2) EC Treaty) that specific measures may be applied to the Azores and Madeira does not affect the applicability of the Regulation there.[91] **49**

ee) Spain: Islands and exclaves

The Regulation is applicable in Spain, in Gibraltar (however, Gibraltar being under British rule)[92] and also on the Canary Islands[93] which belong to Spain (Art. 355 (1) TFEU). The same is true for the Spanish exclaves Ceuta and Melilla in Marocco.[94] **50**

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87 See *Kropholler*/*von Hein*, Europäisches Zivilprozessrecht (9th ed. 2011) Einl. EuGVO note 25; *Layton*/*Mercer*, European Civil Practice (2nd ed. 2004) para. 11.066 (both with respect to the Brussels I Regulation).

88 See *Kropholler*/*von Hein*, Europäisches Zivilprozessrecht (9th ed. 2011) Einl. EuGVO note 26. But cf. Hof Amsterdam NIPR 2000 Nr. 264 p. 424 with regard to the Brussels Convention where different auspices prevail.

89 Rb. Rotterdam S&S 2016 Nr. 130 p. 887.

90 *Plender*/*Wilderspin* para. 1–087.

91 See also *Kropholler*/*von Hein*, Europäisches Zivilprozessrecht (9th ed. 2011) Einl. note 27; *Layton*/*Mercer*, European Civil Practice (2nd ed. 2004) para. 11.069 (both with respect to the Brussels I Regulation).

92 See the Accord of 18 October 2000 between Spain and the United Kingdom (OJ 2001 C 13/1 and BOE 2001, 2508); See further *Calvo Caravaca*/*Carrascosa González* p. 67; *Kropholler*/*von Hein*, Europäisches Zivilprozessrecht (9th ed. 2011) Einl. note 29; *Layton*/*Mercer*, European Civil Practice (2nd ed. 2004) para. 11.070.

93 *Plender*/*Wilderspin* para. 1–087.

94 *Calvo Caravaca*/*Carrascosa González* p. 67; *Kropholler*/*von Hein*, Europäisches Zivilprozessrecht (9th ed. 2011) Einl. note 28.

ff) United Kingdom

(i) Gibraltar

51 According to Art. 355 (3) TFEU, the provisions of the Treaties and consequentially any EU law including the Brussels I*bis* Regulation apply to those European territories for whose external relations a Member State is responsible. The only instance this relates to at present is Gibraltar[95] (whereas historically the respective rule in the original EEC Treaty related to the Saarland and whilst Art. 33 (3) TFEU applies to Gibraltar only with the modifications sanctioned by Art. 28 1985 Accession Act[96]). The United Kingdom is taken to be the Member State "responsible" for Gibraltar, and arrangements have been put into place to facilitate this in the Context of the TFEU, without prejudice to the respective positions of the United Kingdom and Spain on the issue of sovereignty in relation to Gibraltar.[97]

(ii) Channel Islands and Isle of Man

52 Of greater relevance is Art. 355 (5) (c) TFEU: EU law applies only to a limited extent to the Channel Islands (Jersey, Guernsey, Alderney and Sark) and the Isle of Man. The limited extent does not comprise the Brussels I*bis* Regulation[98] and it does not comprise the Rome II Regulation.[99]

(iii) Akrotiri and Dhekelia

53 Art. 355 (5) (b) TFEU in principle excludes the application of EU law to the United Kingdom Sovereign Base Areas of Akrotiri and Dhekelia in Cyprus reflecting some distant remnants from the time when Cyprus was a British territory, and the struggles of the Cypriot fight for independence.[100] The relevance for the Rome II Regulation is marginal if any but it is not in force there.[101]

54 Art. 355 (5) (a) TFEU excludes the application of EU law to the Faeroe Islands. This is not of particular relevance for the Rome II Regulation since Denmark as the motherland of the Faeroe Islands is not a Member State of the Rome II Regulation anyway.

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95 See Parliamentary Question No. 655/85 with answer by Jacques Delors, OJ EEC 1985 C 341/8–9; Ministry of Justice, Should the UK Opt In? (January 2009) http://www.justice.gov.uk/consultations/docs/rome-i-consultation-govt-response.pdf; *Schmalenbach*, in: Christian Calliess/Ruffert, EUV/AEUV (4th ed. 2011) Art. 355 AEUV note 9; *Kokott*, in: Streinz, EUV/AEUV (2nd ed. 2012) Art. 355 AEUV note 7; *Dickinson*, [2013] LMCLQ 86, 89.

96 *Meinhard Schröder*, in: von der Groeben/Schwarze, EUV/EGV, vol. IV (6th ed. 2004) Art. 299 EGV note 32.

97 *Dickinson*, [2013] LMCLQ 86, 89.

98 See BGH NJW 1995, 264; OLG Zweibrücken NJOZ 2011, 1940 = IPRspr. 2010 Nr. 204 p. 514; *Balthasar*, IPRax 2007, 475.

99 *Plender/Wilderspin* para. 1–087; see also *von Hein*, in: Rauscher, Art. 24 Rom I-VO note 10.

100 See Protocol No. 3 of the Treaty of Accession of [i.a.] the Republic of Cyprus on the Sovereign Base Areas oft he United Kingdom of Great Britain and Northern Ireland in Cyprus.

101 *Plender/Wilderspin* para. 1–087; see also *von Hein*, in: Rauscher, Art. 24 Rom I-VO note 10; *Brödermann/Wegen*, in: Prütting/Wegen/Weinreich, Art. 24 Rom IVO note 3.

(iv) Situation after Brexit

Once Brexit will become effective, the United Kingdom will not be a Member State of the Regulation anymore. The Brussels Convention is to govern the free movement of judgments in civil and commercial matters between the UK and the EU[102], bilateral Treaties on recognition and enforcement between Member States of the EU and the United Kingdom might be employed again beyond civil and commercial matters,[103] and the Rome Convention, or rather the Contracts (Applicable Law) Act 1990, might be revitalised in the UK's PIL of contracts, courtesy of Art. 24 Rome I Regulation.[104] A comparable safety net does not exist in the area of non-contractual obligations. There has never been a Rome II Convention, and there have never been bilateral Treaties addressing the conflict of laws for non-contractual obligations. Thus, from the UK perspective without any extra legislative measure taken, one would have to resort to the pre-Rome II domestic PIL of the UK, in particular the Private International Law (Miscellaneous Provisions) Act 1995.[105] In this event, intertemporal questions should be answered appropriately.[106] **54a**

However, it is far more likely that the UK will unilaterally promulgate an Act incorporating the substance of the Rome II Regulation. An alternative would be to except the Rome II Regulation form the Great repeal Peal and to transform it into national British legislation.[107] A surprise solution would be staged if the Exit Convention between the EU and the UK provided for the Rome II Regulation as such to stay in force in the UK. In its remaining Member States perspective the Rome II Regulation will retain its full applicability and operationability anyway for it would not matter whether the UK still is a Member State or nor, with Art. 3 emphasising the uniform nature of the rules of the Regulation. **54b**

e) Not: European micro-States

The European micro-States, i.e. the Vatican State, San Marino, Monaco, and Andorra, do not fall under Art. 355 (3) TFEU.[108] But though France is partly responsible for the external relations of Monaco neither EU law as such nor the Regulation applies in Monaco which in **55**

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102 *Dickinson*, (2016) 12 JPrIL 195, 204–205; see also *Aikens*/*Dinsmore*, Eur. Bus. L. Rev. 27 (2016), 903, 906–910. *Contra Hess*, IPRax 2016, 409 (413).

103 *Basedow*, ZEuP 2016, 567 (572); *Hess*, IPRax 2016, 409 (416). Thorough discussion by *Giesela Rühl,* (2018) 67 ICLQ 99.

104 *Hess*, IPRax 2016, 409 (417); *Dickinson*, (2016) 12 JPrIL 195, 203–204; see also *Giesela Rühl,* JZ 2017, 62; *Ungerer,* in: Kramme/Baldus/Schmidt-Kessel (Hrsg.), Brexit und die juristischen Folgen (2017), p. 297.

105 See *Dickinson*, (2016) 12 JPrIL 195, 198; *Aikens*/*Dinsmore*, Eur. Bus. L. Rev. 27 (2016), 903, 916.

106 *Hess*, IPRax 2016, 409 (417); see also *Dickinson*, (2016) 12 JPrIL 195, 207–209.

107 *Sonnentag,* Die Konsequenzen des Brexit für das internationale Privat- und Zivilverfahrensrecht (2017) pp. 58-59.

108 *Meinhard Schröder*, in: von der Groeben/Schwarze, EUV/EGV, vol. IV (6th ed. 2004) Art. 299 EGV notes 33–36; *Jaeckel*, in: Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union (looseleaf 1993-ongoing) Art. 355 AEUV note 15 (August 2011); *Kokott*, in: Streinz, EUV/AEUV (2nd ed. 2012) Art. 355 AEUV note 8 and in detail *Sack*, EuZW 1997, 45; *Stapper*, Europäische Mikrostaaten und autonome Territorien im Rahmen der EG (1999); *Katrin Friese*, Die europäischen Mikrostaaten und ihre Integration in die Europäische Union: Andorra, Liechtenstein, Monaco, San Marino und Vatikanstadt auf dem Weg in die EU? (2011); *Balboni*, in: Studi in onore di Luigi Costato, tomo II (2014), p. 405.

this respect is independent.[109] Also Andorra[110] whose formal head of state still is the French president jointly with the Spanish Bishop of Seu d'Urgel lies outside the territorial scope of the Regulation. San Marino has own responsible for its external relations in the sense of Art. 355 (3) TFEU although San Marino is under the protective friendship of Italy.[111]

3. Substantive scope of the Rome II Regulation

56 The substantive scope of the Regulation is limited to civil and commercial matters by virtue of Art. 1 (1). Within this outer limitation the specific exceptions as listed in Art. 1 (2) operate and generate additional restrictions.

4. Temporal scope of application

57 Art. 32 states that the Regulation shall apply from 11 January 2009, except for Art. 29, which shall apply from 11 July 2008. This has to be reconciled with Art. 31, headed "Application in time" urging that the Regulation shall apply to events giving rise to damage which will occur after its entry into force. The CJEU in *Homawoo* effectively gave the palm to Art. 32.[112] For all practical purposes, *Homawoo* established the necessary general guidance[113] even if there are some issues remaining.[114] The practical relevance of questions about the temporal scope of the Regulation has faded anyway as time went by.

58 For Croatia the Regulation became binding as part of the then *acquis communautaire* as of 1 January 2013, the date when her accession to the EU became effective. Since the Regulation was promulgated only on 11 July 2007, well after 1 January 2007, intertemporal peculiarities do not occur with regard to Bulgaria and Romania.

VI. Interpretation of the Regulation

1. Independence from national concepts: autonomous interpretation

59 The Rome II Regulation is an EU act. Therefore, an autonomous, genuinely European interpretation of its rules must be exercised and implemented in order to ensure a consistent interpretation throughout the entire EU.[115] The three instances where the Regulation expressly addresses interpretative methodology are unequivocal in this regard, namely Recitals (11), (12) and (30).[116] This includes the provisions of the Regulation to be construed having

109 See also Cass. RCDIP 1999, 759 with note *Ancel*.

110 Andorra is de facto independent since 1993 only and was until that time governed by France and the Bishop of Seu d'Urgel. But both remain Andorra's head of state.

111 See *Kropholler/von Hein*, Europäisches Zivilprozessrecht (9th ed. 2011) Einl. note 22; *Layton/Mercer*, European Civil Practice (2nd ed. 2004) para. 11.067 (both with respect to the Brussels I Regulation).

112 *Deo Antoine Homawoo v. GMF Assurances SA* (Case C-412/10), [2011] ECR I-11603 para. 33.

113 Compare the post-*Homawoo* discussion (*Sujecki*, EuZW 2011, 815; *Illmer*, GPR 2012, 82; *den Tandt/Verhulst*, ERPL 2013, 289; *Torga*, Juridica 2014, 406) to the pre-*Homawoo* discussion (*Bücken*, IPRax 2009, 125; *Glöckner*, IPRax 2009, 121; *Glöckner*, WRP 2011, 137; *Götz Schulze*, IPRax 2011, 287).

114 See Art. 31 note 9 (*Mankowski*).

115 See only *Florin Lazar v. Allianz SpA* (Case C-350/14), ECLI:EU:C:2015:802 para. 21; *Dickinson* para. 3.05.

116 *Dickinson* paras. 3.09–3.10.

regard to their context and their objectives.[117] Uniform and independent interpretation is paramount for EU law wherever its rules to dot expressly refer to the national laws of the Member States.[118]

The competence of the CJEU to interpret the Rome II Regulation authoritatively and finally, serves as the main and ultimate safeguard. National courts must refrain from referring to national concepts or national case law however similar the terms interpreted there might sound compared to the respective terms of the Regulation. This applies even if the forum State has implemented an act of its Act in order to bring its national law in line with the Regulation. **60**

The Rome II Regulation makes a clean break with the past and should not look backward at the national rules of PIL which it has replaced[119] (unless it can be clearly established that a certain national rule has served as model for a certain rule of the Rome II Regulation). The Rome II Regulation set out to lay a new foundation, built to operate in a uniform manner across all Member States.[120] Courts must not succumb to inherent temptations to have recourse to the rules they were used to apply before the Rome II Regulation became effective. Neither must courts settle with less than they could achieve. Courts must not be content with poor quality in deciding cross-border cases.[121] **61**

In particular the central concepts are EU concepts, to be construed in a manner germane to the Regulation. Even if a term used in the Regulation is not expressly defined and neither judge nor lawyer enjoy the assistance of such express definition an autonomous EU notion must prevail. In particular characterisation issues of which the Regulation is replete is for autonomous European yardsticks.[122] There must not be any mystical aura around characterisation rendering it inaccessible to non-specialists.[123] **62**

Single rules of the Rome II Regulation might expressly provide the autonomous meaning and definition of terms used in other rules. The prime example is Art. 2. One might call this a "supplied" autonomous interpretation as opposed to a "crafted" autonomous interpretation.[124] **63**

2. Literal, textual and grammatical interpretation

Literal, textual, or grammatical interpretation (the terms are synonymous) is the starting point of any interpretation. Legal certainty and preserving the legislative balance between **64**

117 See only *Dickinson* para. 3.13 with references.

118 See only *Florin Lazar v. Allianz SpA* (Case C-350/14), ECLI:EU:C:2015:802 para. 21 with reference to *Árpád Kásler and Hajnalka Káslerné Rábai v. OTP Jelzálogbank zrt.* (Case C-26/13), ECLI:EU:C:2014:282 para. 37.

119 *Briggs* para. 8.13.

120 *Briggs* para. 1.56.

121 *González Beilfuss*, Rev. Jur. Cat. 2011, 731, 741.

122 See only *Andrew Scott*, (2009) 125 LQRev 709, 711.

123 *Dickinson* para. 3.63.

124 *McParland*, The Rome I Regulation on the Law Applicable to Contractual Obligations (2015) paras. 3.32–3.33.

the EU institutions as enshrined in Art. 13 (2) TEU strongly militate towards sticking with a clear, express unambiguous wording when such wording is found to exist and is consistent with the overall context and purpose.[125] National courts must not implement an interpretation contrary to the express wording.[126]

65 With regard to EU instruments literal interpretation has to cope with a basic feature: EU legislation is drafted in several languages and the different language versions are all equally authentic.[127] An interpretation of a provision of EU law thus involves comparison of the different language versions.[128] The principle of linguistic equality enjoys a quasi-constitutional status within the EU.[129]

66 Hence, it goes without saying that optimally all language versions should be taken into account with equal consideration. In theory all of them carry equal weight. In practice nobody is such s genius as to master all official languages (or more precisely: the legal terminology of all official languages) of all Member States. Particularly, the advent of the Eastern European languages on the EU scene rendered this virtually impossible.[130]

67 The English version should not be given primacy or a decisive vote although the majority of secondary legislations nowadays is drafted in English. That did not apply to the Rome II Regulation, however, which was originally drafted in French. French should not be given greater weight, either, although it is not a secret that French is the internal working language of the CJEU[131] and thus the home ground for the instance charged with binding interpretation of the Regulation. Any "working language advantage" should not be taken as hierarchical.[132]

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125 *McParland*, The Rome I Regulation on the Law Applicable to Contractual Obligations (2015) para. 3.27.

126 *Hauptzollamt Neubrandenburg v. Leszek Labis and Sagpol SC Transport Miedzynarowy i Spedycja* (Joined Cases C-310/98 and C-406/98), [2000] ECR I-1797 para. 32.

127 Art. 5 Council Regulation No 1 of 15 April 1958 determining the language to be used by the European Economic Community, OJ EEC 17 (6 October 1958), 385/58, as amended by Council Regulation (EC) 920/2005 of 13 June 2005 amending Regulation No 1 of 15 April 1958 determining the language to be used by the European Economic Community and Regulation No 1 of 15 April 1958 determining the language to be used by the European Atomic Energy Community and introducing temporary derogation measures from those Regulations, OJ EC 2005 L 156/3; *Marianne Koschniske v. Raad van Arbeid* (Case 9/79), [1979] ECR 2717 para. 6; *CILFIT v. Ministero della Sanità*, (Case 283/81) [1982] ECR 3415 para. 18; *The Queen v. Commissioners of Customs and Excise, ex parte Emu Tabac* (Case C-296/95), [1998] ECR I-1605 para. 36.

128 *CILFIT v. Ministero della Sanità* (Case 283/81), [1982] ECR 3415 para. 18. The whole panorama is depicted by *Schübel-Pfister*, Sprache und Gemeinschaftsrecht (2004); *Derlén*, Multilingual Interpretation of European Union Law (2009); *Zedler*, Mehrsprachigkeit und Methode (2015).

129 *Hanf/Muir*, in: Hanf/Muir/Malacek (eds.), Langue et construction européenne (Bruxelles 2010), p. 23; *McParland*, The Rome I Regulation on the Law Applicable to Contractual Obligations (2015) para. 3.22.

130 *Junker*, in: Münchener Kommentar BGB, Vor Art. 1 Rom II-VO note 31.

131 See only *Joachim Gruber*, in: Niedobitek (ed.), Europarecht – Grundlagen der Europäischen Union (2014), p. 903, 922; *Joachim Gruber*, EuR 2015, 662 (664); *Konrad Schiemann*, in: Liber amicorum Vassilios Skouris (2015), p. 563, 568–569.

132 See *Schübel-Pfister*, Sprache und Gemeinschaftsrecht (2004) pp. 153–154; *Bernhard Müller*, in: FS Heinz Mayer (2011), p. 391, 399.

Mere counting of numbers must not be decisive, either. A wording and linguistical nuance found to be only in a lesser number of language versions might win the day.[133] The majority version does not always win.[134] But a large majority with only a few outsiders might tip the scale,[135] and an interpretation reconcilable with virtually all languages is to be preferred to one compatible with only one or some of them.[136] A generally accepted methodology how to decide a comparison of different language versions in the event of a genuine conflict has not been established yet, though; a convincing tiebreaker still needs to be found.[137] In practice, courts look at the English or French versions if they bother at all to look beyond the version in their respective home language.[138] Matters might be complicated by so called "asymmetric translations" which for political reasons (particularly in order not to stir opposition in the respective country) adopt deliberately deviating wording.[139] Yet such instances have not been detected with regard to the Rome II Regulation. **68**

3. Teleological or purposive interpretation

Teleological interpretation is the cardinal rule.[140] A purposive reading not sticking to the letter is mandatory and the correct methodological maxim.[141] To this aim, the objectives of the Regulation have to be identified and to be taken into account properly. The primary auxiliary means for achieving this goal are the Recitals.[142] Teleological interpretation caters to the *effet utile* of the Regulation and should be dynamic.[143] **69**

4. (Intra-)Systematic interpretation

Individual Articles of the Rome II Regulation cannot be construed in complete isolation, but only in the context of the Regulation as a whole[144] and in the light of the objectives underpinning it, the latter often to be found in the Recitals.[145] **70**

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133 A prominent example is provided by *DR and TV2 Danmark A/S v. NCB – Nordisk Copyright Bureau* (Case C-510/10), ECLI:EU:C:2012:244 para. 41.

134 *McParland*, The Rome I Regulation on the Law Applicable to Contractual Obligations (2015) para. 3.24.

135 *Denkavit International BV, VITIC Amsterdam BV and Voormeer BV v. Bundesamt für Finanzen* (Joined Cases C-283/94, C-291/94 and C-292/94), [1996] ECR I-5063 para. 25.

136 *The Queen v. Commissioners of Customs and Excise, ex parte Emu Tabac* (Case C-296/95), [1998] ECR I-1605 paras. 37–41.

137 See only *Baldus/Friedrike Vogel*, in: FS Peter Krause (2006), p. 237, 241; *Weiler*, ZEuP 2010, 861 (873); *Hatje/Mankowski*, EuR 2014, 155 (156).

138 *Derlén*, Multilingual Interpretation of European Union Law (2009) pp. 287–289; *Hatje/Mankowski*, EuR 2014, 155 (156).

139 *Bernhard Müller*, in: FS Heinz Mayer (2011), p. 391, 394.

140 *Plender/Wilderspin* para. 1–094.

141 *AD v. CD and AD* [2008] 1 FLR 1003, 1013 (C.A., ct. judgm. delivered by *Thorpe* L.J.).

142 See only *McParland*, The Rome I Regulation on the Law Applicable to Contractual Obligations (2015) para. 3.55; *Junker*, in: Münchener Kommentar BGB, Vor Art. 1 Rom II-VO note 34.

143 *Junker*, in: Münchener Kommentar BGB, Vor Art. 1 Rom II-VO note 34.

144 *Inga Rinau* (Case C-195/08) [2008] ECR I-5271 paras. 59 *et seq.*, in particular para. 83: systematic and purposive interpretation of Art. 42; *C v. FC (Brussels II: Free-standing application for parental responsibility)* [2004] 1 FLR 317, 325 (F.D., Judge *Rex Tedd* Q.C.).

145 *Bailey-Harris*, [2004] Fam. L. 103.

5. Systematic interpretation in the light of the Rome I and Brussels I*bis* Regulations

71 Another means of interpreting the Rome II Regulation is to have a watchful eye on the Rome I and Brussels I*bis* Regulations as well as to the case law of the CJEU (and formerly the ECJ).[146] The quest for uniform interpretation of EU acts calls for this method as far as possible.[147]

72 Recital (7) expressly urges that "the substantive scope and provisions of the Rome II Regulation should be consistent with Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) and the instruments dealing with the law applicable to contractual obligations". Regulation (EC) No. 44/2001, the Brussels I Regulation, has been superseded by Regulation (EU) No. 1215/2012, the Brussels I*bis* Regulation. An external systematic interpretation is required, and a triangulation of the Brussels I(bis), Rome I, and Rome II Regulations is called for.[148] This was duly observed already in the early cases reaching the Kirchberg plateau.[149]

73 In the light of Art. 80 cl. 2 Brussels I*bis* Regulation, the reference to Brussels I must nowadays be read as a reference to Brussels I*bis*. Recital (7) could not refer to the Rome I Regulation by name for the simple reason that the Rome I Regulation (Regulation (EC) No. 593/*2008* of 17 June *2008*) was still in the making at the time when the Rome II Regulation (Regulation (EC) No. 864/*2007* of 11 July *2007*) was already promulgated. Before 17 December 2009 (the date when the Rome I Regulation became effective by virtue of its 28) Recital (7) in fact referred to the Rome Convention, the instrument dealing with the law applicable to contractual obligations which was effective then.

74 Yet, evidently such auxiliary means are not always at hands but rather only where a counterpart in the Rome I or Brussels I*bis* regime really exists. One should keep in mind that Rome I and Rome II are truly alternative acts for Rome I covers contractual obligations and Rome II covers non contractual obligations.

75 Brussels I*bis* exerts only such magic as can be found in its Art. 7 (2) and the former Art. 5 (3) Brussels Convention/Brussels I Regulation. A single, general rule covers each and every tort under Brussels I*bis* whereas Rome II resorts to a plethora of special rules for specific torts in

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146 See only *Ergo Insurance SE v. If P&C Insurance AS* (Joined Cases C-359/14 and C-475/14), ECLI:EU:C:2016:40 para. 44; *Bitter*, IPRax 2008, 98; *Lein*, YbPIL10 (2008), 177; *Haftel*, Clunet 137 (2010), 761; *Markus Würdinger*, RabelsZ 75 (2011) 102; *Lüttringhaus*, RabelsZ 77 (2013) 31; *Giesela Rühl*, GPR 2013, 122; *Manuela Köck*, Die einheitliche Auslegung von Rom I-, Rom II- und Brüssel I-Verordnung im europäischen Internationalen Privat- und Verfahrensrecht (2014).

147 See only in general *Kropholler/von Hein*, in: FS 75 Jahre Max-Planck-Institut für Privatrecht (2001), p. 583; *Overkerk*, in: Voorkeur voor de lex fori – Symposium ter gelegendheid van het afscheid van prof. mr. Th. M. de Boer (2003), p. 59.

148 See only *McParland*, The Rome I Regulation on the Law Applicable to Contractual Obligations (2015) paras. 3.40–3.41.

149 In particular *Ergo Insurance SE v. If P&C Insurance AS* (Joined Cases C-359/14 and C-475/14), ECLI:EU:C:2016:40 para. 43; A-G *Wahl*, Opinion of 10 September 2015 in Case C-350/14, ECLI:EU:C:2015:586 paras. 4, 25, 35, 48–68; see also e.g. Hoge Raad NIPR 2016 Nr. 278 pp. 534–535.

Arts. 5–9. Unjust enrichment and *negotiorum gestio* do not even get any express mention and the less any treatment under Brussels I*bis*. Insofar it might rather be the other way round that Brussels Ibis might profit from Rome II, not Rome II from Brussels I*bis*. Yet in general Brussels I*bis* extends a very big helping hand with regard to Art. 4 (1) Rome II Regulation. There it presents a genuine treasure of experience and offers it generously. This treasure ought to be lifted with caution, though. One should bear mind that jurisdiction and applicable law serve different purposes.[150] Brussels I*bis* and Rome II have different missions, and one should be aware of that when reading across and transposing possible answers from one context to the other.[151]

Furthermore, the auxiliary means outlined have to be employed cautiously in order not to fall victim to a "false friend" pretending to be of the same meaning in both instruments whereas in fact the different contexts require different interpretations.[152] Tiny details can gain unforeseen importance in critical cases off the main roads. Yet concluding, it ought to be stressed again that it would be foolish to dispose lightly of the treasure contained in the Brussels I/I*bis* and Rome I regimes and the experiences made in these realms. Prospective adventure trips might turn entertainment journeys where Brussels I/I*bis* or Rome I have already paved the ways. **76**

6. Systematic interpretation within the entire system of EU law

The Rome II Regulation is not a stand-alone or solitaire. This holds true not only with regard to its sister Acts, the Rome I and Brussels I*bis* Regulation, but also with regard to the system of EU law in its entirety. A rule must be seen in the context in which it occurs and in the light of the objectives of the rules of which it is part.[153] The overall systematic context might sometimes trigger valuable hints as to the interpretation of certain notions which are common in EU law or were also used in other (and older) pieces of secondary EU legislation. Since conflicts rules contained in special Acts of EU legislation would take precedence over the Rome II Regulation by virtue of Art. 29 the primary relevance of other Acts will be found in the field of characterisation, particularly in helping to confine the substantive scope of application of Arts. 5–9 respectively. **77**

Possible candidates for this kind of systematic interpretation in the wider context are the Product Liability Directive[154] with regard to characterisation issues under Art. 5[155] and the Unfair Commercial Practices Directive[156] with regard to characterisation issues under **78**

150 *Mankowski*, in: FS Andreas Heldrich (2005), p. 867.

151 *Briggs* para. 8.16.

152 Very illustrative *Lüttringhaus*, RabelsZ 77 (2013), 31.

153 See only *Florin Lazar v. Allianz SpA* (Case C-350/14), ECLI:EU:C:2015:802 para. 21 with reference to *Minister for Justice and Equality v. Francis Lanigan* (Case C-237/15 PPU), ECLI:EU:C:2015:474 para. 35.

154 Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administration provisions of the Member States concerning liability for defective products, OJ EEC 1985 L 210/29, amended by Directive 1999/34/EC of 10 May 1999, OJ EC 1999 L 141/20.

155 *Plender/Wilderspin* para. 1–112.

156 Directive 2005/29/EC of 11 May 2005 of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC and Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the

Art. 6.[157] Obvious candidates are the EU Acts attempting at harmonisation in the field of intellectual property. They may very well help to define intellectual property rights for the purposes of Art. 8.[158]

79 Another instance where some circumspection might prove advantageous might be to keep track with any case law on the interpretation of the term "civil in commercial matters" under Arts. 1 (1) Service Regulation; 1 (1) Evidence Regulation which term mirrors the phrase used in Art. 1 (1). There is quite some interpretative nexus.[159]

7. Travaux préparatoires

80 As with any EU Regulations the *travaux préparatoires* are sparse. There are the official reasonings, the Explanatory Memoranda of the respective Proposals by the Commission.[160] And one can endure the dutiful task (and ordeal) of pursuing the fate of single proposals throughout the genesis of the Regulation. The task of keeping track with the internal documents is facilitated and a little eased by the fact that an official website[161] lists and links them very conveniently. But still this does not cure the major shortcoming inherent in most Documents: They do not contain any supporting reasoning why a certain solution was proposed or why a certain alteration was brought about.[162] They only encompass the proposals and the results, failure or success, pass or fail.

81 Many times, only contrasting some of them with each other will reveal what things were really about. Just to give a few examples in the specific context of the Rome II Regulation: First, the Legislative Resolutions of the European Parliament cannot be properly understood without taking into account the foregoing Reports and Resolutions of the Parliament's Committee on Legal Affairs. Second, the respective positions of single Member States might remain the same over the times without express repetition.

82 Taking special care of the particular interests of certain industries apparently ranked very high on the agenda of some Member States. The official Documents do not display that to the fullest extent, nor do they contain any background information why a certain Member State might have taken a certain stance.[163] For instance, it is left to guesswork[164] and second

Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, OJ EU 2005 L 149/22.

157 *Mankowski*, GRUR Int 2005, 634, 636; *Mankowski*, in: Münchener Kommentar zum Lauterkeitsrecht (2nd ed. 2014) IntWettbR notes 13–14a; see also COM (2006) 83 final p. 8; *Dickinson* para. 6.49; *Illmer*, in: Peter Huber, Art. 6 note 7; *Nettlau*, Die kollisionsrechtliche Behandlung von Ansprüchen aus unlauterem Wettbewerbsverhalten gemäß Art. 6 Abs. 1und 2 Rom II-VO (2013) pp. 87–88; *Benedikt Buchner*, in: Calliess, Art. 6 Rome II Regulation note 6.

158 *Grünberger*, in: Nomos Kommentar BGB Art. 8 Rom II-VO Rn. 21.

159 *Junker*, in: FS Peter Salje (2013), p. 243, 249–250; Art. 1 note 7 (*Mankowski*).

160 COM (2003) 427 final; COM (2006) 83 final.

161 http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=184392.

162 *Hatje*/*Mankowski*, EuR 2014, 155 (156); *Mankowski*, JZ 2016, 310 (310).

163 *Mankowski*, JZ 2016, 310 (310).

164 But cf. 8498/06 JUSTCIV 105 CODEC 358 and *Knöfel*, in: Beck'scher Online-Großkommentar BGB Art. 9 Rom II-VO notes 14–18 (online 2018).

thoughts as to why exactly Sweden proposed what eventually became Art. 9[165] (but not why Latvia and Estonia adopted the role of persistent objectors to that proposal to the very end[166]).

The painful struggle and power broking between competing lobby interests might not appear from the face of the Documents, either. The most prominent example is the genesis underlying Art. 5 on product liability. The rule became so complicated[167] and almost unworkable because competing lobby interests exerted such strong influences. Manufacturing industry and retail traders on the one hand clashed with consumer associations on the other hand for years on.[168] Both sides can brag to have scored (bogus) victories on single steps of the process of determining the applicable law.[169] **83**

The CJEU only rarely holds recourse to the *Travaux préparatoires* whilst interpreting rules of EU law.[170] It adopted the teleology or purposive method as the dominant method. It holds recourse to the *travaux préparatoires* where the latter are published, provided that such recourse is not inconsistent with the instrument at stake and that the respective *travaux* assist in identifying the objective pursued.[171] *Travaux* might be supportive means for confirming a result already reached by other means of interpretation.[172] *Travaux* might serve as the basis for an *argumentum e contrario* if a certain rule was proposed but not adopted eventually.[173] They might indicate that a certain rule of the final Regulation was the result of a compromise either between EU institutions or between factions within the Council. Where a true compromise can be discerned the initial, conflicting desires can be believed to have not succeeded. They display what was not to be eventually. The CJEU might use *travaux préparatoires* (if it uses them at all) for finishing, refining, or polishing.[174] **84**

Furthermore, *travaux préparatoires* gain their relatively greatest relevance in the early days of the live of an Act when other sources are not available in their plenty. But that overall picture might change more or less rapidly once the judicial and academic discussion of an Act mounts over the lifetime of that Act. Furthermore, economic and social circumstances might change substantially over time compared to the state in which they were when the Act **85**

165 See Doc. 99009/04 ADD 8 JUSTCIV 71 CODEC 645, 12–13.

166 Docs. 12219/06 ADD 1; 11313/07.

167 See the points of criticism leveled by *Illmer, (*2007) 9 Yb. PIL 31; *Illmer*, RabelsZ 73 (2009), 269; *Stone*, Ankara L. Rev. 4 (2007), 95, 118–123; *Kozyris*, 56 Am. J. Comp. L. 471, 485–495 (2008); *Hartley*, (2008) 57 ICLQ 899; *Spickhoff*, in: FS Jan Kropholler (2008), p. 671; *Schwartze*, NIPR 2008, 430; *Rudolf*, wbl 2009, 525; *Junker*, in: Liber amicorum Klaus Schurig (2012), p. 81.

168 *Junker*, in: Liber amicorum Klaus Schurig (2012), p. 81, 87.

169 *Junker*, in: Liber amicorum Klaus Schurig (2012), p. 81, 87.

170 But see *Florin Lazar v. Allianz SpA* (Case C-350/14), ECLI:EU:C:2015:802 paras. 27–28.

171 *AIMA v. Greco* (Case 36/77); [1977] ECR 2059.

172 E.g. *Anne Kuusijärvi v. Riksförsäkringsverket* (Case 275/96), [1998] ECR I-.3419 para. 46; *London Borough of Harrow v. Nimco Hassan Ibrahim and Secretary of State for the Home Department* (Case C-310/08), [2010] ECR I-1107 para. 57; *Secretary of State for Work and Pensions v. Taous Lassal* (Case C-162/09), [2010] ECR I-9217 para. 56.

173 E.g. *Badische Erfrischungs-Getränke GmbH & Co. KG v. Land Baden Württemberg* (Case C-17/96), [1997] ECR I-4617 para. 16.

174 *Schønberg/Karin Frick*, (2003) 28 Eur. L. Rev. 149.

was negotiated. Accordingly, the genetic interpretation relying on the *Travaux préparatoires* might at least gradually loose its importance the older the Regulation grows.[175]

VII. The reference procedure

1. In general

86 Without a central and finally competent court a uniform understanding and application of a legal instrument in different jurisdictions can hardly be achieved, let alone upheld over a longer period of time. The uniform interpretation and application of the Regulation is safeguarded by the European Court of Justice. The CJEU is competent to finally and solely decide all questions concerning the interpretation of the Regulation by a preliminary ruling which is binding on the parties of the original dispute. Those commenting upon European legislation, and even more those concerned with European legislation must contend with the fact that potentially different answers arise in response to the questions, what does the legislation say, what did its authors mean, and what will be taken by the CJEU to say, though.[176]

87 The CJEU's competence follows directly from Art. 267 TFEU (ex Art. 234 EC Treaty). A separate protocol granting the CJEU this competence as under the former Brussels Convention of 1968[177] is unnecessary. General EU law provides for a special reference procedure to the CJEU; the Court then renders in the form of a preliminary ruling a final decision on the referred interpretation issue: under Art. 267 TFEU (ex Art. 234 EC Treaty) any national court may and any national court of last instance must refer questions of interpretation of EU law to the CJEU if the question is relevant for the decision of the dispute, if the question is still undecided by the CJEU and if the answer is not clear beyond reasonable doubt.[178]

88 However Art. 68 EC Treaty specified and qualified the reference procedure for all legislative measures taken under Art. 65 EC Treaty on which provision the Rome II Regulation was necessarily based at the time of its promulgation, prior to the Treaty of Lisbon. Art. 68 EC Treaty restricted considerably the ambit of Art. 234 EC Treaty.[179] Fortunately, Art. 68 EC Treaty was not retained in the Treaty of Lisbon and dropped out of the TFEU with Art. 267 TFEU now operating without any restriction in the field relevant for the Rome II Regulation. This is very much to be welcomed for it opens up opportunities for courts of lower instances to make referral to the CJEU; such courts have far more cases and thus far more material than the supreme courts the latter operating under national rules restricting access to them.[180] Lower courts should be encouraged and not deterred from making references since they can help reaching valuable clarifications.[181]

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175 *Mankowski*, GPR 2015, 258 (259).

176 *Andrew Scott*, (2009) 125 LQRev 709 (709).

177 Protocol on the Interpretation of the Brussels Convention by the European Court of Justice of 3 June 1971.

178 *CILFIT v. Ministero della Sanità*, (Case 283/81) [1982] ECR 3415.

179 As to the details see *infra* Introduction note 95 (*Mankowski*).

180 See only *Rösler*, in: Liber amicorum Hans Micklitz (2014), p. 835.

181 See only *Mankowski*, EuZW 2015, 950 (951).

Any view that Art. 68 EC Treaty would still apply since the Rome II Regulation was promulgated under its reign would be a fallacy and, worse, a step back to a not so bright past. Furthermore, it would be highly impractical to subject any Act of secondary EU legislation to the reference procedure in force at the time when that Act was promulgated. One only needs to imagine Art. 177 EEC Treaty still to apply to all references relating to secondary legislation promulgated before the Treaty of Amsterdam entered into force, in order to discern the inherent absurdity. **89**

2. Requirements of the reference procedure under Art. 267 TFEU

a) No interpretation of national law

According to Art. 267 TFEU the reference procedure concerns only the interpretation of EU law. Questions of national law even if disguised in the reference question cannot be referred.[182] Theoretically, the question whether an expression of the Regulation is to be interpreted autonomously or refers to national law can itself be referred to the CJEU.[183] Whether a certain rule of national law is reconcilable with the Regulation is not an admissible question,[184] theoretically, but regularly the CJEU will find ways to interpret the relevant rules of EU as to enable the referring court to decide the reconcilability issue.[185] To this avail the CJEU will resort to interpreting the questions referred to it.[186] **90**

b) Pending procedure

An admissible referral further requires that the interpretation issue arises during a pending proceeding. The proceeding must have formally begun and must not have been already **91**

182 *The Queen v. Vera Ann Saunders* (Case 175/78), [1979] ECR 1129, 1135; *Hans Moser v. Land Baden-Württemberg* (Case 180/83), [1984] ECR 2539; *Criminal Proceedings against Lucas Asjes and others* (Joined Cases 209 to 213/84), [1986] ECR 1457; *Kleinwort Benson Ltd. v. Glasgow City Council* (Case C-346/93), [1995] ECR I-615; *Daniele Annibaldi v. Sindaco del Comune di Guidonia and Presidente Regione Lazio* (Case C-309/96), [1997] ECR I-7493 para. 13; *Graham J. Wilson v. Ordre des avocats de barreau de Luxembourg* (Case C-506/04), [2006] ECR 8613 para. 34; *Liga Portuguesa and Bwin International Ltd. v. Departamento de Jogos de Santa Casa da Misericórdia de Lisboa* (Case C-42/07), [2009] ECR I-7633 para. 37; but see also *BIAO v. Finanzamt für Großunternehmen Hamburg* (Case C-306/99), [2003] ECR I-1.

183 An example is *Industrie Tessili Italiana v. Dunlop AG*, (Case 12/76) [1976] ECR 1473 concerning the question whether the place of performance is to be determined autonomously or by redress to the applicable national law and deciding that question in the latter sense. But this stems from the earliest phase of interpreting the Brussels Convention in the mid 1970s when the then ECJ had not set strict course towards autonomous interpretation as the rule yet.

184 See only *Costa v. ENEL* (Case 6/64), [1964] ECR 1253, 1268; *Ruth Hünermund v. Landesapothekerkammer Baden-Württemberg* (Case C-292/92), [1993] ECR I-6787 para. 8.

185 See only *Ministère public luxembourgeoise v. Madelien Muller* (Case 10/71), [1971] ECR 723, 729; *Pigs Marketing Board v. Raymond Redmond* (Case 83/78), [1978] ECR 2347; *Criminal proceedings against André Gauchard* (Case 20/87), [1987] ECR 4879 para. 7; *Kalliope Schöning-Kougebetopoulou v. Freie und Hansestadt Hamburg* (Case C-15/96), [1998] ECR I-47 para. 9; *Meletis Apostolides v. David Charles Orams and Linda Elizabeth Orams* (Case C-420/07), [2009] ECR I-3571 para. 61.

186 See e.g. *SARL Albatros v. Société des pétroles et des combustibles liquids (Sopéco)* (Case 20/64), [1965] ECR 46; *Deutsche Grammophon GmbH v. Metro-SB-Großmärkte GmbH & Co. KG* (Case 78/70), [1971] ECR 483 para. 3; *Gerhard Köbler v. Republik Österreich* (Case C-224/01), [2003] ECR I-10239 para. 60.

ended, by judgment or settlement, before the referring court. The nature of the proceedings – contentious or non-contentious – and also the nature of the court or tribunal is irrelevant.

92 Even in proceedings on preliminary measures, including protective measures, a referral is theoretically admissible if it concerns issues that can only arise in such provisional proceedings, but not in main proceedings.[187] But examples can be hardly imagined with regard to the Rome II Regulation which does not apply to purely procedural issues.

93 The court or tribunal which refers the issue to the CJEU must, however, have acted in the original dispute in its judicial capacity. Where it acted merely in an administrative capacity, for instance as a mere registry, it is neither entitled nor obliged to refer.[188]

94 Following orthodoxy, arbitration courts do not belong to the courts envisaged by Art. 267 TFEU, and that provision is construed as relating only to municipal courts. According to the case law of the then ECJ courts of non-compulsory arbitration operating on an exclusively contractual basis are not entitled to referrals to the CJEU.[189]

95 The court must review *ex officio* whether the case hinges upon questions of EU law. It must not confine itself to referring if a party applies for a decision to refer.[190]

c) Court of last instance

96 Art. 68 (1) EC Treaty significantly restricted the number of courts which can make a reference to the then ECJ. Fortunately, under Art. 267 TFEU any court of a Member State is *entitled* to refer questions of interpretation either of EU law or of the Convention to the then ECJ for a preliminary ruling, and the courts of last instance play a special role insofar as they are *obliged* to refer. Under Art. 68 (1) EC Treaty only courts of last instance could make references to the then ECJ. References by all other courts were inadmissible. The restricted access of national courts to the then ECJ due to Art. 68 EC Treaty quite rightly met with considerable and severe critique.[191] The TFEU remedied this shortcoming by deleting Art. 68 EC Treaty.

97 The court or tribunal which is obliged to refer the issue to the CJEU must be a court against whose decision no further remedy is available. This is almost unanimously understood in the sense that it is necessary but also sufficient that in the concrete case no ordinary judicial

187 *Mankowski*, JR 1993, 402.

188 *HSB-Wohnbau GmbH* (Case C-86/00), [2001] ECR I-5353.

189 *"Nordsee" Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG* (Case 102/81), [1982] ECR 1095, 1110 *et seq*. para. 12; *Guy Denuit and Betty Cordenier v. Transporient Mosaïque Voyages et Culture SA* (Case C-125/04), [2005] ECR I-923, I-932 *et seq*. paras. 13–16; *Merck Canada Inc. v. Accord Healthcare Ltd.* (Case C-555/13), ECLI:EU:C:2014:92 para. 17; *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta SA v. Autoridade Tributária e Aduaneira* (Case C-377/13), ECLI:EU:C: 2014:1754 paras. 27–34.

190 *Karpenstein*, in: Leible/Terhechte (eds.), Europäisches Rechtsschutz- und Verfahrensrecht (2014) § 8 note 38.

191 For further critique see *Basedow* ZEuP 2001, 437; *Kropholler*, in: Aufbruch nach Europa – 75 Jahre Max-Planck-Institut für Privatrecht (2001), p. 587 *et seq*.; *Layton/Mercer* para. 11.030.

remedy would be given when the referring court renders its final decision.[192] It is not necessary that there would be generally – *in abstracto* – no judicial remedy against a decision of the referring court. The national law prescribes which ordinary remedies lie.

In any case the highest national courts in civil matters are obliged to refer to the CJEU.[193] It does not matter that their decisions may be subject to attack by an eventual remedy to the constitutional court of the country for such remedy would not be an ordinary, regular judicial remedy, but only an extraordinary remedy.[194] But even lower courts can make a reference insofar as national law provides that there is no judicial remedy against their decision in the concrete case be it that the sum is not reached which is needed to entitle to appeal, be it otherwise. Where the first instance is at the same time the last instance this court is obliged to a reference to the CJEU.[195] **98**

Where it is the court's discretion to permit a remedy to a higher instance the first court remains nonetheless a court of last instance if there is no judicial remedy if the court refuses the permission.[196] Where the court on the contrary either permits the remedy or where its refusal can be attacked by a separate remedy then the court is not a court of last instance.[197] **99**

d) Relevance for the original dispute

A reference for a preliminary ruling of the CJEU is inadmissible where the interpretation issue has no bearing on the outcome of the original dispute before the referring court. The referring court must consider that a decision on the referred question is necessary to enable it to give judgment (Art. 267 TFEU). The CJEU is neither competent nor obliged (nor willing) to answer mere hypothetical questions concerning the interpretation of the Regulation, nor does the CJEU render legal opinions on such issues.[198] References to that effect are thus inadmissible. The referring court must therefore explain in its referral why the answer **100**

192 See only *Kenny Roland Lyckeskog* (Case C-99/00), [2002] ECR I-4839 para. 15; *Intermodal Transports* (Case C-495/03), [2005] ECR I-8151 para. 30; *Wegener*, in: Christian Calliess/Ruffert, EUV Kommentar des Vertrages über die Europäische Union und des Vertrages zur Gründung der Europäischen Gemeinschaft (4. Aufl 2011) Art. 267 AEUV note 27; *Gaitanides*, in: von der Groeben/Schwarze/Hatje, Europäisches Unionsrecht, vol. 4 (7th ed. 2015) Art. 267 AEUV note 62 with further references.

193 For instance in England the Supreme Court, in France the Cour de Cassation, in the Netherlands the Hoge Raad, in Austria the Oberster Gerichtshof, in Germany the Bundesgerichtshof.hekeli.

194 *Dauses*, in: Dauses, Handbuch des EU-Wirtschaftsrechts (looseleaf) P.II note 95; *Schwarze*, in: Schwarze/Hatje, EU-Kommentar (4th ed. 2018) Art. 267 AEUV note 44; *Gaitanides*, in: von der Groeben/Schwarze/Hatje, Europäisches Unionsrecht, vol. 4 (7th ed. 2015) Art. 267 AEUV note 63.

195 *Danmarks Rederiforening v. LO Landsorganisationen i Sverige*, (Case C-18/02) [2004] ECR I-1417, para. 17.

196 See only *Geimer/Schütze,* Europäisches Zivilverfahrensrecht (3rd ed. 2010) Einl. A.1 note 162 with further references.

197 See also *Kenny Roland Lyckeskog* (Case C-99/00), [2002] ECR I-4839 para. 16.

198 See *Pasquale Foglia v. Mariella Novello* (Case 244/80), [1981] ECR 3045 para. 18; *Krystyna Gmurzynska-Bscher v. Oberfinanzdirektion Köln* (Case C-231/89), [1990] ECR I-4003 para. 23; *Wienand Meilicke v. ADV/ORGA AG* (Case C-83/91), [1992] ECR I-4919 para. 25; *Konatinos Adeneler v. Ellinikos Organismos Galaktos* (Case C-212/04), [2006] ECR I-6057 paras. 42–43; *Manuel Acereda Herrera v. Servicio Cántabro de Salud* (Case C-466/04), [2006] ECR I-5341 paras. 48–49.

to the interpretation issue is decisive for the final judgment.[199] The interpretation issue is for instance irrelevant where all possible interpretations lead to the same result[200] or where a party is already precluded to raise the interpretation issue.[201] The interpretation of the national norm as stake, but for its background in EU law, is a preliminary issue to be decided by the national court.[202]

101 It is the referring court's discretion to regard an interpretation issue as doubtful. Only if the issue is clear beyond reasonable doubt a referral becomes inadmissible (*acte clair* doctrine).[203] But the CJEU accepted even a reference on the matter whether under an EU *Regulation* sheep's wool had to be regarded as a product gained from animals.[204] It is for the national court to assess the relevance of questions to be possibly referred, for the original dispute since only the national court sitting has full knowledge of facts, files, and parties' submissions.[205]

e) Obligation to refer

102 Where the mentioned requirements are met the court of last instance is not only entitled but also obliged to refer the interpretation issue to the CJEU, pursuant to Art. 267 (3) TFEU. Without such obligation of the national courts of last instance the CJEU could not effectively fulfil its function to unify the interpretation of the Regulation. It is however only the national court which can make a reference to the CJEU. The parties may urge the court to do so but they themselves are not entitled to a referral and they have no remedy under EU law if the national court refuses a reference (though under national law a remedy may lie).[206]

103 Only in exceptional circumstances is the national court not obliged to refer an interpretation issue. One such situation is where the CJEU has already decided that issue.[207] But even if an CJEU ruling already exists a court is nonetheless entitled to a reference. It can be expected that in such a case the referring court explains in detail why it considers the previous decision of the CJEU as unsatisfactory.

104 There is also no obligation to refer and, as mentioned above, a reference becomes inadmissible if the interpretation issue is an *acte clair*, clear beyond reasonable doubt.[208] However

199 *Gantner Electronic GmbH v. Baasch Exploitatie Maatschappij BV*, (Case C-111/01) [2003] ECR I-4207.

200 See BGH IPRax 2003, 346 (349).

201 *Kropholler/von Hein,* Europäisches Zivilprozessrecht (9th ed. 2011) Einl. note 35.

202 *Nordmeier*, in: FS Peter-Christian Müller-Graff (2015), p. 1146, 1147–1148.

203 *CILFIT v. Ministero della Sanità*, (Case 283/81) [1982] ECR 3415.

204 See *CILFIT v. Ministero della Sanità*, (Case 283/81) [1982] ECR 3415.

205 See only *Pasquale Foglia v. Mariella Novello* (Case 244/80), [1981] ECR 3045 para. 19; *Eurico Italia Srl v. Ente Nazionale Risi* (Joined Cases C-332/92, C-333/92 and C-335/92), [1994] ECR I-711 para. 17; *Julia Schnorbus v. Land Hessen* (Case C-79/99), [2000] ECR I-10997 para. 22.

206 See *Geimer/Schütze,* Europäisches Zivilverfahrensrecht (3rd ed. 2010) Einl. A.1 note 164; *Kropholler/von Hein,* Europäisches Zivilprozessrecht (9th ed. 2011) Einl. note 36.

207 *Da Costa en Schaake NV v. Netherlands Inland Revenue Administration* (Joined Cases 28 to 30/62) [1963] ECR 63 *et seq.*; *CILFIT v. Ministero della Sanità* (Case 283/81) [1982] ECR 3415 para. 15.

208 *CILFIT v. Ministero della Sanità*, (Case 283/81) [1982] ECR 3415 para. 15; *Gaston Schul Douane-expediteur BV v. Minister van Landbouw, Natuur and Voedselkwaliteit* (Case C-461/03), [2005] ECR I-10513 para. 16.

courts should be cautious to consider interpretation issues as so clear. Courts of other jurisdictions and in particular the CJEU might take another view on the interpretation.[209] In order to support the CJEU's function to unify the interpretation of the Regulation national courts should rather refer than avoid referrals. For good measures the CJEU has narrowed down the limits to the exception of *acte clair*. Sometimes the effort which a national court has to take in order to reason why something is clear[210] betrays the result reached.[211]

Yet an issue which originally was not *acte clair*, might have been clarified by subsequent CJEU case law so that it became an *acte éclairé* not triggering an referral anymore. **105**

f) Formal requirements

In its referral the court must formulate concrete questions which the CJEU is asked to answer. The referring court must further give a survey of the facts and of the legal background of the dispute – the facts must therefore already have been established[212] – and it must explain why the interpretation issue is relevant for its decision.[213] Art. 94 Rules of Procedure of the CJEU outline the prerequisites which a referral needs to fulfil in order to be admissible and admitted. In addition, the CJEU has issued very helpful "Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling procedures".[214] They outline the specifications which should be met. **106**

In cases of particular urgency the national courts may apply for the special urgent procedure provided for in Art. 107 Rules of Procedure of the CJEU.[215] According to para. (1) of this provision the national court "shall set out, in its request, the matters of fact and law which establish the urgency and justify the application of that exceptional procedure and shall, insofar as possible, indicate the answer it proposes to the questions referred." **107**

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209 See *CILFIT v. Ministero della Sanità*, (Case 283/81) [1982] ECR 3415 paras. 16–19; *Intermodal Transports BV v. Staatssecratris van Financiën* (Case C-495/03), [2005] ECR I-8151 para. 39.

210 E.g. BGH, EuZW 2013, 184 – Sportwetten.

211 *Knauff,* DÖV 2013, 375; *Karpenstein*, in: Leible/Terhechte (eds.), Europäisches Rechtsschutz- und Verfahrensrecht (2014) § 8 note 62.

212 *Wienand Meilicke v. ADV/ORGA AG* (Case C-83/91), [1992] ECR I-4871 para. 26; *Gantner Electronic GmbH v. Baasch Exploitatie Maatschappij BV*, (Case C-111/01) [2003] ECR I-4207, paras. 35 *et seq.*

213 *Telemarsicabruzzo SpA v. Circostel* (Joined Cases C-320/90 to C-322/90), [1993] ECR I-393; *Pretore di Genova v. Giorgio Domingo Banchero* (Case C-157/92), [1993] ECR I-1085; *Monin Automobiles –maison du deux-roues* (Case C-386/92), [1993] ECR I-2049; *Criminal proceedings against Claude Laguillaumie* (Case C-116/00), [2000] ECR I-4979 paras. 14 *et seq.*; *Gantner Electronic GmbH v. Baasch Exploitatie Maatschappij BV*, (Case C-111/01) [2003] ECR I-4207; *Lucien De Graaf and Gudula Daniels v. Belgische Staat* (Case C-436/05), [2006] ECR I-106 para. 10; *Otmar Greser v. Bundesagentur für Arbeit* (Case C-438/06), [2007] ECR I-69 para. 8; *Eurodomus srl v. Comunee di Bolzano* (Case C-166/06), [2007] ECR I-90 para. 11.

214 Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling procedures, OJ EU 202 C 338/1.

215 See OJ 2008 L 24/39.

3. The effects of decisions of the CJEU

108 The preliminary ruling of the CJEU decides the interpretation issue with binding effect for the court and the parties of the referred dispute.[216] According to Art. 91 (1) Rules of Procedure[217] the CJEU decides as law. Its rulings have an *inter partes* effect.[218] But the ruling is neither a final decision of the original dispute nor has it a binding effect on other parties or other disputes.[219] It closes an intermediate stage, and it is for the courts of the State from which the reference came, to finally decide the case as to substance. Even the referring court can refer the same issue in another dispute again to the CJEU[220] or asked the CJEU for an (authentic) interpretation of its previous ruling.[221]

109 Nonetheless, once the CJEU has decided on an interpretation issue this decision has a wide factual effect and is regularly followed by the national courts of the Member States. It exerts effect as a precedent of the highest order.[222] In principle, interpretative judgments apply retroactively *ex tunc*[223] save for an express limitation to an effect *ex nunc*.[224]

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216 *Milch-, Fett- und Eierkontor GmbH v. Hauptzollamt Saarbrücken* (Case 29/68), [1969] ECR 165 para. 3; *Luigi Benedetti v. Munar F.lli s.a.s.* (Case 52/76), [1977] ECR 163, 183 paras. 26–27; *Fazenda Pública v. Câmara Municipal da Porto* (Case C-446/98), [2000] ECR I-11435 paras. 49–50; *Fastenrath,* JA 1986, 284; *Nachbaur,* JZ 1992, 354; *Middeke*, in: Rengeling/Gellermann/Middeke, Handbuch des Rechtsschutzes in der Europäischen Union (3rd ed. 2014) § 10 note 102.

217 Rules of Procedure of the Court of Justice of the European Union, OJ EU 2012 L 265/1 as amended by Amendments to the Rules of Procedure of the Court of Justice of the European Union, OJ EU 2013 L 173/1.

218 See only *Karpenstein*, in: Leible/Terhechte (eds.), Europäisches Rechtsschutz- und Verfahrensrecht (2014) § 8 note 112.

219 *Geimer/Schütze*, Einl. A.1 note 174; *Kropholler/von Hein*, Einl. note 38; *Schmidt-Parzefall,* Die Auslegung des Parallelübereinkommens von Lugano (1995) pp. 35 *et seq.*; *Ansgar Staudinger*, in: Rauscher Einl. Brüssel I-VO note 62; for a wider binding effect however *Brückner*, in: Hommelhoff/Jayme/Mangold (eds.), Europäischer Binnenmarkt. IPR und Rechtsangleichung (1995), p. 267 *et seq.*

220 See *Da Costa en Schaake NV v. Netherlands Inland Revenue Administration*, (Joined Cases 28 to 30/62) [1963] ECR 63.

221 *Wünsche Handelsgesellschaft GmbH & Co. KG v. Bundesrepublik Deutschland* (Case 69/85), [1986] ECR 947 para. 15; *von Danwitz,* ZESAR 2008, 57, 63.

222 *Pechstein,* EU-Prozessrecht (4th ed. 2011) para. 868; *Middeke*, in: Rengeling/Gellermann/Middeke, Handbuch des Rechtsschutzes in der Europäischen Union (3rd ed. 2014) § 10 note 104; *Karpenstein*, in: Leible/Terhechte (eds.), Europäisches Rechtsschutz- und Verfahrensrecht (2014) § 8 notes 113–114; *Gaitanides*, in: von der Groeben/Schwarze/Hatje, Europäisches Unionsrecht, vol. 4 (7th ed. 2015) Art. 267 AEUV note 93.

223 *Administrazione delle finanze dello Stato v. Denkavit Italiana srl* (Case 61/79), [1980] ECR 1205 para. 15; *Ministero delle Finanze v. In.Co.GE'90.srl and others* (joined Cases C-10/97 to C-22/97), [1998] ECR I-6307 para. 23; *The Queen, ex parte Danny Bidar v. London Borough of Ealing and Secretary of State for Education and Skills* (Case C-209/03), [2005] I-2119 para. 69; *Wienand Meilicke, Heidi Christa Weyde and Marina Stöffler v. Finanzamt Bonn-Innenstadt* (Case C-292/04), [2007] I-1835 para. 34.

224 See only *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena* (Case 43/75), [1976] ECR 455 para. 74; *Bruno Barra v. Belgischer Staad and City of Liège* (Case 309/85), [1988] ECR 355 para. 13; *The Queen, ex parte Danny Bidar v. London Borough of Ealing and Secretary of State for Education and Skills* (Case C-209/03), [2005] I-2119 para. 67 with further references; *Wienand Meilicke, Heidi*

VIII. History of references under the Rome II regime in a nutshell

The Rome II Regulation has not generated all too many references for preliminary rulings to the CJEU yet. An important reason to explain the scarcity of references might be that courts can draw on the already jurisprudence and case law on Arts. 5 (3) Brussels Convention/Brussels I Regulation/2007 Lugano Convention; 7 (2) Brussels I*bis* Regulation to a very large extent. Jurisdiction has to be asserted at an earlier stage of proceedings than the applicable law as to substance. Formerly the CJEU and now the CJEU painfully addresses the place where the damage occurred under the said jurisdictional rules, and Recital (7) urges case-handlers to have proper regard to the interpretation of the Brussels I(bis) Regulation. This gives ample guidance for the interpretation of Art. 4 (1) in particular, and Art. 4 (1) in turn is the fundamental conflicts rule in torts. **110**

The first occasion when the CJEU had to rule directly on a conflicts rule of the Rome II Regulation was *Prüller-Frey*.[225] It should not come as a surprise that this decision addresses Art. 18 on direct action against the insurer of the person liable, a rule which does not have a counterpart in the Brussels I*bis* Regulation. **111**

Lazar rose to the opportunity to give first guidance on Art. 4 Rome II Regulation as the most important rule in the Rome II Regulation.[226] It addressed the notion of direct and indirect damage in cases where relatives of the primary victim suffered own damage and some national law awarded them own claims against the tortfeasor.[227] The pivot of the solution was found in Art. 15 (f) Rome II Regulation.[228] **111a**

A potpourri of issues unveiled in *Ergo Insurance*[229]. The issues to be considered ranged from the general statement that "non contractual" should be interpreted in the same vein as under Art. 5 (3) Brussels I Regulation[230] to relations between different insurers and the characterisation matters raised by Art. 19.[231] **111b**

Christa Weyde and Marina Stöffler v. Finanzamt Bonn-Innenstadt (Case C-292/04), [2007] I-1835 paras. 36–37.

225 *Eleonore Prüller-Frey v. Norbert Brodnig and Axa Versicherung AG* (Case C-240/14), ECLI:EU:C:2015:567 paras. 37–45 with A-G *Szpunar,* Conclusions of 20 May 2015 in Case C-240/14, ECLI:EU:C:2015:325 paras. 71–87.

226 *Florin Lazar v. Allianz SpA* (Case C-350/14), ECLI:EU:C:2015:802 with A-G *Wahl,* Conclusions of 10 September 2015 in Case C-350/14, ECLI:EU:C:2015:586.

227 See in more detail *Mankowski,* JZ 2016, 310 (311)-312; *Kadner Graziano,* RIW 2016, 227.

228 *Florin Lazar v. Allianz SpA* (Case C-350/14), ECLI:EU:C:2015:802 paras. 27–28; applauding *Kadner Graziano,* RIW 2016, 227 at 227.

229 *Ergo Insurance SE v. If P&C Insurance AS* (Joined Cases C-359/14 and C-475/14), ECLI:EU:C:2016:40; A-G *Sharpston,* Opinion of 24 September 2015 in Joined Cases C-359/14 and C-475/14, ECLI:EU:C:2015:630.

230 *Ergo Insurance SE v. If P&C Insurance AS* (Joined Cases C-359/14 and C-475/14), ECLI:EU:C:2016:40 para. 45.

231 *Ergo Insurance SE v. If P&C Insurance AS* (Joined Cases C-359/14 and C-475/14), ECLI:EU:C:2016:40 paras. 49–62.

112 Else the CJEU took pains to clarify the temporal scope of the Rome II Regulation by effectively giving Art. 32 precedence to Art. 31 in *Homawoo*.[232]

113 Indirectly, the CJEU had a short brush on the Rome II Regulation in *Kainz*, a case on the Brussel I Regulation, where it considered Art. 5 Rome II Regulation inappropriate as guidance for the interpretation of Art. 5 (3) Brussels I Regulation.[233]

114 In *CDC* A-G *Jääskinen* used harmony with Art. 6 (3) Rome II Regulation as a supporting argument for proposing a certain interpretation of Art. 6 pt. 1 Brussels I Regulation.[234] The CJEU did not seize upon nor reject this argument, though.

IX. General structure of the Regulation

115 The Regulation is divided in seven chapters. That rules on its scope constitute the first chapter is a natural and goes without saying. The central chapters are Chapters II to IV which contain the conflicts rules, supplemented by Chapters V and VI on some common features. Chapter VII comprises the final provisions as it is common in inter- or supranational instruments. This general structure is evident and self-explanatory but for the subdivision between Chapters V and VI on the one hand and for the position of Chapter IV and Art. 14 on the other hand.

116 It is not quite clear why a certain rule is attributed to Chapter V and why the other to Chapter VI. Presumably, Chapter V is believed to encompass matters related to scope matters of the single conflicts rules or even special conflicts rules for certain issues whereas Chapter VI deals with refining connecting factors employed in Chapters II to IV. The present Chapters V and VI should be read as a single Chapter, and one should not invest too much effort in explaining and defending the subdivision anyway.

117 Chapter IV is the odd man out of the Rome II Regulation. It should rather have been put at the top of the list as Chapter II for, hierarchically, Art. 14 is superior to any rule contained in Chapters II and III. For any practical purposes, Art. 14 is the first conflicts rule to pay close attention to.[235] For once a parties' choice of law is admitted and ascertained in the concrete case, Arts. 4–13 have lost all their sway. It would be a frustrated to employ them. Art. 14 is not to displace an applicable law after it has been identified by the means of Arts. 4–13.[236] Presumably, Art. 14 has become that late in the numerical order for historical reasons, traditional hesitance towards party autonomy, and the fact that party autonomy is not generally admitted but only under certain, rather severe restrictions.

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232 *Deo Antoine Homawoo v. GMF Assurances SA* (Case C-412/10), [2011] ECR I-11603 para. 33.

233 *Andreas Kainz v. Pantherwerke AG* (Case C-45/13), ECLI:EU:C:2014:7 para. 20.

234 A-G *Jääskinen,* Opinion of 11 December 2014 in Case C-352/13, ECLI:EU:C: 2014:2443 para. 75.

235 To the same avail *Dickinson,* [2013] LMCLQ 86, 122.

236 Incorrect *Briggs* para. 8.25.

X. General features

1. Element of internationality required

In order to become applicable the Rome II Regulation requires and presupposes a connection of the case with another state different from the *forum* state. Purely internal cases are not covered since the Rome II regime is only concerned with international jurisdiction whereas purely internal matters connected only with the *forum* state pose no true conflict **118**

In order to keep consistency with Art. 3, it should be clear that internationality is also established and generated by an element connecting the case with a non-Member State. That internationality is given where a relation with another Member State than the present *forum* state exists, is uncontroversial and in fact a no-brainer. Yet internationality can also stem from elements connecting the case with a non-Member State since such a case is not a purely internal case related exclusively to the *forum* state anymore. **119**

2. Party autonomy

a) First place for Art. 14 Rome II Regulation and (restricted) "direct" party autonomy

The order in which the Rome II Regulation has to be tackled in a given case, might be surprising to the unwary and is by no means self-evident: The first rule to be addressed amongst the conflict rules is Art. 14.[237] The first pick must not be any rule in Chapters II or III, but one has to start with the one and only rule to be found in Chapter IV, rather late and hidden in the overall structure of the Regulation. If placed correctly the present Art. 14 should have been an Article 3, and the present Chapter IV should have been a chapter II. The European Parliament unsuccessfully ventured to this avail[238] which would also have mirrored the order within the Rome I Regulation where Art. 3 on party autonomy precedes any objective connection.[239] The Parliament was stopped in its tracks by the Council eventually.[240] **120**

However, Art. 14 is perhaps the greatest innovation and the great novelty brought about by the Rome II Regulation compared to the previous national conflict rules of the Member States on non contractual obligations,[241] and Art. 14 certainly is the first stop for all drafters of commercial contracts with a very practical interest in "commercial" PIL.[242] Economically thinking writers promote party autonomy since they believe that, in the absence of market **121**

237 *Brödermann/Rosengarten,* Internationales Privat- und Zivilverfahrensrecht (IPR/IZVR) (7th ed. 2015) para. 416; see also A-G *Wahl,* Opinion of 10 September 2015 in Case C-350/14, ECLI:EU:C:2015:586 para. 22.

238 Art. 3 Position of the European Parliament adopted at first reading on 6 July 2005 with a view to the adoption of Regulation EC No. …/2005 of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II), reprinted in: *Malatesta* p. 392.

239 *von Hein*, in: Calliess, Art. 4 Rome II Regulation note 12.

240 Art. 14 (1) Art. 14 Council Common Position of 25 September 2006, OJ 2006 C/289E/68.

241 *Mankowski,* GPR 2010, 154.

242 See *Andrew Scott,* (2009) 125 LQRev 709, 712–713.

failure problems, the law should uphold the parties' bargain in relation to matters of care and cost bearing, where such a bargain exists.[243]

122 It should be noted that Art. 14 (1) (b) puts severe limitations on a choice of law made *ex ante* whereas Art. 14 (1) (a) liberally admits a choice of law *ex post*. Art. 14 (1) (a) grants a free choice of law (as the heading to Art. 14 promises) only insofar as parties may select any law in the world which they want to choose and as their options are not restricted to a pre-selected variety of laws displaying objective connections with the case. But a choice of law *ex ante* is only permitted in B2B cases not in B2C, C2B or C2C cases. Only where professionals are concerned on both sides of the obligations, such choice is enforced, and even then only if the additional precondition is met that the choice of law agreement was freely negotiated.

123 Consequentially, the instances where Art. 14 is actually operative are rare and more random than one would expect at first glance.[244] A choice *ex post* requires cooperativity on the creditor's side, a willingness to possibly give up a position which he has already acquired under the law applicable absent such choice. Free negotiations for a choice of law *ex ante* between professionals require that neither of them relies on a boilerplate clause in its own Standard Terms and Conditions.

b) "Indirect" party autonomy under objective accessory connections

124 But it should be kept in mind that Art. 14 addresses party autonomy only insofar as it might be granted directly by the Rome II Regulation. Yet there are important instances where party autonomy indirectly enters through the backdoor. The door opened to party autonomy granted by other conflicts rules not contained in the Rome II Regulation are the accessory connections in Arts. 4 (3) cl. 2; 5 (2) cl. 2; 10 (1); 11 (1); 12 (1): If the respective relationship existing between the parties is subject to party autonomy as established by the conflicts rules governing that relationship the Rome II Regulation follows suit. Accessory connections do not alter the conflicts rules governing the dominant relationship. Nor do they introduce specific limitations insofar as the are proper accessory connections.[245]

125 In particular, where the dominant relationship is a contract Art. 3 (1) Rome I Regulation will set the standard. Even where a dominant contract is a consumer contract or an individual employment and is thus governed by the protective regimes of Art. 6 or Art. 8 Rome I Regulation respectively, Art. 3 (1) Rome I Regulation will determine the applicable law by

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243 *Whincop/Keyes.* 19 Nw. J. Int'l. L. & Bus. 215, 236 (1999); *O'Hara/Ribstein,* 67 U. Chi. L. Rev. 1151, 1210–1211 (2000); *Kagami*, in: Basedow/Kono (eds.), An Economic Analysis of Private International Law (Tübingen 2006), p. 15, 26–28; *Hans-Bernd Schäfer/Lantermann*, in: Basedow/Kono (eds.), An Economic Analysis of Private International Law (Tübingen 2006), p. 87, 94–95; *Rühl,* Statut und Effiziens (2011) pp. 601–602.

244 See in more detail the commentary on Art. 14 (*Ferrari*) and *de Boer*, (2007) 9 YbPIL 19; *Zhang,* 39 Seton Hall L. Rev. 861 (2009); *Vogeler,* Die freie Rechtswahl im Kollisionsrecht der außervertraglichen Schuldverhältnisse (2013).

245 *Werner Lorenz*, in: Vorschläge und Gutachten zur Reform des internationalen Privatrechts der außervertraglichen Schuldverhältnisse (193), p. 87, 135; *de Boer,* (2007) 9 YbPIL 19, 27; *Junker*, in: Münchener Kommentar zum BGB Art. 14 Rome II note 10.

virtue of Arts. 6 (2) cl. 1 or Art. 8 (1) cl. 1 Rome I Regulation respectively.[246] But likewise Arts. 6 (2) cl. 2; 8 (1) cl. 2 Rome I Regulation should apply and trigger the more favourable law principle.[247] Where the dominant contract is an insurance contract (save for Art. 7 (1), (2) Rome I Regulation) or a contract for the carriage of passengers Art. 7 (3) or Art. 5 (2) subpara. 2 Rome I Regulation respectively limit the options for the laws permitted to be chosen. Generally, there should not be a burning need to ruminate about a teleological reduction of, or the introduction of judicial discretion into, the accessory connection.[248]

Systematically, "indirect" party autonomy has the same place in the order of a case as the rule establishing the underlying accessory connection. The rank of this place might vary. Arts. 10 (1); 11 (1); 12 (1) outrightly give first place to accessory connections when it comes to objectively determining the applicable law. Art. 4 (3) cl. 2 at first glance appears to be the main exemplification of the escape clause in Art. 4 (3) cl. 1 and thus to become only operative after one has ascertained which law would be applicable by virtue of Art. 4 (1) or (2). But in fact, Art. 4 (3) cl. 2 reverses order and should be considered before addressing Art. 4 (2) or (1).[249] **126**

3. Rule-based standard

The Rome II Regulation beyond even the slightest doubt adopts a rule-based standard. It refrains from resorting to mere approaches. Approaches based on few rather general rules leaving much discretion to judges were proposed, ventilated, discussed – and eventually dismissed. The genesis of the Regulation is crystal-clear in this regard. The advocates for importing American ideas and approaches waged and lost their battle.[250] As to torts the Regulation follows modern Continental ideas:[251] a number of specific rules for specific torts; a general rule setting a clear favouring the *lex loci damni*; restricted recourse to so called *Auflockerungen des Deliktsstatuts*; an escape clause to be used cautiously. The comparatively most revolutionary element is the addition of certain measure of party autonomy, even *ex ante* party autonomy. The Regulation pursues traditional values.[252] It is evolutionary in the best sense, not revolutionary.[253] **127**

With regard to torts every legislator has to decide whether to opt for the *lex loci damni*, the *lex loci actus*, some combination of both (particularly the principle of ubiquity), or the **128**

246 See only *Vogeler,* Die freie Rechtswahl im Kollisionsrecht der außervertraglichen Schuldverhältnisse (2013) p. 287; *Limbach*, in: jurisPK BGB Art. 6 Rom I-VO note 56.

247 See *Vogeler,* Die freie Rechtswahl im Kollisionsrecht der außervertraglichen Schuldverhältnisse (2013) pp. 288–291.

248 But cf. *Kadner Graziano,* RCDIP 97 (2008), 445, 464 *et seq.*; *Kadner Graziano,* RabelsZ 73 (2009), 1 (71) *et seq.* on the one hand and *von Hein,* ZEuP 2009, 6 (21); *Kadner Graziano,* RabelsZ 73 (2009), 461 (490); *Spickhoff*, in: Bamberger/Herbert Roth, Art. 14 Rom II-VO note 1 on the other hand.

249 *Infra* Introduction note 136 (*Mankowski*).

250 *Supra* Introduction notes 19–23 (*Mankowski*).

251 *Knöfel*, in: Nomos Kommentar BGB Vor Art. 1 Rom II-VO note 5.

252 *von Hein,* 82 Tulane L. Rev. 1663, 1703 (2008); *Mankowski,* Interessenpolitik und Kollisionsrecht (2011) p. 66.

253 *von Hein,* 82 Tulane L. Rev. 1663 (2008); *von Hein,* ZEuP 2009, 6 (9); *Mankowski,* Interessenpolitik und Kollisionsrecht (2011) p. 66.

country of origin. Art. 4 (1) cl. 1 delivers a clear-cut choice in favour of the *lex loc damni*. The *lex loci actus* comes to the fore as a rule only in Art. 9 and to some extent in Art. 5 (1). Basically, this is a very sound and efficient solution: First, the tortfeasor is not treated unfairly if he is bound to gather information about the law of the State where the damage occurs. Second, the potential victim can calculate the necessary level of insurance of his assets according to the yardsticks of the place where they are located.[254]

129 This basic decision puts responsibility where it belongs: to the person extending its activities and in a position to control the consequences of its activities, else it has to internalise the costs of negative externalities.[255] Conversely, being potentially confronted with a law the contents of which one is not familiar with, might exert a welcome deterring effect. The active party has all means to prevent the damage from occurring.[256] Furthermore, the *lex loc damni* leads to equal treatment of all tortfeasors causing damage in the same State.[257] This avoids both suboptimal and superoptimal care,[258] and caters for institutions.[259] Relying on the *lex loci damni* reflects the comparative trend in substantive law to favour compensation over punishment.[260] Protecting integrity is preferred to regulation of conduct.[261]

130 Chapter II is conservative (in the best sense) and Savignyan in another regard, too: It decides against adopting any country of origin principle.[262] Only Art. 27 gives some leeway but insofar as other Acts of EU have adopted this principle. The policy decision against the country-of-origin principle is just and sound for it avoids the inherent structural and political defects of the country-of-origin principle.[263] Resorting to the *lex originis* might even amount to an indirect obstacle in the way of the freedom of establishment.[264] The frolics of

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254 See only *von Hein,* Das Günstigkeitsprinzip im Internationalen Deliktsrecht, 1999, S. 217–220; *von Hein,* ZEuP 2009, 6 (16); *von Hein,* RabelsZ 73 (2009), 461 (475); *Basedow*, in: Lima de Pinheiro (ed.), Seminário Internacional sobre a Comunitarização do Direito Internacional Privado (2005), S. 17, 26; *Petch,* [2006] JIBLR 449, 454; *Garcimartín Alférez,* EuLF 2007, I-77, I-84; *Junker,* NJW 2007, 3675 (3678); Lima de Pinheiro, RDIPP 2008, 5, 16; *Sujecki,* EWS 2009, 310 (314); *Mankowski,* Interessenpolitik und Kollisionsrecht (2011) pp. 67–68.

255 *Garcimartín Alférez,* EuLF 2007, I-77, I-84; Lima de Pinheiro, RDIPP 2008, 5, 16; *von Hein,* RabelsZ 73 (2009), 461 (475).

256 *Calvo Caravaca*/*Carrascosa González* p. 108.

257 *Kadner Graziano,* Gemeineuropäisches Internationales Privatrecht (2002) p. 532; *Mankowski*, in: FS Andreas Heldrich (2005), p. 867, 886.

258 *Mankowski,* Interessenpolitik und Kollisionsrecht (2011) p. 68; see also *Hans-Bernd Schäfer*/*Lantermann*, in: Basedow/Kono (eds.), An Economic Analysis of Private International Law (Tübingen 2006), p. 89, 114–115.

259 *d'Avout,* D. 2009, 1629, 1633.

260 *Xandra Ellen Kramer,* NIPR 2008, 414, 420.

261 *Knöfel*, in: Nomos Kommentar BGB Vor Art. 1 Rom II-VO note 5.

262 *Wilderspin,* NIPR 2008, 408, 409; *von Hein,* 82 Tulane L. Rev. 1663, 1703 (2008); *von Hein,* ZEuP 2009, 6 (9); *Kozyris,* 56 Am. J. Comp. L. 471 (2008); *Leible* pp. 9–12; *Mankowski,* Interessenpolitik und Kollisionsrecht (2011) pp. 69–70.

263 On these see *Mankowski,* IPRax 2004, 385 (387–389); *Mankowski,* Interessenpolitik und Kollisionsrecht (2011) p. 70.

264 *Calvo Caravaca*/*Carrascosa González* pp. 63–64; see also *Muir Watt,* RdC 307 82004), 29, 206.

progressism are lost on the Regulation. The Regulation is also based on a crucial policy decision against any principle of mutual recognition instead of proper conflicts rules.[265]

4. Establishing facts, burden of proof and ascertaining facts *ex officio*

The court must apply the conflicts rules of the Rome II Regulation *ex officio*, i.e. on its own motion.[266] It does not have any discretion in this regard.[267] **131**

But this is neither tantamount nor to be confused with the court having an obligation to establish the relevant facts *ex officio*. The Regulation does not impose such burden. There is nothing even remotely to such avail to be found in the Regulation or in EU law in general. How to treat facts is a matter left for the procedural rules of the forum State. Insofar as the forum law knows a burden of proof for facts and obliges interested parties to plead and to prove facts, this applies to the facts the existence of which would render a certain rule of the Regulation applicable, too.[268] At stake is not only the "if" but also the "how" of a certain connection under a given conflicts rule.[269] **132**

The relevant point of time as to which the relevant facts have to be ascertained, is in principle the time of the last admitted argument in the respective instance. **133**

XI. Order of conflict rules in practical cases

1. The general matrix, step by step

For practitioners it might be helpful to set out the order in which to address the conflict rules of the Regulation in practical cases. First, one has to ascertain whether the Rome II Regulation is applicable at all. This takes three steps: **134**

1. Is it a non contractual obligation at all? – Art. 1 (1)
2. Does any special exclusion from the substantive scope of the Rome II Regulation apply? – Art. 1 (2), (3)
3. Is the case governed by any special conflicts rule in another Act of EU law takes precedence over the Rome II Regulation by virtue of the latter's Art. 27?
4. Does the case fall in the scope of any international Convention which is in force in the forum State and thus takes precedence over the Rome II Regulation by virtue of the latter's Art. 28?[270]

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265 *Calvo Caravaca/Carrascosa González* pp. 56–62.

266 See only BGH NJW 1993, 2305; BGH NJW 1995, 2097; BGH RIW 1995, 1027 (1028).

267 See references in last fn.

268 See *Hepting*, in: FS Werner Lorenz zum 70. Geb. (1991), p. 393, 400–401; *Lüderitz,* Internationales Privatrecht (2nd ed. 1992) para. 280; *Mankowski,* IPRax 2009, 474 (477) and also *Magnus*, in: Staudinger, BGB, Artt. 1–10 Rom I-VO (2011) Art. 4 Rom I-VO note 171. Cf. the more complicated model developed by *Seibl,* Die Beweislast bei Kollisionsnormen (2009) pp. 339–346 after extensive reasoning.

269 *Mankowski,* IPRax 2009, 474 (477). *Contra Hepting*, in: FS Werner Lorenz zum 70. Geb. (1991), p. 393, 404–405.

270 See in more detail Art. 28 notes 29–32 (*Mankowski*).

135 5. If the Regulation is applicable: Is there a parties' choice of law enforced by virtue of Art. 14?
- a) Do Art. 6 (4) or Art. 8 (3) exclude any choice of law in the concrete case?[271]
- b) If no: Have the parties concluded a choice of law agreement?
- c) If yes: Have the parties concluded that agreement after the relevant events?
- d) If no, i.e. if the parties have concluded the agreement before the relevant events:
  - aa) Have all parties to the agreement been acting in a commercial or professional capacity?
  - bb) If yes: Has the agreement been freely negotiated?

136 If the answers in Step 2–4 all are to the negative, the further order differs depending on which kind of non contractual obligation is at stake. Hence, characterisation has to come first in order to identify the proper sub-regime. Characterisation takes yet another step. The ensuing question reads:

6. Is it an obligation stemming from tort or unjust enrichment or negotiorum gestio or culpa in contrahendo?

137 7A
- a) If it is a claim in tort: Is it a tort covered by one of the special rules in Arts. 5, 6, 7, 8, or 9?
- b) If it is a tort covered by one of the special rules in Arts. 5, 6 (1), (2), 6 (3), 7, 8, or 9: Apply the respective special rule.[272] (There cannot be any overlap between the special rules for they are strict alternatives to each other.)
- c) Is it a tort **not** covered by one of the special rules in Arts. 5, 6, 7, 8, or 9: Apply in descending order
  - aa) Art. 4 (3) cl. 2
  - bb) If not: Art. 4 (2)
  - cc) If not: Art. 4 (1)
  - dd) If aa) not: Art. 4 (3) cl. 1[273]

138 7B If it is a claim in unjust enrichment or restitution:
- a) Art. 10 (1)
- b) Art. 10 (2)
- c) Art. 10 (3)
- d) Art. 10 (4)

139 7C If it is a claim in *negotiorum gestio*:
- a) Art. 11 (1)
- b) Art. 11 (2)
- c) Art. 11 (3)
- d) Art. 11 (4)

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271 Possibly Art. 7 and Art. 9 might be added to the list of (materially, not formally) excluding rules; discussed *infra* Art. 14 notes 9, 10 and in particular by *Vogeler,* Die freie Rechtswahl im Kollisionsrecht der außervertraglichen Schuldverhältnisse (2013) pp. 122–134.

272 See *infra* Introduction notes 143–150.

273 Insofar Art. 4 (3) cl. 2 on the one hand and Art. 4 (3) cl. 1 on the other hand are to be treated differently for the purposes of a concrete case. They do not team up as an inseparable pair as cases like Rb. Rotterdam NIPR 2016 Nr. 69 p. 137 could possibly suggest.

7D If it is a claim in *culpa in contrahendo*: **140**
- a) Characterise whether the case falls under Art. 12 (1)
- b) If yes: apply Art. 12 (1)
- c) If not: apply Art. 12 (2) in descending order
  - aa) Art. 12 (2) (a)
  - bb) Art. 12 (2) (b)
  - cc) Art. 12 (2) (c)

As should be evident and self-explaining, Steps 7A, 7B, 7C, and 7D are strict alternatives to each other, depending on the answer to be given to the question posed in Step 6 in the respective case. Practitioners thus are confronted only with one of them for a single aspect. If they have to address a multiplicity of aspects, the process has to be started again with Step 1 and might lead to different rules to be applied for different aspects. That is a necessary consequence of the so called analytical method of private international law,[274] like it is emanating in characterisation as an institution which dissects a case in its different aspects. **141**

Of course, experienced practitioners may mentally shortcut the process by immediately proceeding to Steps 7A to 7D. But nonetheless even they should do a quick check on Steps 2, 3, 4, and 5 in order to avoid overlooking something relevant in these regards. Likewise, the wary might be tempted to commence with Step 4 skipping Steps 1 and 2 if it is evident that (1) the case concerns a traffic accident or product liability and (2) the forum State adheres to the respective Hague Convention. **142**

2. Peculiarities of the special tort rules

As the single conflict rules for special torts are subject to full commentaries, only a few sketchy impressions as to their practical operation might suffice. In any event, each of them enjoys precedence to, and prevails over, Art. 4 due to *lex specialis derogate legi generali*.[275] **143**

a) Art. 5

The most complicated amongst the special tort rules is Art. 5 on product liability. Taken step by step from the very start it might be entangled in an eight step-procedure[276] once the Rome II Regulation has been found applicable and the case has been identified as one of product liability: **144**

1. Art. 14
2. If not: Art. 5 (2) cl. 2
3. If not: Art. 4 (2) (according to Art. 5 (1) pr.)
4. If not: Art. 5 (1) subpara. 1 (a)
5. If not: Art. 5 (1) subpara. 1 (b)

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274 This terminology was coined by *Goldschmidt*, in: FS Martin Wolff (1952), p. 203, 209–210.

275 See only *Brödermann/Rosengarten,* Internationales Privat- und Zivilverfahrensrecht (IPR/IZVR) (7th ed. 2015) para. 418.

276 The count by *Gerhard Wagner,* IPRax 2008, 1 (7) and *Junker*, in: Liber amicorum Klaus Schurig (2012), p. 81, 88 runs to "only" seven. The difference can be explained in that both disregard the split between the two sentences of Art. 5 (2). *Illmer,* RabelsZ 73 (2009), 269 (285) counts to six. The explanation for the difference is, first, the same as the one relating to the seven count and, second, that *Illmer* does not identify Step 7 as a separate step but integrates it in what here is numbered as Steps 4 to 6.

6. If not: Art. 5 (1) subpara. 1 (c)
7. Steps 4 to 6 are conditional upon the marketing of the product or a like product in the country of the applicable law having been foreseeable to the possible debtor; if not: Art. 5 (1) subpara. 2
8. Art. 5 (2) cl. 1

145 It should be mentioned that product liability cases are in particular prone to raise issues of applicability of the Rome II regime:[277] First, in a substantial number of Member States (namely Croatia, Finland, France, Luxembourg, the Netherlands, Slovenia, and Spain) the Hague Products Liability Convention can claim precedence by virtue of Art. 28 since these States are also contracting States of that Convention. Second, special conflicts rules as contained in other Acts of EU law might precede pursuant to Art. 29, for instance Art. 4 (5) pt. (4) e-commerce Directive with regard to prospectus liability in an online environment. Third, rules regulating specific products (for instance medical drugs) might be characterised as *lois de police* and thus trigger Art. 16.

b) Art. 6

146 Art. 6 deals with two different subject areas, namely on the one hand (1) and (2) with unfair competition and on the other hand (3) with acts restricting free competition. (1) and (2) are separated from each other by the criterion, verbally, whether the relevant act of unfair competition affects exclusively the interests of a specific competitor or, more economically, whether the unfair competition was not affected via the market.[278] Art. 14 is especially excluded by Art. 6 (4) for all kinds of torts falling in the scope of Art. 6.

147 Hence, the matrix for Art. 6 runs:

1. Characterisation: Is the conduct at stake unfair competition or an act restricting free competition?
   - 3A If unfair competition: Is exclusively a specific competitor affected?
     - a) If yes: Art. 6 (2) Art. 4
     - b) If not: Art. 6 (1)
   - 3B If act restricting free competition
     - a) Can the market affected localized in only one country?
     - b) If yes: Art. 6 (3) (a)
     - c) If not:
       - aa) Art. 6 (3) (a)
       - bb) Alternative option: Art. 6 (3) (b)
         - (1) One or more defendants?
         - (2) If one defendant: Art. 6 (3) (b) first part
         - (3) Several co-defendants: Art. 6 (3) (b) second part *iuncto* first part

277 *Spickhoff*, in: FS Jan Kropholler (2008), p. 671, 673–674.

278 *Sack,* GRUR Int 202, 601, 604–606; *Mankowski*, in: Münchener Kommentar zum Lauterkeitsrecht (2nd ed. 2014) IntWettbR notes 242–244a; see also BGHZ 185, 166 – Ausschreibung in Bulgarien; *Nettlau,* Die kollisionsrechtliche Behandlung von Ansprüchen aus unlauterem Wettbewerbsverhalten gemäß Art. 6 Abs. 1 und 2 Rom II-VO (2013) pp. 252–253.

c) Art. 7

Compared to Arts. 5 or 6, Art. 7 appears rather simplistic – but for the peculiarity that of all rules only Art. 7 introduces a unilateral choice for the victim to opt for the law of the country in which the event giving rise to the damage occurred. Hence: **148**

1. Art. 14
   2A Art. 7 first part Art. 4 (1)[279]
   2B Art. 7 second part

Art. 7 might be marred, and for practical purposes dominated, by the incidental question about the influence of permissions granted under foreign public law.[280] **149**

d) Art. 8

The criterion for differentiating between Art. 8 (1) and (2) is as to whether the intellectual property right (possibly) infringed is a unitary Community (read today as: Union) intellectual property right is infringed or not. Art. 8 (3) specifically prohibits party autonomy. Hence: **150**

1. Is the intellectual property right (possibly) infringed a unitary Union intellectual property right?
   2A If yes:
      a) Apply the respective Union Act as far as it goes
      b) For remaining issues: Art. 8 (2)
   2B If not: Art. 8 (1)

e) Art. 9

Art. 9 is truly simple in its structure for it contains a single conflicts rule. This might be called one-stop shopping but for the possibility of a parties' choice of law under Art. 14. **151**

1. Art. 14
2. Art. 9

4. Common rules in Chapter V (Arts. 15–22)

Chapter V offers so called "Common Rules". It assembles a rather mixed bunch, though: Arts. 15; 22 are the necessary provisions on general issues of characterisation supplementing Arts. 4–14, whereas Arts. 16–21 contain special conflicts rules in their own right for specific topics. Those two factions are interrelated insofar as the existence of a special conflicts rule automatically severes, and excludes, the respective issue from the scope of the general conflicts rules. One could try ancillary issues as an overarching heading for the latter.[281] In the following, matters are arranged, and treated, in the order in which one has to tackle them in a concrete case. **152**

a) Overriding mandatory provisions of the forum: Art. 16

Art. 16 opens the door to overriding mandatory provisions, *lois de police, Eingriffsnormen*, of the forum law. If the law of the forum pursues so important public interests (e.g. public sanitary) that they demand to topple any result possibly reached by the applicable law, way **153**

279 *Nota bene*: Neither Art. 4 (2) nor Art. 4 (3) is referred to.

280 See *Mankowski,* IPRax 2010, 389 (390–395).

281 *Briggs* para. 8.27.

should be given to the respective provisions of the forum law. In order to qualify as a *loi de police* a provision of the forum law should comply with yardsticks which *mutatis mutandis* are to be derived from Art. 9 (1) Rome I Regulation (which in turn is based on CJEU judgments rendered well before the implementation of the Rome II Regulation). This "*mutatis mutandis*" is of particular importance for it implies a "translation" or rather transposition from the contractual realm to the non contractual realm.

154 As to where to apply Art. 16 in a concrete case there are two feasible options: at the very beginning or at the very end after completing the process of determining the applicable law. There are two reasons why to put it at the start: Firstly, *Lois de police* are overriding *per definitionem* and apply irrespective of the *lex causae* or of which law is the *lex causae*. Secondly, pragmatism and reducing tertiary costs at bay advocates in favour of starting with Art. 16. Why should one invest in determining or investigating something which will be possibly overridden and rendered irrelevant in the concrete case?

b) Special conflicts rules: Arts. 18–21

aa) Matters addressed: Arts. 18–21

155 The special conflicts rules for specific issues commence with Art. 18 on direct action against the insurer of the person liable. The subject matter is whether the injured can bring his claim directly against the insurer avoiding the tire- and troublesome triangulation that first the injured hat to sue the insured, and second the injured seeks redress against his insurers. Art. 18 heavily the injured for he will be entitled to do so if either the law applicable to the insured's liability or the law applicable to the insurance contract so provide. The injured benefits from an *alternative Anknüpfung* with two prongs. Art. 18 gains quite some relevance with regard to compulsory liability insurance and in particular to traffic accidents.

156 Subrogation or *cessio legis* is an intricate issue involving three parties. Art. 19 devotes a complicated rule on it, following the lead established by Art. 13 (1) Rome Convention and continued in Art. 15 Rome I Regulation. Likewise, another closely related three party-relationship, namely joint and several liability, is addressed in Art. 20 (teaming up with Art. 13 (2) Rome Convention as virtual predecessor and Art. 16 Rome I Regulation. In both instances the law governing the paying third party debtor's (Art. 19) or debtor's (Art. 20) obligation towards the creditor decides about that payor's right to have redress against the debtor (Art. 19) or the other debtors. The general idea is the same, only the technical means differ. Both times a specific rule is needed in order to identify the law applicable to the redress mechanism.

157 Art. 21 governs a very rare contingency, namely the formal validity of a unilateral act intended to have legal effect and relating to a non contractual obligation. In the vein of Arts. 11 Rome Convention; 11 Rome I Regulation it resorts to an *alternative Anknüpfung* with the law applicable to that non contractual obligation or the law of the country where the act is performed, as its two prongs.

bb) Matters not addressed: *lacunae*

158 Art. 17 Rome I Regulation establishing a special conflicts rule for set-off and recoupment does not have a counterpart in the Rome II Regulation. This is a deplorable *lacuna*. One

should apply Art. 17 Rome I Regulation *per analogiam* and resort set-off being governed by the law applicable to the claim against which the right to set-off is asserted.

Art. 4 (1) Draft Proposal of 3 May 2002[282] dealt with acts in areas not subject to territorial sovereignty. It ventilated that the law applicable to a tort occurring in such area shall be the law of the country in which the means of transport or the installation connected with the tort is registered or whose flag it flies or with which it has similar connections. Amendments were proposed by the Hamburg Group on Private International Law distinguishing between the different possible scenarios and catering for a reference to aircraft being added.[283] Neither Proposal was retained in the final Regulation. **159**

Like all other Regulations in the field of PIL the Rome II Regulation does not contain an express rule on incidental questions, also called preliminary issues. This unfortunately allows for ample opportunity to argue one way or the other and to challenge the correctness of the assertion that in the context of European PIL have to be subject to an independent connection on the ground of the conflicts rules of the *lex fori*.[284] Recital (6) in particular does not militate the other way.[285] Incidental questions can be envisaged easily in the fields covered by the Rome II Regulation, e.g. ownership of a damaged chattel or of an IP right infringed. **160**

c) Special characterisation rule: Art. 22

Art. 22 accompanies Art. 15 and clarifies the most relevant aspect of the substance/procedure divide: burden of proof.[286] In general it attributes this issue to substantive law and thus to the *lex causae.* It is also interrelated with Art. 1 (3) and thus rightly reserved in Art. 1 (3). **161**

d) General characterisation rule: Art. 15

Art. 15 is a central rule in the overall system of the Rome II Regulation. It is the general characterization rule, delineating the scope of the applicable law. Its non exhaustive ("in particular") lists expressly nominate the most relevant issues which are governed by the *lex causae*. It goes into some detail and extends an immensely helpful hand. Modeled after Art. 10 Rome Convention, it draws upon the experience that the more detailed a characterization rule is the less it will stir questions of interpretation. One might even say that it translated Art. 10 Rome Convention into the language of non contractual obligations and adapted it to their specific needs. Courts are in principle relieved of the burden to develop individual yardsticks for characterization by identifying specific matters to be governed by the *lex causae*; matters previously controversial are now safely placed within the so called "scope of the applicable law".[287] **162**

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282 See Introduction note 17 (*Mankowski*).

283 Hamburg Group on Private International Law, RabelsZ 67 (2003), 1 (40) Art. 11b, 41.

284 Backing, and providing convincing reasons, for this assertion in particular *Bernitt,* Die Anknüpfung von Vorfragen im europäischen Kollisionsrecht (2010); *Solomon*, in: FS Ulrich Spellenberg (2010), p. 355; *Gössl,* ZfRV 2011, 65; *Gössl,* (2012) 8 JPrIL 63.

285 But cf. *Unberath/Cziupka*, in: Rauscher, Einl. Rom II-VO note 46.

286 See e.g. *Cox v. Ergo* [2014] UKSC 22, [2014] AC 1379 (S.C.); *Wall v. Mutuelle de Poitiers Assurances* [2014] EWCA Civ 138, [2014] 1 WLR 4263 (C.A.); *Andrew Scott,* (2014) 85 BYIL 252.

287 *Garnett,* Substance and Procedure in Private International Law (2012) para. 3.08.

163 But Art. 15 suffers from a major shortcoming, though: The language used is appropriate only for torts/delicts and to *culpa in contrahendo*. "Damage", "injury", "compensation" are terms germane to tort law, not really appropriate for unjust enrichment or *negotiorum gestio*. One might even question whether this criticism should relate to "liability", too. Of course, it is readily admitted that in practice torts are dominating amongst non contractual obligations and that cross-border cases centered on unjust enrichment or *negotiorum gestio* are rare in deed. Nonetheless, it would have been preferable to devote a separate chapter to each kind of non contractual obligations, consisting of the respective conflicts rules and a specific characterization rule each. Proposals to this avail have been submitted,[288] but did not find favour with European legislators, apparently.

164 Art. 15 becomes operative one has determined which law is applicable. It answers the question as to which extent and as to which the issues the applicable law ought to be applied. Art. 15 is applicable irrespective of the nature of the non contractual obligation at stake for it is deemed to cover all non contractual obligations alike. *A fortiori*, in matters of tort it applies irrespective of whether the concrete tort falls under Art. 4, 5, 6, 7, 8, or 9.

165 Art.15 cedes if an issue is covered by Arts. 18–22, due to *lex specialis derogat legi generali*. Thus, any matrix as outlined above[289] ought to be supplemented by the following three steps at its respective end:

1. Does the case fall under any of the rules contained in Art. 18, 19, 20, 21, or 22?
2. On matters of burden of proof consult Art. 22.
3. If not: Which issues are governed by the applicable law?

e) Relevance of rules of safety and conduct of the *lex loci actus*: Art. 17

166 But for Arts. 7; 8 (2); 9 the Rome II Regulation in matters of tort has relegated the place where the event giving rise to the damage or liability has occurred, to the confines of the escape clauses as one among many factors. Yet to a limited extent Art. 17 opens a back door: In assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the damage. The evident example is on which side of the road a car has to drive in different countries,[290] left in England, right on the Continent.

167 But Art. 17 has to be read very carefully and expertly in order to find its proper place in the overall system: "account shall be taken" and, even more, "as a matter of fact" are clear warning signs that must not be overlooked or disregarded. Art. 17 is *not* a proper conflicts rule. Art. 17 does *not lead* to a bi-furcated choice of law approach. It does not lead to two laws being *applicable* simultaneously. The rules of safety and conduct of the *lex loci actus* are not to be applied as rules but only to be taken into account as matters of fact. They are so called

288 Hamburg Group on Private International Law, RabelsZ 67 (2003), 1 (29) Art. 10a, 30 Art. 10c, 33.

289 *Supra* Introduction notes 133–150 (*Mankowski*).

290 *von Hein*, in: FS Bernd von Hoffmann (2011), p. 139, 145; *von Hein*, in: Calliess, Art. 17 Rome II Regulation note 17; *Mankowski,* Schadensersatzklagen bei Kartelldelikten – Fragen des anwendbaren Rechts und der internationalen Zuständigkeit (2012) p. 55–56.

data. Art. 17 is a stronghold of the data theory[291] conceptually designed by *Albert A. Ehrenzweig*.[292] One might criticize this as methodological eclecticism.[293]

Hence, Art. 17 due to its character has to find its place within the truly applicable substantive rules of the *lex causae*. It does not amount to an overriding *Sonderanknüpfung*. It does not carve anything out of the general realm of the applicable law, the *lex causae*. It only adds something, reduplicating the yardsticks for certain issues. **168**

As to substance, the great enigma surrounding Art. 17 is its scope: Does it relate only to such rules of safety and conduct which positively demand a certain conduct?[294] Or, alternatively, does it also encompass such rules of safety and conduct which only permit a certain conduct without demanding it?[295] An affirmative answer to the second question would be quite relevant for justifying a debtor's conduct. But it would add a normative dimension to Art. 17 that cannot be reconciled with the data theory which Art. 17 embraces as its fundament.[296] **169**

5. Supplementary rules in Chapter VI (Arts. 23–26)

Under the general heading of "Other provisions", Chapter VI contains a number of rules serving different functions. A mental split should be made between Arts. 23–26 on the one hand and Arts. 27; 28 on the other hand. Whereas the latters are so called disconnection clauses dealing with the relationships with other Acts, the former (but for Art. 24) answer questions relating to the connecting factors used in Arts. 4–14. They (on this count including Art. 24) tackle issues related to the General Part of PIL.[297] **170**

Art. 23 explains the notion of habitual residence as it is employed in Arts. 4 (2); 5 (1) cl. 1 (a); 5 (1) cl. 2; 12 (2) (b) and possibly in the context of Arts. 4 (3) cl. 1; 5 (2) cl. 1; 10 (4); 11 (4); 12 (2) (c) respectively. It aligns with Art. 19 Rome I Regulation and deviates from the common **171**

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291 See only Explanatory Memorandum, COM (2003) 427 endg. p. 25; *Betlem/Bernasconi,* (2006) 122 LQR 124, 150; *Leible/Michael Lehmann,* RIW 2007, 721 (725); *Dickinson* (Fn. 133), Rn. 15.33; *Bach*, in: Peter Huber Art. 17 Rome II Regulation note 6; *von Hein*, in: FS Bernd von Hoffmann (2011), p. 139, 141; *von Hein*, in: Calliess, Art. 17 Rome II Regulation note 3 with extensive references; *Pfeiffer*, in: Liber amicorum Klaus Schurig (2012), p. 229.

292 *Albert A. Ehrenzweig,* 16 Buff. L. Rev. 55 (1996); *Kay,* 53 Cal. L. Rev. 47 (1965); *Jayme*, in: GS Albert A. Ehrenzweig (1976), p. 35; *Hans Stoll*, in: FS Kurt Lipstein (1980), p. 259.

293 *Reppy,* 82 Tul. L. Rev. 2053, 2086 (2008).

294 To this avail *Mankowski,* Schadensersatzklagen bei Kartelldelikten – Fragen des anwendbaren Rechts und der internationalen Zuständigkeit (2012) pp. 55–57; *von Hein*, in: FS Bernd von Hoffmann (2011), p. 139, 156; see also Hamburg Group on Private International Law, RabelsZ 67 (2003), 1 (43–44); see also *Bogdan*, in: Malatesta (ed.), The Unification of Choice of Law Rules on Torts and Other Non-Contractual Obligations in Europe (Padova 2006), p. 33, 45.

295 To this avail *Wulf-Henning Roth*, in: FS Jan Kropholler (2008), p. 623, 639; *Thomas Ackermann*, in: Liber Amicorum Pieter Jan Slot (2009), p. 109, 121.

296 *Mankowski,* Schadensersatzklagen bei Kartelldelikten – Fragen des anwendbaren Rechts und der internationalen Zuständigkeit (2012) p. 56.

297 *Brödermann/Rosengarten,* Internationales Privat- und Zivilverfahrensrecht (IPR/IZVR) (7th ed. 2015) para. 424.

use of "habitual residence" in the realms of international family and of the PIL of successions.

172 The express and unambiguous exclusion of *renvoi* in Art. 24 is standard for unified European PIL regimes, but at least a welcome clarification for non-specialists. A small and tiny question mark might be inserted as to whether this applies full fledge in the event that, based on Art. 14, the parties have chosen the PIL, not the substantive law of the law elected. The question about the eligibility of conflicts rules has generated some discussion under Art. 3 (1) Rome I Regulation although Art. 20 Rome I Regulation excludes *renvoi*, too.[298]

173 Art. 25 provides for the necessary supplemental rule in the event that a State comprises several territorial units and consequentially several legal systems, like e.g. the USA (fifty States plus the District of Columbia) or the United Kingdom (England and Wales, Scotland, Northern Ireland) do.

174 Art. 26 caters for a general public policy clause permitting any Member State, if forum state, to draw red lines in concrete cases. Like any public policy clause, Art. 26 becomes only operative after one has reached a concrete result under the *lex causae.* Hence, Art. 26 is the last step in the application of legal rules. Mind that public policy is an extraordinary device to be used with extreme caution and not to be employed lightly and wantonly.

6. Disconnection clauses in Chapter VI (Arts. 27, 28)

175 Arts. 27; 28 are two so called disconnection clauses. They grant precedence to specialist conflict rules in other Acts of EU law (Art. 27) and to conflict rules in specialist international Conventions (Art. 28). As between the two of them, in the case of a collision between a specific Act of EU legislation and an international Convention it is for the disconnection clauses in the respective Act and the respective Convention to sort matters out and to establish a ranking order. Art. 27 and Art. 28 do not establish such ranking order, even not by the numerical order of their appearance. Only one issue is clear in such case of a collision: Rome II cedes to either of the competitors.

XII. The Rome II Regulation and arbitration

176 Whether arbitration tribunals with their seat in a Member State have to apply the Rome II Regulation is not directly addressed in Art. 1 nor anywhere else in the Rome II Regulation.

177 Sometimes an affirmative answer is based on Recital (8) which in its English version puts "tribunal" side by side with "court" leaving room for an implication that "tribunal" designates arbitral tribunals.[299]

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298 Favouring such eligibility e.g. *Siehr*, in: FS Claus-Wilhelm Canaris zum 70. Geb., vol. II (2007), p. 815, 822 *et seq.*; *Otto Sandrock*, in: FS Gunther Kühne (2009), p. 881, 896. *Contra* in particular *Rugullis*, ZvglRWiss 106 (2007), 217, 226 *et passim*; *Mankowski,* RIW 2011, 30 (40); *Mankowski*, in: Magnus/Mankowski, Art. 3 Rome I Regulation notes 243–246.

299 Advanced by *Gerhard Wagner,* IPRax 2008, 1 (3); see also *Ansgar Staudinger,* EuLF 2007, I- 257, I-263; *Ansgar Staudinger,* AnwBl 2008, 8, 13.

Such reasoning does not withstand scrutiny, though.[300] Firstly, the English version is almost a solitaire in this regard, and a like reduplication cannot be detected in the clear majority of other linguistical versions.[301] These linguistical versions employ other terms ("organo giurisdizionale"; "órgano jurisdiccional"; "tribunal" [Portuguese]; "trybunał"; "instanţei", "súdneho orgáno") or tentatively point rather towards an understanding as State judiciary ("Gericht"; "gerecht"; "domstol"; "soudu"; "kurā"; "kuria"; "bíróság") Only the French ("de la cour ou du tribunal") serves as companion. Secondly, the English wording of Recital (12) Rome I Regulation also features "court and tribunal" whereas the French version ("juridictions") begs to differ while Dutch deviates the other way and joins English ("gerechten of tribunalen"). This implies that not too much reliance should be placed on a literal understanding since it appears a trifle fortuitous or fanciful whether a reduplication was used or not. Thirdly, in English legal terminology "tribunal" does not necessarily denominate arbitral tribunals, but should also encompass State courts. One should be reminded of the Employment Appeal Tribunal. Fourthly, the language used in the English version of Recital (8) is the same as in Art. 1 (1) Brussels I*bis* Regulation. There it does not have any exclusive character. In the light of Art. 1 (2) (d) Brussels I*bis* Regulation, it cannot be understood as inclusive, either.[302] Fifthly, the very same language reappears in Arts. 2 (1) cl. 1 Uncontested Claims Regulation; 2 (1) cl. 1 Small Claims Regulation. In both instances it cannot be understood inclusively since both Regulations contain explicit exclusions.[303] Sixthly, the drafting history does not provide support for any contention that an inclusion was envisaged by employing the said wording in Recital (8).[304] **178**

But it must be stressed and emphasised that (2) does *not* contain an exception for proceedings before arbitral tribunals.[305] This must be seen in the light of the sister Regulations and in contrast to them: Art. 1 (2) (d) Brussels I*bis* Regulation as Art. 1 (2) (d) Brussels I Regulation excludes "arbitration" from the scope of the Brussels I*bis* regime, and Art. 1 (2) (e) Rome I Regulation exempts "arbitration agreements" from the application of the Rome I Regulation. The Rome II Regulation does not provide for an exclusion which would run parallel to either of them. The Rome II Regulation and its *effet utile* generally call for wide application as comprehensive as possible. Without an express auto-limitation for arbitration proceedings the call for applicability thus extends to arbitration proceedings.[306] **179**

The contrast strongly suggests that a *conclusio e contrario* should be drawn and that an *argumentum e contrario* prevails so that the Rome II Regulation must be applied by arbitral tribunals having their seat in a Member State and thus being subject to the European PIL regime as part of their *lex fori*.[307] But it must be conceded, though, that the missing parallel to **180**

300 *Kondring,* RIW 2010, 184 (189–190); *Mankowski*, in: FS Bernd von Hoffmann (2011), p. 1012, 1022.

301 *Kondring,* RIW 2010, 184 (190).

302 *Kondring,* RIW 2010, 184 (190).

303 *Kondring,* RIW 2010, 184 (190).

304 *Kondring,* RIW 2010, 184 (190).

305 See only *Dickinson,* para. 3.82; *Hartenstein,* TranspR 2010, 261 (264, 267); *Mankowski*, in: FS Bernd von Hoffmann (2011), p. 1012, 1022; *Mäsch*, in: GS Hannes Unberath (2015), p. 303, 305 and *Unberath*/*Cziupka*, in: Rauscher, Art. 1 Rom II-VO note 11.

306 *Mankowski*, in: FS Rolf A. Schütze zum 80. Geb. (2014), p. 369, 374.

307 See *Dutoit*, in: Liber Fausto Pocar, vol. II (2009), p. 309, 311; *Mankowski*, in: FS Bernd von Hoffmann (2011), p. 1012, 1022; *Knöfel*, in: Nomos Kommentar BGB, Art. 1 Rom II-VO note 15. Concurring in the

Art. 1 (2) (e) Rome I Regulation (excluding "arbitration *agreements*"[308]) could be explained in a different way: In the non-contractual realm the necessity to distinguish between substantive law and procedural law does not arise in this regard.[309]

181 Furthermore, several rules touch on common interests of the community or upon the interests of a multiplicity of victims.[310] This carries in particular the exceptions from party autonomy in Arts. 6 (4); 8 (3).

182 For good measure: Any supportive background reasoning that purely contractual arbitral tribunals (as opposed to legally mandatory arbitral tribunals[311]) could not be bound for the were not entitled to refer to the CJEU[312] and thus would not form part of the judicial system,[313] would be fallible. To construe the notion of "Court" so restrictively would apply only to that notion as employed in Art. 267 TFEU. Conversely, European private international law and international procedure law create their own, specific notion of "court": Notions and definitions specific to the respective Regulations are to be found in Arts. 3 Brussels I*bis* Regulation; 62 Brussels I Regulation; 4 (7) Uncontested Claims Regulation; 2 lit. d Insolvency Regulation 2000; 2 pt. 5 Insolvency Regulation 2015; 2 pt. 1 Brussels II*bis* Regulation; 5 pt. (3) European Payment Order Regulation; 2 (2) Maintenance Regulation.[314] The general trend towards "privatisation" of dispute resolution on the one hand and the marching on of secondary legislation in the field of private law might call for construing "court" in a different, more extensive manner even for the purposes of Art. 267 TFEU.[315] Arbitral tribunals in sport matters have already been named as possible "courts" in this vein.[316] Nowadays dispute resolution extends beyond litigation.[317]

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result *Gerhard Wagner,* IPRax 2008, 1 (3); see also *Ansgar Staudinger,* EuLF 2007, I-257, I-263; *Ansgar Staudinger,* AnwBl 2008, 8, 13. *Contra Dickinson,* paras. 3.83 *et seq.*; Comité Français de l'Arbitrage, Response (16 June 2009) p. 2; *Kondring,* RIW 2010, 184 (189)-190.

308 Emphasis added.

309 *Mankowski,* RIW 2011, 30, 38; *Mankowski*, in: FS Bernd von Hoffmann (2011), p. 1012, 1022.

310 *Dickinson,* para. 3.82; *Mankowski*, in: FS Bernd von Hoffmann (2011), p. 1012, 1022.

311 *Handels- og Kontorfunctionærernes Forbund i Danmark v. Dansk Arbejdsgiverforening acting on behalf of Danfoss A/S* (Case 109/88), [1989] ECR 3199, 3224–3225 paras. 7–9; *Merck Canada Inc. v. Accord Healthcare Ltd.* (Case C-555/13), ECLI:EU:C:2014:92 para. 17.

312 *"Nordsee" Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG* (Case 102/81), [1982] ECR 1095, 1110 *et seq.* para. 12; *Guy Denuit and Betty Cordenier v. Transporient Mosaïque Voyages et Culture SA* (Case C-125/04), [2005] ECR I-923, I-932 *et seq.* paras. 13–16; *Merck Canada Inc. v. Accord Healthcare Ltd.* (Case C-555/13), ECLI:EU:C:2014:92 para. 17; *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta SA v. Autoridade Tributária e Aduaneira* (Case C-377/13), ECLI:EU:C: 2014:1754 paras. 27–34.

313 Comprehensively *Zobel,* Schiedsgerichtsbarkeit und Unionsrecht (2005) pp. 120–213.

314 *Knöfel*, in: Nomos Kommentar BGB, Art. 1 Rom II-VO para. 15.

315 *Basedow,* J. Int. Arb. 32 (2015), 367, 382–386; see also A-G *Szpunar,* Opinion of 8 April 2014 in Case C-377/13, ECLI:EU:C:2014:246 para. 50.

316 *Axtmann,* Die Vorlageberechtigung von Sportschiedsgerichten zum EuGH nach Art. 267 AEUV (2016) pp. 238–240 after extensive reasoning.

317 *Basedow,* J. Int. Arb. 32 (2015), 367, 382.

XIII. State liability for incorrect application of the Regulation

In the wake of the controversial[318] judgments in *Köbler*[319] and *Traghetti Mediterraneo*[320] which established state liability under EU law for judicial misapprehensions of EU rules by national courts and were followed in *Ferreira da Silva e Brito*[321], some provoking thoughts might be tentatively ventilated: Member States could possibly be held liable if a *forum* is denied and a case was dismissed for lack of jurisdiction where on closer inspection jurisdiction would have existed. **183**

Yet two restricting conditions must be met: The final judgment must be by a court of last instance whose decisions are not subject to further appeal,[322] and the misapprehension of EU rules must be obvious and evident.[323] Any restriction possibly imposed by national law that liability can only flow from a judgment which was reversed, cannot stand.[324] **184**

The damage due would be the damage resulting from the ensuing necessity to file another application elsewhere[325] (plus the costs for dismissing the first case insofar as such costs ought to be borne by the parties). **185**

In practice, *Köbler* did not cause a wake but has always been rather dead law. Whenever it was invoked, national courts decided against establishing liability of their employing state for the alleged miscues of their fellow judicial brethren.[326] **186**

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318 See the lively discussion e.g. by *Obwexer,* EuZW 2003, 726; *Schwarzenegger,* ZfRV 2003, 236; *Breuer,* BayVBl 2003, 586; *Grune,* BayVBl 2003, 673; *Frenz,* DVBl 2003, 1522; *Gundel,* EWS 2004, 8; *Kremer,* NJW 2004, 480; *von Danwitz,* JZ 2004, 301; *Streinz,* Jura 2004, 425; *Wegner/Held,* Jura 2004, 479; *Kluth,* DVBl 2004, 393; *Rademacher,* NVwZ 2004, 1415; *Heike Krieger,* JuS 2004, 855; *Götz Schulze,* ZEuP 2004, 1049; *Daniel Tietjen,* Das System des gemeinschaftsrechtlichen Staatshaftungsrechts (2010) pp. 108–117, 177–180; *Machado,* RLJ 2015, 246. Most comprehensively *Marten Breuer,* Staatshaftung für judikatives Unrecht (2011) pp. 378–520.

319 *Gerhard Köbler v. Republik Österreich* (Case C-224/01), [2003] ECR I-10239.

320 *Traghetti del Mediterraneo SpA v. Repubblica Italiana* (Case C-173/03), [2006] ECR I-5177.

321 *João Filipe Ferreia da Silva e Brito v. Estado Português* (Case C-160/14), ECLI:EU:C:2015:565 paras. 46–60; A-G *Bot,* Opinion of 11 June 2015 in Case C-160/14, ECLI:EU:C:2015:390 paras. 105–115; discussed e.g. by *Mengozzi,* Dir. UE 2016, 401.

322 *Gerhard Köbler v. Republik Österreich* (Case C-224/01), [2003] ECR I-10239, I-10310 para. 50; *Traghetti del Mediterraneo SpA v. Repubblica Italiana* (Case C-173/03), [2006] ECR I-5177 para. 32.

323 *Gerhard Köbler v. Republik Österreich* (Case C-224/01), [2003] ECR I-10239, I-10312 para. 56, I-10329 para. 120; *Traghetti del Mediterraneo SpA v. Repubblica Italiana* (Case C-173/03), [2006] ECR I-5177 para. 43.

324 *João Filipe Ferreia da Silva e Brito v. Estado Português* (Case C-160/14), ECLI:EU:C:2015:565 paras. 51–60; A-G *Bot,* Opinion of 11 June 2015 in Case C-160/14, ECLI:EU:C:2015:390 paras. 105–115.

325 *Tsikrikas,* ZZP Int. 9 (2004), 123, 132.

326 In detail *Zsófia Varga,* Maastricht J. 23 (2016), 984.

Chapter I: **Scope**

Article 1: Scope

1. This Regulation shall apply, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters. It shall not apply, in particular, to revenue, customs or administrative matters or or to the liability of the State for acts and omissions in the exercise of State authority (acta iure imperii).

2. The following shall be excluded from the scope of this Regulation:

(a) non-contractual obligations arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects including maintenance obligations;

(b) non-contractual obligations arising out of matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage, and wills and succession;

(c) non-contractual obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;

(d) non-contractual obligations arising out of the law of companies and other bodies corporate or unincorporated regarding matters such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies corporate or unincorporated, the personal liability of officers and members as such for the obligations of the company or body and the personal liability of auditors to a company or to its members in the statutory audits of accounting documents;

(e) non-contractual obligations arising out of the relations between the settlors, trustees and beneficiaries of a trust created voluntarily;

(f) non-contractual obligations arising out of nuclear damage;

(g) non-contractual obligations arising out of violation of privacy and rights relating to personality, including defamation.

(3) This Regulation shall not apply to evidence and procedure, without prejudice to Articles 21 and 22.

(4) For the purposes of this Regulation, 'Member State' shall mean any Member State other than Denmark.

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I. General substantive scope of application: non-contractual obligations, (1) 1st sentence

Art. 1 (1) 1st sentence circumscribes the general substantive scope of application of the Rome II Regulation. The terms used for this purpose are rather broad and generic, not specific. They do not benefit from detailed definitions but have to be enlivened by way of interpretation. **1**

1. Situations involving a conflict of laws: the element of internationality

Verbally, there is a prerequisite that situations involve a conflict of laws. This translates into a cross-border element, an element of internationality being required. There might be linguistic differences with the English version of Art. 1 (1) 1st sentence Rome I Regulation (which reads: "in any situation involving a choice between the laws of different countries"),[1] but they do not gain relevance, the less since the versions in other languages are identical for **2**

[1] *Dickinson,* in: Dicey/Morris/Collins para. 34-016 rightly regards the latter term which emanated in Art. 1 (1) 1st sentence Rome Convention, as clearer and more precise.

both Regulations.[2] In English there might be a slight chance of misunderstanding since "Conflict of laws" in traditional English legal terminology comprises not only choice of law, but also jurisdiction and recognition and enforcement of foreign judgments.[3]

3 The element of internationality should not be overstated, though. At first glance, it might exclude purely domestic cases from the scope of the Rome II Regulation as referring to situations in which there are one or more elements that are alien to the domestic social life of a country.[4] But Art. 14 (2) shatters such assumption.[5] (1) 1st sentence stems from the misconception that conflict of laws or private international law becomes only operative where there is a relevant cross-border element. This is circular and thus nonsensical.[6] It is even compounded by the German version which in its wording verbatim demands "eine Verbindung zum Recht verschiedener Staaten". The plural is misleading, and connections are with a State, not with its law.[7] In a purely domestic case one ordinarily skips the first step of consulting choice of law rules but in a perfectly correct step-by-step process one would have to recognise that this would have to be done, though, only in order to reach the result for practical purposes that the law of that State is to be applied which has the sole connection with the case.[8] If there is no alternative there is nothing to chose.[9] (1) 1st sentence adds an unnecessary element of uncertainty to the blend, but fortunately it is unlikely that this will cause any serious trouble in practice.[10]

4 Internationality (if one is prepared to establish it in an intermediate step[11]) might stem from the persons of the parties either to the incident or to the ensuing dispute resolution proceedings. Internationality might be generated by the events and facts giving rise to the alleged no contractual obligation, too. If for instance a road traffic accident occurred in another Member State distinct from the forum State it does not prove detrimental matter that afterwards institutions which are located in the forum State stepped in by way of *cessio legis* and that pursuing the claim has become an (only seemingly) domestic affair since the defendant is also resident in the forum State.[12] Parties are not at liberty to extinguish existing internationality by taking a common position that their dispute should be resolved by the application of the *lex fori* insofar as this would amount to an implied choice of law and a degree of party autonomy not admitted by Art. 14.[13]

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2 *Plender/Wilderspin,* para. 17–039.

3 *Cheshire/North/Fawcett/Carruthers,* Private International Law (14th ed. 2008) p. 775; *Bach*, in: Peter Huber, Art. 1 note 32.

4 Commission's Explanatory Memorandum COM (2003) 427 final p. 8.

5 *Hau*, in: GS Hannes Unberath (2015), p. 139, 142, 154–155.

6 *Knöfel*, in: Nomos Kommentar BGB, Art. 1 Rom II-VO note 9.

7 *Knöfel*, in: Nomos Kommentar BGB, Art. 1 Rom II-VO note 8.

8 *Harald Koch*, in: FS Ulrich Magnus (2014), p. 475, 476–477. See *Bach*, in: Peter Huber, Art. 1 note 32.

9 See only *Hau*, in: GS Hannes Unberath (2015), p. 139, 142.

10 *Dickinson* para. 3.75.

11 As *Magnus*, in: FS Gunther Kühne (2009), p. 779, 789–790 ventures in the parallel context of Art. 1 (1) Rome I Regulation.

12 *Clinton Davis Jacobs v. Motor Insurers Bureau* [2010] EWHC 231 paras. 18–31 (Q.B.D., *Owen* J.); *Knöfel*, in: Nomos Kommentar BGB, Art. 1 Rome II-VO note 10.

13 But cf. *Briggs,* Private International Law in English Courts (2014) para. 8.39.

In any event, it is not required that the case presents connections with two *Member* States.[14] The implication from Art. 3 is clear: Internationality is not equivalent with an Internal Market element, but every cross-border element suffices. Relations with Third States are qualifiers, too.[15] Matters covered by uniform law might advance by virtue of Art. 28, but they cannot be regarded as excluding a conflict of laws making Art. 1 (1) and consequentially the entire Rome II Regulation inoperable;[16] the simple need for a subsidiarily applicable law filling the gaps left in any uniform law tells the opposite story. **5**

2. Civil and commercial matters

a) The functional private law vs. public law divide in disguise

The Rome II Regulation is applicable only in civil and commercial matters. Civil and commercial matters ought to be distinguished from public matters. The line to be drawn is roughly equivalent to that to be drawn between private law and public law in civil law jurisdiction. But traditionally European Acts refrain from referring to "private law" and "public law" since the common law jurisdictions for a long time have not been privy to such distinction.[17] Furthermore, "private law" might carry different meanings even in different civil law jurisdictions.[18] "Civil and commercial matters" pursues a more functional approach, looking at the substance of the case and deliberately avoiding traditional terminology borrowed from any national law. The term once was a neologism when introduced for the first time in Art. 1 (1) Convention 1968. As a neutral term it minimises the risk that national courts would interpret the Regulation according to established domestic understandings.[19] **6**

b) Guidance offered by Brussels I/I*bis* case law

The term "civil and commercial matters" basically has the same meaning as in Arts. 1 (1) 1st sentence Brussels I*bis* Regulation; 1 (1) 1st sentence Brussels I Regulation; 1 (1) 1_{st} sentence Service Regulation; 1 (1) Evidence Regulation; 1 (1) 1st sentence Rome I Regulation. It is clearly modelled on Art. 1 (1) 1st sentence Brussels I Regulation. It indicates a key concept of European PIL and European International procedural law in its entirety and in all its elements.[20] The phrase emanated in Art. 1 (1) Brussels Convention 1968. The ECJ has had many opportunities to give rulings on it.[21] It is sensible to borrow from this jurisprudence[22] **7**

14 See only OGH, ZfRV 2016, 182.

15 See only OGH, ZfRV 2016, 182; *Junker,* NJW 2007, 3675 (3677); *Dutoit*, in: Liber Fausto Pocar, vol. II (2009), p. 309, 311; *Matthias Lehmann*/*Duczek,* JuS 202, 681, 682.

16 *Contra Basedow*, in: Liber amicorum Rüdiger Wolfrum (2012), 1869, 1881, 1893.

17 *Rogerson*, in: Magnus/Mankowski, Art. 1 Brussels Ibis Regulation note 12; *Bach*, in: Peter Huber, Art. 1 note 4.

18 Report *Schlosser,* OJ EEC 1979 C 59/71 paras. 23 *et seq*.

19 *Rogerson*, in: Magnus/Mankowski, Art. 1 Brussels Ibis Regulation note 12; *Bach*, in: Peter Huber, Art. 1 note 4.

20 *Basedow*, in: Festkrift till Helge Johan Thue (2008), p. 161; *Mankowski,* EWiR 2015, 495 (496).

21 Ample references are to be found in the commentaries on Art. 1 (1) Brussels Ibis Regulation; e.g. *Rogerson*, in: Magnus/Mankowski, Art. 1 Brussels Ibis Regulation notes 13–27; *Mankowski*, in: Rauscher, EuZPR/EuIPR, vol. I (4th ed. 2016) Art. 1 Brüssel Ia-VO notes 18–35.

22 See A-G *Bot,* Opinion of 9 December 2014 in Joined Cases C-226/13 etc., ECLI:EU:C:2014:2424 paras. 48–49.

and to keep a watchful eye on its further developments (and its possibly varying siblings with regard to the Service and Evidence Regulations[23]). There is a close interpretative nexus between Art. 1 (1) and its sister rules.[24] Neither of them contains a proper definition of civil and commercial matters, though. Commercial matters are a sub-category of, not a complementary field to, civil matters.[25] In the context of the Rome II Regulation, civil matters should be given a meaning as specific to non-contractual obligations as possible.[26]

c) Irrelevance of the nature of the court seised

8 A civil matter is not characterised by the fact that the case is or is not pending before a civil court.[27] Art. 1 (1) 1st sentence Brussels I*bis* Regulation sets the pace and rightly states that civil and commercial matters are within the scope whatever the nature of the court or tribunal. Recital (8) reiterates that the Rome II Regulation should apply irrespective of the nature of the court or tribunal seised. Insofar a general principle which universally pervades European PIL,[28] finds its specific expression.[29]

9 Art. 6 (1) EHRC might also be supportive.[30] This rule employs the term "civil rights and obligations". A case concerns civil rights and obligations as envisaged by Art. 6 (1) EHRC if the outcome of the proceedings is directly decisive for the right in question, merely tenuous connections or remote consequences being insufficient to bring Art. 6 (1) EHRC into play and if the right at stake is an individual right of which the applicant may consider himself the holder, irrespective of any discretion on the State's side.[31]

10 With regard to non-contractual obligations, this can gain importance in two respects: Firstly, many Member States know civil actions by the victims of crimes before criminal courts.[32]

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23 See *Stefan Fahnenbrock et al. v. Hellenische Republik* (Joined Cases C-226/13, C-245/13, C-247/13 and C-578/13), ECLI:EU:C:2015:383 paras. 33–60; thereon *Mankowski,* EWiR 2015, 495 (496); *Rolf Wagner,* EuZW 2015, 636; *Knöfel,* RIW 2015, 503.

24 *Junker*, in: FS Peter Salje (2013), p. 243, 249–250.

25 *Geimer,* EuR 1977, 341 (350); *Knöfel*, in: Nomos Kommentar BGB, Art. 1 note 11; *Mankowski*, in: Rauscher, Art. 1 Brüssel Ia-VO note 1.

26 *Knöfel*, in: Nomos Kommentar BGB, Art. 1 note 12 with reference to A-G *Kokott,* Opinion of 20 September 2007 in Case C-435/06, [2007] ECR I-10144 para. 38 and *Re C* (Case C-435/06), [2007] ECR I-10141 para. 45 (in the context of the Brussels II*bis* Regulation).

27 *Junker*, in: Münchener Kommentar BGB, Art. 1 note 11 fn. 15; *Knöfel*, in: Nomos Kommentar BGB, Art. 1 note 13.

28 See A-G *Ruiz-Jarabo Colomer,* Opinion of 8 November 2006 in Case C-292/05, [2007] ECR I-1521 para. 20.

29 *Knöfel*, in: Nomos Kommentar BGB, Art. 1 note 13.

30 *Knöfel*, in: Nomos Kommentar BGB, Art. 1 notes 16 *et seq*.

31 See ECHR *Sporrong and Lönnrath v. Sweden* Serie A 52, 30 § 81; ECHR *Fayed v. United Kingdom* Serie A 294-B pp. 45–46 § 56; ECHR *Masson and van Zon v. Netherlands* Serie A 327-A p. 17 § 44; ECHR *Balmer-Schafroth v. Switzerland* RJD 1997-IV p. 1357 § 32; ECHR *Basic v. Austria* RJD 1999-II, 595, 606; ECHR *Chevrol v. France* RJD 2003-III p. 195 § 44; ECHR *SARL du Parc d'activités de Blotzheim and SCI Haselaecker v. France* RJD 2003-III p. 359 § 6; ECHR *Gutfreund v. France* RJD 2003-VII p. 89 § 38; ECHR *Luordo v. Italy* RJD 2003-IX p. 117 § 83; ECHR *Loiseau v. France* RJD 2003-XI p. 351 § 7.

32 Compare Art. 7 (6) Brussels Ibis Regulation; *Mankowski*, in: FG Rudolf Machacek und Franz Matscher (2008), p. 785.

Such *actions civiles* are particularly prominent and commonplace in Romanic legal orders[33] (whereas the *Adhäsionsklage* in Germany is a dormant beauty[34]). Secondly, expropriation by the State might lead to actions before administrative or civil courts as the case might be under the respective legal order.[35] Having recourse to the kind of jurisdiction before which a matter has to be tried would be recourse to national law and would thus collide with the need for an autonomous interpretation.

d) Creditorship of the State not *per se* sufficient

It is not *per se* sufficient (and not even indicative) that a State is the creditor.[36] If the State defends its property like any other owner would do and based on property as such, this is a civil matter.[37] Ownership of property is nothing specifically germane to a State but conversely some epitome of what everyone could enjoy. But if the State takes measures based on rules which are only open to the State and to private actors, this is not a civil matter anymore. The same applies to claims for the reimbursement of costs incurred by the State performing and complying *en lieu* of the addressee of administrative acts.[38] Even in environmental affairs a "green interpretation", allegedly friendly to, and in favour of, the environment[39] is not sustainable.[40] Generally, claims against the State and its officials might be excluded from the Rome II Regulation whereas claims by the State are included where they are claims of a kind which any claimant might have.[41] **11**

e) Public authority acting

The formal status of the subject acting cannot be all-decisive. A functional approach pierces any veil of a formally private nature if the respective subject performs public tasks. The State might be free in which means he uses to organise the performance of its tasks. But generally, functionally interchangeable means of organisation have to be treated as equivalent. By mere delegation to formally independent bodies the State cannot switch the very nature of its activities. This applies for instance to formally independent agencies or Central Banks. **12**

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33 See only *Hardt*, in: Kühne (ed.), Opferrechte im Strafprozess – Ein europäischer Vergleich (1988), p. 64; *Gewaltig,* Die action civile im französischen Strafprozess (1990) pp. 94 *et seq*.; *Prinz v. Sachsen Gessaphe,* ZZP 112 (1999), 3; *Geimer*, in: Studia in honorem Németh János (2003), p. 229, 232.

34 See only *Schoibl*, in: FS Rainer Sprung (2001), p. 321, 323; *Hans-Heiner Kühne,* Strafprozessrecht (8th ed. 2010) paras. 1136–1137; *Meyer-Goßner*/*Bertram Schmitt,* StPO (60th ed. 2017) Vor § 403 StPO note 1; KMR/*Stöckel,* Kommentar zur StPO (looseleaf) Vor § 403 dStPO note 2 (August 2005); *Mankowski*, in: FG Rudolf Machacek und Franz Matscher (2008), p. 785, 786. For (slightly dated) empirical data see *Hans-Heiner Kühne,* MSchrKrim 1986, 98, 102; *Schöch*, in: AK StPO (1996) Vor § 403 dStPO note 3.

35 See for instance Art. 14 (3) 4th sentence GG in Germany referring disputes for compensation following an expropriation to the civil courts.

36 *Junker*, in: FS Peter Salje (2013), p. 243, 249.

37 *Junker*, in: FS Peter Salje (2013), p. 243, 249.

38 *Junker*, in: FS Peter Salje (2013), p. 243, 250.

39 As advocated for by *Betlem*/*Bernasconi,* (2006) 122 L.Q.Rev. 124, 136.

40 *Junker*, in: FS Peter Salje (2013), p. 243, 251.

41 *Briggs,* Private International Law in English Courts (2014) para. 8.55.

f) Public authority acting in the exercise of its powers

13 A matter is not civil and commercial if a public authority is involved in creating the disputed obligation and this public authority acts in the exercise of its powers.[42] The latter requirement raises a double problem: first how to determine the confines of the powers of the public authority; and second how to deal with public authorities acting beyond such confines, i.e. acting *ultra vires*.

14 Relevant examples abound: collateral damage inflicted by military activities; policemen in hot pursuit of suspects causing accidents with damage suffered by third persons; policemen exerting unnecessary violence whilst arresting suspects; civil servants or policemen causing accidents whilst on their way to work.[43] It is argued that a policeman participating in traffic like an ordinary motorist (even while simply patrolling) does not act in exercise of specific public powers, and that the picture will only change when he causes an accident while driving under siren and rotating lights.[44]

15 The outset can be described as follows: Public powers are exercised only when a civil servant's conduct contains some action beyond the conduct that is available under the rules that govern relations between private individuals.[45] For instance, medical treatment in a state-run hospital very well aligns with, and is exchangeable against, medical treatment in a privately owned and run hospital, thus it does not relate to the exercise of public powers.[46]

16 If representatives of the State or civil servants conclude contracts for the State overstepping the limits of power of agency which was conferred upon them, their personal liability is not a civil and commercial matter.

g) Exclusion of revenue, customs and administrative matters, (1) 2nd sentence

17 (1) 2nd sentence expressly excludes revenue, customs and administrative matters. This is a traditional exclusion which appeared for the first time already in Art. 1 (1) Brussels Convention in 1968. It is declaratory in nature only. If it did not exist the exactly same results would have to be derived by virtue of (1) 1st sentence. An example for an exclusion by virtue of (1) 2nd sentence might be provided by review proceedings regarding awards of public works, supply, or service contracts.[47]

h) Exclusion of the liability of State authority (acta iure imperii), (1) 2nd sentence

18 (1) 2nd sentence also excludes the liability of State authority for so called *acta iure imperii*. The progeny of the formula is telling, at least to a certain extent. It was first introduced in 2004 in Art. 2 (1) Uncontested Claims Regulation upon request and insistence by Germa-

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42 *LTU Lufttransportunternehmen GmbH & Co KG v. Eurocontrol* (Case C-29/76), [1976] ECR 1541 para. 4; *Netherlands v. Reinhard Rüffer* (Case 814/79), [1980] ECR 3807 para. 9; *Volker Sonntag v. Hans Waidmann* (Case C-172/91), [1993] ECR I-1963 para. 20; *Préservatrice foncière TIARD SA v. Staat der Nederlanden* (Case C-266/01), [2003] ECR I-4867 para. 21.

43 For the last two examples see *Bach*, in: Peter Huber, Art. 1 note 8.

44 *Leible*/*Andreas Engel,* EuZW 2004, 7 (9); *Bach*, in: Peter Huber, Art. 1 note 11.

45 *Volker Sonntag v. Hans Waidmann* (Case C-172/91), [1993] ECR I-1963 para. 24.

46 *Siehr*, in: FS Willi Fischer (2016), p. 473, 482.

47 *Opitz*, in: FS Fridhelm Marx (2013), p. 505, 512.

ny.[48] This request in turn was a reaction to the ECJ's decision in *Lechouritou*[49] dealing with war crimes committed by German troops in Greece in 1943/44. The ECJ granted immunity to Germany and construed Art. 1 (1) Brussels Convention (in which the *acta iure imperii* formula did not appear yet) narrowly.[50] Germany later-on asked to elevate this to the level of legislative safeguard[51] and succeeded with that request: From Art. 1 (1) Uncontested Claims Regulation onwards the formula became standard in the later Regulations.

Immunity *per se* is not an issue for the Rome II Regulation. Immunity is an issue of procedural law. *Par in parem not habet jurisdictionem*. Immunity is not for substantive law and consequentially not for the PIL related to it. In fact, immunity has to be tried even before the jurisdictional rules of the Brussels I*bis* Regulation become operable. Even less the Rome II Regulation operating only at a later stage than the Brussels I*bis* Regulation, is concerned. Insofar as a State enjoys immunity a court case will be stopped in its tracks and will not reach the stage where the Rome II Regulation possibly could become relevant. **19**

In the context of non-contractual obligations, the exclusion of State liability for *acta iure imperii* gains particular importance and prominence. Possible cases are widespread – and would many times make flashy headlines in the news: unlawful imprisonment or detention; torture; war crimes in occupied territories; so called "collateral damage" of military actions. **20**

In an age of financial crisis and ever rising State debts piling up, State bonds and subsequent legislative activity by the issuing States are a topic of particular interest. State debt restructuring has become a major issue. For instance, Argentina has legislated for a so called moratorium, and Greece chose to have bonds mandatorily exchanged against new bonds once a qualified majority of the bondholders has consented. This begs question whether it amounts to an at least partial expropriation. Some support for such contention could be gathered from the rather wide notion of expropriation[52] prevalent in international investment law in general and in ICSID arbitration in particular. **21**

(1) 2nd sentence has been attacked on the ground of human rights.[53] The reasons for the challenge are as follows:[54] Conflict rules of secondary EU legislation have to conform to, and have not to be in conflict with, the FRC and the EHRC. Arts. 47 FRC; 6 (1) EHRC grant and guarantee a right to fair trial. For the purposes of Art. 6 (1) EHRC the ECHR has classified **22**

48 Note of the Presidency of 30. June 2003, Council Doc. 10660/03 JUSTCIV 92 p. 2; Note of the German Delegation of 28 July 2003, Council Doc. 11813/03 JUSTCIV 122 S 2.

49 *Eirene Lechouritou v. Germany* (Case C-292/05), [2007] ECR I-1519.

50 *Eirene Lechouritou v. Germany* (Case C-292/05), [2007] ECR I-1519 paras. 35–39.

51 *Pabst*, in: Rauscher, EuZPR/EuIPR, vol. 2 (4th ed. 2015) Art. 2 EG-VollstrTitelVO note 5*; Kropholler/von Hein,* Art. 2 EuVTVO note 2; *Requejo,* EuLF 2007, I-206, I-209; *Knöfel*, in: FS Ulrich Magnus (2014), p. 459, 465.

52 Seminal *Newcombe,* 20 ICSID Rev. 1 (1995); see also e.g. *Gaillard*, in: Essays in Honour of Christoph Schreuer (Oxford 2011), p. 403; *Classen,* EuZW 2014, 611.

53 *Knöfel*, in: FS Ulrich Magnus (2014), p. 459, 473; *Knöfel*, in: Nomos Kommentar BGB, Art. 1 Rom II-VO note 28.

54 *Knöfel*, in: FS Ulrich Magnus (2014), p. 459, 473; *Knöfel*, in: Nomos Kommentar BGB, Art. 1 Rom II-VO note 28.

state liability and the liability of state officials as matters of private law.[55] This applies to claims for compensation for unlawful imprisonment,[56] arising out of forced labour,[57] or stemming from wrongful behaviour of soldiers abroad.[58] Unilateral privileges for the State hamper and diminish equal justice and equality of arms.

23 However, the CJEU is very reluctant to cede its interpretative supremacy even partially to the ECHR, the Strasbourg Court, as is amply and beyond the slightest doubt evidenced by its Opinion against the accession of the EU to the EHRC which opinion is primarily based on the fear of loss of interpretative sovereignty.[59] A transfer *tel quel* of the emanations of wisdom by the ECHR appears to be at odds with this firm statement of European judicial policy. But on the other hand, secondary EU law is generally subject to an interpretation in the light of fundamental freedoms and human rights.[60] This might not strictly demand to refer to each and every emanation from Strasbourg, but thus at least not rule out to take any into account.[61]

i) Incidental questions

24 Only the main cause of action determines the outcome of the characterisation process. Mere incidental questions are irrelevant. They are only preliminary matters and not characteristic for the claim in its entirety. Hence, if only an incidental question touches upon matters which are not civil or commercial by nature, this does not impugn the main claim. Preliminary and central matters can be separated from each other. If the main claim depends on an official act or order by a public authority being extinguished or lifted, this might imply

55 ECHR *McGinley and Egan v. United Kingdom,* ÖJZ 1999, 355 (356) § 84; ECHR *McElhinney v. Ireland* EHRJ 2002, 415 §§ 24–25; Eur. Comm. HR CD 17, 36.

56 ECHR *Georgiadis v. Greece,* ÖJZ 1998, 197 (198) § 35; ECHR *Werner v. Austria,* ÖJZ 1998, 233 (234) §§ 34–35; ECHR *Lamanna v. Austria,* ÖJZ 2001, 910 (911) § 29.

57 ECHR *Woś v. Poland,* NJOZ 2007, 2326 (2330–2331) § 26.

58 ECHR *McElhinney v. Ireland* EHRJ 2002, 415 §§ 24–25.

59 *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* (Opinion 2/13), ECLI:EU:C:2014:2454 paras. 178–258; thereon e.g. *Jacqué,* RTDEur 2014, 823; *Jacqué,* Cah. dr. eur. 2015, 19; Editorial, (2015) 51 CML Rev. 1; *Gragl,* The reasonableness of jealousy http://www.academia.eu; *D. Simon,* JCl Europe février 2015, S. 4; *Halberstam,* German L.J. 16 (2015), 105; *Krenin,* German L.J. 16 (2015), 147; *Øby Johansen,* German L.J. 16 (2015), 169; *Lazowski/Wessel,* German L.J. 16 (2015), 169; *Peers,* German L.J. 16 (2015), 213; *Eeckhout,* Jean Monnet Working Paper 1/2015; *Tomuschat,* EuGRZ 2015, 133; *Wendel,* NJW 2015, 921; *Lambrecht,* (2015) 20 Eur. Hum. Rghts. Rev. 185; *Thym/Grabenwarter,* EuZW 2015, 180; *Usunier,* RTDciv 2015, 335; *Wessel,* Ars aequi 2015, 674; *de Witte/Imamović,* (2014) 40 Eur. L.J. 683; *Govaere,* (2015) 52 CMLRev. 1277; *Christoph Schmidt,* jM 2015, 417; *Vergès*, in: Liber amicorum Vlad Constantinesco (2015), p. 613; *Odermatt,* 47 NYU J. Int'l. L. & Politics 783 (2015); *Martín y Pérez de Nanclarez,* Rev. Der. Com. Eur. 52 (2015), 825; *Malenovský,* Rev. Gén. Dr. Int. Public 2015, 705; *Vezzani,* Riv. dir. int. 2016, 68; *Maubernaud,* Rev. UE 2016, 398 and 406; *Tinière,* Rev. UE 2016, 400; *Nivard,* Rev. UE 2016, 416; *Picheral,* Rev. UE 2016, 426; *Dollat,* Rev. dr. UE 2016, 513; *Gilliaux,* CDE 2016, 839.

60 See *Association de médication sociale v. Union locale des syndicats CGT* (Case C-176/12), ECLI:EU:C:2014:2 paras. 41–42; *Monika Kušionová v. SMART Capital a.s.* (Case C-34/13), ECLI:EU:C:2014:2189 paras. 63–65; *Gsell*, in: FS Helmut Köhler (2014), p. 197; *Mankowski,* WuB 2015, 196.

61 See *Monika Kušionová v. SMART Capital a.s.* (Case C-34/13), ECLI:EU:C:2014:2189 paras. 63–65.

that the court suspends the case pending until that has been accomplished. But this is an issue for the procedural law of the forum State to resolve.

3. Non-contractual obligations

a) Obligation

The notion of non-contractual obligations consists of two elements: First, there must be an obligation. Second, this obligation must be non-contractual. To define obligations positively is difficult. The best attempt at it so far describes an obligation as a two-ended relationship which appears from the one end as a personal right to claim and from the other as duty to render performance.[62] This does not *per se* exclude multilateral relationships.[63] In German terminology this clearly is the *Schuldverhältnis im engeren Sinne*, the single claim in isolation, not the *Schuldverhältnis im weiteren Sinne,* for instance the tortious relationship in its entirety.[64] **25**

The more important issue is the negative exclusivity of the notion of 'obligation'. It is to state what does not constitute an obligation and thus falls outside the realm of the Rome II Regulation (or, in fact, the Rome I and II Regulations). Matters of property law, be it related to movables or to immovable, are the prime candidate. Furthermore, matters of status are generally outside the ambit of the Rome II Regulation.[65] Status comprises three categories:[66] legal attributes of a natural person; the personal relationship between two or more persons; and the relationship between a person and a thing or a subjective right. Status is covered only insofar as the capacity to be held liable for conduct is at stake. A minor's capacity to incur tortious liability, the *Deliktsfähigkeit*, is within Art. 15 (a), (b). **26**

Whether an independent right exists which is possibly infringed, is an incidental question; it does not exclude obligations arising out of an actual infringement.[67] This does not constitute any kind of *depéçage*[68] for incidental questions are preliminary matters subject to an own *lex causae* and do not form part of the main *lex causae.* **27**

It does not bear major relevance that (1) refers to non-contractual obligations and not to non-contractual issues, matters, claims or disputes. Recital (11) conveys the clear message that strict liability and all kinds of non fault-based liability qualify, too.[69] Characterisations by categories of national law which would be appropriate in a purely domestic context have to cede to the wider, autonomous and European notion.[70] The kind of remedy ensuing does **28**

62 *Reinhard Zimmermann,* The Law of Obligations (Cape Town 1990) p. 1.

63 *Andrew Scott*, in: Ahern/Binchy (eds.), The Rome II Regulation on the Law Applicable to Non-Contractual Obligations (2009), p. 57, 72 fn. 52.

64 *Reiher,* Der Vertragsbegriff im europäischen Internationalen Privatrecht (2010) pp. 42–45.

65 *Rushworth/Andrew Scott,* [2008] LMCLQ 274, 301–303; *Dickinson,* paras. 3.88–3.103.

66 *Dickinson,* para. 3.90.

67 Concurring in the result, *Andrew Scott*, in: Ahern/Binchy (eds.), The Rome II Regulation on the Law Applicable to Non-Contractual Obligations (2009), p. 57, 73–74.

68 Insofar *contra Andrew Scott*, in: Ahern/Binchy (eds.), The Rome II Regulation on the Law Applicable to Non-Contractual Obligations (2009), p. 57, 74.

69 See only *Halfmeier*, in: Calliess, Art. 1 note 34.

70 *Briggs,* Private International Law in English Courts (2014) para. 8.44.

not bear relevance, either, as Art. 15 (c) clearly demonstrates.[71] The concept of 'obligation' is not limited to claims for damages.

b) Non-contractual: general considerations

aa) Transfer of the first limb of the *Kalfelis* approach from the Brussels I regime

29 "Non-contractual" is an autonomous European concept.[72] Recital (11) 2nd sentence is unambiguous in this regard. Characterisation on this issue should be uniform since any characterisation on the ground of the *lex fori* would have the unacceptable consequence of causing the scope of the Rome II Regulation to vary from one Member State to the other.[73]

30 The European concept does not borrow from, or necessarily correlate with, the classification under the *lex fori* or under the prospective *lex causae.* The characterisation of a concrete obligation for the purposes of the Rome II Regulation might differ from the characterisation of either of these laws.[74] For instance, the category of equity and equitable claims as cherished by English substantive law is irrelevant for characterisation under the Rome II Regulation.[75] Furthermore, Art. 5 clearly decides that product liability is a non-contractual matter despite French law internally construing product liability in a contractual manner. This follows the footsteps of *Handte* where the ECJ classified product liability as non-contractual for the purposes of then Art. 5 (3) Brussels Convention.[76]

31 In the light of Recital (7), it appears at first glance as going without saying that the circumscription which the ECJ in *Kalfelis* divined for 'non-contractual' in the context of Art. 5 (3) Brussels Convention/Brussels I Regulation (now Art. 7 (2) Brussels I*bis* Regulation), should be imported into the Rome II Regulation:[77] namely that tort, quasi-tort and delict cover all actions which seek to establish liability of a defendant and which are not related to a contract within the meaning of the Art. 5 (1) Brussels Convention/Brussels I Regulation, today Art. 7 (1) Brussels I*bis* Regulation.[78] But there are severe obstacles to such an approach, though.

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71 *Andrew Scott*, in: Ahern/Binchy (eds.), The Rome II Regulation on the Law Applicable to Non-Contractual Obligations (2009), p. 57, 75–76.

72 See only *Andrew Scott*, in: Ahern/Binchy (eds.), The Rome II Regulation on the Law Applicable to Non-Contractual Obligations (2009), p. 57, 60; *Behnen,* IPRax 2011, 221 (225); *Knöfel*, in: Nomos Kommentar BGB, Art. 1 Rom II-VO note 3; *Plender/Wilderspin* para. 2–002 with reference to *Trafigura Beher BV v. Kookmin Bank Co.* [2006] EWHC 1450 (Comm) [64] (Q.B.D., *Aikens* J.).

73 *Plender/Wilderspin* para. 2–002.

74 See only *Beig,* in: Beig/Graf-Schimek/Grubinger/Schacherreiter, p. 37, 39.

75 *Andrew Scott*, in: Ahern/Binchy (eds.), The Rome II Regulation on the Law Applicable to Non-Contractual Obligations (2009), p. 57, 76; *Briggs,* Private International Law in English Courts (2014) para. 8.44.

76 *Jakob Handte & Co. GmbH v. Traitements Mécano-chimiques des surfaces SA*, (Case C-26/91) [1992] ECR I-3967, I-3994 *et seq*. para. 16. *Contra* previously Cass. RCDIP 76 (1987), 612 with note *Gaudemet-Tallon*; correctly afterwards Cass. DMF 1995, 283, 286 with note *Tassel.*

77 See only *Knöfel*, in: Nomos Kommentar BGB, Art. 1 Rom II-VO note 3.

78 *Anastasios Kalfelis v. Bankhaus Schröder Münchmeyer Hengst & Cie.*, (Case 189/87) [1988] ECR 5565, 5585 para. 18; *Mario Reichert et al. v. Dresdner Bank AG*, (Case C-261/90) [1992] ECR I-2149, I-2180 para. 16; *Réunion européenne SA v. Spliethoff's Bevrachtingskantoor BV and Master of the vessel "Alblasgracht 002"*, (Case C-51/97) [1998] ECR I-6511, I-6543 para. 22; *Rudolf Gabriel*, (Case C-96/00) [2002] I-

Kalfelis does not fit all too well for anything in the fields of unjust enrichment or *negotiorum gestio* which two fields are encompassed by the Rome II Regulation beyond even the slightest of doubts, given Arts. 10 and 11. Art. 2 acknowledges and endorses this. Likewise, Art. 2 clarifies that not only compensatory liability for damages is covered, but also negatory remedies.[79]

Yet the first step in *Kalfelis*[80] should be the first step for the understanding of 'non-contractual' under the Rome II Regulation, too: 'Non-contractual' in the first place and primarily means non-*contractual*. Everything that can be classified as contractual for the purposes of the Rome I Regulation must *not* be classified as 'non-contractual' for the purposes of the Rome II Regulation.[81] Aut A aut non-A. Contractual and non-contractual are strict alternatives. There is no intermingling between the two of them with regard to the same claim. Insofar a harmonious interpretation avoiding any frictions and any contradictions is paramount. (1) 1st sentence is caught in a kind of triangle with Art. 1 (1) 1st sentence Rome I Regulation and the *Kalfelis* line under Arts. 5 (3) Brussels Convention/Brussels Regulation; 7 (2) Brussels I*bis* Regulation.[82] The concept of non-contractual obligations is residual, in the outset defined negatively in terms of that which is not, namely "contractual".[83] Hence, for practical purposes the starting point is a negative one: to reach a negative result on a contractual characterisation.[84] Methodologically, Recital (7) leads to generally importing the yardsticks for contracts developed under then Art. 5 (1) Brussels Convention or Brussels I Regulation, now Art. 7 (1) Brussels I*bis* Regulation into the realm of the Rome Regulations.[85] **32**

6367, I-6398 para. 33; *Verein für Konsumenteninformation v. Karl-Heinz Henkel*, (Case C-167/00) [2002], I-8111, I-8139 para. 36; *ÖFAB Östergötlands Fastigheter AB v. Frank Koot and Evergreen Investments BV* (Case C-147/12), ECLI:EU:C:2013:490 para. 32; *OTP Bank Nyilvánosan Müködö Részvénytársaság v. Hochtief Solution AG* (C-519/12), ECLI:EU:C:2013:674 para. 26; *Marc Brogsitter v. Fabrication de Montres Normandes EURL and Karsten Fräßdorf* (Case C-548/12), ECLI:EU:C:2014:148 para. 20; *Harald Kolassa v. Barclays Bank plc* (Case C-375/13), ECLI:EU:C:2015:37 para. 44; *Granarolo SpA v. Emmi France SA* (Case C-196/15), ECLI:EU:C:2016:559 para. 20. Followed e.g. in BGHZ 176, 342 = NJW 2008, 2344; BGH WM 2014, 1614 [20]; *Source Ltd. v. TÜV Rheinland Holding AG* [1997] 3 WLR 365, 371 (C.A., per *Staughton* L.J.); OLG Stuttgart, IPRax 1999, 103 (104); *Constance Short and others v. Ireland, The Attorney General and British Nuclear Fuels plc* [1996] 2 I.R. 188, 202 (H.C., *O'Hanlon* J.); HG Zürich SZIER 1996, 74, 75 note *Volken*; LAG Rheinland-Pfalz IPRspr. 2008 Nr. 160 p. 515; LG Kiel, IPRax 2009, 164 (165); AG Frankfurt/M. AG 2006, 859 *et seq*.

79 *Jessica Schmidt,* Jura 2011, 117, 123.

80 *Anastasios Kalfelis v. Bankhaus Schröder Münchmeyer Hengst & Cie.*, (Case 189/87) [1988] ECR 5565, 5585 para. 18.

81 See *Andrew Scott*, in: Ahern/Binchy (eds.), The Rome II Regulation on the Law Applicable to Non-Contractual Obligations (2009), p. 57, 61.

82 *Jessica Schmidt,* Jura 2011, 117, 123.

83 *Andrew Scott*, in: Ahern/Binchy (eds.), The Rome II Regulation on the Law Applicable to Non-Contractual Obligations (2009), p. 57, 61.

84 *Martiny*, in: FS Ulrich Magnus (2014), p. 483, 486.

85 But cf. *Reiher,* Der Vertragsbegriff im europäischen Internationalen Privatrecht (2010) pp. 64–83.

33 The ordinary case of "contract" appears evident and obvious: a mutual consent[86] binding upon all parties under which each party has to perform obligations. Consensual transactions are contracts.[87] Obligations voluntarily[88] assumed by agreement are contractual by their nature.[89] This is by no means restricted to commercial transactions, but covers all and every mutual agreements.[90] But does this exhaustively and comprehensively define 'contract' also with regard to less obvious cases? Can there be a conclusion that anything else apart from a mutual contract with consideration (in the English legal terminology) cannot be treated as a 'contract' for the purposes of European PIL?[91] Should the seemingly obvious impression gained at first glance narrow the overall concept, or should this concept be broader? Some examples of practical importance might suffice to illustrate and emphasise the problem: How about cheques, bills of exchange or independent warranties (the latter issued by the producer not by the seller)?[92] Apart from classifying these instruments of a rather unilateral than mutual nature, questions might arise as to the classification of side issues which can occur in the vicinity of any contract, i.e. claims for terminating negotiations without a justifying reason, or claims for damage done to the goods or assets of either party in the conduct of a negotiation or of the performance of a contract concluded.

34 'Contract' should be given a broader meaning[93] adjusted to the underpinning economic issues.[94] Offer and acceptance as such are not the all-decisive elements.[95] The paramount borderline is to distinguish between contract and tort.[96] Functionally, two distinguishing features can be detected: the fortuitous character of the meeting of the parties on the one hand, and the possibility or opportunity for (self-)protection or distribution of risks by agreement on the other hand.[97] A contract is the result of strategic and co-operative interaction between the parties searching to transform an uncooperative game into a cooperative

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86 On this criterion, taking into consideration both comparative approaches and etymological studies across all language versions *Reiher,* Der Vertragsbegriff im europäischen Internationalen Privatrecht (2010) pp. 122–134. The alternative model would rely on a unilateral promise, but appears unreliable for the purposes of European private international law; see in detail *Reiher,* op. cit., pp. 110–121.

87 *Agnew v. Länsförsäkringsbolagens AB* [2001] 1 A.C. 223, 264 (H.L., per Lord *Millett*).

88 But cf. against voluntariness at least as the sole criterion *Reiher,* Der Vertragsbegriff im europäischen Internationalen Privatrecht (2010) pp. 95–107.

89 *Base Metal Trading Ltd. v. Shamurin* [2005] 1 All ER (Comm) 17, 27 (C.A., per *Tuckey* L.J.).

90 Høyesteret [1998] I.L.Pr. 804, 806.

91 Against such assumption *Reiher,* Der Vertragsbegriff im europäischen Internationalen Privatrecht (2010) pp. 134–137.

92 See *Mankowski,* in: Magnus/Mankowski, Art. 7 Brussels Ibis Regulation note 41.

93 See only *Petra Engler v. Janus Versand GmbH,* (Case C-27/02) [2005] ECR I-481, I-517 para. 48; A-G *Szpunar,* Opinion in Case C-375/13 of 3 September 2014, ECLI:EU:C:2014:2135 para. 49; BAG AP Nr. 1 zu Art. 5 Lugano-Abkommen Bl. 5 note *Mankowski*; OLG Saarbrücken IPRax 2013, 74, 77; *Ferrari,* Giust. civ. 2007 I 1397, 1405 *et seq.*

94 *Mankowski,* IPRax 2003, 127 (131). Against an exclusive recourse to economic contract models, at least restricting their usefulness to commercial relations, *Reiher,* Der Vertragsbegriff im europäischen Internationalen Privatrecht (2010) pp. 137–140.

95 *Stephan Lorenz/Unberath,* IPRax 2005, 219 (222).

96 See only OLG Hamburg, WRP 2015, 87 para. 61; *Hofmann/Kunz*, in: Basler Kommentar LugÜ (2nd ed. 2016) Art. 5 LugÜ note 72.

97 *Mankowski,* IPRax 2003, 127 (131).

game.[98] Its core consists of reliable commitment which is sanctioned and enforceable.[99] It aims at protecting transaction specific investments.[100] The creditor chooses deliberately to invest. He is active and not only passively subjected to the debtor's activities[101] since contract is a mechanism for planning and for reducing complexity.[102] Choice, commitment and co-operation are the keywords for contract.[103] An involuntary creditor in tort has nothing to choose. The accidental meeting is not the intentional meeting of the minds.[104] Electronisation has not changed the notion of contract a bit(e).[105] Mere promises to do the recipient a favour lack the necessary degree of enforceability.[106]

That the debtor voluntarily entered into it technically is the basic characteristic feature of a contractual obligation. If the obligation at stake is not freely assumed by the debtor it can not be characterised as contractual.[107] A freely assumed and voluntary undertaking is the core element, and an agreement is not necessarily required.[108] Acceptance is not required, and unilateral promises are also encompassed.[109] This implies that national categories of contract law are irrelevant, for instance whether English law phrases the obligations owed by a **35**

98 *Urs Schweizer,* Vertragstheorie (1999) p. 5; *Brousseau/Glachant*, in: Brousseau/Glachant (eds.), The Economics of Contract (2002) p. 3; *Cooter/Ulen,* Law and Economics (6th ed. 2012) pp. 196 *et seq*.

99 See only *Masten*, in: Bouckaert/De Geest (eds.), Encyclopedia of Law and Economics, vol. III (2000), p. 25, 26.

100 See only *Oliver E. Williamson,* 22 J. L. & Econ. 233 (1979); *Katz*, in: Newman (ed.), The New Palgrave Dictionary of Economics and the Law, vol. I: A-D (2nd ed. 1998), p. 425, 427.

101 *Mankowski,* IPRax 2003, 127 (131).

102 *Macaulay,* in: L. Friedman/Macaulay, Law and the Behavioral Sciences (2nd ed. 1977), p. 141; *Ripperger,* Ökonomik des Vertrauens (1998) p. 29.

103 See only *Macneil,* The New Social Contract (1980) p. 3 *et seq*.; *Oliver E. Williamson*, in: Brousseau/Glachant (eds.), The Economics of Contract (2002), p. 49.

104 *Ghestin*, in: Brousseau/Glachant (eds.), The Economics of Contract (2002), p. 99, 102–104.

105 *Marianne Roth*, in: Studia in honorem Pelayia Yessiou-Faltsi (2007), p. 531, 537 *et seq*.

106 *Reiher,* Der Vertragsbegriff im europäischen Internationalen Privatrecht (2010) p. 157.

107 *Jakob Handte & Co. GmbH v. Traitements Mécano-chimiques des surfaces SA*, (Case C-26/91) [1992] ECR I-3967, I-3994 para. 15; *Réunion européenne SA v. Spliethoff's Bevrachtingskantoor BV and Master of the vessel "Alblasgracht 002"*, (Case C-51/97), [1998] ECR I-6511, I-6542 para. 17; *Fonderie Officine Meccaniche Tacconi SpA von Heinrich Wagner Sinto Maschinenfabrik GmbH*, (Case C-334/00) [2002] ECR I-7357, I-7393 para. 23; *Frahuil SA v. Assitalia SpA*, (Case C-265/02) [2004] ECR I-1543, I-1555 para. 24; *Petra Engler v. Janus Versand GmbH*, (Case C-27/02) [2005] ECR I-481, I-517 para. 50; *Česká spořitelna as v. Gerald Feichter*, (Case C-419/11), ECLI:EU:C:2013:165 paras. 46 et seq.; *ÖFAB Östergötlands Fastigheter AB v. Frank Koot and Evergreen Investments BV* (Case C-147/12), ECLI:EU:C:2013:490 para. 33; *OTP Bank Nyilvánosan Működö Részvénytársaság v. Hochtief Solution AG* (C-519/12), ECLI:EU:C:2013:674 para. 23; *Harald Kolassa v. Barclays Bank plc* (Case C-375/13), ECLI:EU:C:2015:37 para. 39; Cassaz. Foro it. 2006 col. 3388, 3394 = RDIPP 2006, 1076, 1082; BGHZ 176, 342 = NJW 2008, 2344; BGH, WM 2014, 1614 [26]; OLG Saarbrücken IPRax 2013, 74 (77); OLG Hamburg, WRP 2015, 87 [61]; Rb. Rotterdam NIPR 2011 Nr. 250 p. 437. *Sindres*, J-Cl. Dr. int. fasc. 584–130 no. 9 (mars 2014) complains this to leave some uncertainty.

108 *Andrew Scott*, in: Ahern/Binchy (eds.), The Rome II Regulation on the Law Applicable to Non-Contractual Obligations (2009), p. 57, 67–69.

109 *Crespi Reghizzi,* RDIPP 2012, 317, 328–332.

gratuitous bailee as obligations in bailment,[110] or a gratuitous agent's obligations as obligations in agency.[111]

36 A correction appears necessary, though, in instances where contracts are forced upon one of the parties by law, i.e. where the law obliges the respective party to conclude the contract in the extreme even against that party's will.[112] Insofar the creation of a new and special obligation which did not exist previously, arises as a possible criterion,[113] at least if is added that the contact between the parties is not accidental and that there is something like a formal consent. Insofar as an interpretation of the contract is required this might serve as an indication for the contractual nature of the respective claim.[114]

37 The ECJ in *Brogsitter* employs a very broad understanding of "contract". A claim concerns matters relating to a contract in the sense of (1) if the conduct complained of may be considered a breach of contract.[115] That will be *a priori* the case where the interpretation of the contract which links the defendant to the applicant is indispensable to establish the lawful or, on the contrary, unlawful nature of the conduct complained of against the former by the latter.[116] It is for the national court to determine in the concrete case whether the purpose of the claims brought is to seek damages the legal basis of which can reasonably be regarded as a breach of the rights and obligations set out in the contract which would making its taking into account indispensable in deciding the action.[117] In principle Recital (7) obliges to import this result into the Rome II Regulation.[118] But any import should be done very cautiously and hesitantly since it in turn would reduce the scope of specifically tailored provisions of the Rome II Regulation and would threaten a conflict with the different approaches towards party autonomy under Rome I and Rome II as they are highlighted by Arts. 6 (4); 8 (3) Rome II Regulation.[119]

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110 *Palmer,* Bailment (3rd ed. 2009) para. 42.021; *Aikens,* [2011] LMCLQ 484, 493–503. On the English law of bailment e.g. *The "Pioneer Container"* [1994] 2 AC 324, 338 f. (P.C. per Lord *Goff of Chieveley*).

111 *Andrew Scott*, in: Ahern/Binchy (eds.), The Rome II Regulation on the Law Applicable to Non-Contractual Obligations (2009), p. 57, 70.

112 *Reiher,* Der Vertragsbegriff im europäischen Internationalen Privatrecht (2010) p. 174; *Spickhoff*, in: Bamberger/Herbert Roth, Art. 1 Rom I-VO note 21; *Magnus*, in: Staudinger, BGB, Artt. 1–10 Rom I-VO (2011) Art. 1 Rom I-VO note 34; *Magnus*, in: FS Dagmar Coester Waltjen (2015), p. 555, 560.

113 *Magnus*, in: Staudinger, BGB, Artt. 1–10 Rom I-VO (2011) Art. 1 Rom I-VO note 33; *Magnus*, in: FS Dagmar Coester Waltjen (2015), p. 555, 560.

114 *Wendelstein,* Kollisionsrechtliche Probleme der Telemedizin (2014) pp. 142 *et seq.*: *Wendelstein,* ZEuP 2015, 624 (635); *Anna-Lisa Kühn,* Die gestörte Gesamtschuld im Internationalen Privatrecht (2014) p. 215.

115 *Marc Brogsitter v. Fabrication de Montres Normandes EURL and Karsten Fräßdorf* (Case C-519/12), ECLI:EU:C:2014:148 para. 24.

116 *Marc Brogsitter v. Fabrication de Montres Normandes EURL and Karsten Fräßdorf* (Case C-519/12), ECLI:EU:C:2014:148 para. 25.

117 *Marc Brogsitter v. Fabrication de Montres Normandes EURL and Karsten Fräßdorf* (Case C-519/12), ECLI:EU:C:2014:148 para. 26. The first example is provided by LG Krefeld 26 August 2014 – Case 12 O 28/12 [30]-[32] in the *Brogsitter* case itself.

118 *Wendelstein,* ZEuP 2015, 624 (634–635).

119 *Dickinson,* [2014] LMCLQ 466, 473; see also *Briggs,* Private International Law in English Courts (2014) para. 8.43.

bb) The interplay between the Rome I and Rome II Regulations

Any conclusion that either the Rome I or the Rome II Regulation must be squeezed into application by every possible means and at every intellectual cost[120] should be avoided. There is a third option: the national PIL of the *forum*. Rome I and Rome II do *not* erect a comprehensive system which would cater for every possibly conceivable obligation.[121] *Tertium datur*.[122] In few instances obligations happen to slip between Rome I and Rome II, for instance accessory liability of an entrepreneur taking over an already established business under §§ 25; 28 HGB[123] whereas the Austrian parallel §§ 38 *et seq*. UGB appears to have a contractual nature due to a different construction.[124] **38**

Art. 1 (2) (i) Rome I Regulation on the one hand and Arts. 2; 12 Rome II Regulation on the other hand have authoritatively decided an issue the proper characterisation of which has been discussed vigorously and for long, namely *culpa in contrahendo*. Nor it is put beyond any reasonable doubt that *culpa in contrahendo* in all its sub-cases is submitted to the realm of non-contractual obligations. *Culpa in contrahendo*, and it particular the breaking-off of negotiations, might be at a crossroads between Rome I and Rome II,[125] but the said provisions indubitably show the direction.[126] **39**

cc) Concurrent claims

In many instances there are concurrent claims of which one can be characterised as contractual whereas the other(s) ought to be characterised as non-contractual. Characterisation is kept at that, and each claim has to be characterised on its own merits. It does not borrow its character from its fellow brethren. As to characterisation, it remains independent from the other, concurring claims.[127] Concurrent claims do not submerge and are not submitted to a single, uniform characterisation. There is nothing like an accessory characterisation, not even at a second tier. Consequentially, the contractual claim will be governed by the Rome I Regulation whereas a non-contractual claim will be governed by the Rome II Regulation. The undesirable result that they are subjected to different applicable laws might be avoided, though, since Art. 4 (3) 2nd sentence Rome II Regulation provides for an *akzessorische Anknüpfung* of the non-contractual claim submitting it to the same law which is the *lex causae* of the contractual claim. But even Art. 4 (3) 2nd sentence Rome II Regulation does not employ a re-characterisation of the non-contractual claims as contractual, but a different technique operating at the next level of determining the applicable law after the character- **40**

120 To this avail *Leible,* Rom I und Rom II: Neue Perspektiven im Europäischen Kollisionsrecht (2009) p. 43; *Bogdan*, in: FS Bernd von Hoffmann (2011), p. 561, 567.

121 *Knöfel*, in: Nomos Kommentar BGB, Art. 1 Rome II-VO note 5. *Contra Dickinson,* para. 3.104; *Matthias Lehmann,* IPRax 2015, 495 (496–497).

122 *Freitag*, in: FS Ulrich Spellenberg (2010), p. 169; *Crespi Reghizzi,* RDIPP 2012, 317, 319; *Knöfel*, in: Nomos Kommentar BGB, Art. 1 Rome II-VO note 5. *Contra Matthias Lehmann,* IPRax 2015, 495 (496–497).

123 *Freitag*, in: FS Ulrich Spellenberg (2010), p. 169, 175; *Freitag,* ZHR 174 (2010), 429; *Kramme,* IPRax 2015, 225 (228).

124 *Friederike Schäfer*, in: FS Hellwig Torggler (Wien 2013), p. 1073, 1076; see also OGH ÖBA 2014, 948 = IPRax 2015, 541.

125 *Bollée,* D. 208, 2161; *Lagarde*, in: Liber Fausto Pocar (2009), p. 583.

126 See only *Crespi Reghizzi,* RDIPP 2012, 317, 335–338.

127 *Andrew Scott*, in: Ahern/Binchy (eds.), The Rome II Regulation on the Law Applicable to Non-Contractual Obligations (2009), p. 57, 60.

isation process has been passed and concluded. Art. 4 (3) 2nd sentence Rome II Regulation would not be applicable if the claim at stake had not been characterised as non-contractual beforehand.

41 A specific problem with concurrent claims appears to arise where one law concerned admits both claims concurring whereas the other law sticks to the doctrine of *non cumul* and would not have concurring claims.[128] But this problem is with identifying the applicable laws only, in particular to answer the question which law is to determine whether a cumulation takes place or not.[129] A characterisation issue does not arise, though. Both claims retain their nature. A non-contractual obligation does not turn contractual simply because a contractual claim concurs. It is an entirely different question (and to be answered to the negative) whether an alternative characterisation of a single obligation is permitted or even sensible.[130]

c) Non-contractual: Single areas of concern

aa) Prize notifications

42 So called prize notifications, *Gewinnzusagen,* have prompted not less than three decisions by the ECJ under the Brussels Convention and the Brussels I Regulation; each time the ECJ characterised them as contractual, but not necessarily as falling under the special protective regime for consumer contracts established in then Arts. 13–15 Brussels Convention or Arts. 15–17 Brussels I Regulation.[131] The ECJ did not classify them as non-contractual a single time.[132] Given Recital (7), there is a strong claim militating in favour of a transfer of

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128 For a comparative survey on whether and to which extent the legal order of a certain Member States permits to pursue concurrent claims *von Bar,* The Common European Law of Torts (1998) paras. 413–458.

129 Thereon *Spelsberg-Korspeter,* Anspruchskonkurrenz im internationalen Privatrecht (2009) pp. 110 *et passim*; *Mankowski,* RIW 2011, 420, 422; see also *Czepelak,* (2011) 7 JPrIL 393.

130 *Dickinson,* paras. 3.124–3.135 rather addresses this question than truly concurrent liability arising from two or more claims.

131 *Rudolf Gabriel* (Case C-96/00), [2002] ECR I-6367; *Petra Engler* v. *Janus Versand GmbH* (Case C-27/02), [2005] ECR I-481; *Renate Ilsinger v. Martin Dreschers, acting as administrator in the insolvency of Schlank & Schick GmbH* (Case C-180/06), [2009] ECR I-3961. To the same avail *Mörsdorf-Schulte,* JZ 2005, 770, 780; *Tamm/Gaedtke,* VuR 2006, 169, 175; *Tamm/Gaedtke,* IPRax 2006, 584; *Gerhard Wagner/Potsch,* Jura 2006, 401, 409; *Kathrin Hofmann,* Verfahrensrechtliche Aspekte grenzüberschreitender Gewinnzusagen nach § 661a BGB (2007) pp. 133–137.

132 See *Rudolf Gabriel* (Case C-96/00), [2002] ECR I-6367; *Petra Engler v. Janus Versand GmbH* (Case C-27/02), [2005] ECR I-481; *Renate Ilsinger v. Martin Dreschers, acting as administrator in the insolvency of Schlank & Schick GmbH* (Case C-180/06), [2009] ECR I-3961. For a contractual characterisation also OLG Stuttgart, MDR 2003, 350; OLG Hamm NJW-RR 2003, 317; OLG Stuttgart, VuR 2004, 151; OLG Brandenburg 13 January 2004 – Case 6 U 79/03; OLG Braunschweig, NJW 2006, 161; OLG Rostock, NJW-RR 2006, 209; OLG Bamberg, NJOZ 2007, 1972 = IPRspr. 2006 Nr. 138 p. 308; LG Braunschweig, IPRax 2002, 213; LG Kaiserslautern 12 May 2004 – Case 2 O 434/03; LG Hannover, IPRspr. 2004 Nr. 127 p. 279; AG Waren, VuR 2005, 316. See also (leaving open whether a contractual or a delictual classification should prevail since either way jurisdiction of German was founded in the concrete cases) BGH, NJW 2003, 426; BGH NJW 2004, 1652; BGH, NJW 2004, 3039; OLG Dresden IPRspr. 2001 Nr. 156

this jurisprudence to the Rome Regulations and consequentially to submit prize notifications to the realm of the Rome I Regulation.[133]

The background for doubts stems from Austrian and German law. Both of these laws grant claims to the recipients of such notifications where the notifications promise the recipients to have won a certain prize, in § 5j KSchG and § 661a BGB respectively. These legislative intrusions overrule even small print statement to the contrary which the issuers of prize notifications insert in the notifications. Conceptually, the issuers' intention of course is not to grant the prize "promised" effectively. Austrian and German law treat this as some kind of *protestatio facto contraria* and disregard it. Luxemburg joined in,[134] and French case law tends in the same direction.[135] **43**

As to characterisation under European yardsticks, two approaches alternative to a contractual classification and the ensuing direct application of the Rome I Regulation are put forward: first to apply the Rome I Regulation *per analogiam* since a prize notification would be a unilateral judicial act (*einseitiges Rechtsgeschäft*);[136] second to characterise the phenomenon as non-contractual[137] and thus to apply the Rome II Regulation, particularly its Art. 6.[138] **44**

bb) Collective claims (in particular class actions) or actions brought by consumer associations or other associations

Ordinarily, collective claims or actions brought by consumer associations fall on the civil matters side of the divide. Functionally the State might use an association as some kind of private attorney in order to enforce market standards, consumer contract law, or the law regulating unfair commercial practices. Unless the acting association has not been officially integrated in the State's organisation it is a private body, though. **45**

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p. 318; OLG Stuttgart, NJW-RR 2004, 1063; OLG Hamm, IPRspr. 2005 Nr. 100 p. 252; LG Osnabrück, IPRspr. 2004 Nr. 30 pp. 72–73.

133 *Piepenbrock/Götz Schulze,* IPRax 2003, 328; *Häcker,* ZvglRWiss 103 (2004), 462, 492 *et seq.*; *Stephan Lorenz/Unberath,* IPRax 2005, 219 (223); *Wurmnest*, in: jurisPK BGB, Art. 1 Rom II-VO note 33; *Halfmeier*, in: Calliess, Art. 1 note 33.

134 Art. 21e Loi du 30 juillet 2002 règlementant certaines pratiques commerciales.

135 Cass. D. 1999 somm. 109 note *Libchaber*; Cass. JCP 2002 II.10104 note *Houtcieff*; Cass. D. 2002, 2963 note *Denis Mazeaud* = Petites affiches 2002 N° 213 note *Houtcieff* = Defrénois 2002.1608 note *Savaux*; Cass. Clunet 138 (2011), 141 note *Brière*; see also Cass. D. 1995, 227 note *Delebecque*; *Claude Witz/Reinert,* ZEuP 2005, 106.

136 *Dörner*, in: FS Helmut Kollhosser (2004), p. 75, 76; *Leipold*, in: FS Hans Joachim Musielak (2004), p. 317, 327–328; *Stephan Lorenz,* NJW 2006, 472; see also BGHZ 165, 172, 180; *Reiher,* Der Vertragsbegriff im europäischen Internationalen Privatrecht (2010) pp. 179–181. *Contra Fetsch,* RIW 2002, 936, 937; *Fenyves,* ÖJZ 2008, 305.

137 LG Bonn 25 November 2003 – Case 2 O 495/02; *Fetsch,* RIW 2002, 936, 942; *Leible,* IPRax 2003, 28, 30-31; *Leible,* NJW 2003, 407, 408; *Christian Schneider,* VuR 2003, 476, 477; *Harald Koch,* ZZP Int 7 (2002), 272, 277; *Ansgar Staudinger,* ZEuP 2004, 767, 777; *Dörr,* MDR 2006, 1141, 1143; *Andra Lindner,* Irreführende Gewinnzusagen nach § 661a BGB (2010) pp. 137, 142–146; *Schwartze*, in: FS Helmut Koziol (2010), p. 407, 412–415.

138 *Schwartze*, in: FS Helmut Koziol (2010), p. 407, 418–419.

46 The single consumer might have a claim in contract. But an association suing under the Injunctions Directive 1998/27/EC[139] and its national implementations does so outside the context of any concrete contract.[140] This can be illustrated by the example of an association attacking a certain enterprise's Standard Terms and Conditions. Directive 93/13/EEC[141] would not entitle the single consumer to proceed against them on an abstract basis; only the association has such a claim, and in its own right, to be derived from the Injunctions Directive 98/27/EC and its national implementations.[142] Associations fight unfair competition, and the very existence of Art. 6 is a strong indication of the non-contractual nature of any claims in this regard.[143]

47 The case is different where the association proceeds on the ground of contractual claims assigned by consumers or other private party who were the original creditors of the claims concerned. If the association only bundles pre-existing claims by way of assignment the claims retain their contractual nature.

48 Collective claims by several consumers or other private parties, in particular class actions (as they are gradually also intruding the legal orders of Member States with Italy,[144] Belgium[145] and France[146] being the most prominent recent entries on the list), are civil matters and contractual in nature. The position as to who the creditor of the single claim is, does not alter by bundling and organising a class of plaintiff. Even the lead plaintiff pursues an own claim. The claims are pre-existing and not subject to any assignment. They retain their original nature unimpeded

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139 Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, OJ EC 1998 L 166/51.

140 *Bach*, in: Peter Huber, Art. 1 note 29.

141 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ EC 1993 L 95/29.

142 *Bach*, in: Peter Huber, Art. 1 note 29.

143 See BGHZ 182, 24; *Bach*, in: Peter Huber, Art. 1 note 29.

144 Art. 140bis cod. cons. (legge 23 luglio 2009 n. 99), G.U. No. 137 of 31. July 2009; on this e.g. Trib. Milano NGCC 2011 I 502; Trib. Napoli Giur. mer 2013, 210 m. Anm. *Giussani* = Foro it. 2013 I col. 1719 m. Anm. *de Santis*; Trib. Milano Foro it. 2014 I col. 274; *Punzi,* Riv. dir. proc. 2010, 253; *Apla,* Riv. trim. dir. proc. civ. 2010, 379; *Giusani,* Riv. dir. proc. 2010, 595; *Menchini/Motio,* NLCC 2010, 1413; *Cerratto,* Banca, borsa, tit. cred. 2010 II 619; *Scaglione,* Riv. dir. priv. 2011, 63; *Gentile,* Riv. dir. proc. 2011, 99; *Ferrante,* Contratto e impresa/Europa 2011, 1; *Conte,* Riv. dir. civ. 2011, 609; *Donzelli,* L'azione di classe a tutela dei consumatori, 2011; *Marinucci,* Corr. giur. 2011, 1112; *Consolo/Zuffi,* L'azione di classe ex art. 140-bis cod. cons., 2012; *Caponi,* Foro it. 2012 V 149; *Comoglio,* Dir. pubbl. comp. eur. 2012, 1114; *Linhart/Finazzi Agrò,* RIW 2013, 443; *Afferni,* Contratto e impresa 2013, 1275.

145 Loi du 27 mars 2014 portant insertion des dispositions réglant des matières visées de l'article de la Constitution dans le livre XVII du Code de droit économique, Mon. belge 2014, 35197, und Loi du 27 mars 2014 portant insertion d'un titre 2 "de l'action en réparation collectives" dans le livre XVII du Code de droit économique, Mon. belge 2014, 35201; thereon e.g. *Rozie/Rutten/van Oevelen* (eds.), Class Actions, Antwerpen/Cambridge 2015.; *Longfils,* Bull. ass. 2015, 19.

146 Loi n° 2014–344 du 17 mars 2014 relatif à la consommation, JO 2014, 5400 introducing Arts. L 423-1 – L 426-6 C. consomm.; *Azar-Baud,* Gaz. Pal. N°. 244-246, 1–3 septembre 2013, 16; *Pietrini,* Gaz. Pal. N°. 244246, 1–3 septembre 2013, 21; *Sénéchal,* Petites affiches n°. 299, 15 novembre 2013, 6; *Rakoff/Schimmel/Pezard,* Rev. trim. dr. fin. 2014, 148; *Grandjean/Sicsic,* Gaz. Pal. Nos. 311 à 312, 7/8 novembre 2014, S. 12 and the contributions in Gaz. Pal. Nos. 110-114, 20-24 avril 2014, by *Kilgus, Timothée Jacob, Philippe Schultz, Rzepecki, Mignot, Lasserre Capdeville, Hilt, Ereseo*.

by any subsequent events. Hence, this holds true the other way round, too: If claims originally have been non-contractual in nature, they remain non-contractual claims. Mass claims and claims from mass torts brought before the Hof Amsterdam (as the centralised court having exclusive jurisdiction in this regard) under the WCAM[147] are still non-contractual claims.

Even if claims are assigned their nature remains unchanged. Consequentially, if the victims of a cartel assign their individual claims (granted to them by the system of private enforcement under current European competition law[148]) to a specific CDC SA,[149] special purpose vehicles established as private corporations under Belgian law, the action is a civil matter, but non-contractual by nature since the assigned claims are based on competition law, thus clearly in the non-contractual realm as Art. 6 (3) conveys. **49**

cc) Falsa procuratio

A *falsus procurator* acts without the necessary agency or oversteps the limits of an agency principally existing. He might be liable to the other party since he cannot bind the intended principal and thus cannot convey a contractual claim against the intended principal to the third party. The Rome II Regulation does not address a *falsus procurator*'s liability towards the third party specifically. The only rule addressing but a single issue of *falsa procuratio*, and then only negatively, is Art. 1 (2) (g) Rome I Regulation which bans "the question whether an agent is able to bind a principal" from the realm of the Rome I Regulation. This exclusion does not imply that all other issues of agency and *falsa procuratio* are to be characterised as non-contractual automatically. Conversely, they might fall under the Rome I Regulation in so far as they are of a contractual nature.[150] If Art. 7 (4) Proposal Rome I Regulation[151] had been promulgated *tel quel*, the die would have been cast in favour of regulating the matter in the Rome I Regulation. But that was not to be. The only conclusion which can be safely drawn from this legislative history is that the attempt to address the matter expressly within the confines of the contractual realm failed.[152] **50**

Hence, the European legislature does not directly decide whether the *falsus procurator*'s liability towards the third party is non-contractual. Principally, it does meet the requirement established under the general definition of "non-contractual".[153] The *falsus procurator* intended to bind the envisaged principal, not to bind himself contractually, and he never freely entered into obligations towards the third party.[154] Furthermore, it can be regarded as a **51**

147 Wet collective afwikkeling massaschade (WCAM), Stb. 2005, 340, and Wet tot wijziging de WCAM, Stb. 2013, 256; thereon e.g. *Klaassen*, Ars aequi 2013, 627; *de Baere*, TPR 2013, 2563.

148 Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ EC 2003 L 1/1; Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ EU 2014 L 349/1.

149 Cartel Damages Claims SA.

150 Report *Giuliano/Lagarde,* OJ EEC 1980 C 282/15.

151 COM (2005) 650 final.

152 *Hausmann*, in: Reithmann/Martiny, Internationales Vertragsrecht (8th ed. 2015) para. 7.444; *Behnen,* IPRax 2011, 221 (224).

153 *Bach*, in: Peter Huber, Art. 1 note 23.

154 *Bach*, in: Peter Huber, Art. 1 note 23.

special case of *culpa in contrahendo* since it arises out of pre-contractual dealings.[155] Certainly it is different from the ordinary case of *culpa in contrahendo* in which one of the parties of the contract or intended contract is liable towards the other whereas the *falsus procurator* was never intended to become the party of any contract.[156] But this difference is not decisive. Nothing either in Art. 2 or in Art. 12 limits *culpa in contrahendo* to cases where liability is inferred by a party or an intended party to the contract.[157]

52 Neither can rules like § 179 (1) BGB prompt and carry a different characterisation.[158] The liability incurred by the *falsus procurator* might result in the *falsus procurator* having to take over the contractual position of the intended principal he could not bind for lack of proper agency. But this is only a special appearance of damages distinct from the ordinary and regular appearance of damages. Whether the *falsus procurator* can be tied to a contractual bon is a non-contractual issue, and only other the contractual position has been transferred upon the *falsus procurator* the contractual regime takes over. The contractual position is forced upon the *falsus procurator* by the law.

dd) Apparent authority

53 An intermediate problem half-way between properly authorised agents and *falsa procuratio* is posed by a principal being bound to third parties by an agent's apparent authority. It may be presupposed that such apparent authority can be established under the law applicable to this issue by the virtue of the respective conflicts rule of the *lex fori*, the existence of apparent authority being an incidental question. The principal's liability ought to be characterised. The characterisation might be determined by the nature of the result ensuing from admitting apparent authority, namely that the principal is bound as though he had truly authorized the agent. This would result in parallelising the connection factor for apparent authority with that for duly authorised agency[159] (but for the possibility of a choice of law by either party). Another option would be to resort to the law where the apparent agent entered into his declaration or where the third party relied on the apparent agent's word.[160]

54 Alternatively, it is argued that at least where the principal did not have actual knowledge of the agent's conduct he (the principal) did not freely enter into his obligations towards the third party and, instead, liability was imposed upon him by operation of law with the consequence of the Rome II Regulation being applicable.[161] Given the result of the pretend-

155 *Bach*, in: Peter Huber, Art. 1 note 24.

156 *Behnen,* IPRax 2011, 221 (225).

157 *Contra Behnen,* IPRax 2011, 221 (225).

158 But cf. *Spellenberg*, in: Münchener Kommentar BGB, Vor Art. 11 EGBGB note 165.

159 In particular *Hausmann*, in: Reithmann/Martiny, Internationales Vertragsrecht (7th ed. 2010) para. 5507 and as a starting point *Ruthig,* Vollmacht und Rechtsschein im IPR (1996) pp. 154 *et seq*.

160 To this avail BGHZ 43, 21 (27); BGH, WM 1968, 440; BGH, NJW 2007, 1529 (1530); OLG Hamburg, IPRspr. 1931 Nr. 29; KG IPRspr. 1932 Nr. 25; OLG Hamm, IPRspr. 1956/57 Nr. 27; OLG Köln, IPRspr. 1966/67 Nr. 25; OLG Düsseldorf MDR 1978, 930; OLG Karlsruhe IPRax 1987, 257 (thereon *Weitnauer,* IPRax 1987, 221); KG IPRax 1998, 280 (thereon *Leible,* IPRax 1998, 257); OLG Hamm RIW 2003, 305; but compare BGH NJW-RR 1990, 250; OLG Düsseldorf MDR 1978, 440; OLG München IPRspr. 2008 Nr. 13; OLG Hamburg NJW-RR 2009, 988; OLG Celle OLGR Braunschweig/Celle/Oldenburg 2009, 720.

161 *Bach,* IPRax 2011, 116 (118); *Bach*, in: Peter Huber, Art. 1 note 24.

ing agent's activity, namely the contract, it is then argued that Art. 12 (1) should apply.[162] The problem with this reasoning is that Art. 7 Proposal Rome I Regulation[163] expressly contained a solution for apparent authority and would have subjected it to the contractual realm if it had succeeded. Now it did not succeed, but failed after severe criticism[164]. The issue was left open and thus tentatively submitted to national conflict rules although the Rome II Regulation was already in the making. This indicates that the European legislature rather did not believe in the Rome II Regulation covering the issue.[165]

ee) *Rei vindicatio* and consequential claims: the frontier to property law

Art. 1 (2) does not contain a specific exclusion to matters of property law. Hence, no specific guidance is provided as to where to draw the borderline between the Rome II Regulation and property law. The answer might be predetermined on grounds of competence under EU primary law.[166] Property law is a residual area for which the Member States retained exclusive competence by virtue of Art. 345 TFEU (ex-Art. 295 EC Treaty). Hence, the then EC would have overstepped its competence insofar as the Rome II Regulation extended its scope to property law. The EU has deliberately refrained from even ruminating about unifying and harmonising the PIL of property law. **55**

Vindicatory claims, the *vindicatio rei,* can be said to fall in the scope of Art. 7 (2) Brussels I*bis* Regulation, though.[167] Accordingly, claims for removal flowing from the ownership of a good can in some instances be characterised as tortious under Art. 7 (2) Brussels I*bis* Regulation.[168] Particularly, to countries outside the Roman law tradition, such as Sweden, it could appear attractive to subject the *vindicatio rei* to the realm of non-contractual obligations.[169] The same applies *a maiore ad minus* to claims based in conversion by the standards of English law possibly irrespective of the inclusion or non-inclusion of the *vindicatio rei* as such in the Rome II Regulation.[170] However, the remedy which is granted if the claim is upheld should not demarcate any decisive difference.[171] **56**

Ownership is an incidental question. The Rome II Regulation does not provide for an answer to the question who is owner of a certain property since it (like all other Acts of European PIL) refrain from establishing rules in the field of the PIL of property. Accord- **57**

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162 *Bach,* IPRax 2011, 116 (118–119).

163 COM (2005) 650 final.

164 In particular *Mankowski,* IPRax 2006, 101 (108–109); *Spellenberg*, in: Ferrari/Leible (Hrsg.), Ein neues Internationales Vertragsrecht für Europa, 2007, S. 151; Max Planck Institute for Comparative and Private International Law, RabelsZ 71 (2007), 225 (298–301); *Simon Schwarz,* RabelsZ 71 (2007), 729 (746–774).

165 *Spellenberg*, in: Münchener Kommentar BGB, Vor Art. 11 EGBGB note 136.

166 Compare *Dickinson,* para. 3.91.

167 *Guus E. Schmidt,* NIPR 2004, 296, 298; *Mankowski*, in: Magnus/Mankowski, Art. 7 Brussels Ibis Regulation note 246. *Contra* Rb. Breda, NIPR 1991 Nr. 158.

168 *Kindler*, in: FS Peter Ulmer (2003), p. 305, 318; *Hüßtege*, in: Thomas/Putzo, ZPO (37th ed. 2018) Art. 7 EuGVVO note 10; *Mankowski*, in: Magnus/Mankowski, Art. 7 Brussels Ibis Regulation note 246.

169 Note by the Swedish Delegation to the Commission, Doc. 9009/04 Add 8 p. 3 (18 May 2004), which advocated an express exclusion of property rights and which evidently did not succeed.

170 *Dickinson,* para. 3.95; *Briggs,* Private International Law in English Courts (2014) para. 8.47.

171 *Briggs,* Private International Law in English Courts (2014) para. 8.47. Tentatively *contra Dickinson,* para. 3.95.

ingly, incidental questions as to ownership must be answered *via* the PIL of the *forum*.[172] This comprises the person of the owner and the content and the limits of ownership. Questions of title are outside the ambition of the Rome II Regulation which does not contain a rule specifically devoted to answer such questions.[173] The Rome II Regulation is concerned with establishing the defendant's responsibility for conduct or another event, not with status and consequentially the assertion by the claimant of his proprietary entitlement to a thing.[174]

58 Consequential and secondary claims to a *rei vindicatio*, be it the owner's claims for damages against the possessor, be it the possessor's claims for reimbursement against the owner, are indubitably non-contractual. They might relate to the *rei vindicatio* but gather such a degree of independence once they are in existence that it appears justified to subject them to the Rome II Regulation. For instance, if the possessor claims for reimbursement of the costs which he has incurred for maintaining the *res*, this does not flow from the owner's property. Generally, any claims by the possessor against the owner fall under the Rome II Regulation. That might give raise to a right of retention on the possessor's side against the owner's *rei vindicatio* does not make them a matter of property just as a right of retention could be based on a contractual counter-claim.

59 Extrinsic interference with the substance of property is a different treat anyway. Destroying or damaging a chattel which is owned by someone else is the proverbial tort. If this was not a tort, almost nothing would qualify as a tort. Hence, such extrinsic interference ought to be characterised as non-contractual.[175] The Member States' exclusive competence to regulate questions of property law and title under Art. 345 TFEU (ex-Art. 295 EC Treaty)[176] does not extend to an exclusive competence for shaping PIL rules related to the protection of titles so granted.[177] Interference necessarily can only be at stake where a right to be possibly interfered with, really exists and thus raises an incidental question about the existence, incidents, nature, construction, content, and reach of that independently existing right.[178] It might be useful to keep in mind, as some guidance for the line of delineation, the distinction[179] between rights *in rem* and claims *in personam* arising from the interference with such rights as it is prevalent under Art. 24 (1) Brussels I*bis* Regulation and its predecessors, Arts. 16 (1) Brussels Convention; 22 (1) Brussels I Regulation.[180]

60 Nuisance has been held to be tortious for the purposes of Art. 5 (3) Brussels I Regulation.[181] The same should apply to trespass. Likewise, they should carry a characterisation as torts

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172 *Ansgar Staudinger,* NJW 2011, 650 (651); *Knöfel*, in: Nomos Kommentar BGB, Art. 1 Rome II-VO note 6.

173 *Dickinson,* paras. 3.88–3.89; *Bach*, in: Peter Huber, Art. 1 note 26.

174 *Dickinson,* para. 3.95.

175 *Bach*, in: Peter Huber, Art. 1 note 26; *Wurmnest*, in: jurisPK BGB, Art. 1 note 30.

176 Thereon e.g. *Akkermans/Ramaekers,* (2010) 16 Eur. L.J. 292.

177 *Dickinson,* para. 3.91.

178 See *Andrew Scott*, in: Ahern/Binchy (eds.), The Rome II Regulation on the Law Applicable to Non-Contractual Obligations (2009), p. 57, 73.

179 Thereon e.g. de *Lima Pinheiro*, in: Magnus/Mankowski, Art. 24 Brussels Ibis Regulation notes 26–27; *Mankowski*, in: Rauscher, EuZPR/EuIPR, vol. 1 (4th ed. 2015) Art. 24 Brüssel I-VO notes 12–25.

180 *Dickinson,* paras. 3.97–3.100.

181 *Land Oberösterreich v. ČEZ as* (Case C-343/04), [2006] ECR I-4557 para. 34.

and thus non-contractual for the purposes of the Rome II Regulation.[182] But for the sake of precaution it ought to be emphasised that such classification ought to be derived from a functional evaluation not from the laws of some Member States providing for special torts of that name.

ff) Actio pauliana

An *actio pauliana* entitles a creditor to set aside his debtor's transfer of property to a third party if certain preconditions are met. The *actio pauliana* is not directed against the original creditor and transferor, but against the third party, the transferee. The action might succeed irrespective of whether the transferee acted in bad faith. This could carry a conclusion that an *actio pauliana* does not seek to establish the liability of a defendant.[183] Such reasoning, developed to demarcate the borderline between then Arts. 5 (1) and (3) Brussels Convention,[184] could indicate that the Rome II Regulation does not govern *actiones paulianae*.[185] Yet it fits ill with the Rome II Regulation generally covering liability regardless whether the debtor of an obligation acted with fault or not, and stretching to strict liability, too.[186] Tort must not be equated with *culpa* and fault-based liability. Furthermore, what if the success of the *actio pauliana* depends on the transferee having acted in concert with the transferor or having been in a position that he could have known of the transferor diminishes the funds from which the creditor could recover? The alternative to applying the Rome II Regulation[187] would be to have recourse to the national PIL of the *forum*, for instance § 19 AnfG in Germany.[188] **61**

The case is clear-cut with a different result, anyway, if the *actio pauliana* arises in an insolvency context: Under these auspices, the *actio pauliana* is to be characterised as an insolvency matter and falls under the Insolvency Regulation, not under the Rome II Regulation. Arts. 4 (2) (m); 13 Insolvency Regulation 2000 and Arts. 7 (2) (m); 16 Insolvency Regulation 2015 are unambiguous in this regard for their very existence indicates the claim and ambition of the Insolvency Regulation to govern the matter. The yardsticks developed with regard to the Insolvency Regulation have to be applied to answer the question whether an insolvency context is present or not. Insofar the Insolvency Regulation ought to be treated as some kind of *lex specialis*. **62**

gg) *Vertrag mit Schutzwirkung für Dritte* (Contract with protective effect for third parties)

The so called *Vertrag mit Schutzwirkung für Dritte* has been developed in order to overcome and to shortcut certain deficiencies in particular of German and Austrian (but also of Swiss and Estonian) tort law.[189] The instrument chosen is contractual by name only, namely to **63**

182 *Bach*, in: Peter Huber, Art. 1 note 27.

183 *Mario Reichert et al. v. Dresdner Bank AG*, (Case C-261/90) [1992] ECR I-2149 paras. 19–20.

184 *Mario Reichert et al. v. Dresdner Bank AG*, (Case C-261/90) [1992] ECR I-2149 para. 19–20.

185 *Junker*, in: Münchener Kommentar BGB, Art. 1 Rome II Regulation notes 19–20; *Bach*, in: Peter Huber, Art. 1 note 28. *Contra Dickinson* paras. 3.249–250.

186 See *Halfmeier*, in: Calliess, Art. 1 note 41.

187 For an application of the Rome II Regulation *Halfmeier*, in: Calliess, Art. 1 note 41.

188 *Hohloch,* IPRax 2012, 110 (112); *Knöfel*, in: Nomos Kommentar BGB, Art. 1 Rome II-VO note 5.

189 See only monographically *Henning Dahm,* Die dogmatische Grundlagen und tatbestandlichen Voraussetzungen des Vertrages mit Schutzwirkung für Dritte (1988); *Dammann,* Die Einbeziehung Dritter in

extend protective effects of a contract to a third party if and insofar that third party is close to the obligations under the contract and if and insofar as one of the contracting parties has to take care for that third party's respective interests, too.[190] Since characterisation under autonomous European yardsticks is independent from characterisation under a particular national law, but has to look at functionalities not at denominations, the *Vertrag mit Schutzwirkung für Dritte* is subject to the Rome II Regulation.[191] Only the incidental question whether a contract exists should be subject to the Rome I Regulation.[192] The *Vertrag mit Schutzwirkung für Dritte* has to be clearly distinguished from the *Vertrag zugunsten Dritter* (contract to the benefit of a third party), the latter being wholly contractual by nature and thus a matter for the Rome I Regulation.[193]

hh) Liability of experts towards third parties

64 The liability of experts towards third parties is a non-contractual issue, too.[194] Third parties rely upon the expert opinion issued by the expert without being having direct contractual ties with the expert. The expert might know that his contractual partner (if there is any) will present his expert opinion to third parties, but that does incise him to freely incur liability towards those parties. The expert's liability should be governed by the general rules, in particular absent a parties' choice of law by Art. 4,[195] not by Art. 12

die Schutzwirkung eines Vertrages (1990); *van Eickels,* Die Drittschutzwirkung von Verträgen (2005); *Liebmann,* Der Vertrag mit Schutzwirkung zugunsten Dritter (2006); *Papadimitropoulos,* Schuldverhältnisse mit Schutzwirkung zu Gunsten Dritter (2007); *Lakenberg,* Kinder, Kranke, Küchenhilfen – Wie das Reichsgericht nach 1900 die Schutzwirkung von Verträgen zugunsten Dritter erweiterte (2014) and *Zenner,* NJW 2009, 1030; *Gottwald*, in: Münchener Kommentar zum BGB, vol. 2 (7th ed. 2016) § 328 BGB note 161; *Klumpp*, in: Staudinger, BGB, §§ 328–345 BGB (2015) § 328 BGB note 91; *Grüneberg*, in: Palandt, § 328 BGB note 13.

190 See in German law recently only BGHZ 133, 168; BGH, NJW 2001, 3115; BGHZ 200, 188; BGH, NJW 2014, 2345; BGH NJW 2014, 3580; BGH NJW 2015, 1098; OLG Hamm, NJW-RR 2013, 267; OLG Hamm, NJW-RR 2013, 1522.

191 *Dutta,* IPRax 2009, 293 (294–297); *Martiny*, in: FS Reinhold Geimer (2002), p. 641, 663; *Martiny*, in: FS Ulrich Magnus (2014), p. 483, 491–492; *Martiny*, in: Münchener Kommentar zum BGB, Art. 11 Rom I-VO Rn. 9; *von Hein*, in: Rauscher, Art. 1 Rom I-VO Rn. 10; *Freitag*, in: Rauscher, Art. 12 Rom II-VO notes 4, 20; *David Paulus,* Außervertragliche Gesellschafter- und Organwalterhaftung im Lichte des Unionskollisionsrechts (2013) para. 483; *Wurmnest*, in: juris PK BGB, Art. 1 Rom II-VO note 29. *Contra Spellenberg*, in: Münchener Kommentar BGB, Art. 12 Rom I-VO note 63; *Knöfel*, in: Nomos Kommentar BGB, Art. 1 Rome II-VO note 4. In favour of a non-contractual characterisation also under the IPRG OGH IPRax 1988, 363 (364); OGH, IPRax 2009, 354 (355–356); *contra* under the EGBGB OLG Hamburg, VersR 1983, 350 (351); OLG Köln, ZIP 1993, 1538 (1539).

192 *Dutta,* IPRax 2009, 293 (294–297); *Martiny*, in: FS Ulrich Magnus (2014), p. 483, 491–492; *Wurmnest*, in: juris PK BGB, Art. 1 Rom II-VO note 29.

193 *Mankowski,* IPRax 1996, 427 (428–429); *Mankowski*, in: FS Stanisława Kalus (2010), p. 287, 298; *Magnus*, in: Staudinger, BGB, Artt. 11–29 Rom I-VO (2011) Art. 12 Rom I-VO note 37; *Martiny*, in: FS Ulrich Magnus (2014), p. 483, 491; *Spellenberg*, in: Münchener Kommentar BGB, Art. 12 Rom I-VO note 63.

194 *Schinkels,* JZ 2008, 272 (279–280); *Mankowski*, in: FS Stanisława Kalus (2010), p. 287, 298; *Martiny*, in: FS Ulrich Magnus (2014), p. 483, 492; *Wurmnest*, in: juris PK BGB, Art. 1 Rom II-VO note 30; *Halfmeier*, in: Calliess, Art. 1 note 35. *Contra Sprenger,* Internationale Expertenhaftung (2009) pp. 115–116.

195 *Martiny*, in: FS Ulrich Magnus (2014), p. 483, 492; *Wurmnest*, in: juris PK BGB, Art. 1 Rom II-VO note 30.

(1).[196] One must not resort to the (somewhat) arbitrary construction of a hypothetic contract.[197]

ii) Third Party Legal Opinions or Fairness Opinions issued by lawyers

Third Party Legal Opinions (also called Fairness Opinions) issued by lawyers are commonplace in transactions above a certain level on the balance sheet. In particular they have flourished in complex M&A transactions. A client asks a lawyer to provide an opinion about the content, the features and the inherent risks of a projected transaction. The Legal Opinion is not only to reassure the client (insofar it is definitely contractual and subject to the *lex causae* of the contract between lawyer and client[198]), but is aimed at being presented to the counterparty of the transaction. The *lex causae* of the contract between client and lawyers decides whether the contract gives the third party a direct claim in contract against the lawyer or whether it exerts protective effects in the third party's favour.[199] **65**

If the answer is to the negative, the lawyer's liability towards the third party is non-contractual in nature[200] for the lawyer lacks direct contact with the third party. Regularly he does not give a freely assumed promise to the third party. If he exceptionally does or if the Legal Opinion is ordered directly by the counter-party, the lawyer's liability towards the counterparty is a contractual one.[201] The same applies with regard to so called Fairness Opinions[202].[203] **66**

jj) Direct liability in chains of contracts

In chains of contracts, some legal orders provide for direct liability of a party to one contract in such chain towards a party to another contract in that very chain. The most prominent example is provided by French law giving the principal a direct claim against a sub-contractor. Generally, it does not suffice if either party freely agreed to an obligation with a third party.[204] Privity of contract is a fundamental feature of contract law. **67**

196 But cf. *Schinkels,* JZ 2008, 272, 279.

197 *Mankowski*, in: FS Stanisława Kalus (2010), p. 287, 299. *Contra Schinkels,* JZ 2008, 272, 279; *Schinkels*, in: Calliess, Art. 12 Rome II-VO note 26.

198 *Adolff*, Die zivilrechtliche Verantwortlichkeit deutscher Anwälte bei der Abgabe von Third Party Legal Opinions (1997) p. 197; *Knöfel*, JuS 2008, 708, 710; *Mankowski/Knöfel*, in: Reithmann/Martiny, Internationales Vertragsrecht (8th ed. 2015) para. 6.703.

199 *Mankowski/Knöfel*, in: Reithmann/Martiny, Internationales Vertragsrecht (8th ed. 2015) para. 6.704.

200 *Nickl,* Die Qualifikation der culpa in contrahendo im Internationalen Privatrecht (1992) pp. 224–225; *Egerer,* Konsensprobleme im internationalen Schuldvertragsrecht (1994) p. 237; *Bertschinger*, in: Nobel (ed.), Aktuelle rechtspolitische Probleme des Finanz- und Börsenplatzes Schweiz (1999), p. 87, 114; *Mankowski,* CR 1999, 512 (520); see also Hof 's-Hertogenbosch, NIPR 1998 Nr. 225 p. 267; *Reder,* Die Eigenhaftung vertragsfremder Dritter im internationalen Privatrecht (1989) pp. 149–176; *Adolff,* Die zivilrechtliche Verantwortlichkeit deutscher Anwälte bei der Abgabe von Third Party Legal Opinions (1997) p. 203; *Mankowski/Knöfel*, in: Reithmann/Martiny, Internationales Vertragsrecht (8th ed. 2015) para. 6.705.

201 *Mankowski/Knöfel*, in: Reithmann/Martiny, Internationales Vertragsrecht (8th ed. 2015) para. 6.704.

202 On these *Davidoff*, 55 Am. U. L. Rev. 1557 (2006); *Essler/Lobe/Röder*, Fairness Opinions (2008); *Harrer/Devlin*, (2008) 23 JIBLR 603.

203 *Mankowski*, in: Reithmann/Martiny, Internationales Vertragsrecht (7th ed. 2010) para. 1436.

204 *Matthias Lehmann*, in: Dickinson/Lein, The Brussels I Regulation Recast (2015) para. 4.37.

(1) Sub-buyer vs. manufacturer

68 The general principle for an outset may be described as follows borrowing yet again from the case law developed with regard to Art. 5 (1) and (3) Brussels Convention/Brussels I Regulation: Where a sub-buyer of goods purchased from an intermediate seller brings an action against the manufacturer for damages on the ground that the goods are not in conformity, no contractual relationship between the sub-buyer and the manufacturer exists because the latter has neither undertaken or else freely assumed any obligation against the former.[205] It is immaterial whether the substantive law of the *forum* (be it the applicable substantive law or not) qualifies product liability as contractual[206] since the meaning of "contract" under (1) must be an independent and autonomous one. Legal certainty and predictability demand that the manufacturer or any previous seller must neither be confronted with a writ by a person personally unknown to him in the contractual *forum destinatae solutionis*[207] nor with a claim under a law to which he does not have established relations. *Pacta tertiis nec nocent nec prosunt* appears to be the appropriate adage.[208]

69 Additionally, in a chain of contracts, the parties' contractual rights and obligations may vary from contract to contract so that the contractual rights a buyer can enforce against his immediate seller will not necessarily be identical with, and equal to, the rights which the seller can exercise against his own seller or the rights which the manufacturer will have accepted in his relationship with the first buyer/re-seller.[209] A chain of contract does not overcome the principle of privity of contract. There are contractual relations in it, but only relatively between the respective parts of the chain, not directly between all and every parts of the chain.[210]

(2) Sous-traitance

70 French law particularly protects subcontractors[211] and grants them direct claims against the principal under the main contract. In PIL, it is a matter of intense discussion whether the *lex causae* of the main contract[212] or the *lex causae* of the sub-contract[213] or both cumulatively[214] apply and the former should decide about any direct claim or whether Art. 9 Rome I Regulation applies since the respective rules ought to be characterised as internationally

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205 *Jakob Handte & Co. GmbH v. Traitements Mécano-chimiques des surfaces SA*, (Case C-26/91) [1992] ECR I-3967, I-3994 *et seq*. para. 16; *Béraudo,* Clunet 128 (2001), 1033, 1041.

206 Wrongly decided by Cass. RCDIP 76 (1987), 612 with note *Gaudemet-Tallon*. But correctly Cass. DMF 1995, 283, 286 with note *Tassel*.

207 *Jakob Handte & Co. GmbH v. Traitements Mécano-chimiques des surfaces SA*, (Case C-26/91) [1992] ECR I-3967, I-3995 para. 19.

208 *Franzina,* Riv. dir. int. 2003, 714, 727.

209 *Jakob Handte & Co. GmbH v. Traitements Mécano-chimiques des surfaces SA*, (Case C-26/91) [1992] ECR I-3967, I-3995 para. 17.

210 A-G *Szpunar,* Opinion in Case C-375/13 of 3 September 2014, ECLI:EU:C:2014:2135 paras. 51–52.

211 Loi n° 75–1334 du 31 décembre relative à la sous-traitance, JO de 3 janvier 1976.

212 To this avail *Heuzé,* RCDIP 85 (1996), 243, 258; *Pulkowski,* Subunternehmer und internationales Privatrecht (2004) pp. 229 *et seq*.; *Bauerreis,* ZEuP 2001, 406 (411–412).

213 To this avail *Piroddi,* YbPIL 7 (2005), 289, 322; *Hök,* Handbuch des internationalen und ausländischen Baurechts (2nd ed. 2012) § 14 notes 11 *et seq*.

214 To this avail *Beemelmans,* RabelsZ 20 (1965), 511, 537-538; *Jayme,* in: FS Klemens Pleyer (1986), p. 371, 378.

mandatory, as *Eingriffsnormen*.[215] A further option would let the *lex causae* of the subcontract decide whether a direct claim exists, and the *lex causae* of the main contract govern the extent of the principal's liability.[216] But for once it appears safe to assert that a non-contractual characterisation is not amongst the contestants in the arena.

(3) Sender vs. actual carrier

In German law § 437 HGB constitutes a direct claim by the sender against the actual carrier[217]. Between these two parties, there is not any contractual bond. As to characterisation the choice is between applicability of the Rome I or the Rome II Regulation.[218] Alternative classifications as quasi-contractual[219] or similar to a contract[220] would leave the eventual result in doubt without further considerations being added.[221] When applying the Rome II Regulation, sometimes Art. 12 (1) Rome II Regulation is proposed as an option,[222] though rather not *per analogiam*.[223] But the ordinary approach under the Rome II Regulation should lead to Art. 4,[224] and more specifically to an *akzessorische Anknüpfung* (accessory connection) to the law applicable to the main contract of carriage under Art. 4 (3) 2nd sentence.[225] Neither Arts. 15; 16 Rome I Regulation nor Arts. 19; 20 Rome II Regulation extend any helping hand in this regard.[226] **71**

215 To this avail Cass. Clunet 135 (2008), 1073 Anm. *Perreau-Saussine*; *Niggemann,* IPRax 2009, 444; see also Cass. RCDIP 100 (2011), 624 rapport *Maitrepierre* with note *Marie-Élodie Ancel*; *Piroddi,* YbPIL 10 (2008), 593; *Kondring,* RIW 2009, 118; *Bauerreis,* ZEuP 2011, 406. *Contra Hauser,* IPRax 2015, 182 (184–185).

216 To this avail Cass. RCDIP 82 (1993), 46 note *Muir Watt*; *Lagarde*, in: Gavalda (dir.), La sous-traitance de marchés de travaux et de service (1978), p. 186, 191–192, 197; *Vischer/Lucius Huber/Oser,* Internationales Vertragsrecht (2nd ed. Bern 2000) para. 523.

217 On this under German law *Susanne Knöfel*, in: FG Rolf Herber (1999), p. 96; *Ramming*, TranspR 2000, 277; *Ramming*, VersR 2007, 1190; *Ramming*, RdTW 2013, 81.

218 Favouring the latter *Ramming*, TranspR 2000, 277 (294–296); *Ramming*, VersR 2007, 1190; *Czerwenka*, NJW 2006, 1250, 1251-1252; *Czerwenka*, TranspR 2012, 408 (409–413); *Häußer*, Subunternehmer beim Seetransport (2006) pp. 88–89; *Herber*, in: Münchener Kommentar zum HGB, vol. 7: §§ 407–619 HGB (3rd ed. 2014), § 437 HGB note 51.

219 To this avail *Thume*, VersR 2000, 1071; *Fremuth*, in: Fremuth/Thume, Kommentar zum Transportrecht (2000), § 437 HGB notes 20–21; *Herber*, in: Münchener Kommentar zum HGB, vol. 7: §§ 407–619 HGB (3rd ed. 2014), § 437 HGB notes 51–52.

220 To this avail *Schaffert*, in: Ebenroth/Boujong/Joost/Strohn, HGB (3rd ed. 2015) § 437 HGB note. 4; *Koller*, Transportrecht (9th ed. 2017) § 437 HGB notes 9, 48.

221 *Mankowski,* TranspR 2016, 131 (132). Tentatively *contra Hartenstein*, in: Kuhlen/Egon Lorenz/Riedel/Carsten Schäfer/Patrick Schmidt/Günther Wiese (eds.), Probleme des Binnenschifffahrtsrechts XIII (2013), p. 55, 85–86: *akzessorische Anknüpfung* to the law applicable to the contract of carriage to which the actual carrier is a party.

222 *Patrick Schmidt*, in: Staub, HGB, vol 12/2: §§ 407–424; 436–442 HGB (5th ed. 2014), § 437 HGB note. 71; see also *Koller*, Transportrecht (8th ed. 2013) § 437 HGB note 48.

223 *Czerwenka,* TranspR 2012, 407 (410–411); *Martiny*, in: FS Ulrich Magnus (2014), p. 483, 499. *Contra Patrick Schmidt*, in: Staub, HGB, vol. 12/2: §§ 407–424; 436–442 HGB (5th ed. 2014) § 437 HGB note 71.

224 *Czerwenka,* TranspR 2012, 407 (410–411); *Ramming,* RdTW 2013, 81, 82; *Ramming,* RdTW 2014, 421, 435.

225 *Mankowski,* TranspR 2016, 131 (134–135).

226 *Mankowski,* TranspR 2016, 131 (135).

72 To construe a statutory subrogation[227] or some kind of statutory guarantee[228] indicates the way to a solution but does not directly carry such solution. The relatively most convincing solution is a classification as non-contractual for the claim is not related to the main contract of carriage between sender and contractual carrier, but is directed against the actual carrier.[229] On the other hand, it would not suffice *per se* that the claim is founded in a statutory rule.[230] The decisive element is that the actual carrier does not submit voluntarily to any obligation but that such obligation is coerced upon him by force of law. Hence, the autonomous notion of contract[231] is not fulfilled.[232] Furthermore, direct claims in chains of contracts have been classified consistently as non-contractual for the purposes of the Brussels I regime[233] which ought to be respected for the purposes of the Rome II Regulation due to the latter's Recital (7).[234] Ascertaining a non-contractual classification keeps harmony in line with the CMNI and uniform law, too.[235]

kk) Effects of contract clauses on non-contractual liability

73 In a number of instances contract clauses might intend to exert influence on non-contractual liability. The first level might be that of conflict of laws. Choice of law clauses might be phrased broadly enough as to be able to cover not only the contractual, but also the non-contractual relationships between the contracting parties. If they cover all claims "arising out of the contract", "arising in connection with the contract" or "arising out of the relationship between the parties, they are wide enough in principle.[236] But such attempt at a choice of law does not alter the yardsticks and the results of characterisation. A non-contractual claim retains its non-contractual character.

74 Consequentially, Art. 14 Rome II Regulation applies to it, not Art. 3 Rome I Regulation as far as a direct Regulation of party autonomy is at stake. Only the accessory connection by virtue of Art. 4 (3) 2nd sentence Rome II Regulation opens a backdoor and invites contractual party

227 Begründung der Bundesregierung zum Entwurf eines Gesetzes zur Reform des Transportrechts, BT-Drucks. 13/8445, p. 74; *Susanne Knöfel*, FG Rolf Herber (1999), S. 96, 97.

228 So OLG Köln, VersR 2007, 1149.

229 *Czerwenka*, TranspR 2012, 408 (410); *Mankowski*, in: Reithmann/Martiny, Internationales Vertragsrecht (8th ed. 2015) para. 6.1918; *Mankowski,* TranspR 2016, 131 (134).

230 *Mankowski*, in: Reithmann/Martiny, Internationales Vertragsrecht (8th ed. 2015) para. 6.1918. But cf. *Herber*, TranspR 2014, 42, 43.

231 *Supra* Art. 1 note 35 with extensive references.

232 *Mankowski,* TranspR 2016, 131 (133).

233 *Jakob Handte & Co. GmbH/Traitements Mécano-chimiques des surfaces SA* (Case C-26/91), [1992] ECR I-3967, I-3995 paras. 16–19; *Refcomp SpA/Axa Corporate Solutions Assurance SA* (Case C-543/10), ECLI:EU:2013:62 para. 41.

234 *Czerwenka*, TranspR 2012, 408 (410–411); *Hartenstein*, in: Kuhlen/Egon Lorenz/Riedel/Carsten Schäfer/Patrick Schmidt/Günther Wiese (eds.), Probleme des Binnenschifffahrtsrechts XIII (2013), p. 55, 83; *Mankowski,* TranspR 2016 sub II 1 b.

235 *Hartenstein*, in: Kuhlen/Egon Lorenz/Riedel/Carsten Schäfer/Patrick Schmidt/Günther Wiese (eds.), Probleme des Binnenschifffahrtsrechts XIII (2013), p. 55, 86.

236 *Mankowski*, in: FS Dieter Martiny (2014), p. 449, 469 with reference to *The "Playa Larga"* [1983] 2 Lloyd's Rep. 171 (C.A.); *Continental Bank NA v. Aeakos Compania Naviera SA* [199] 1 WLR 588 (C.A.); *Government of Gibraltar v. Kenney* [1956] 2 QB 410, 422 (Q.B.D.).

autonomy in indirectly,[237] but only if the non-contractual claim concurs with a contractual one, not if the non-contractual claims stems from a source independent of the contract.[238] In principle, the claim in tort remains a claim in tort subject to the Rome II Regulation, and the question as to which effect the contractual stipulation on it must be answered by the law applicable in tort; there is only one incidental question to be answered by the *lex contractus* namely whether the contractual stipulation as such is consented and valid.[239]

The second level of possible effects of contract clauses is substantive law. A contracting party might cater for the liability of its auxiliary personnel or its sub-contractors towards the other contracting party. In most instances the motivation for this is not altruistic at all but rather egotistic and self-serving: to avoid own liability indirectly which would otherwise be incurring by the other contracting party approaching the auxiliary personnel or the sub-contractor and the latter taking redress against the first contracting party. The most prominent example for such contract clauses are so called Himalaya clauses[240] in international shipping extending exemptions from liability as benefit the carrier to stevedores.[241] **75**

d) No transfer of the second limb *Kalfelis* approach from the Brussels I regime

Kalfelis established a test with two elements. So far, only the first limb has been discussed, the non-*contractual* obligation. But there is the second limb: that the claim in order to fall under Art. 7 (2) Brussels I*bis* Regulation must be a claim for liability and damages against the debtor. Furthermore, it must be borne in mind that the *Kalfelis* test was developed with the aim to distinguish the substantive scopes of application of then Art. 5 (1) and Art. 5 (3) Brussels Convention from each other. Yet Art. 5 (3) Brussels Convention and its successors, Art. 5 (3) Brussels I Regulation and Art. 7 (2) Brussels I*bis* Regulation, do not cover all kinds of non-contractual obligations, but only torts, delicts and quasi-delicts. Their wording does not utter a single word about unjust enrichment, *negotiorum gestio* or *culpa in contrahendo*, in quite a contrast to Art. 2 Rome II Regulation. Hence, *Kalfelis* sets out to circumscribe 'tort' and not the wider notion of 'non-contractual obligation'. Insofar *Kalfelis* has been decided on a differing basis, and its second limb may not be transferred to the realm of the Rome II Regulation.[242] **76**

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237 *Mankowski*, in: FS Dieter Martiny (2014), p. 449, 469.

238 *Mankowski*, in: FS Dieter Martiny (2014), p. 449, 469–470.

239 *Delechaux,* Die Anknüpfung der Obligationen aus Delikt und Quasi-Delikt im internationalen Privatrecht (1960) p. 200; *Kahn-Freund,* RdC 124 (1968 II), 1, 142–143; *Rolf Birk,* Schadensersatz und sonstige Restitutionsformen im internationalen Privatrecht (1969) pp. 28–31; *North,* (1977) 26 ICLQ 914, 931; *Gisela Brandt,* Die Sonderanknüpfung im internationalen Deliktsrecht (1993) p. 89; *Mankowski,* TranspR 1996, 10 (13); *Mankowski,* IPRax 1998, 214 (219). *Contra* (applying the *lex delicti*) *Dubbink,* De onrechtmatige daad in het Nederlands internationaal privaatrecht (1947) pp. 125–126; *Boure,* Les conflits de lois en matière d'obligations extracontractuelles (1961) p. 260 and (cumulating *lex contractus* and *lex delicti*) *Drion,* Limitation of Liabilities in International Air Law (1954) p. 276.

240 Named after *Adler v. Dickson (The "Himalaya")* [1955] 1 QB 158, [1954] 2 Lloyd's Rep. 267 (C.A.).

241 See only *The "Pioneer Container"* [1994] 2 AC 324 (H.L.); *The "Mahkutai"* [1996] AC 650 (P.C.); *Tettenborn,* (1994) 53 Cambridge L.J. 440; *Reynolds,* (1995) 111 LQRev. 8; *Bell,* [1995] LMCLQ 177; *Toh Kian Sing,* [1995] LMCLQ 183; *Phang,* (1995) 58 Mod. L.Rev. 422; *Devonshire,* [1996] JBL 329; *MacMillan,* [1997] LMCLQ 1; *Mankowski,* IPRax 1998, 214; *Corcione,* ETL 2014, 271.

242 Imprecise also *Crespi Reghizzi,* RDIPP 2012, 317, 325 who describes the core distinction as being between "contratto" and "illecito".

77 For instance, Art. 7 (2) Brussels I*bis* Regulation can be said to apply to claims founded in *negotiorum gestio* since it can be surmised that either the principal or the *gestor* suffers disadvantages[243] this is of limited relevance only: Only claims for damages under this heading would be covered whereas claims for compensation or remuneration would not.[244]

II. Specific exclusions, (2)

1. Generalities

78 (2) contains a list of named exclusions of specific areas. These areas do not have a common denominator. The single exclusions stem from different policies and sometimes even from different politics. They have in common that all of them relate to non-contractual obligations only which is made clear as each and every exclusion commences with "non-contractual obligations". In general, one could deduct that from the general limitation of the scope of the Rome II Regulation to non-contractual obligations already.[245] But to start seven times with "non-contractual obligations arising out of" makes for a nice compositional element, a kind of recurring melody.

79 The basic idea underlying most of the exclusions is sound: Insofar as non-contractual obligations come into existence in the vicinity of, and in connection with, a special relationship the law governing that special relationship should also govern the ensuing on-contractual obligation. Where those involved in the non-contractual obligation had legally relevant previous ties, the rule governing that previously established relationship, i.e. the underlying *lex causae*, should govern matters directly.[246] This *rationale* applies to (2) (a)–(e). Litt. (f) and (g) cannot be based on this idea but pursue their own agenda respectively. It was even argued that the main body of exceptions, now (2) (a)–(e) could be abandoned since the result intended could be reached (and positively and directly at that, not only negatively and indirectly as by way of an exception) by an *akzessorische Anknüpfung* by virtue of now Arts. 4 (3) 2nd sentence; 5 (2) 2nd sentence; 6 (2); 10 (1); 11 (1).[247]

80 The progeny of the different exceptions is equally different. The first and most numerous group of them draws its inspiration from parallel exclusions in the Rome Convention (which in turn to a certain extent copied the Brussels Convention). A second group assembles slightly adopted exclusions from the vicinity of the Rome Convention. The third group consists of particularities to be found only here. It has its founding in political (rather than policy) considerations. The first group features litt. a, b, c, the second litt. d and e, and the third litt. f and g. The first and second groups were considered as rather technical matters and proved to be uncontroversial. But lit. g stirred the utmost controversy and almost

243 See in more detail *Uhl,* Internationale Zuständigkeit gemäß Art. 5 Nr. 3 des Brüsseler und Lugano-Übereinkommens, ausgeführt am Beispiel der Produktehaftung unter Berücksichtigung des deutschen, englischen, schweizerischen und US-amerikanischen Rechts (2000) pp. 126 *et seq*.

244 OLG Köln IPRax 2011, 174 (175); *Dutta,* IPRax 2011, 134 (137); *Looschelders,* IPRax 2014, 406 (407); *Mankowski*, in: Magnus/Mankowski, Art. 7 Brussels Ibis Regulation note 245.

245 In more detail Art. 1 notes 29–39 (*Mankowski*).

246 *Rodríguez Pineau,* (2012) 8 JPrIL 113, 122–123.

247 Hamburg Group for Private International Law, RabelsZ 67 (2003), 1 (5); *Garcimartín Alférez,* EuLF 2007, I-77, I-80; see also *Unberath/Cziupka*, in: Rauscher, Art. 1 note 30.

brought the entire project of a Rome II Regulation to its breaking point.[248] The exclusion is the result of a compromise: The Members could only agree that they disagreed, and thus decided to exclude the matter from the scope of the final Regulation.

81 The problem with the first group of exclusions, the one borrowed from the Rome Convention, is a rather hidden one: copying the wording is one thing, but transferring it from the realm of contractual relationships to the realm of non-contractual relationships implies some adapting. In some instances, it is barely imaginable which cases the drafters envisaged to be excluded.[249] Not everything that works in a contractual environment is equally sensible in a non-contractual environment. Furthermore, the parallel is only a parallel *mutatis mutandis*, and the *mutanda* deserve close and intensive attention. Contractual obligations and non-contractual obligations operate in different spheres and cover different phenomena. It has to be argued afresh an on its own merits whether a certain non-contractual claim should be not covered by the Rome II Regulation. Any indication of inference to such an avail from the fact that a parallel claim in contract would not be covered by the Rome I Regulation would be circular. Its inherent defect is hidden in the premise that a contractual claim would be parallel.

82 The very existence of (2) does not carry a strict and comprehensive *conclusio* that all obligations excluded would be covered by the Rome II Regulation if (2) did not exist. This would only be true and a feasible conclusion if the Rome II Regulation covered all possibly conceivable kinds of non-contractual obligations – which is does not, being limited to torts, unjust enrichment, *negotiorum gestio* and *culpa in contrahendo*. Insofar as (2) relates to non-contractual obligations which would not be covered by the Rome II Regulation anyway it has only a declaratory function, not a constitutive one.[250]

83 The technique chosen, namely to implement a catalogue of express exclusions, is traditional but costly. It raises the implementation costs of the Rome II Regulation for it requires the Member State to retain national conflict rules for those non-contractual obligations excluded. For instance, the German legislator found itself in a position not to be able to abandon Arts. 40–42 EGBGB but faced with a need to keep them. The unwary amongst practitioners might be misled and might fall victim to the misapprehension to believe that the national rules retained still have the full force and ambit which they had before the Rome II Regulation became effective.

84 Preliminary issues or incidental questions abound. In (2) (a) features prominently whether a family relationship exists, in (2) (b) whether a marriage or an equivalent relationship exists and whether it has a specific property regime or whether there is a proper and valid testamentary will, in (2) (c) whether there is a negotiable instrument, in (2) (d) whether any company and, if so, which kind of company is involved, and in (2) (e) whether a trust exists. But incidental questions are preliminary issues only. They are not characteristic for the main cause.

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248 *Rolf Wagner*, in: FS Jan Kropholler (2008), p. 715, 720–721; *Mankowski,* Interessenpolitik und Europäisches Kollisionsrecht (2011) p. 79.

249 See in more detail *infra* Art. 1 notes 123–125 (*Mankowski*).

250 *Unberath*/*Cziupka*, in: Rauscher, Art. 1 note 31.

85 Hence, if only an incidental question, but not the main cause *per se* relates to an area excluded in (2), the main cause will remain within the scope of the Rome II Regulation.[251] For instance, if the existence of a claim in unjust enrichment depends on whether a contract exists and the existence of such contract in turn depends on one spouse having consented to the other spouse's doing under the law applicable to issues of matrimonial property, the claim in unjust enrichment will be governed by Art. 10 Rome II Regulation.[252]

86 Occasionally it is argued that the exceptions contained in (2) should be construed strictly if not narrowly in order to give the widest possible scope to, and to foster the *effet utile* of, the Rome II Regulation.[253] But do the exceptions contained in (2) not have an *effet utile* of their own? Certainly there are exceptions to a rule. But the maxim *singularia non sunt extendenda* has long lost its sway. This applies in particular where the exception details some examples without attributing a comprehensive character to them and without establishing any kind of *eiusdem generis* rule.[254] Furthermore, some of the exception in turns are intertwined with the scope of application of other Regulation the *effet utile* of which would militate in favour of an extensive interpretation if the recourse to any *effet utile* was to be held consistently.

2. Non-contractual obligations arising out of family relationships, (2) (a)

a) Family relationships

aa) Relatives

87 As far as family relationships go, there is no classificatory reference to any national law, be it the *lex fori* or be it the law determined to be applicable by the PIL of the forum. According to Recital (10) 1st sentence family relationships should cover parentage, marriage, affinity and collateral relatives. This list contains only family relationships, not relationships equivalent to family relationships. Given the modality of the verb, "should", this list should not be regarded as exhaustive although, conversely, there is no clear indication (like an inserted "in particular") that it is not exhaustive. However, the list puts one issue straight: All relationships listed in Recital (10) 1st sentence are family relationships for the purposes of (2) (a).

88 Family relationships include adopted children for they become relatives of their adoptive parent(s). Whether their links towards their original, natural or biological family are severed is a question to be answered by the mode of adoption: Is it a strong or a weak adoption, the latter not cutting the ties to the child's original family completely? Generally, if the adoption was by decree and not *ex lege* the matter is one of recognition and enforcement insofar as the decree was rendered in another State than the forum state.

89 But even in the age of patchwork families mere stepchildren are not relatives. *A maoire ad minus,* the same applies to foster children.

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251 *Knöfel*, in: Nomos Kommentar BGB, Art. 1 Rom II-VO note 40.

252 *Knöfel*, in: Nomos Kommentar BGB, Art. 1 Rom II-VO note 40; see also *Hau*, in: FS Daphne-Ariane Simotta (2012), p. 215, 217.

253 *Ansgar Staudinger,* AnwBl 2008, 316, 323.

254 See *Servatius*, in: Michalski, GmbHG (3rd ed. 2017) Systematische Darstellung 4: Konzernrecht note 387; *Spahlinger*, in: FS Gerhard Wegen (2015), p. 527, 535, both with regard to (2) (d).

However, there are some limits to the exclusionary effect of (2) (a). Invoking a family relationship does lead automatically to the inapplicability of the Rome II Regulation. For instance, the vicarious liability of parents for torts committed by their children is very well covered by Art. 15 (g).[255] **90**

bb) Marriage

"Marriage" is the most problematic term used. In their respective substantive laws, some Member States have opened "marriage" to same-sex partnerships and coin such partnerships proper marriages if they have duly registered so whereas other Member States are strongly opposed to taking such course. Some Spanish foral laws were the frontrunners and pioneered,[256] with Sweden,[257] the Netherlands,[258] Belgium,[259] Spain[260] (as such) and Portugal[261] following suit.[262] France has introduced the *mariage pour tous*[263] almost in societal turmoil whereas the United Kingdom proceeded smoothly to the same goal.[264] Germany has made its turn in 2017.[265] Eastern European Member States generally are very sceptical at least, if not downright opposed. **91**

255 Explanatory Memorandum, COM (2003) 427 final p. 9; *Plender*/*Wilderspin* para. 17–047.

256 Aragon: Ley 6/1999 de 26 de marzo 1999 relativo a parejas estables no casadas, BO Aragon no. 39 of 6 April 1999, p. 1926; Baleares: Ley 18/2001 de 19 de diciembre 2001 de parejas estables, BOE no. 14 of 16 January 2002; Catalonia: Ley 10/1998 de 15 de julio 1998 de uniones estables de pareja, DOGC no. 2787 de 23 julio 1998, p. 28345; Navarra: Ley Foral 6/2000 de 2 de julio 2000 para la igualdad jurídica de la parejas estables, BOE no. 14 of 6 September 2000.

257 Ägteskabsloven af 1 avril 2009.

258 In particular Art. 1:30 BW, introduced by Wet van 21 december 2000 tot wijziging van Boek I van het Burgerlijk Wetboek in verband met de openstelling van het huwelijk voor personen van hetzelfde geslacht, Staatsblad 2001, 9, and Wet van 29 maart 2001, Staatsblad 2001, 160.

259 Art. 134 Code civil, introduced by Loi 13 février 2003 ouvrant le mariage à des personnes de même sexe et modifiant certaines dispositions du Code civil, Moniteur belge 2003, 9880.

260 Art. 44 Abs. 2 Código Civil, introduced by Ley 13/2005 de 1 de julio por la que se modifica el Código Civil en materia de derecho a contraer matrimonio, BOE núm. 157 de 2 julio 2005, p. 23632. Constitutional review by Trib. Const. BOE núm. 286 de 28 noviembre 2012, Suplemento TC p. 168; notes by e.g. *Rixen,* JZ 2013, 864.

261 Lei do Casamento Civil Entre Pessoas do Mesmo Sexo, Lei n° 9/2010, Diário da República, 1ª série – N.° 105 – 31 de Maio de 2010.

262 Comparative overwiews, if only more or less outdated as to subsequent additions and developments, may be found in Institut de Droit Comparé Edouard Lambert Université Jean Moulin – Lyon 3, Rev. int. dr. comp. 2008, 375; *Staudinger*/*Mankowski,* BGB, Artt. 13–17b EGBGB (2011) Art. 17b EGBGB notes 22–22f; *Mankowski*/*Friederike Höffmann,* IPRax 2011, 247 (248–250); *Brière,* Rev. dr. UE 2011, 81.

263 Loi n° 2013–404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe, JO 2013, 8253; Cons. const. 17.5.2013 – n°. 2013–669 DC; for the debate see e.g. the contributions by *Larralde, Chassin, Douville, Gosselin-Gorand, Batteur, Frossard, Rogue, Mauger-Vielpeau, Raoul-Cormeil* and *Leprovaux,* in: Petites affiches N° 133, 4 juillet 2013, pp. 5-74 or *Grimaldi, Combret, Champenois* and *Massip*, Defrénois 2013, 719-743 or *Fulchiron,* D. 2013, 100; *Ferrand*/*Francoz-Terminal,* FamRZ 2013, 1448; *Casaburi,* Foro it. 2014 IV col. 49; *Devaux,* 73 Tulane J. Int'l. & Comp. L. 73 (2014).

264 Marriage (Same Sex Couples) Act 2013. und den Marriage and Civil Partnership (Scotland) Act 2014; thereon e.g. *Eekelaar,* (2014) 28 Int. J. L., Policy & the Fam. 1; *Norrie,* [2014] Juridical Rev. 135.

265 Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts vom 20.7.2017, BGBl. 2017 I 2787.

92 The Rome III Regulation has established some kind of compromise: In a first step, it recognises same-sex marriages as marriages,[266] but in a second step, its Art. 13 introduces a *caveat* in favour of the respective *lex fori*. Furthermore, the Rome III Regulation is not a common standard of all Member States of the Rome II Regulation, but only the result of an Enhanced Cooperation amongst several Member States. Hence, the Rome III Regulation does not constitute the basis for a strong and reliable conclusion.

93 But not every relation to a marriage makes (2) (a) operative and in the consequence the Rome II Regulation inoperative automatically. For instance, inter-spousal immunity appears to be covered by Art. 15 (b).[267]

b) Relationships deemed by the law applicable to such relationships to have comparable effects

94 Relationships deemed by the law applicable to family relationships to have comparable effects including maintenance obligations are put on an equal footing with traditional family relationships. This relates in particular to partnerships, registered or unregistered, different sex or same sex, as the case may be for the applicable law. The classificatory reference to the law applicable to the relationship in question is a political compromise. The Member States do not share common views towards registered partnerships, and particularly so in their homosexual variant. The spectre reaches from the full legal recognition of same sex marriages (Sweden, the Netherlands, Belgium, Spain, United Kingdom, France), to complete antipathy and refusal (Poland, Czech Republic) with registered partnerships as some kind of middle or intermediate solution (especially in Germany).

95 Which law is applicable ought to be ascertained by the PIL of the forum state without interference by unified or harmonised EU conflict rules. The alternative would be to apply the Rome II Regulation by some bootstrap principle. Yet this would not be convincing since in the event that a family relationship or an equivalent relationship exists the Rome II Regulation would be rendered in applicable. Any bootstrap principle thus consequentially would result in not employing the Rome II Regulation. Family conflict rules have not been harmonised in the EU yet.[268]

96 On the other hand, it is not for the substantive law of the *lex fori* to decide automatically.[269] Recital (10) 2nd sentence carries a misleading wording and must cede to the wording of (2) (a) itself. There is a certain degree of contradiction, if not perplexity, between (2) (a) and Recital (10) 2nd sentence[270] which must be resolved by sheer hierarchy: Rule prevails over Recital. Intermediate solutions that the *lex fori* is called upon to decide whether a certain relationship can be considered as having comparable effects to marriage and other family

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266 *Traar,* ÖJZ 2011, 805 (807); *Rudolf,* EF-Z 2012, 101, 102; *Devers/Farge,* JCP G 2012, 1277, 1279; *Verschraegen,* Internationales Privatrecht (2012) para. 125; *Nitsch,* ZfRV 2012, 264 (at 264); *Makowsky,* GPR 2012, 266, 267; *Hau,* FamRZ 2013, 249, 250-251; *Gade,* JuS 2013, 779 (at 779); see also *Rösler,* RabelsZ 78 (2014), 155, 175-176. *Contra Nademleinsky,* Zak 2012/288, 147; *Pietsch,* NJW 2012, 1768 (at 1768).

267 Explanatory Memorandum, COM (2003) 427 final p. 8; *Plender/Wilderspin* para. 17–047.

268 Explanatory Memorandum, COM (2003) 427 final p. 8; *Rodríguez Pineau,* (2012) 8 JPrIL 113, 125.

269 As *Bach*, in: Peter Huber, Art. 1 note 34 appears (wrongly) to infere.

270 *Plender/Wilderspin* para. 17–047.

relationships,[271] appear overly complex and rather unsuited for practical purposes. Further more, it would make the evaluation of the same relationship depending on the location of the forum.[272]

97 For practical purposes, the characterisation process is as follows: Starting point is the private international law of the forum. From its rules the one is to be applied which the PIL of the forum regards as applicable to the relationship to be judged. Either directly or via any kind of *renvoi* (as the case may be according to the PIL of the forum), this eventually to a certain substantive law. This *lex causae* decides whether it regards the relationship to be judged as some kind of family relationship or not.

98 Registration is not required. Hence, non-registered partnerships can be amongst the qualifiers.[273] Of course, this does not put a hindrance in the way of the argument, that registered partnerships might have the stronger claim and that it is more likely that the law applicable deems a registered partnership to have comparable effects to a family relationship and a marriage in particular than it would credit a non-registered partnership with such effects.

99 The most prominent candidate triggering the need of further consideration is the French *Pacte en action civil de solidarité* (PACS).[274] The PACS was once introduced in order to enable same-sex partnerships to establish some legal bond, but in practice it gained its main popularity amongst different sex partnerships which constitute the vast majority of PACSes.[275]

A simple cohabitation will most likely not qualify for the purposes of (2) (a).[276] This can gain particular relevance after such cohabitation has failed and the former partners now struggle for the restitution of assets or reimbursement for services rendered.[277] But the *lex causae* may qualify cohabitation to be like marriage at least after a certain (longer) duration of such cohabitation as does Russian, Ukrainian or Slovenian law.[278]

100 Mere engagements intended to lead to future marriage between the now *fiancées* are sometimes regarded as being covered by (2) (a).[279] Yet it appears hardly conceivable that engagements really carry a regime of common property between the *fiancées*. If and insofar as non-registered partnerships in general carry such regime under their respective applicable law it appears unnecessary to refer to the engagement as some kind of specific sub-type.

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271 *Garcimartín Alférez,* EuLF 2007, I-131, I-136.

272 *Plender/Wilderspin* para. 17–047.

273 *Spickhoff*, in: Liber amicorum Klaus Schurig (2012), p. 285, 298.

274 See *Hilbig,* GPR 2011, 310 (314–315); *Spickhoff*, in: Liber amicorum Klaus Schurig (2012), p. 285, 292.

275 94 % in 2012 according to Liberation of 18 July 2012. Statistics until 2013 (including) may be found at https://en.wikipedia.org/wiki/civil_solidarity_pact.

276 *Leible/Matthias Lehmann,* RIW 2008, 528 (530); *Unberath/Cziupka*, in: Rauscher, Art. 1 Rom II-VO note 33; *Spickhoff*, in: Liber amicorum Klaus Schurig (2012), p. 285, 295–296.

277 *Spickhoff*, in: Liber amicorum Klaus Schurig (2012), p. 285, 295–296.

278 *Spickhoff*, in: Liber amicorum Klaus Schurig (2012), p. 285, 298–299.

279 *Reiher,* Der Vertragsbegriff im europäischen Internationalen Privatrecht (2010) pp. 79–80.

c) Maintenance obligations

101 (2) (a) *in fine* excludes maintenance obligations expressly from the material scope of the Rome II Regulation. The term is related to both family relationships and equivalent relationships. Nowadays this exclusion complements, and supplements, the Maintenance Regulation[280] and the Hague Maintenance Protocol[281] to which the EU (as Regional Economic Integration Organisation) is a Contracting State[282] and which has entered into force on 1 August 2013[283]. "Maintenance" for the purposes of (2) (a) *in fine* should have the same meaning which it has under the Maintenance Regulation and the Hague Maintenance Protocol. It would be extremely odd to have an own, separate and independent notion of 'maintenance' for the limited purposes of (2) (a) *in fine*.

102 If it was not for (2) (a) *in fine,* maintenance relationships would be excluded from applicability of the Rome II Regulation by virtue of Art. 27. But scope rules prevail over rules regulating a conflict between a Regulation which would be principally applicable and another Act. Art. 27 presupposes that the Rome II Regulation would be principally applicable for otherwise there was not any conflict to be solved.

d) Intra-family torts

103 A further, second question is when a non-contractual obligation is arising out of a family relationships or an equivalent relationship. The Commission in its Explanatory Memorandum surmises that such obligations are unlikely to arise in a tortious context.[284] But then it gives the example that a claim for compensation for damage arises out of the late payment of a maintenance obligation.[285] The exemption from the Rome II Regulation is justified since neither Art. 4 (1) nor Art. 4 (2), the basic rules of Rome II, seem fit enough for intra-family relationships, the latter since habitual residence at the time of the alleged damage cannot be said to be on its own conterminous with the social environment of the tort.[286] To elevate Art. 4 (3) and its *akzessorische Anknüpfung* to the rank of the basic rule on the other hand would revolt against the inner structure and hierarchy of Art. 4.[287]

104 Theoretically, a Member State could decide to apply Rome II to intra-family torts *per analogiam*,[288] but such approach would be a decision entirely of the national legislature or judicature of that Member State.

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280 Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ EU 2009 L 7/1.

281 Hague Protocol on the Law Applicable to Maintenance Obligations, concluded 23 November 2007, OJ EU 2009 L 331/19.

282 Council Decision 2009/941/EC of 30 November 2009 on the conclusion by the European Community of the Hague Protocol on the Law Applicable to Maintenance Obligations, concluded 23 November 2007, OJ EU 2009 L 331/17.

283 http:/www.hcch.net/index_en.php?act=conventions.status2&cid=133.

284 Explanatory Memorandum, COM (2003) 427 final p. 8.

285 Explanatory Memorandum, COM (2003) 427 final p. 8.

286 *Rodríguez Pineau,* (2012) 8 JPrIL 113, 126–129.

287 See *Rodríguez Pineau,* (2012) 8 JPrIL 113, 130.

288 *Rodríguez Pineau,* (2012) 8 JPrIL 113, 126.

3. Non-contractual obligations arising out of matrimonial property regimes, (2) (b)

The exclusion of obligations arising out of matrimonial property regimes follows the tradition of Art. 1 (2) (b) 2nd lemma Rome Convention. This covers only such obligations as are specific for matrimonial property regimes, but not such obligations which could also arise between non-spouses (or non-partners).[289] If spouses became co-debtors of a loan any obligations arising in connection with the respective debt are not germane to spouses and their matrimonial property (even if the spouses used the money they got from their lender to acquire real estate which after its acquisition fell within their matrimonial property).[290] **105**

In the context of European PIL in its entirety and as an overarching system (2) (b) pays respect (in advance) to a then future Matrimonial Property Regulation, a project which has been advanced only starting 2011 when the Commission introduced the respective Proposal[291]. The Proposal finally and irrevocably met its fate, and did not a become a proper and general EU Regulation, on 3 December 2015 when it was vetoed[292] by Poland and Hungary in the Justice and Home Affairs Council.[293] But the other Member States carried on the flame and supported an Enhanced Cooperation which would eventually result in a Regulation.[294] The Commission duly initiated the legislative process for such Enhanced Cooperation and tabled respective Proposals[295] on the insistence of finally not less than eighteen Member States.[296] On 9 June 2016 the Council gave green light to the Enhanced Cooperation[297] which already on 24 June 2016 prompted results.[298] Once the Matrimonial Property Regulation has entered into force on 29 January 2019, its definition of matrimonial property as contained in Art. 3 (a) should be guiding also for the interpretation of the respective term "matrimonial **106**

289 OGH ZfRV 2015, 173 = ecolex 2016/119, 296.

290 OGH ZfRV 2015, 173 = ecolex 2016/119, 296.

291 Proposal for a Council Regulation on jurisdiction, applicable law and recognition and enforcement of decisions in matters of matrimonial property regimes, COM (2011) 126 final (16 March 2011).

292 Under the auspices of Art. 81 (3) TFEU.

293 Video of Meeting n° 3433 http://video.consilium.europa.eu/webcast.aspx?ticket=775–979–16687; Justice and Home Affairs Council 3–4 December 2015, Council of the European Union, Meeting n° 3433 http://consilium.europa.eu/en/meetings/jha/2015/12/03–04.

294 Video of Meeting n° 3433 http://video.consilium.europa.eu/webcast.aspx?ticket=775–979–16687.

295 Proposal for a Council Regulation on jurisdiction, applicable law and recognition and enforcement of decisions in matters of matrimonial property regimes, COM (2016) 106 final; Proposal for a Council Regulation on jurisdiction, applicable law and recognition and enforcement of decisions in matters of the property consequences of registered partnerships, COM (2016) 107 final.

296 Recital (11) Matrimonial Property Regulation.

297 Council Decision (EU) 2016/954 of 9 June 2016 authorising enhanced cooperation in the area of jurisdiction, applicable law and recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and of the property consequences of registered partnerships, OJ EU 2016 L 159/16.

298 Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and recognition and enforcement of decisions in matters of matrimonial property regimes, OJ EU 2016 L 183/1; Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and recognition and enforcement of decisions in matters of the property consequences of registered partnerships, OJ EU 2016 L 183/30.

property" in (2) (b). This definition is a very wide and extensive one.[299] In particular, it does not distinguish between different kinds of obligations stemming from the matrimonial property regime and covers obligations among the spouses as well as the spouses' obligations towards third parties, be such obligations contractual or non-contractual. In fact, it does not even mention non-contractual obligations as a specific category or sub-category.

107 However, it is hardly conceivable how non-contractual obligations could possibly arise out of matrimonial property regimes.[300] An example could perhaps be that one spouse detains or destroys a certain chattel, owned by the other spouse or commonly owned by the spouses, to the other spouse's detriment. If separation of goods is the matrimonial property regime under which the spouses are living this scenario cannot arise.[301] The same applies under the German regime of *Zugewinngemeinschaft* and as to the assets which each spouse personally owns at the beginning of the marriage where only such assets which acquired during marriage become both spouses' common property. If one spouse commits adultery and the other seeks to recover the costs he or she invested in employing a private eye, such claim in *negotiorum gestio* might be related to the marriage, but is not related to matrimonial property.[302]

108 Property regimes of registered partnerships and other relationships deemed by the law applicable to that relationships to have comparable effects to marriage should be treated as though they were matrimonial property regimes. Even if one was not prepared to admit this, as to property consequences of registered partnerships the Partnership Property Regulation[303] by virtue of Art. 27 takes precedence over the Rome II Regulation insofar as it covers non-contractual obligations.

4. Non-contractual obligations arising out of wills and succession, (2) (b)

109 The exclusion of non-contractual obligations arising out of wills and succession aims at avoiding a double coverage by two possibly competing and colliding EU Regulation. It pays respect to what has now become the Successions Regulation[304]. The avenue was already flagged out by Art. 1 (2) 1st lemma Rome Convention.

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299 See OGH iFamZ 2016, 122, 123 = JBl 2016, 459, 460; *Nademleinsky,* EF-Z 2014, 143; *Mankowski*, in: Rauscher, Art. 1 Brüssel Ia-VO note 57; *Fucik*, iFamZ 2016, 123.

300 *Bach*, in: Peter Huber, Art. 1 note 38; *Knöfel*, in: Nomos Kommentar BGB, Art. 1 Rom II-VO note 39.

301 OGH EF-Z 2015, 283; *Gitschthaler,* EF-Z 2015, 283.

302 OGH iFamZ 2016, 122, 123 = ZfRV 2016, 80 = ZfRV-LS 2016/19; *Fucik*, iFamZ 2016, 123.

303 See Proposal for a Council Regulation on jurisdiction, applicable law and recognition and enforcement of decisions regarding the property consequences of registered partnerships, COM (2011) 127 final (16 March 2011) and now Note from the Presidency to the Council, Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes – Political agreement, 26 November 2015, 14651/15 JUSTCIV 276, accompanied by another Note, 1 December 2015, 14655/15 JUSTCIV 278.

304 Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ EU 2012 L 201/107.

Non-contractual obligations do not feature in the catalogue contained in Art. 23 (2) Successions Regulation. But this catalogue is neither exhaustive nor limitative. It lists the topics and subjects which *in particular* are to be classified as a matter of the law of successions. Art. 23 (1) Successions Regulation is the basic rule and might go beyond the areas expressly included by virtue of Art. 23 (2) Successions Regulation.[305] **110**

To mention "wills" separately is either a duplication doing no harm or could be taken as limiting the following "succession" to intestate inheritance. Either way, inheritance both testate and intestate is covered by the exception. **111**

In the field of successions, (2) (b) will gain only limited relevance. A possible example where it might become operable is a claim in unjust enrichment based on *condictio ob rem* or *condictio causa data causa non secuta* by a person who had made investments in the defunct's well-being which became disappointed and frustrated afterwards since the defunct did not make him a testamentary heir.[306] A claim for damages against a lawyer who negligently drafted a will,[307] does not arise out of the will[308] and should most likely be characterised as a contractual claim anyway. Likewise, a claim against a lawyer who negligently failed to draft a will in time so that the estate passed in accordance with the testator's wishes as expressed in a previous will towards the would be beneficiary[309] is a case for Rome II. A claim in just enrichment by one beneficiary to recover excess sums paid to another beneficiary[310] might not arise out of a will,[311] but nonetheless in the field of successions. A claim for damages against a fraudulent would-be heir or beneficiary for forgery of a will might be an example for non-contractual liability arising out of a will.[312] **112**

5. Non-contractual obligations arising under negotiable instruments, (2) (c)

a) Negotiable instruments

(2) (c) excludes non-contractual obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character. Bills of exchange, cheques and promissory notes are but only named examples for negotiable instruments. **113**

Bills of exchange and in particular cheques have become rare occurrences in continental Europe nowadays.[313] The respective definitions should be borrowed from the Hague Uniform Laws on Bills of Exchange and Cheques. Even though they have been promulgated **114**

305 See only *Rolf Wagner,* DNotZ 2010, 506, 516; *Janzen,* DNotZ 2012, 484, 485; *Franzina*/*Leandro,* NLCC 2013, 275, 326; *Volmer,* RPfleger 2013, 421, 424; *Döbereiner,* MittBayNot 2013, 358, 363; *Mankowski,* in: *Schauer*/*Deixler-Hübner,* EuErbVO (2015) Art. 23 EuErbVO note 3.

306 *Knöfel*, in: Nomos Kommentar BGB, Art. 1 Rom II-VO note 39 with reference to the case of OLG Karlsruhe ZEV 2002, 196 = DStR 2002, 1232 with note *Haas*/*Holla*.

307 Example taken from *Dicey*/*Morris*/*Collins*/*Dickinson,* para. 34–030 fn. 215.

308 *Bach*, in: Peter Huber, Art. 1 note 38.

309 See for such case *White v. Jones* [1995] 2 AC 207 (H.L.).

310 *Dickinson,* para. 3.155.

311 *Bach*, in: Peter Huber, Art. 1 note 38.

312 *Contra Bach*, in: Peter Huber, Art. 1 note 38.

313 See only *Müller-Christmann,* WuB 2015, 2.

already in the 1930s internationally they are still the fundament on which all rules concerning bills of exchange or cheques build. Their definition should the more be decisive since the first undercurrent of (2) (c) is to give proper regard to those Uniform Laws.

115 (2) (c) can be seen in a line with, and in some context with, Art. 28. The respect for Uniform Laws extend to conflicts rules derived from such Uniform Law by a Contracting State of any Uniform Law.[314] It does not matter whether the Uniform Law is directly applicable or whether it has been duly transformed into a formally national rule. But this *ratio* does not extend to genuinely national conflict rules which dare to rule the PIL of negotiable instruments in its entirety; insofar the Rome II Regulation takes precedence.[315] Such verdict applies in particular to Art. 31 Polish PIL Act of 2012[316].[317] On the other hand, the term "negotiable instrument" should not be read too much in the light of Art. 4 (1) pt. (18) MiFID[318].[319] This rule is too sector-specific related to financial instruments. Art. 4 (1) pts. (15) and (17) MiFID II[320] rightly refers only to 'financial instruments' and 'money-market instruments'.

116 "Negotiable" ought to be given a European, autonomous meaning[321] not dominated by the understanding under any particular national law. Certainly the terminology is borrowed from English law, but that should not be equated with an automatic import of concepts of English law. In English law, "negotiable" is basically "transferable". Yet it would be highly questionable under methodical auspices to interpret (2) (c) in the light of a particular national terminology as used in a particular national law.[322] Even English decisions often relate to "*negotiable* bills of ladings",[323] and commercial parlance is to the same avail. Insofar,

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314 *See* BGHZ 99 207 210; *Basedow*, IPRax 1987, 333 (338); *Mankowski*, TranspR 1988, 410 (411–412); *Mankowski*, Seerechtliche Vertragsverhältnisse im Internationalen Privatrecht (1995) p. 317.

315 *Knöfel*, in: Nomos Kommentar BGB, Art. 1 Rom II-VO note 41.

316 Ustawa z dnia 4.2.2011 r. – Prawo prywatne międzynarodowe, Dz. U. 2011 Nr. 80 Pos. 432.

317 *Ulrich Ernst*, RabelsZ 76 (2012), 597 (622); *Knöfel*, in: Nomos Kommentar BGB, Art. 1 Rom II-VO note 41.

318 Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 1985/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council 93/22/EEC, OJ EU 2004 L 145/1.

319 But cf. *Andrea Isabell Dicke,* Kapitalmarktgeschäfte mit Verbrauchern unter der Rom I-VO (2015) p. 347.

320 Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments amending Directives 2002/92/EC and 2011/61/EU, OJ EU 2014 L 173/349.

321 *Garcimartín Alférez*, EuLF 2008, I-61, I-63 Fn. 16; *Mankowski*, IHR 2008, 133 (134); *Mankowski*, TranspR 2008, 339 (352); *Ramming*, HmbZSchR 2009, 21, 29.

322 *Mankowski*, Seerechtliche Vertragsverhältnisse im Internationalen Privatrecht (1995) pp. 137–138; *Mankowski*, in: Reithmann/Martiny, Internationales Vertragsrecht (8th ed. 2015) para. 6.1992 and *Malatesta*, Riv. dir. int. priv. proc. 1992, 887, 891.

323 *The "Federal Bulker"*[1989] 1 Lloyd's Rep. 103, 105 (C.A., per *Bingham* L.J.); *The "Mobil Courage"* [1987] 2 Lloyd's Rep. 655, 658; *The "Houda"*[1994] 2 Lloyd's Rep. 541, 556 (C.A., per *Millett* L.J.); *Motis Exports Ltd.*v. *Dampskibsselskabet AF 1912* [2000] 1 Lloyd's Rep. 211, 216 (C.A., per *Stuart-Smith* L.J.); *O.K. Petroleum AB* v. *Vitol Energy SA* [1995] 2 Lloyd's Rep. 160, 162 (Q.B.D., Colman J.); *Excess Insurance Co. Ltd.* v. Mander [1997] 2 Lloyd's Rep. 119, 125 (Q.B.D., *Colman* J.); *The "Hector"* [1998] 2 Lloyd's Rep. 287, 293 (Q.B.D., *Rix* J.); *The "Chitral"* [2001] 1 All ER (Comm) 932, 937 f. (Q.B.D., *David Steel* J.).

"negotiable" might be intermingled with "transferable".[324] But on the other hand it is not guaranteed that Art. 1 (2) (c) Rome Convention which introduced the European phrase, is modelled on the use of precise English legal terminology, not on the ordinary use of "negotiable".[325] Even for the purposes of sec. 1 (4) COGSA 1971 "negotiable" and "transferable" are on equal footing, and the crucial issue is to exclude straight consigned bills of lading.[326]

Recital (9) Rome I Regulation authoritatively decrees bills of lading to be negotiable documents. Straight bills of lading are included for Recital (9) Rome I Regulation does not differentiate between different types of bills of lading.[327] It is not a necessary requirement that a bill of lading[328] is made out "to order". Only sea waybills are out.[329] A limitation of Recital (9) Rome I Regulation to *sea* bills of lading must not be implemented, either. Hence, Freight forwarders' bills of lading, in particular the FIATA Bill of Lading (FBL), are equally covered. This line how to characterise can be transposed to the realm of the Rome II Regulation. A justification why one should not import that line it is not discernible. **117**

b) Obligations arising out of negotiability as such

Negotiable instruments are only excluded to the extent that the obligations under such other negotiable instruments arise out of their negotiable character. The negotiability relates to the instrument, not the obligation.[330] The French version is more precise: "dérivent de leur caractère négotiable." In historic perspective, negotiability was the tool in England to overcome the doctrine of privity of contract and the opposition against transferring choses in action[331]. **118**

From the negotiable character of the instruments as such, at least the opportunity of a *bona fide* acquisition defying *meno plus iure transferre potest quam ipse habet* and the exclusion of certain defences if the paper is in the hands of a *bona fide* acquirer arise.[332] One could **119**

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324 *Asariotis*, 26 JMLC 293, 296 (1995); *Carver*/*Treitel*/*Reynolds*, Bills of Lading (London 2001) para. 6–014.

325 See *Anton*, Private International Law (Edinburgh 1991) p. 321; *Merkin*, 1991 JBL 205, 208; *Plender*, The European Contracts Convention (London 1991) p. 65. Offen auch *G. Zekos*, Dir. mar. 104 (2002), 161, 169. *Malcolm Clarke*, [2002] LMCLQ 356, 364 bezeichnet Konnossemente als quasi-negotiable; s. auch Kum v. *Wah Tat Bank* [1971] 1 Lloyd's Rep. 439, 446 (P.C., per Lord *Devlin*).

326 See *The "Happy Ranger"* [2001] 2 Lloyd's Rep. 530, 539 (Q.B.D., *Tomlinson* J.); *The "Rafaela S"* [2002] 2 Lloyd's Rep. 403, 406 f. (Q.B.D., *Langley* J.) and *The "Captain Gregos"* [1990] 1 Lloyd's Rep. 310, 317 f. (C. A., per *Bingham* L.J.).

327 *Mankowski*, TranspR 2008, 339 (352); *Mankowski,* TranspR 2008, 417 (419); *Mankowski,* Neues aus Europa zum Internationalen Privat- und Prozessrecht der seerechtlichen Beförderungsverträge (2011) paras. 87–89; *Mankowski*, in: Reithmann/Martiny, Internationales Vertragsrecht (8th ed. 2015) paras. 6.1985–6.1987.

328 On the definition of the term "bill of lading" and the underlying concepts *Mankowski*, TranspR 2008, 417 (418–419); *Mankowski,* Neues aus Europa zum Internationalen Privat- und Prozessrecht der seerechtlichen Beförderungsverträge (2011) paras. 82–86; *Mankowski*, in: Reithmann/Martiny, Internationales Vertragsrecht (8th ed. 2015) paras. 6.1983–6.1984.

329 *Mankowski*, TranspR 2008, 339 (352); *Mankowski,* TranspR 2008, 417 (419–420); *Jens Nielsen,* TranspR 2008, 269 (283).

330 *Rugullis*, TranspR 2008, 102 (103).

331 *McMeel*, [2005] LMCLQ 273, 278.

332 Insofar in the same vein Begründung der Bundesregierung zum Entwurf eines Gesetzes zur Neuregelung

theoretically be content with that.[333] But this would have the severe and unwanted consequence of splitting the applicable law depending upon who is the holder f the negotiable instrument, the original holder or a later acquirer, and the question asked would be limited to as to whether the acquirer has a better title than the original holder.[334] That would be not convincing but in contradiction tot he principle of a uniform object in the PIL of negotiable instruments.[335] Furthermore, it would neglect that the mere possibility of a *bona fide* acquisition is the decisive element regardless whether such acquisition took place actually or not.[336] To subject only such limited aspects as those mentioned to a special conflicts regime would not make too much sense.[337]

120 Furthermore, excluding defences is not an obligation in the true sense. Excluding defences is related to the debtor's counter-rights to an existing obligation. If one was to restrict (2) (c) to exclusion of defences and *bona fide* acquisition, one would have to reduce the wording of the rule teleologically.[338] That would beg justification and reason.

121 The correct construction is that (2) (c) encompasses all claims documented and transported by the negotiable instrument, i.e. all primary and secondary obligations.[339] These are the

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des Internationalen Privatrechts, BT-Drucks. 10/504, 84; *Schultsz*, in: North (ed.), Contract Conflicts (Amsterdam/New York/Oxford 1982), p. 185, 189–190; *Flessner*, Reform des Seehandelsrechts: Was bringt sie dem internationalen Privatrecht? (1987) p. 21; *Tetley*, International Conflict of Laws (Montreal 1994) p. 312; *Herber*, in: FS Peter Raisch (1995), p. 67, 78; *Herber*, Seehandelsrecht (1999) p. 409; *Herber*, in: FS Karl-Heinz Thume (2008), p. 177, 183–184 fn. 20; *Asariotis*, Die Anwendungs- und Zuständigkeitsvorschriften der Hamburg-Regeln und ihre Ausstrahlungswirkung in Nichtvertragsstaaten (1999) pp. 44–45; *von Ziegler*, Schadensersatz im internationalen Seefrachtrecht (1990) p. 55; *Looschelders*, Internationales Privatrecht (2004) Art. 37 EGBGB note 12; *Martiny*, in: MünchKomm, Art. 1 Rom I-VO note 57; *Ramming*, TranspR 2007, 279 (296); *Paschke*, TranspR 2010, 268 (269); *Völker*, in: Hartenstein/Reuschle (eds.), Handbuch des Fachanwalts Transport- und Speditionsrecht (2nd ed. 2012) ch. 11 note 96.

333 Concurring, yet with nuances, the authors cited in the previous fn. (but for Regierungsbegründung and *Ramming*) plus *Boonk*, in: Hendrikse/N.H. Margetson/H.J. Margetson, Aspects of Maritime Law (Alphen aan den Rijn 2008), p. 319, 325.

334 *Schultsz*, North (ed.), Contract Conflicts (Amsterdam/New York/Oxford 1982), p. 185, 190.

335 *Mankowski*, TranspR 1988, 410 (412); *Mankowski*, Seerechtliche Vertragsverhältnisse im Internationalen Privatrecht (1995) p. 138; see also sowie *von Hoffmann*, in: Soergel, BGB, vol. 10 (12th ed. 1996) Art. 37 EGBGB note 36; *Czernich/Heis/Nemeth*, EVÜ (Wien 1999) Art. 1 EVÜ note 35; *Magnus*, in: Staudinger, BGB, Artt. 1–10 EGBGB (2016) Art.1 Rom I-VO note 71.

336 *Mankowski*, Seerechtliche Vertragsverhältnisse im Internationalen Privatrecht (1995) p. 139; *Kopper*, Der multimodale Ladeschein im internationalen Transportrecht (2007) p. 112.

337 Insofar correct *Puttfarken*, Seehandelsrecht (1997) para. 316.

338 *Mankowski*, Seerechtliche Vertragsverhältnisse im Internationalen Privatrecht (1995) pp. 138–139; *Mankowski*, in: Reithmann/Martiny, Internationales Vertragsrecht (8th ed. 2015) para. 6.1991.

339 *Mankowski*, TranspR 1988, 410 (412); *Mankowski*, Seerechtliche Vertragsverhältnisse im Internationalen Privatrecht (1995) p. 140; *Mankowski,* TranspR 2008, 417 (422); *Mankowski,* Neues aus Europa zum Internationalen Privat- und Prozessrecht der seerechtlichen Beförderungsverträge (2011) para. 95; *Mankowski*, in: Reithmann/Martiny, Internationales Vertragsrecht (8th ed. 2015) para. 6.1993; *von Bar*, in: FS Werner Lorenz zum 70. Geb. (1991), p. 273, 285–286; *Thode*, WuB IV A. § 817 BGB 2.94, 312, 313; *von Hoffmann*, in: Soergel, BGB, vol. 10 (12th ed. 1996) Art. 37 EGBGB note 36; *Dieter Rabe*, Seehandelsrecht

obligations which get special treatment in the light of the interests of possible third party holders. Primary and secondary obligations have to be treated equally and are to be subject to the same PIL regime.[340] This is not a German particularity.[341] On the contrary, common law countries, generally not prone to specific performance but to damages, are even more proceeding down such avenue.[342] Furthermore the maxim of *accessorium sequitur principale* can be transferred from the European international procedural law for contracts.[343] Secondary claims follow primary claims, *accessorium sequitur principale*. This concept is enshrined also in Art. 12 (1) (c) Rome I Regulation. To assume that (2) (c) covers only primary claims[344] would introduce an unwarranted split.[345]

In modern times, traditional negotiable instruments in writing and on paper are on the retreat if they have not already vanished altogether. Dematerialised, electronic instruments are the dish of the day. Electronic bills of lading and electronic securities held by intermediaries in electronic accounts have become commonplace. They constitute a serious challenge to rules like (2) (c). On the one hand, one could keep them outside the exception and cling to a traditional, paper-based view. On the other hand, this would severely curtail and diminish the ambit of the exception; in turn it would extend the scope of the Rome II Regulation by the backdoor. But eventually such result has to be accepted. If the very phenomena justifying the exception cease to exist, the general regime re-gains its sway. Changing circumstances might very well result in a switch of applicable legal regimes. **122**

c) Non-contractual obligations arising under negotiable instruments out of their negotiable character

Reading (2) (c) literally, non-contractual obligations arising under other negotiable instruments than bills of exchange, cheques and promissory notes are not excluded in a wholesale **123**

(4th ed. 2000) Vor § 556 HGB note 124; *Kopper*, Der multimodale Ladeschein im internationalen Transportrecht (2007) pp. 112-133; *Hartenstein*, TranspR 2008, 143 (155); *Shariatmadari*, TranspR 2010, 275 (277); *Andrea Isabell Dicke,* Kapitalmarktgeschäfte mit Verbrauchern unter der Rom I-VO (2015) pp. 357–358; see also BGHZ 99, 207 209; Trib. Livorno Dir. mar. 99 (1997), 166, 168; *Klaus H. Abraham*, WuB VII A. § 38 ZPO 1.87, 641, 642; *Malatesta*, Riv. dir. int. priv. proc. 1992, 887, 896–897; *Ballarino/Bonomi*, Riv. dir. int. 1993, 939, 953; *Czernich/Heis/Nemeth*, EVÜ (Wien 1999) Art. 1 EVÜ note 35; *Fremuth*, in: Fremuth/Thume, Frachtrecht (2000) § 452a HGB note 18; *Magnus*, in: Staudinger, BGB, Artt. 1–10 Rom I-VO (2016) Art. 1 Rom I-VO note 69; *Ramming*, TranspR 2007, 279 (296).

340 *Mankowski*, Neues aus Europa zum Internationalen Privat- und Prozessrecht der seerechtlichen Beförderungsverträge (2011) para. 96.

341 *Contra Häußer*, TranspR 2010, 246 (247).

342 *Mankowski*, Neues aus Europa zum Internationalen Privat- und Prozessrecht der seerechtlichen Beförderungsverträge (2011) para. 96; *Mankowski*, in: Reithmann/Martiny, Internationales Vertragsrecht 88th ed. 2015) para. 6.1994.

343 See only *Hassan Shenavai v. Klaus Kreischer* (Case 266/85), [1987] ECR 239, 259 para. 19; *Leathertex Divisione Sintetici SpA/Bodetex BVBA* (Case C-420/97), [1999] ECR I-6747, I-6791 para. 38; Epheteio Thessaloniki Arm. 1999, 1744; Rb. Kh. Gent TBH 2003, 175, 177; *Rogerson*, [2001] Cambridge Yb. Eur. L. 383; *Mankowski*, in: Magnus/Mankowski, Brussels Ibis Regulation (2015) Art. 7 Brussels Ibis Regulation note 199.

344 To this avail *Häußer*, TranspR 2010, 246 (248).

345 *Mankowski*, Neues aus Europa zum Internationalen Privat- und Prozessrecht der seerechtlichen Beförderungsverträge (2011) para. 95.

manner but only to the extent that the obligations under such other negotiable instruments arise out of their negotiable character. Hence, there is a qualifying requirement. This requirement is to the letter borrowed from Art. 1 (2) (c) Rome Convention and has caused much confusion and controversy in the contractual ambit. Particularly maritime law and bills of lading had to come to terms with it. The range and variety of possible interpretations is very wide there. The most restrictive approach confines the contractual obligations covered to *bona fide* acquisition and excluding defences. The most liberal approach extends the contractual obligations covered to all primary and secondary obligations from the bill of lading. There are many attempts to mediate between these attempts.

124 The Commission believed (2) (c) to be a simple transfer from Art. 1 (2) (c) Rome Convention.[346] It is said that the exclusion repeats *mutatis mutandis* Art. 1 (2) (c) Rome Convention.[347] With all due respect, this view is overly simplistic. It does not pay proper attention to, and rather disregards, the second condition that the obligations must arise out of the negotiable character of the instruments concerned. To put it bluntly, the obligations must travel with the instrument and the paper, or they must arise from the debtor being cut off from raising defences if the instrument has passed into the hands of a *bona fide* acquirer. Contractual claims travel with instruments that are contractual in principle. Non-contractual claims have a different nature and are not likely to travel with instruments that are contractual in principle. One has to bear in mind that not every claim based on statutory or judge-made rules is a non-contractual claim.

125 Fiddling and tampering with bonds or company shares resulting in financial loss on the markets is not related to the negotiability of those instruments concerned the more so since bonds, securities and other financial instruments do rarely still exist "in paper" nowadays but have been reduced to mere electronic notions in accounts ordinarily held with intermediaries. Torts on the capital markets are a different treat from that envisaged by (2) (c).

d) Torts on capital markets

126 In modern financial trade, financial instruments and securities are not negotiable instruments anymore. In fact, they are documented only electronically, and there is no paper print embodying them or their content anymore. Intermediary held securities are ordinarily held in electronic accounts as bits and bytes. Consequentially, torts and other non-contractual obligations concerning them do fall within the scope of the Rome II Regulation. In particular, The Regulation has to cope with the non-contractual aspects of Public Offers, for instance takeover issues. Likewise, securities fraud and churning are "in".

127 Prospectus liability is not covered by (2) (c) since such liability does not stem from the negotiability of the instrument and not even from the instrument itself, but from the breach of accompanying and surrounding informational duties.[348] Likewise, the liability of rating

346 Explanatory Memorandum, COM (2003) 427 final p. 9.

347 *Plender/Wilderspin,* para. 17–050.

348 *Tschäpe/Robert Kramer/Glück,* RIW 2008, 657 (661); *Christoph Weber,* WM 2008, 1581 (1584); *von Hein*, in: Perspektiven des Wirtschaftsrechts – Beträge für Klaus J. Hopt (2008), p. 371, 382; *Unberath/Cziupka*, in: Rauscher, Art. 1 note 36; *Bach*, in: Peter Huber, Art. 1 note 42; *Wurmnest*, in: jurisPK BGB, Art. 1 Rome II-VO note 46; see also *Freitag,* WM 2015, 1165 (1168).

agencies towards third parties is not based on freely assumed obligations and thus not contractual.[349]

In general, modern torts on the capital markets are not excluded and the less exempt from the Rome II Regulation. The Regulation is a factor to be taken into account and to be well considered as part of the calculus. But this does not mean that it is a child's play to apply the single rules of the Regulation to torts on the capital markets.[350] **128**

6. Non-contractual obligations arising out of the law of companies, (2) (d)

a) General considerations

(2) (d) excludes non-contractual obligations arising out of the law of companies and other bodies corporate or unincorporated regarding matters such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies corporate or unincorporated, the personal liability of officers and members as such for the obligations of the company or body and the personal liability of auditors to a company or to its members in the statutory audits of accounting documents, from the realm of the Rome II Regulation. (2) (d) in effect is a copycat from Art. 1 (2) (d) Rome Convention. This rule contained a like exclusion of matters of company law "in view of the work being conducted within the European Communities".[351] **129**

(2) (d) covers all types and kinds of companies, expressly including companies both corporate and incorporate and not containing even the slightest restriction to legal persons, *juristische Personen* or *personnes morales*. It employs the widest possible notion in order to make any misapprehension virtually impossible. It does not relate of the definition of companies under any specific national law, but establishes functional approach. In particular, incorporation is not required which is important for many *Personengesellschaften* under the Germanic systems. Neither is the liability system of the company relevant. Companies without limitation of liability are equally covered as limited companies. Furthermore, companies *in condendo* are subject to (2) (d).[352] **130**

It has been argued that (2) (d) should not be interpreted extensively but should be given a rather restrictive reading for systematic and purposive reasons, namely to foster uniformity within the Internal Market and to enhance the *effet utile* of the freedom of establishment[353] which certainly is in the closest vicinity of (2) (d). **131**

(2) (d) contains a pretty detailed list of sub-subjects excluded. It does not limit itself to expressing only the principles but rather spells the principle out. The detailed catalogue **132**

349 *Steinrötter,* ZIP 2015, 110 (114).

350 See the proposal *de regulatione ferenda* by *Matthias Lehmann,* IPRax 2012, 399; *Lehmann,* RCDIP 101 (2012), 485.

351 Report *Giuliano/Lagarde,* OJ EEC 1980 C 282/15; *KA Finanz AG v. Sparkassen Versicherung AG Vienna Insurance Group* (Case C-483/14), ECLI:EU:C:2016:205 para. 52.

352 *David Paulus,* Außervertragliche Gesellschafter- und Organwalterhaftung im Lichte des Unionskollisionsrechts (2013) paras. 276, 281.

353 *David Paulus,* Außervertragliche Gesellschafter- und Organwalterhaftung im Lichte des Unionskollisionsrechts (2013) paras. 249–254.

provides very valuable guidance. But of course even this catalogue can only be a starting point given the complexity, variability and technicality of company law, the proverbial insiders' law. Many details are not directly addressed, and may be difficult to clarify. Just one example might be provided by claims generated under Art. 15 Directive 78/355/EEC or Art. 15 Directive 2011/35/EU respectively.[354]

133 Hiddenly and secretly, a third player is sitting at the table taking precedence over the Rome II Regulation: Insofar as a matter has to be characterised as a matter of insolvency law the European Insolvency Regulation (EIR) 2000 or the EIR 2015 respectively has to be applied. What is covered by Art. 4 (2) EIR 2000 or Art. 7 (2) EIR 2015 respectively in particular, must be characterised as a matter of insolvency law. There might be some grey zone between company law and insolvency law, for instance with regard to §15a InsO or § 64 GmbHG[355] or to the so called *Existenzvernichtungshaftung*[356] but the ranking should be clear: first place to the EIR 2000 or the EIR 2015 respectively,[357] second place to company law, third place to the Rome II Regulation. From the limited perspective of the Rome II Regulation it does not matter whether eventually the EIR or the PIL of companies provides the applicable choice of law regime. For this limited perspective it entirely suffices that either of them grabs the ball and that consequentially the Rome II Regulation is *not* applicable. The negative answer suffices for these limited purposes. Furthermore, in the case of the *Existenzvernichtungshaftung* they are strong positive arguments for applying (2) (d) since it serves to supplement the rules on fixed capital.[358]

134 (2) (d) is a peculiar rule. Its main impact might be on the area of law it excludes. The EU has not yet promulgated a PIL codification for company law and has no intention to alter this situation in the foreseeable future. The ECJ soldiers on and on with ever new judgments, from *Centros*[359] via *Überseering,*[360] *Inspire Art*,[361] *SEVIC*[362] to *Cartesio*,[363] *National Grid*

354 See the reference by OGH ecolex 2015/120, 304 with notes *Markus Artz* and *Rizzi* on the interpretation of Art. 1 (2) (e) Rome Convention.

355 See only *H. v. H.K.* (Case C-295/13), ECLI:EU:2014:2410 paras. 14–26; *Simona Kornhaas v. Thomas Dithmar* (Case C-594/14), ECLI:EU:C:2015:806; BGH ZIP 2015, 68; *Renner*, Insolvenzverschleppungshaftung in internationalen Fällen (2007) pp. 104–116; *Barthel,* Deutsche Insolvenzantragspflicht und Insolvenzverschleppungshaftung in Scheinauslandsgesellschaften nach dem MoMiG (2009) pp. 219–235; *Haas,* NZG 2010, 495 496; *Kindler,* IPRax 2010, 430; *Kindler,* EuZW 2015, 143; *Hannes Wais,* IPRax 2011, 138; *Johannes Weber,* Gesellschaftsrecht und Gläubigerschutz im Internationalen Zivilverfahrensrecht (2011) pp. 131–150; *David Paulus,* Außervertragliche Gesellschafter- und Organwalterhaftung im Lichte des Unionskollisionsrechts (2013) paras. 505–521; *Marc-Philippe Weller*/*Alix Schulz,* IPRax 2014, 336; *Czaplinski*/*Knodel,* GWR 2015, 16; *Cranshaw,* jurisPR-InsR 4/2015 Anm. 1; *Mankowski,* NZG 2016.

356 See *Bayh,* Die Bereichsausnahme auf dem Gebiet des Gesellschaftsrechts in Artikel 1 Absatz 2 Buchstabe d Verordnung Rom II (2014) pp. 167–172; *Spahlinger*, in: FS Gerhard Wegen (2015), p. 527, 535–536.

357 *Thole,* ZHR 178 (2014), 763 (766).

358 *Spahlinger*, in: FS Gerhard Wegen (2015), p. 527, 535–536.

359 *Centros Ltd. v. Erhvervs- og Selskabsstyrelsen* (Case C-212/97), [1999] ECR I-1459.

360 *Überseering BV v. Nordic Construction Company Baumanagement GmbH* (Case C-208/00), [2002] ECR I-9919.

361 *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art. Ltd.* (Case C-167/01), [2003] ECR I-10155.

362 *SEVIC Systems AG* (Case C-411/03), [2005] ECR I-10805.

363 *Cartesio Oktató és Szolgáltató bt* (Case C-120/06), [2008] ECR I-9641.

Indus[364] and *VALE*[365] in order to clarify what primary law demands. But it does not address issues of characterisation. To this avail, (2) (d) and its counterpart Art. 1 (2) (f) are still the best guideline there is. Hence, taken seriously (2) (d) provides a basic characterisation rule for the PIL of companies, a kind of reverse parallel in the negative to Arts. 12 Rome I Regulation; 15. It provides the ramifications for the PIL of companies in Europe.

b) Creation

The "creation" of a company relates to its founding and incorporation. Mainly, this encompasses all issues surrounding the contractual basis of the company, the company statute, the Articles of Agreement and alike, including all previous documents like Memoranda of Understanding, Letters of Intent etc. Intermediate steps in the founding process are covered, too. **135**

c) Legal capacity

(2) (d) expressly encompasses the company's legal capacity. Yet this is limited to but one issue: whether the company is a legal entity in its own right separate from its members. Companies are phenomena created by law, they do not have own hands and mouths and have to borrow them. Accordingly, any capacity to act in person can not be at stake for any company and can thus not be covered by (2) (d).[366] Furthermore, whether a company has the capacity to incur liability is not excluded by (2) (d).[367] **136**

d) Internal organisation

The internal organisation of a company is a core matter of company law, and tort law is not to interfere with it. The *lex societatis* is to determine in particular: the existence and structure of a board; whether there are separate managing and controlling bodies; the composition of such bodies; the role and influence of any assembly of shareholders; the admissibility and structure of eventual additional bodies; **137**

Shares are covered by (2) (d) only insofar as the relations between shareholders and the companies of which they own shares are at stake. But they are not covered insofar as they are only the object of a transaction, an intended transaction or any kind of advertisement (in a non-technical sense) or announcement related to an intended. Hence, securities fraud is governed by the Rome II Regulation. The entire area of torts committed on the capital markets does not escape the Rome II Regulation even if the single tort relates to shares or options on shares as the object of an intended transaction. False information and incorrect announcements to (potential) investors are caught even if they refer to shares. Shares are not to be treated differently from other securities and do not enjoy a special role in this regard. **138**

e) Winding-up of companies

The winding-up of companies is excluded from the scope of the Rome II Regulation. This should go without saying given the European Insolvency Regulation at least insofar as insolvencies are at stake. Anything already covered by the European Insolvency Regulation **139**

364 *National Grid Indus BV v. Inspecteur van de Belastingdienst Rijnmond, kantoor Rotterdam* (Case C-371/10), [2011] ECR I-12273.

365 VALE Építési kft (Case C-378/10), ECLI:EU:C:2012:440.

366 But cf. Rb. Rotterdam S&S 2015 Nr. 80 pp. 252–526.

367 *Dickinson,* paras. 14.11–14.12; *Bach*, in: Peter Huber, Art. 1 note 44.

would be excluded from the Rome II Regulation by virtue of Art. 27 even if (2) (e) did not mention the winding-up of companies. What can be regarded as a matter of insolvency law should be judged by the yardsticks prevailing under Arts. 4 European Insolvency Regulation 2000; 7 European Insolvency Regulation 2015.

140 Yet "winding-up" is not restricted to insolvencies but encompasses administrative winding-up by public bodies, too. National law might sanction non-compliance with certain rules by striking out companies of the respective register thus ending the life of any company mandatorily requiring incorporation. Furthermore, winding-up comprises every matter which untechnically speaking results in the respective company vanishing from the scene, like in particular, mergers.[368]

f) Personal liability of officers and members

141 The personal liability of officers and members as such for the obligations of the company falls under (2) (d) and is in turn not governed by the Rome II Regulation.[369] In practice, this can be of the utmost relevance. Creditors will often try to hold directors, board members, officers and shareholders liable if the company as their primary debtor has become insolvent or is threatening to file bankruptcy in due course. To interpret (2) (d) restrictively and to limit it to claims which do not arise from an "independent" cause of non-contractual liability[370] rather rephrases and reformulates the problem than helps to solve it. Labelling a duty as fiduciary should not expel it from the realm of company law for fiduciary duties by company officers are intimately linked with the organisation of the company.[371]

aa) External liability towards the company's creditors vs. internal liability towards the company

142 The fundamental question surrounding this part of (2) (d) is whether only the officers' or members' personal liability towards external creditors of the company is excluded or also their internal liability towards the company.[372] If one is prepared to characterise such liability as arising out of a contract the die is cast. It could be argued that officers are contractually tied and obliged towards the company by their respective employment or service agreements[373] whereas members are parties of the charter of the company.

143 If one is not prepared to proceed down the avenue so flagged one should be aware that the exclusion of personal liability towards external creditors is but an example. The range of (2) (d) is wider than the list of examples expressly list. Thus a restrictive literal interpretation of (2) (d) and employing the list of examples as the basis for an *argumentum a contrario* would be ill conceived. Any question genuinely attributed to company law should be excluded.

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368 *KA Finanz AG v. Sparkassen Versicherung AG Vienna Insurance Group* (Case-483/14), ECLI:EU:C:2016:205 para. 52; *Chacornac,* D. 2016, 1404, 1407.

369 See only A-G *Vlas,* NIPR 2016 Nr. 279 p. 543.

370 To this avail Hof Den Haag NIPR 2015 Nr. 170 p. 291.

371 *Dickinson,* para. 3.167; see also *Base Metal Trading Ltd. v. Shamurin* [2004] EWCA Civ 1316, [2005] 1 WLR 1157 [65]-[66] (C.A., per *Arden* L.J.). But cf. *Plender/Wilderspin* para. 17–051.

372 *Pro Dickinson,* paras. 3.162 *et seq.*; *Plender/Wilderspin,* para. 17–045; *Bach*, in: Peter Huber, Art. 1 para. 46. *Contra Gerhard Wagner,* IPRax 2008, 1 (2).

373 Compare *David Paulus,* Außervertragliche Gesellschafter- und Organwalterhaftung im Lichte des Unionskollisionsrechts (2013) paras. 264–276.

Furthermore, holding officers or members liable towards the company indirectly enhances the chances of external creditors to recover since the augments the assets of the company to which the respective liability claims for damages are added and which might be garnished by the creditors. In the event of the company's insolvency the administrator might try to cash them in and to distribute the monies recovered amongst the company's creditors. **144**

bb) Possible instances

Liability for activities in the establishing stages of a company and under the regime of a company *in condendo* in particular as eventually introduced in the laws of the Member States[374] in the wake of Art. 7 Directive 68/151/EEC[375] (if not already present before) is covered.[376] **145**

Claims for liability which in substance arises from delaying to file bankruptcy for the company and are based on rules like § 64 GmbHG or § 15a InsO (which have gained quite some notoriety in the jurisdictional field), are covered by (2) (d),[377] else they are governed by the Insolvency Regulation anyway.[378] **146**

Claims against the company's "members" which pierce the corporate veil in order to lift limitations of personal liability of the company's members, are clearly supplementing the rules on fixed capital and fall within the realm of the law of companies; thus they are covered by (2) (d).[379] This applies for instance where a member confounds the company's assets with his own assets.[380] Matters are more complicated with regard to claims which do not directly pierce the corporate veil but establish formally "independent" personal liability of the company's members and might be couched and phrased in terms of national tort law like § 826 BGB.[381] But at least liability based on lack of providing sufficient funds should be characterised as a matter of company law of European purposes.[382] The *Exis-* **147**

374 See e.g. § 11 (2) German GmbHG; § 2 (1) 2nd sentence Austrian GmbHG; Art. 1843 Code civil; Art. 15 Ley de Soiedades Anónimas; Art. 2331 Codice civile; sec. 9 (2) European Communities Act 1972.

375 First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, OJ EEC 1968 L 65/8.

376 *David Paulus,* Außervertragliche Gesellschafter- und Organwalterhaftung im Lichte des Unionskollisionsrechts (2013) paras. 280–291.

377 *Bayh,* Die Bereichsausnahme auf dem Gebiet des Gesellschaftsrechts in Artikel 1 Absatz 2 Buchstabe d Verordnung Rom II (2014) pp. 176–180.

378 See *H. v. H.K.* (Case C-295/13), ECLI:EU:C:2014:2410 paras. 19–25; *Mankowski,* EWiR 2015, 93 (94).

379 *David Paulus,* Außervertragliche Gesellschafter- und Organwalterhaftung im Lichte des Unionskollisionsrechts (2013) para. 470.

380 *Alexander Schall,* Kapitalgesellschaftsrechtlicher Gläubigerschutz (2009) p. 241; *David Paulus,* Außervertragliche Gesellschafter- und Organwalterhaftung im Lichte des Unionskollisionsrechts (2013) para. 472; see also *Spahlinger/Wegen,* Internationales Gesellschaftsrecht in der Praxis (2005) para. 338.

381 *David Paulus,* Außervertragliche Gesellschafter- und Organwalterhaftung im Lichte des Unionskollisionsrechts (2013) para. 470.

382 *David Paulus,* Außervertragliche Gesellschafter- und Organwalterhaftung im Lichte des Unionskollisionsrechts (2013) paras. 481–484.

tenzvernichtungshaftung falls outside the Rome II Regulation arguably since it is a matter of insolvency law.[383]

148 If the officer or member is personally liable in *culpa in contrahendo*, it might be questionable whether this is liability especially "for the obligations of the company or body".[384] But given the not exhaustive nature of the list of examples a negative answer to such question would not be conclusive as far as the liability at stake functionally relates to the law companies. But the latter cannot be assumed[385] so that (2) (d) is not operable in this regard.[386]

149 Any liability incurred for the criminal offense of defalcation or embezzlement committed against the company might be characterised as tortious and not falling under (2) (d).[387] On the other hand, fraudulent trading and wrongful trading are a matter of insolvency law and thus covered by the European Insolvency Regulation.[388] Liability based on nominally general delicts is a case for the Rome II Regulation insofar as such liability could be incurred by anyone; but if it is structurally linked to company law, (2) (d) will apply.[389]

cc) D&O insurances

150 Claims under a D&O insurance contract are not covered by (2) (d), but are contractual by nature anyway. In rather few cases only the company's creditors will be direct beneficiaries of a D&O insurance.

g) Personal liability of auditors and members in statutory audits

151 Compared to Art. 1 (2) (f) Rome I Regulation, (2) (d) comprises an exception at least for one extended area: the personal liability of auditors to a company or to its members in the statutory audits of accounting documents. Auditors are defined by Art. 3 (1) Auditing Directive[390].[391]

152 There are certain limitations to this exclusion: Firstly, auditors' liability to other persons than the company audited and its members (shareholders) is possibly covered by the Rome II Regulation (provided that it is not to be qualified as contractual). Liability to the

383 *David Paulus,* Außervertragliche Gesellschafter- und Organwalterhaftung im Lichte des Unionskollisionsrechts (2013) paras. 489–496; *Spahlinger*, in: FS Gerhard Wegen (2015), p. 527, 535–536.

384 See *David Paulus,* Außervertragliche Gesellschafter- und Organwalterhaftung im Lichte des Unionskollisionsrechts (2013) para. 308.

385 *Contra Hans-Jürgen Ahrens,* IPRax 1986, 355 (360–361).

386 *Dickinson,* paras. 12.07–12.08; *David Paulus,* Außervertragliche Gesellschafter- und Organwalterhaftung im Lichte des Unionskollisionsrechts (2013) para. 313.

387 *Bayh,* Die Bereichsausnahme auf dem Gebiet des Gesellschaftsrechts in Artikel 1 Absatz 2 Buchstabe d Verordnung Rom II (2014) p. 188.

388 *Bayh,* Die Bereichsausnahme auf dem Gebiet des Gesellschaftsrechts in Artikel 1 Absatz 2 Buchstabe d Verordnung Rom II (2014) pp. 198–199.

389 *Bayh,* Die Bereichsausnahme auf dem Gebiet des Gesellschaftsrechts in Artikel 1 Absatz 2 Buchstabe d Verordnung Rom II (2014) pp. 205–206.

390 Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC, OJ EC 2006 L 157/87.

391 *Knöfel*, in: Nomos Kommentar BGB Art. 1 Rom II-VO note 48.

audited company's creditors or its officers is not covered by (2) (d) nor is liability towards persons relying on the auditors' reports and statements, e.g. putative investors, take over bidders or addressees of the company's balance sheet.[392] This does not prejudice whether auditors are liable to such persons at all[393] since to determine liability is for the applicable law. If take over bidders or prospective investors (for instance private equity funds) order an audit to be executed on their account this will most likely be a contractual issue anyway. A re-exception and a return to (2) (d) ought to be made for other companies of the group to which the audited companies belong.[394]

Secondly, only liability for statutory audits is excluded. Statutory audits are mandatory audits imposed by statute, within the system of EU law primarily by Art. 2 pt. 1 Auditing Directive.[395] The reason behind the exclusion is to secure the purpose of the statutory audit and to avoid interference from the side of general tort law differing from the *lex societatis*.[396] Hence, the *lex societatis* should have the say.[397] This *rationale* does not apply to voluntary audits which do not form part of the law of companies, either. Furthermore, auditors' liability arising from voluntary audits might arguably be a contractual matter. **153**

h) Other areas of company law

The list of examples is a list of examples only is not designed to be exhaustive. Other areas of claims arising out of company law can be excluded by virtue of (2) (d), too. Cash pooling might thus find a home under (2) (d), too.[398] **154**

7. Non-contractual obligations arising out of the internal relations of trusts, (2) (e)

(2) (e) expels non-contractual obligations arising out of the relations between the settlors, trustees and beneficiaries of a trust created voluntarily from the realm of the Rome II Regulation. Bearing in mind the history of the legal institution and the legal history of Art. 5 (6) Brussels Convention, the "grandfather" of dealing with trusts in European PIL, in mind, the definition of trust should take into consideration the English understanding foremost.[399] Scottish and Irish concepts might provide additional value,[400] theoretically also Maltese concepts[401]. The common law provides the problem to be dealt with, and accordingly, it would be the first haven for the answers.[402] An autonomous European notion of trust is **155**

392 *Ebke,* ZvglRWiss 109 (2010), 397, 406; *Knöfel*, in: Nomos Kommentar BGB Art. 1 Rom II-VO note 48.

393 Negating liability under English law *Caparo Industries plc v. Dickman* [19909 2 AC 605 (H.L.).

394 *Knöfel*, in: Nomos Kommentar BGB Art. 1 Rom II-VO note 48.

395 *Knöfel*, in: Nomos Kommentar BGB Art. 1 Rom II-VO note 48.

396 *Ebke*, in: FS Otto Sandrock (2000), p. 243, 249; *Ebke,* ZvglRWiss 109 (2010), 397, 406; *Knöfel,* Grundfragen der internationalen Berufsausübung von Rechtsanwälten (2005) p. 247; *Knöfel*, in: Nomos Kommentar BGB Art. 1 Rom II-VO note 48.

397 *Ebke,* ZvglRWiss 109 (2010), 397, 406.

398 See *Dutta*, in: FS Rolf Schütze zum 80. Geb. (2014), p. 39, 43.

399 *Leible*, in: Rauscher, Brussels Ibis Regulation (2015) Art. 7 Brussels Ibis Regulation note 112; *Layton/Mercer* para. 15.117. See *Conrad* pp. 278 *et seq.*

400 *Layton/Mercer* para. 15.117.

401 See in particular *Berti-Riboli/Ganado,* La legge di Malta sul trust (Milano 2007).

402 See *Gardella/Radicati di Brozolo,* 51 Am. J. Comp. L. 611, 619 *et seq.* (2003).

hardly conceivable.[403] Yet the most elegant solution is to hold recourse to the definition in the 1985 Hague Trusts Convention[404].[405] The justification for such a recourse gets better by the time the more civil law countries introduce the legal institution of trust in their national law after ratifying, or acceding to, the 1985 Hague Trusts Convention. The most prominent entries in that list of civil law countries entail the Netherlands,[406] France,[407] Italy[408] and Luxembourg[409] plus Switzerland.[410] Overall, an autonomous understanding is called for which might get some guidance from national concepts, but is not determined by them.[411] Generally, (2) (e) if seen beneath (2) (d) indicates that the Rome II Regulation regards trusts *inter vivos* as something akin to, or in the vicinity of, corporations, a view which will conflict with the English understanding to a certain degree.[412]

156 Trusts should bear the same meaning as in the Hague Trust Convention[413] which in turn has heavily influenced the concept of trust as it was imported in continental, civil law orders like Italy and the Netherlands or Switzerland (just to name the most important amongst the Third States which have promulgated national trust laws).

157 Careful reading of (2) (e) reveals that solely trust voluntarily created are addressed. The Commission's original proposal did not contain such distinction and excluded all trust

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403 *Roman Huber* para. 118.

404 Hague Convention on the Law Applicable to Trusts and Their Recognition, July 1, 1985, published i.a. in: RabelsZ 50 (1986), 698.

405 *Mankowski*, in: Magnus/Mankowski, Art. 7 Brussels Ibis Regulaton note 455; *Roman Huber* para. 118; see also *Conrad* p. 292.

406 *Aertsen,* De Trust – Beschouwingen over invoering van de Trust in het Nederlandse recht (2004) pp. 103–281 with further references.

407 Loi n°. 2007–211 du 19 février 2007 instituant la fiducie, JO 2007, 3052. On this e.g. *Barrière,* (2013) 58 McGill L.J. 869.

408 Cassaz. NGCC 2009 I 78 with note *Martone*; Trib. Belluno NGCC 2003 I 329; Trib. Bologna NGCC 2004 I 844 m. Anm. *Renda*; Trib. Parma Dir. e Giur. 2004, 655; Trib. Milano Riv. not. 2005, 850; Trib. Parma Riv. not. 2005, 851; Trib. Velletri Europa e dir. priv. 2005, 785; Trib. Reggio di Emilia Giur. it. 2008 I 629 with note *Monteleone*; *Federico Maria Giuliani,* Contratto e impresa 19 (2003) 433; *Carro,* Dir. e. Giur. 2004, 656; *de Guglielmi,* Riv. not. 2005, 858; *Monegat,* Riv. not. 2005, 868; *Mazzamuto,* Europa e dir. priv. 2005, 803; *Arianna Neri,* Il Trust e la tutela del beneficiario (2005); *Bartoli,* Trust e atto di destinazione nel diritto di famiglia e delle persone (2011); *Maurizio Lupoi,* Vita not. 2013, 1049. A popular denomination for the trust Italian style is "trust tricolore"; *Fusaro,* Riv. not. 2013, 859, 863.

409 Loi du 27 juillet 2003 relative au trust et aux contrats fiduciaires, Mémoire n°. 124 du 3 septembre 2003, p. 2620.

410 Siehe nur *Matthias Seiler,* Trust und Treuhand im schweizerischen Recht (Zürich etc. 2005); *Stephan Wolf/Jordi,* Trust und schweizerisches Zivilrecht, insbesondere Ehegüter-, Erb- und Immobiliarsachenrecht, in: Der Trust (Bern 2008), p. 29.

411 *Donzallaz,* La Convention de Lugano (1998) para. 5374 with fn. 17; *Geimer/Schütze,* Europäisches Zivilprozessrecht (3rd ed. 2010) Art. 5 EuGVVO note 326; *Hofmann/Kunz*, in: Basler Kommentar zum LugÜ (2011), Art. 5 LugÜ note 758.

412 *Aubrey L. Diamond,* RDIPP 1981, 289, 303; *Wittuhn,* Das Internationale Privatrecht des trust (1987) pp. 112 *et seq*., 117 *et seq*.

413 See COM 2003 427-C5–0338/2003–2003/0168 (COD) – P6TA_2005_0284; COM (2006) 83 final sub 3.2.

matters on the basis of the assumption that trusts are a *sui generis* institution.[414] But the European Parliament entered an amendment so as to ensure greater consistency with the Hague Trusts Convention.[415] The Commission accepted this and tabled its amended Proposal[416] which followed the wording of the Hague Trusts Convention to such an extent that it even borrowed the term "and evidenced in writing" which was inexplicably dropped in the Council's Common Position[417].

Hence, trusts created by statute or law are not addressed. This includes resulting trusts and constructive trusts.[418] The scope of the exclusion does not follow Arts. 5 (6) Brussels I Regulation; 7 (6) Brussels I*bis* Regulation in this regard. The latter rules have a wider ambit and extend to trusts created by the operation of a statute, or by a written instrument or created orally and evidenced in writing. (2) (e) does not repeat and reiterate that. The difference should be telling and a valuable guidance. However, where a defendant receives a mistaken payment, and knows of the payor's mistake, a claim that the defendant holds the payment as trustee for the payor is argued to be covered by Art. 10 Rome II Regulation.[419] **158**

Only the relations between the settlors, trustees and beneficiaries of a trust created voluntarily are excluded. This means the internal relations within and inside the trust. External relations of the trust itself (insofar as the trust has an own legal capacity and is treated as a separate legal entity), the settlors, the trustees, or the beneficiaries towards third persons without any function in the structure of the trust are not excluded. This relates in particular to creditors and debtors of the trust or of the said persons. The rights and obligations of third persons holding trust assets and obligations owed by or to 'outsiders' are not covered by (2) (e) as are the obligations owed by or to other persons concerned in the administration of the trust.[420] **159**

8. Non-contractual obligations arising out of nuclear damage, (2) (f)

Pursuant to (2) (f), non-contractual obligations arising out of nuclear damage are excluded. There are two reasons behind this exclusion: Firstly, the topic is regulated by a plethora of international conventions.[421] Uniform law covers much of the area.[422] Secondly, it touches upon vital national interests and policies.[423] Any decision in favour or against nuclear energy is a fundamental decision for national energy policy (as was amply demonstrated by Chancellor *Merkel*'s so called *Energiewende* in Germany following Fukushima and the smashing **160**

414 COM (2003) 427 final p. 9.

415 Amendment 21, COM 2003 427-C5–0338/2003–2003/0168 (COD) – P6TA_2005_0284.

416 COM (2006) 83 final sub 3.2.

417 OJ EC 2006 C 289/68.

418 Sceptical as to the latter *Schinkels,* ZEuP 2018, 250, 254 with further discussion.

419 *Andrew Scott*, in: Ahern/Binchy (eds.), The Rome II Regulation on the Law Applicable to Non-Contractual Obligations (2009), p. 57, 77; see *Gomez v. Gomez-Monche Vives* [2008] EWCA Civ 1065 [81]-[90], [2009] 2 WLR 950 (C.A., per *Lawrence Collins* L.J.).

420 *Dickinson,* paras. 3.195–3.196.

421 Listed, outlined or discussed e.g. by *Kissich,* Internationales Atomhaftungsrecht (2004); *Hinteregger*, in: FS Helmut Koziol (2010), p. 667; *Schärf,* Europäisches Atomrecht (2nd ed. 2012) pp. 54–75.

422 *Junker*, in: FS Peter Salje (2013), p. 243, 251.

423 *Knöfel*, in: Nomos Kommentar, Art. 1 note 50; *Junker*, in: Münchener Kommentar, Art. 1 note 42.

defeat of her ruling party in the regional election in its pretended home turf Baden-Württemberg in March 2011 immediately after Fukushima). For either reason, it is deplorable that the liability for nuclear damage is not subject to uniform conflict rules[424] since the present exclusion presents opportunities to the Member States to introduce unilateral national conflicts rules privileging their domestic nuclear industry or giving overly to nuclear fear (or rather nuclear *Angst*) prevalent in its domestic populace thus over-deterring and overregulating foreign industries.

161 The first *ratio* mentioned is somewhat spurious since international conventions (or more precisely the rules on their respective scope of application, being unilateral conflict rules) would take precedence by virtue of Art. 28 anyway. But primarily this first *ratio* carried that (2) (f) was formulated so widely[425] even wider than the international conventions would have demanded.[426] In fact, there are important aspects not covered by those conventions which are nevertheless excluded by virtue of (2) (f), in particular protective claims against ionising rays.[427]

162 (2) (f) covers any damage directly caused by nuclear plant, be it by explosion or implosion, be it by leaking radioactivity to the environment, air or water, be it the liability of a doctor or a hospital using radioisotopes for medical purposes, be it an accident in which a transportation vehicle carrying nuclear substances is involved.[428] (2) (f) is not restricted and limited to phenotypic nuclear damages like radioactive emissions, contamination of persons or property. Medical maltreatment after a nuclear incident might be a *causa superveniens*, though.

163 The question how remote the relation between a damage and nuclear energy can be to be still covered by (2) (f). An example where it is highly questionable whether the level of remoteness has become too great, might be provided by the injury which a protester suffers from the hands of security personnel or the police guarding a nuclear plant,[429] or the other way round by the injury which a guard or a policeman suffers from the hands of violent protestors whilst he attempts to protect a nuclear plant.

164 At present, "nuclear energy" should be understood in the traditional sense relating to nuclear fission from Uranium or Plutonium isotopes. That was the *status quo* when the Rome II Regulation was promulgated. But future developments could go important steps beyond nuclear fission. Energy might be won from, and generated by, nuclear fusion in particular. Hydrogen technology is dawning. The political dimension of new developments is both imminent and evident. Their repercussions can be wide. They might generate problems comparable to those which have been caused by the advance of fission plants and research. To restrict "nuclear damage" to nuclear fission eternally would petrify the meaning and would deny any technological dynamic to work its wile.

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424 *Magnus*, in: FS Jan Kropholler (2008), p. 595, 610–611; *Unberath/Cziupka*, in: Rauscher, Art. 1 note 43; *Knöfel*, in: Nomos Kommentar, Art. 1 note 52.

425 *Junker,* NJW 2007, 3675 (3677); *Sujecki,* EWS 2009, 310 (312).

426 *Magnus*, in: FS Jan Kropholler (2008), p. 595, 606–607; *Knöfel*, in: Nomos Kommentar, Art. 1 note 50.

427 *Junker*, in: FS Peter Salje (2013), p. 243, 252.

428 *Knöfel*, in: Nomos Kommentar, Art. 1 note 50.

429 *Knöfel*, in: Nomos Kommentar, Art. 1 note 51.

9. Non-contractual obligations arising out of violation of privacy and rights relating to personality, (2) (g)

a) Legislative history

165 The most important and by the same token the most controversial of all exceptions is the one in (2) (g) for non-contractual obligations arising out of violation of privacy and rights relating to personality, including defamation. The exclusion is the result of a long and protracted legislative history.[430] The Commission initially suggested to apply the law of the plaintiff's habitual residence to defamation cases. But the backlash against this was so grave that the Commission dropped such ideas even before submitting its first official Proposal.[431] The Proposal included a special rule specifically addressing violations of privacy or rights relating to the personality.[432] It almost immediately met fierce opposition and received a decidedly negative reception from broadcasters and newspapers throughout Europe.[433] Media enterprises and in particular the English Yellow Press, the proverbial "Fleet Street", feared that they might be held liable abroad according to foreign law establishing lesser privileges based on freedom of the press or freedom of speech and thus establishing stricter standards of liability.[434] They would not have that. In this fear they were joined by their continental counterparts. Together the united press media exerted severe pressure on their respective governments. Lobbying reached a massive level of intensity.[435]

166 The European Parliament voted in favour of an approach based on searching for the most significant element under a rebuttable presumption that the most significant element had to be the principal direction of the publication or subsidiarily the exercise of editorial control.[436] But the Commission rejected this chiefly because of the perception that it would be too generous to press editors rather that the victim of alleged defamations in the press.[437] Eventually, dissent over the substance of an independent rule for defamation or libel resulted in no rule at all.[438] The Commission itself described the deadlock as a political impasse and preferred to exclude the tricky question from the scope of the Regulation altogether.[439] The

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430 On this e.g. *von Hein,* VersR 2007, 440 (442); *Warshaw,* 32 Brooklyn J. Int'l. L. 269 (2006).

431 See European Union Committee of the House of Lords HL Paper 66/2004 [112]; *Kunke,* 19 Emory Int'l. L. Rev. 1733, 1739; *Kenny*/*Hefferman*, in: Stone/Farah (eds.), Research Handbook on EU Private International Law (2015), p. 315, 318.

432 Art. 6 COM (2003) 427 final.

433 See European Union Committee of the House of Lords HL Paper 66/2004 [114]; *Kenny*/*Hefferman*, in: Stone/Farah (eds.), Research Handbook on EU Private International Law (2015), p. 315, 319.

434 See the summary of reactions in: European Union Committee of the House of Lords HL Paper 66/2004 [114]-[127].

435 *Wallis*, in: Ahern/Binchy (eds.), The Rome II Regulation on the Law Applicable to Non-Contractual Obligations (2009), p. 1, 5; *Brand,* GPR 2008, 298 (299–300).

436 Art. 5 (1) European Parliament Legislative Resolution on the Proposal for a Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations, P6_TA2005–0284.

437 COM (2006) 83 final p. 6.

438 *Kenny*/*Hefferman*, in: Stone/Farah (eds.), Research Handbook on EU Private International Law (2015), p. 315, 320–321.

439 COM (20017) 126 final p. 5.

final Regulation is terse in its incorporation of the blanket exclusion which is not justified or explained by any Recital.[440]

167 The weighing of protected interests is delicate and far from simple.[441] Torts by media further compound difficulties and complications. They see a genuine clash of protected interests, all elevated and backed by human rights. On the one hand there are the freedom of the press and the liberty of expression; on the other hand there are the interests of the prospective victims (or, to put it in a more neutral fashion, the subjects of media coverage), their right to privacy and their rights of personality. Different constitutional traditions of the Member States emphasise, and put forward, different aspects. Trenches are deep, and national perspectives are diverse.[442] The interests concerned are high ranking in the national legal orders. Not even the ECHR has paved a way under Art. 10 EHRC,[443] but has referred to the different national traditions and the ensuing leeway open to the Contracting States of the EHRC.[444] The hierarchy between national constitutional law and EU secondary law has not been clarified yet, either. Different national attitudes and cultural values as to the freedom of press and impertinent journalism clashed to a degree that a common positive approach which would be acceptable to all Member States could not be reached.[445]

168 Eventually, a compromise saved the day. The political instances were unable to agree on anything positively.[446] Hence, they agreed to disagree and resorted to excluding the matter from the scope of the Rome II Regulation. (2) (g) was the pivotal part of the compromise, and Art. 30 (2) adds some desperate attempt to camouflage the failure and to reconcile the European Parliament.

169 This way, the most politically sensitive area of the PIL of torts has not been unified or harmonised, but is still subject to not harmonised national conflict rules.[447] If they employ the place where the damage occurred as their connecting factor, exactly that result is reached

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440 *Kenny*/*Hefferman*, in: Stone/Farah (eds.), Research Handbook on EU Private International Law (2015), p. 315, 321.

441 See e.g. *Gerhard Wagner,* ERPL 2005, 21; *Kropholler*/*von Hein*, in: FS Andreas Heldrich (2005), p. 793; *Morse,* (2005) 58 Current Leg. Probl. 133; *Kunke,* 19 Emory Int'l. L. Rev. 1733 (2005); *Heiderhoff,* EuZW 2007, 428; *v. Hinden*, in: FS Jan Kropholler (2008), p. 573; *Feraci,* Riv. dir. int. 2009, 1020.

442 See *Koziol*/*Warzilek* (eds.), Persönlichkeitsschutz gegen Massenmedien (2005); *Beater*/*Habermeier* (eds.), Verletzungen von Persönlichkeitsrechten durch die Medien (2005); *Wüllrich,* Das Persönlichkeitsrecht des einzelnen im Internet (2006); *Brüggemeier*/*Ciacchi*/*O'Callaghan* (eds.), Personality Rights in European Tort Law (2010); *Thiede,* Internationale Persönlichkeitsrechtsverletzungen (2010); *Thiede*, in: Koziol/Seethaler/Thiede (eds.), Medienpolitik und Recht (2010), p. 149.

443 *Hess,* JZ 2012, 189; *Knöfel*, in: Nomos Kommentar, Art. 1 note 53.

444 *Max Mosley v. United Kingdom,* ECHR 10 May 2011 – No. 48009/08 para. 107.

445 *Briggs,* Private International Law in English Courts (2014) para. 8.59.

446 *Gerhard Wagner,* IPRax 2008, 1 (3, 10); *von Hein,* ZEuP 2009, 6 (13); *Bogdan*, in: Liber amicorum Kurt Siehr (2010), p. 375, 385–386; *Knöfel*, in: Nomos Kommentar, Art. 1 note 53.

447 See only OLG Stuttgart NJW-RR 2014, 423; *Rolf Wagner,* IPRax 2008, 314 (316); *Rushworth*/*Scott,* [2008] LMCLQ 274, 276; *Brand,* GPR 2008, 298 (299 f.); *Kadner Graziano,* RabelsZ 73 (2009), 1 (60); *Mankowski,* Interessenpolitik und Europäisches Kollisionsrecht (2011) p. 79.

which the media wanted to avoid. That is deeply ironic[448] and worlds apart from a sweeping victory of the media industry.[449] Furthermore, the ECJ has begun to develop case law on jurisdiction under Arts. 5 (3) Brussels Convention/Brussels I Regulation; 7 (2) Brussels I*bis* Regulation which addresses torts by media.[450] Hence, since the Brussels I*bis* Regulation does not contain a parallel exclusion to (2) (g) there might be judge made European law answering the questions which the politicians were not able to cope with in the Rome II context.[451] Jurisdiction is even more important in this area than conflicts law since it decides whether the case is tried "home" or "away" – and indirectly according to which procedural rules and under which constitutional ramifications.

Originally, the exclusion was envisaging torts by media. But the political instances did not agree on a viable definition of "media".[452] Consequentially, they settled in a hurried last minute compromise for the current wording which relates to violation of privacy and rights relating to personality, including defamation. That partially loses target and overshoots the mark.[453] It causes a number of problems and open questions: Firstly, can companies and other non-natural persons enjoy rights of personality? Secondly, disclosure of confidential data is big in the fields of competition law and intellectual property, fields which are expressly addressed in Arts. 6; 8 which may severely suffer from fragmentation.[454] Thirdly, arbitrary results in data theft are likely to occur, for instance as to whether whose claims are excluded from the scope of the Rome II Regulation, the claims of the person whose data, or the claims of the person from whom the date were stolen (the latter being any kind of data or communication intermediaries).[455] Fourthly, some activities inflict damage and other torts concurrently, e.g. a public slap in the face might be regarded as defamation and battery simultaneously.[456] **170**

b) Details

(2) (g) might owe its very existence to libel tourism, defamation and torts by media. But nothing in the wording restricts it to these fields. Its wording is wider and covers all kinds of non-contractual obligations stemming from the violation of privacy or rights of personality. Even a person's name is also a right of personality. Its whole purpose is to identify that person. In modern times, the permission to use a person's name for instance in an advertisement of in a TV ad might even be a commercially valuable asset. (2) (g) also relates to issues of data protection.[457] **171**

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448 *Mankowski,* Interessenpolitik und Europäisches Kollisionsrecht (2011) p. 79.

449 But such victory was attested e.g. by *Rolf Wagner,* IPRax 2008, 314 (316); *Rushworth/Scott,* [2008] LMCLQ 274, 276; *Brand,* GPR 2008, 298 (299–300); *Kadner Graziano,* RabelsZ 73 (2009), 1 (60).

450 *Fiona Shevill v. Presse Alliance SA*, (Case C-68/93) [1995] ECR I-415 (print); *eDate Advertising v. X and Olivier Martinez and Robert Martinez v. MGN Ltd.* (Joined Cases C-509/09 and C-161/10), [2011] ECR I-10269 (online).

451 *Mankowski,* Interessenpolitik und Europäisches Kollisionsrecht (2011) p. 81.

452 Communication from the Commission to the European Parliament, COM (2006) 566 p. 3.

453 *Bach*, in: Peter Huber, Art. 1 note 54.

454 *Dickinson,* para. 3.227; *Bach*, in: Peter Huber, Art. 1 note 55.

455 *Bach*, in: Peter Huber, Art. 1 note 56.

456 *Bach*, in: Peter Huber, Art. 1 note 57.

457 OLG Köln, MMR 2011, 394 (395); *Härting,* Internetrecht (5th ed. 2014) para. 2336; *Herbrich/Beyvers,* RDV 2016, 3 (7).

172 Enterprises, businesses and companies corporate or unincorporated are within (2) (g) insofar as they are privy to privacy or a personality.[458] Whether they enjoy a right of privacy, might be a question for Art. 8 ECHR to answer.[459] Another application might arise in the context of data protection and Art. 8 Charter of Fundamental Rights. In any event, the Rome II Regulation is applicable if bodies corporate or unincorporate protect their employees or their premises.[460] The liability for professional ratings does not fall under (2) (g), either.[461]

173 (2) (g) does not apply to physical harm[462] even if under the auspices of the substantive law of the *lex fori* such harm would be phrased and couched in terms of violation of personality rights.[463] This applies for instance to medical malpractice neglecting the lack of the patient's permission or disobeying duties to inform the patient properly,[464] or to social freezing and other kinds of kryoconservating techniques of human genetical material destined to carry on its donor's personality.[465]

c) The latest gap-filling attempt of the European Parliament

174 The European Parliament was not prepared to leave matters at the status reached with (2) (g). Reporter in the Committee on Legal Affairs was initially yet again the indefatigable *Diana Wallis* MEP[466] who was later-on succeeded by *Cecilia Wikström* MEP.[467] After having commenced work on the topic already in November 2009,[468] the European Parliament on 10 May 2012 finally reached the following **Non-legislative Resolution**,[469] **based on Art. 225 TFEU**:

"The European Parliament,
– having regard to Article 225 of the Treaty on the Functioning of the European Union,
– having regard to Article 81 of the Treaty on the Functioning of the European Union, in particular point (c) of paragraph 2 thereof,

458 *Marc-Philippe Weller,* LMK 2013, 344766; deliberately undecided BGH, GRUR 2016, 810 para. 35 – profitbricks.es. Compare A-G *Bobek,* Opinion of 13 July 2017 in Case C-194/16, ECLI:EU:C:2017:554 paras. 36–69.

459 See *Dickinson,* para. 3.227.

460 See *Dickinson,* para. 3.227.

461 *Dutta,* IPRax 2014, 33 (37).

462 *Breidenstein,* FamFR 2012, 172 (175).

463 *Knöfel*, in: Nomos Komm BGB Art. 1 Rom II-VO note 55.

464 *Spickhoff*, in: FS Gerfried Fischer (2010), p. 503, 504; *Spickhoff*, in: FS Bernd von Hoffmann (2011), p. 437, 441; *Knöfel*, in: Nomos Komm BGB Art. 1 Rom II-VO note 55. Tentatively *contra Deutsch*, in: FS Gerfried Fischer (2010), p. 27, 29.

465 *Knöfel*, in: Nomos Komm BGB Art. 1 Rom II-VO note 55 reflecting on BGHZ 124, 52 (54).

466 Committee on Legal Affairs of the European Parliament, Draft Report with recommendations to the Commission on the amendment of Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations (Rome II), Committee on Legal Affairs, Rapporteur: *Diana Wallis,* 21 November 2011, 2009/2170 (INI) – PR\874724EN.doc.

467 Committee on Legal Affairs of the European Parliament, Report with recommendations to the Commission on the amendment of Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations (Rome II), Committee on Legal Affairs, Rapporteur: *Cecilia Wikström,* 2 May 2012, A7–0152/2012 – PE 469.993v03–00.

468 2009/2120/INI.

469 P7_TA(2012)0200.

– having regard to Articles 8 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and Articles 7 and 11 of the Charter of Fundamental Rights of the European Union,
– having regard to the forthcoming accession of the Union to that Convention pursuant to Article 6(2) of the Treaty on European Union,
– having regard to Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[470], in particular Articles 2 and 5(3) thereof, and to the proposal for a recast of that Regulation (COM(2010)0748),
– having regard to the judgment of the Court of Justice of 7 March 1995 in Case C-68/93 *Shevill* [1995] ECR I-415,
– having regard to the judgment of the Court of Justice of 25 October 2011 in Joined Cases C509/09 and C161/10 *eDate Advertising GmbH,*[471]
– having regard to the opinion of Advocate General Mancini in Case 352/85 *Bond van Adverteerders and Others v Netherlands [*1988] ECR 2085, the judgment in Case C260/89 *Elliniki Radiofonia Tileorasi (ERT-AE) [*1991] ECR I-2925, the judgment and the opinion of Advocate General Van Gerven in Case C-159/90 *Society for the Protection of Unborn Children Ireland Ltd* [1991] ECR I-4685 and the opinion of Advocate General Jacobs in Case C-168/91 *Christos Konstantinidis [1993] ECR I-1191,*
– having regard to the Commission's original proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (COM (2003)0427),
– having regard to its position of 6 July 2005 on the proposal for a Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ("Rome II"),[472]
– having regard 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)[473] ("the Rome II Regulation"), in particular Article 30(2) thereof,[474]
– having regard to the comparative study commissioned by the Commission on the situation in the 27 Member States as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality,[475]
– having regard to the alleged phenomenon of "libel tourism",[476]

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470 OJ L 12, 16.1.2001, p.1.

471 Not yet reported in the European Court Reports.

472 OJ C 157 E, 6.7.2006, p. 370.

473 OJ L 199, 31.7.2007, p. 40.

474 *Not later than 31 December 2008, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, taking into account rules relating to freedom of the press and freedom of expression in the media, and conflict-of-law issues related to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.*

475 JLS/2007/C4/028, Final Report.

476 See the Fifth Dame Ann Ebsworth Memorial Public Lecture given by the Rt Hon. The Lord Hoffmann on 2 February 2010 and Trevor C. Hartley, *'Libel Tourism' and Conflict of Laws*, ICLQ vol 59, p. 25, January 2010.

– having regard to the UK Defamation Bill,[477]
– having regard to the public hearing held on 28 January 2010,[478]
– having regard to the working documents drawn up by the rapporteur of the Committee on Legal Affairs and the large body of scholarly writings on this matter,[479]
– having regard to Rules 42 and 48 of its Rules of Procedure,
– having regard to the report of the Committee on Legal Affairs (A7–0152/2012),

A. whereas, following its ruling in *Shevill,* the Court of Justice has held in *eDate Advertising* that Article 5(3) of Regulation (EC) No. 44/2001 must be interpreted as meaning that, in the event of an alleged infringement of personality rights by means of content placed online on an internet website, the person who considers that his or her rights have been infringed has the option of bringing an action for liability, in respect of all the damage caused, either before the courts of the Member State in which the publisher of that content is established or before the courts of the Member State in which the centre of his or her interests is based. That person may also, instead of an action for liability in respect of all the damage caused, bring his or her action before the courts of each Member State in the territory of which content placed online is or has been accessible. Those courts have jurisdiction only in respect of the damage caused in the territory of the Member State of the court seised;

B. whereas the Rome II Regulation lacks a provision for the determination of the law applicable to violations of privacy and rights relating to personality;

C. whereas consideration of an appropriate rule has been coloured by controversy about "libel tourism", a type of forum shopping in which a claimant elects to bring an action for defamation in the jurisdiction which is considered most likely to produce a favourable

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477 Published as a consultative document on http://www.justice.gov.uk/consultations/docs/draft-defamation-bill-consultation.pdf; see also the first report of the joint committee of the UK Parliament at http://www.publications.parliament.uk/pa/jt201012/jtselect/jtdefam/203/20302.htm.

478 Hearing on rights relating to personality, in particular in relation to defamation, in the context of private international law, particularly the Rome II Regulation. For the speakers' contributions, see http://www.europarl.europa.eu/activities/committees/eventsCom.do?page=2&product=CHE&language=EN&body=JURI.

479 DT\820547EN.doc and DT\836983EN.doc; see in particular the publications made in July 2010 in the online symposium *Rome II and Defamation*: http://conflictoflaws.net/2010/rome-ii-and-defamation-online-symposium by *Jan von Hein*, Professor of civil law, private international law and comparative law at the University of Trier, Germany (to whom the rapporteur is particularly indebted for the proposal set out in this document), *Trevor Hartley,* Emeritus Professor at the London School of Economics, Andrew Dickinson, Visiting Fellow in Private International Law at the British Institute of International and Comparative Law and Visiting Professor at the University of Sydney, Olivera Boskovic, Professor of Law at the University of Orléans, *Bettina Heiderhoff,* Professor of Law at the University of Hamburg, Nerea Magallón, former Professor of Law at the University of the Basque Country, at present teaching Private International Law in Santiago de Compostela, Louis Perreau-Saussine, Professor of Law at the University of Nancy, and Angela Mills Wade, Executive Director of the European Publishers Council. See also Jan-Jaap Kuipers, *Towards a European Approach in the Cross-Border Infringement of Personality Rights*, 12 German Law Journal 1681-1706 (2011), available at http://www.germanlawjournal.com/index.php?pageID=11&artID=1379. For the EU and fundamental rights, see Darcy S. Binder, *The European Court of Justice and the Protection of Fundamental Rights in the European Community: New Developments and Future Possibilities in Expanding Fundamental Rights Review to Member State Action,* Jean Monnet Working Paper No. 4/95, at http://centers.law.nyu.edu/jeanmonnet/papers/95/9504ind.html.

result – generally that of England and Wales, which is "regarded as the most claimant-friendly in the world"; whereas, however, this is an issue that goes beyond the United Kingdom and is also of concern for other jurisdictions;

D. whereas the high costs of litigating in that jurisdiction and the potentially high level of damages that may be awarded there allegedly have a chilling effect on freedom of expression; whereas where legal costs are high, publishers may be forced to settle even where they consider that they have a good defence;

E. whereas the Defamation Bill presently before the UK Parliament promises to go a long way towards removing the alleged chilling effect on publishers, although it seems unlikely to resolve the difficult issue of high legal costs;

F. whereas the internet has added the further complication of virtual universal accessibility, coupled with the permanence of postings and the emergence of blogs and anonymous postings;

G. whereas press and media freedom are hallmarks of a democratic society;

H. whereas legal remedies must be available when that freedom is abused, particularly to the detriment of peoples' private lives and reputation[480]; whereas each Member State should ensure that such remedies exist and are effective in cases of infringements of such rights; whereas Member States should strive to ensure that prohibitively high legal costs do not result in any claimant being denied access to justice in practice; whereas the cost of legal proceedings can also be ruinous for the media;

I. whereas it is for each State to determine the proper balance between the right to respect for private life guaranteed by Article 8 of the ECHR and the right to freedom of expression guaranteed by Article 10 of the ECHR as it thinks fit;

J. whereas, notwithstanding this, with the Union's accession to the ECHR, the Union may over time have to find a common yardstick in cross-border cases relating to the freedoms to supply goods and services as a result of the "dialectical development" looked forward to by Advocate General Mancini in the *Bond van Adverteerders* case, having regard also to the judgments in *Elliniki Radiofonia Tileorasi and Society for the Protection of Unborn Children Ireland Ltd and Advocate General Jacobs' opinion in Christos Konstantinidis; indeed, in the case Society for the Protection of Unborn Children Ireland Ltd*[481]*, Advocate General Van Gerven put forward* the proposition that "a national rule which in order to show that it is compatible with [Union] law has to rely on legal concepts, such as imperative requirements of public interest or public policy ... falls 'within the scope' of [Union] law" on the ground that, although the Member States have some discretion in defining the public interest or public policy concepts, the scope of those concepts in the case of measures falling within the scope of Union law is nevertheless subject to Union control and they have to be "justified and delimited in a uniform manner for the whole [Union] under [Union] law and therefore taking into account the general principles in regard to fundamental rights and freedoms";

K. whereas, nevertheless, it would not be appropriate to adopt rules of private international law for the determination of the applicable law which are skewed in one way or another to protect one right above another or designed to restrict the reach of the law of a particular Member State, particularly given the existence of the public policy/*ordre public* clause in

480 Reputation is nowadays considered to be protected by the ECHR as part of private life (see *N. v. Sweden*, No. 11366/85).

481 Paragraph 31.

Article 26 of the Rome II Regulation; whereas it is therefore especially important to retain the public policy control in the Brussels I Regulation;

L. whereas the criterion of the closest connection should be used for the right of reply, since such relief should be granted swiftly and is interim in nature; whereas the provision of the type set out in the Annex should also cater for party autonomy and the option of electing to apply the *lex fori* where the claimant elects to sue in the media's courts for damage sustained in more than one Member State;

M. whereas it is further considered that, in order to promote the public goods of reducing litigation, promoting access to justice, ensuring the proper functioning of the internal market and securing an appropriate balance between freedom of expression and the right to a private life, the Commission should carry out extensive consultations with interested parties, including journalists, the media and specialist lawyers and judges, with a view to proposing the creation of a centre for the voluntary settlement of cross-border disputes arising out of violations of privacy and rights relating to personality, including defamation, by way of alternative dispute resolution (ADR); whereas this would be a much more progressive and 21st-century approach to the resolution of such disputes and facilitate a move towards a more modern mediation-friendly justice culture;

N. whereas Member States could encourage and promote the use of a future ADR centre, also by allowing non-use of the centre to be taken into account in orders for costs;

O. whereas the centre could ultimately be self-financing;

1. Requests the Commission to submit, on the basis of point (c) of Article 81(2) of the Treaty on the Functioning of the European Union, a proposal designed to add to the Rome II Regulation a provision to govern the law applicable to a non-contractual obligation arising out of violations of privacy and rights relating to personality, including defamation, following the detailed recommendations set out in the annex hereto;
2. Further requests the Commission to submit, on the basis of point (d) of Article 81(2) of the Treaty on the Functioning of the European Union, a proposal for the creation of a centre for the voluntary settlement of cross-border disputes arising out of violations of privacy and rights relating to personality, including defamation, by way of alternative dispute resolution;
3. Confirms that the recommendations respect fundamental rights and the principle of subsidiarity;
4. Considers that the requested proposal does not have financial implications;
5. Instructs its President to forward this resolution and the accompanying detailed recommendations to the Commission and the Council.

Annex to Resolution: Detailed recommendations as to the content of the Proposal requested

The European Parliament considers that the following Recital 32a and Article 5a ought to be added to Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II):

Recital 32a

This Regulation does not prevent Member States from applying their constitutional rules relating to freedom of the press and freedom of expression in the media. In particular, the application of a provision of the law designated by this Regulation which would have the

effect of significantly restricting the scope of those constitutional rules may, depending on the circumstances of the case and the legal order of the Member State of the court seised, be regarded as being contrary to the public policy (ordre public) of the forum.

Article 5a
Privacy and rights relating to personality
(1) The law applicable to a non-contractual obligation arising out of a violation of privacy or rights relating to the personality, including defamation, shall be the law of the country in which the most significant element or elements of the loss or damage occur or are likely to occur.
(2) However, the law applicable shall be the law of the country in which the defendant is habitually resident if he or she could not reasonably have foreseen substantial consequences of his or her act occurring in the country designated by paragraph 1.
(3) Where the violation is caused by the publication of printed matter or by a broadcast, the country in which the most significant element or elements of the damage occur or are likely to occur shall be deemed to be the country to which the publication or broadcasting service is principally directed or, if this is not apparent, the country in which editorial control is exercised, and that country's law shall be applicable. The country to which the publication or broadcast is directed shall be determined in particular by the language of the publication or broadcast or by sales or audience size in a given country as a proportion of total sales or audience size or by a combination of those factors.
(4) The law applicable to the right of reply or equivalent measures and to any preventive measures or prohibitory injunctions against a publisher or broadcaster regarding the content of a publication or broadcast and regarding the violation of privacy or of rights relating to the personality resulting from the handling of personal data shall be the law of the country in which the publisher, broadcaster or handler has its habitual residence."

175 As to substance, the European Parliament adopted to a certain extent a proposal tabled by *von Hein*[482].[483] However, several years have elapsed since the European Parliament passed this Resolution. The Resolution did not entice the Commission to re-address the matter. It has not lived up to any expectations which the European Parliament might have possible nurtured. The Commission and the Council remained silent. An official reaction on the Commission's side cannot be detected. The Parliament's Committee on Legal Affairs[484] has reprimanded the Commission for failing to respond formally and thus breaching interinstitutional agreements[485].

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482 *von Hein,* in: von Hein on Rome II and Defamation (19 July 2010) http://www.conflictoflaws.net/2010/von-hein-on-rome-ii-and-defamation.

483 *Kenny*/*Hefferman*, in: Stone/Farah (eds.), Research Handbook on EU Private International Law (2015), p. 315, 341.

484 Stocktaking of parliamentary committee activities during the 7th legislature – Committee on Legal Affairs (3 November 2014) p. 8 http://www.europaparl.europa.eu/document/activities/cont/201411/20141103ATT92392/20141103ATT92392.EN.pdf.

485 Namely para. 16 Framework Agreement on relations between the European Parliament and the European Commission of 20 October 2010, OJ EU 2010 L 304/47.

176 The European PIL of damages for the violation of personality rights has become a dormant beauty again. No-one should expect realistically that this will change in the foreseeable future. Even the academic discussion which was so vividly buzzing around 2010 and which culminated in an online symposium "Rome II and Defamation" on Conflict of laws.net[486] has been silenced and has almost died off.[487] Libel tourism,[488] i.e. forum shopping in alleged defamation matters, might have passed its peak but it has definitely not vanished and evaporated entirely. It would be premature to write its obituary.[489]

III. Exclusion of evidence and procedure, (3)

177 Evidence and procedure are excluded from the scope of the Rome II Regulation pursuant to (3). This exclusion follows the footmarks of Art. 1 (2) (h) Rome Convention and is mirrored in Art. 1 (3) Rome I Regulation. In fact, even the re-exception, the exception to the exception, relating to Art. 22 is a copycat. Art. 22 mirrors Art. 14 Rome Convention and in turn Art. 18 Rome I Regulation. Art. 21, equally referred to, is the parallel to Art. 11 Rome I Regulation which serves as point of reference in Art. 18 (2) Rome I Regulation as Art. 21 does in Art. 22 (2). (3) is further qualified by Art. 15 (c)[490] which unfortunately is not expressly reserved in the wording of (3). However, it should be clear, that a matter falling within Art. 15 (c) cannot be held to be a matter of evidence or procedure.[491] An area of doubt surrounding Art. 22 is the attribution of rules governing *prim facie* evidence.[492]

178 It should be noted that (3) is confined to negatively excluding evidence and procedure from the realm of the Rome II Regulation but refrains from expressly establishing positively that they are governed by the *lex fori*.[493] Instead, the mere exclusion leaves it in principle to the national conflict rules of the Member States to characterise these matters as they like and to subject them to whichever law they deem appropriate.

179 Yet evidence and procedure are traditionally part of the realm of the *lex fori*.[494] Taken at face value, (3) is rather declaratory since non-contractual obligations are by their very nature substantive, not procedural. But that would be only one part of the picture. The other part is the difficult one: the great characterisation divide between substance and procedure. Delineating the frontier between the two of them and allocating legal institutions to either side of

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486 http://conflictoflaws.net/2010/rome-ii-and-defamation-online-symposium with contributions by *Boskovic, Dickinson, Hartley, Heiderhoff, von Hein, Magallón, Mills Wade/Perreau-Sassine,* and *Wallis*.

487 With the exceptions of *Thiede,* YbPIL 14 (2012/13), 247; *Knöfel*, in: Nomos Kommentar BGB, Art. 30 notes 13–17.

488 See on this phenomenon *Hartley,* (2010) 59 ICLQ 25; Lord *Hoffmann,* Libel Tourism – Dame Anne Ebsworth Lecture (1 February 2010) http://inform.files.wordpress.com/2010/02/libel-tourism-lordhoffmann-speech-01–02–2010.doc.

489 But cf. *Thiede,* AEDIPr 2013, 487.

490 *Folkard,* [2015] Cambridge L.J. 37, 38.

491 *Morse*, in: Essays in honour of Hans van Loon (2013), p. 389, 391.

492 See LG Saarbrücken IPRax 2015, 567 (568–569); *Zwickel,* IPRax 2015, 531 (533–534).

493 *Illmer,* (2009) 28 CJQ 237, 242; *Patrick Ostendorf,* (2015) 11 JPrIL 163, 173.

494 See only – expressly located in the vicinity of (3) – Rb. Gelderland, zittingsplaats Arnhem NIPR 2016 Nr. 286 p. 553.

the line is not the simplest task. Art. 15 gives more than mere hints, and the qualification issue arising under (3) has to be addressed in its light.[495]

The Rome II Regulation covers some issues without expressly labelling them "substantive"[496] for such labelling would only be an intermediate step whereas the technique chosen in Art. 15 achieves an additional goal. It pursues a pragmatic approach and does not formulate a theory for distinguishing, but positively identifies issues subjected to the *lex causae* without further ado.[497] It is result-focused and allocates issues without resorting to general theories of characterisation.[498] It does particularly not employ a right-remedy distinction as it was traditionally known in some common law jurisdictions,[499] introduced mainly as a shield against attempts to reduce liability by the backdoor of importing foreign (procedural) devices.[500] The disappearance of such divide avoids any major twilight zone between substance and procedure[501] and liberates from domestic shackles.[502] For practical purposes, there is no longer a substance vs. procedure classification in transnational personal injury actions.[503] The Rome II Regulation implements some kind of "blanket" approach in this regard.[504] Remoteness, heads of damages, and assessment are subject of the applicable substantive law.[505] Recital (33) generates some degree of uncertainty as to quantifying damages for personal injury, but should not be given precedence over Art. 15 (c), though.[506] **180**

The Regulation's abstinence from giving a general definition of substantive or procedural law leaves some leeway for the courts to relatively free define matters of evidence and procedure.[507] If one attempted at developing guidelines in the vein of establishing an autonomous interpretation[508] the following results could be prompted: (3) excludes as procedural only such matters as are concerned with the commencement of (formal) proceedings with a dispute resolution authority and the manner in which proceedings are conducted and the machinery of the administration of justice by national dispute resolution authorities.[509] These might cover in particular: the formalities of bringing a claim; a court summons; service of proceedings; types of proceedings admissible (such as summary proceedings, a procedure based on documentary evidence only, collective proceedings like the Dutch WCAM proceedings, or representative proceedings like the German KapMuG proceed- **181**

495 *Plender/Wilderspin,* para. 17–072.

496 *Schoeman,* [2010] LMCLQ 81, 83–84.

497 *Schoeman,* [2010] LMCLQ 81, 86.

498 *Schoeman,* [2010] LMCLQ 81, 86–87.

499 *Schoeman,* [2010] LMCLQ 81, 87–88.

500 *McParland,* The Rome I Regulation on the Law Applicable to Contractual Obligations (2015) para. 8.27.

501 *Schoeman,* [2010] LMCLQ 81, 89.

502 *Schoeman,* [2010] LMCLQ 81, 93.

503 *Cox v. Ergo Versicherung AG* [2014] UKSC 22, [2014] AC 1379 [40] (S.C., per Lord *Mance*).

504 *Schoeman,* (2015) 21 NZ Bus. L.Q. 30, 44.

505 *Morse*, in: Essays in honour of Hans van Loon (2013), p. 389, 394.

506 *Morse*, in: Essays in honour of Hans van Loon (2013), p. 389, 395.

507 *Mortensen,* YbPIL 9 (2007), 203, 215–216.

508 *Illmer,* (2009) 28 CJQ 237, 247. Politically *contra McParland,* The Rome I Regulation on the Law Applicable to Contractual Obligations (2015) paras. 8.36–8.37.

509 *Illmer,* (2009) 28 CJQ 237, 247.

ings); case management and the conduct of the proceedings; stay of proceedings; consolidation of claims; admissibility of counterclaims; functions of judge, dispute administrator, or jury; costs; and appeals.[510]

182 Foreign judicial conventions are to be recognised even if they do not relate to law but to fact.[511] Yet proof of the underlying facts remains a matter for the *lex fori*.[512] There Was never any legislative intention under either Rome Regulation that the courts of the Member States would be required to change their national rules on evidence and procedure to accommodate foreign practices found in the applicable law, other than in the ways agreed upon by the Member States in the text as constituting matters governed by the *lex causae*.[513]

183 This holds particularly true for common law legal orders which in the past have fashioned an extensive procedural characterisation[514] namely that actionability of damage is classified as substantive whereas the remedies which a (foreign) court provides in respect of such damage are treated as procedural.[515] To give the *lex fori* as much sway as possible would run counter to the clearly discernible intention of European legislature to submit as many issues as possible to the Rome II Regulation as expressed in Art. 15.[516] To split the remedy from the right would be tentatively artificial and would raise the need to reconcile two different laws on two closely related issues.[517] To draw a proper and reliable borderline within damages would be a vexed issue.[518]

184 The phrase "evidence and procedure" should be given a natural, not a narrowed and restricted meaning.[519] Recital (33) not merely invites, but orders the court seised to take into account all the relevant actual circumstances of the specific victim, including in particular the actual losses and costs of after-care and medical attention when quantifying personal injury in cases in which a road traffic accident takes place in a State other than that of the habitual residence of the victim. The Rome II Regulation does not envisage the rules of the *lex delicti* to govern the way in which evidence of fact or opinion is to be given to the court seised.[520] Courts are ill-equipped to receive for instance expert evidence given in a foreign

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510 *Illmer,* (2009) 28 CJQ 237, 247.

511 *Wall v. Mutuelle de Poitiers Assurance* [2014] EWCA Civ 138, [2014] 3 All ER 340 [23] (C.A., per *Longmore* L.J.); *Folkard,* [2015] Cambridge L.J. 37, 39.
Contra Cheshire/North/Fawcett/Carruthers, Private International Law (14th ed. 2008) pp. 844–846; *Rushworth/Scott,* [2008] LMCLQ 273, 274.

512 *Dickinson,* para. 14.19; *Folkard,* [2015] Cambridge L.J. 37, 39.

513 *McParland,* The Rome I Regulation on the Law Applicable to Contractual Obligations (2015) para. 8.26.

514 *Stone,* Ankara L. J. 4 (2007), 95, 128; *Plender/Wilderspin,* paras. 17–072, 17–076.

515 See *Harding v. Wealands* [2006] UKHL 32, [2007] 2 AC 1, [2006] 3 WLR 83, [2006] 4 All ER 1 (H.L.); noted by *Rogerson,* [2006] Cambridge L.J. 515; *Dougherty/Wyles,* (2007) 56 ICLQ 443.

516 *Plender/Wilderspin,* para. 17–076; see also *Morse*, in: FS Erik Jayme 82004), p. 593, 602–603.

517 See *Beaumont/Tang,* (2008) 12 Edinburgh L. Rev. 131, 135.

518 *Beaumont/Tang,* (2008) 12 Edinburgh L. Rev. 131, 135.

519 *Wall v. Mutuelle de Poitiers Assurance* [2014] EWCA Civ 138, [2014] 3 All ER 340 [41] (C.A., per *Jackson* L.J.). But cf. *Beaumont/Tang,* (2008) 12 Edinburgh L. Rev. 131, 135.

520 *Wall v. Mutuelle de Poitiers Assurance* [2014] EWCA Civ 138, [2014] 3 All ER 340 [12] (C.A., per *Longmore* L.J.).

manner.[521] Likewise, disclosure and expert evidence are handled in very different manners.[522] It would be unrealistic and inefficient to expect courts to adopt the evidential practices of different jurisdictions which differ vastly within Europe.[523] Moreover, cost rules are inextricably linked to the evidential practices.[524] The mode of assessing damages is too distinguished from the substantive basis for such assessment.[525]

"Procedure" must not be construed restrictively as to relate only to judicial proceedings, but should extend to all modes of dispute resolution at least if they enjoy a formalised basic structure and relate to solution finding on legal grounds. Hence, arbitration, conciliation, mediation, med-arb, med-lit and all other modes of alternative dispute resolution are covered, be they hybrids or not.[526] On the other hand, it does not suffice to trigger (3) if a certain topic is particularly intertwined with procedural means, like for instance injunctory relief against domestic violence.[527] **185**

"Evidence" should be interpreted also taking into consideration the meaning it has under the Evidence Regulation. Yet the Evidence Regulation does not extend too much of a helping hand for its Art. 1 does not set out to define or even circumscribe "evidence" or "taking of evidence". But any future case law under the Evidence Regulation addressing the issue could become a sound and fair starting point. **186**

IV. Special role of Denmark, (4)

Albeit being a Member State of the EU Denmark is not a Member State of the Regulation. This splendid isolation is fortified in Recital (40). It stems from Denmark's decision to drop out of Title IV of the Treaty of Amsterdam in a wholesale manner. The Protocol on the Position of Denmark (now Protocol No. 20 to the TFEU) in the version in force in 2007 stated this in an unequivocal manner. Whilst the United Kingdom and Ireland were prudent enough to keep the back door open and contracted for their opportunities to opt in specific legislative acts based on that Title, Denmark chose a more radical way - and bitterly regretted it. Why Denmark did not follow the lead established by the UK and decided against even the very favourable opportunity of cherry picking by way of opt-in remains one of the darker mysteries of modern PIL. Instead of convoying with the UK, it set sail for its own, solitary course. **187**

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521 *Wall v. Mutuelle de Poitiers Assurance* [2014] EWCA Civ 138, [2014] 3 All ER 340 [12] (C.A., per *Longmore* L.J.).

522 *Wall v. Mutuelle de Poitiers Assurance* [2014] EWCA Civ 138, [2014] 3 All ER 340 [12]-[14] (C.A., per *Longmore* L.J.).

523 *Wall v. Mutuelle de Poitiers Assurance* [2014] EWCA Civ 138, [2014] 3 All ER 340 [43] (C.A., per *Jackson* L.J.); *Folkard,* [2015] Cambridge L.J. 37, 38.

524 *Wall v. Mutuelle de Poitiers Assurance* [2014] EWCA Civ 138, [2014] 3 All ER 340 [44] (C.A., per *Jackson* L.J.); *Folkard,* [2015] Cambridge L.J. 37, 38.

525 *Wall v. Mutuelle de Poitiers Assurance* [2014] EWCA Civ 138, [2014] 3 All ER 340 [18] (C.A., per *Longmore* L.J.); *Dickinson* para. 14.19.

526 *Knöfel*, in: Nomos Kommentar BGB Art. 1 Rom II-VO note 56; *Junker*, in: Münchener Kommentar BGB, Art. 1Rom II-VO note 44.

527 *Knöfel*, in: Nomos Kommentar BGB Art. 1 Rom II-VO note 56.

188 Apparently Denmark was so horrified of the "Schengen chapter" and the neighbourhood in which private international law was placed that she did not recognise how sensible European measures in PIL could be. Only afterwards she learned how strenuous and complicated the way back was to become: She has to conclude a separate bilateral Convention with the EU for each and every single Regulation in the field of international procedural law and private international law. Such bilateral Agreements have been concluded for the purpose of extending the Brussels I, Evidence and Service Regulations. They have not been attempted at for the Rome II or the Rome I Regulations. Hence, Denmark is running on its own national conflict rules for non-contractual obligations and does not even adhere to a spatial extension of the Rome II Regulation by a bilateral Agreement with the EU or by other means of international law.[528]

189 Arguably, Art. 4 Annex to the Protocol on the Position of Denmark (Protocol No. 20 to the TFEU) as amended by the Treaty of Lisbon opens the door for Denmark to opt-in in favour of Acts under the Schengen chapter.[529] But Denmark has not opted into the Rome II Regulation since that Art. 4 might apply only to new Acts implemented after the Treaty of Lisbon became effective.[530]

190 Denmark thus is just another non-Member State of the Rome II Regulation like any Third State who is not even Member of the EU. In practical terms, Danish courts have not to apply the Regulation or its standards as Danish PIL. They simply apply national Danish PIL as it stands.

191 From the perspective of the Member States, their courts apply the Rome II Regulation in cases with connection to Denmark.[531] Art. 3 saves the day and Danish law can be applied like the law of any Third State. The universal application of the *loi uniforme* Rome II Regulation, particularly in connection with the exclusion of *renvoi* pursuant to Art. 24, prevents the courts of the Member States from any necessity to take the Danish perspective or even to take it into account.[532]

192 There is but one issue in respect of which Denmark should be treated like a Member State: Art. 14 (3) implements a special restriction on parties' choice of law where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in one or more of the Member States. Under these circumstances the choice of the law of a Third State shall not prejudice the application of provisions of Community (now: Union) law where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement. Since in this regard, rules of "ordinary", "general" EU law are at stake. Denmark features amongst the Member State in the sense used in Art. 14 (3). Art. 1 (4) 2nd sentence Rome I Regulation, part of the younger sister Regulation to the Rome II Regulation, expressly states so in order to avoid irreconcilable contradictions. The

528 *Knöfel*, in: Nomos Kommentar BGB Art. 1 Rom II-VO note 61.

529 *Vandekerckhove,* Rev. dr. UE 2010, 57, 64 fn. 13; *Mankowski*, in: FS Rolf A. Schütze zum 80. Geb. (2014), p. 369 (369 fn. 3).

530 *Mankowski,* NZFam 2015, 346 (at 346).

531 *Hohloch,* YbPIL 9 (2007), 1, 18; *Ansgar Staudinger*, in: Gebauer/Wiedmann, ch. 38 notes 21–22; *Ansgar Staudinger*/*Steinrötter,* JA 2011, 241, 242; *Knöfel*, in: Nomos Kommentar BGB, Art. 1 Rom II-VO note 61.

532 *Unberath*/*Cziupka*, in: Rauscher, Art. 1 Rom II-VO note 48; *Thorn*, in: Palandt, Art. 1 Rom II-VO note 17.

same extension of the term "Member State" is called for in Art. 14 (3).[533] Art. 1 (4) 2nd sentence Rome I Regulation expresses the relevant legislative intention, and such a correction is methodologically feasible.[534]

Article 2: Non-contractual obligations

1. For the purposes of this Regulation, damage shall cover any consequence arising out of tort/delict, unjust enrichment, *negotiorum gestio* or *culpa in contrahendo*.
2. This Regulation shall apply also to non-contractual obligations that are likely to arise.
3. Any reference in this Regulation to:
(a) an event giving rise to damage shall include events giving rise to damage that are likely to occur; and
(b) damage shall include damage that is likely to occur.

I. General remarks

Art. 2 is a late entry. It was not contained in the original Proposal. The Proposal did not pay all too much regard to non contractual obligations beyond torts and intended to deal with them rather summarily by means of a single Art. 9, a residual 'catch-all others' rule. The differentiation into the present Arts. 10–12 was only there *in nuce*[1] and developed fully only afterwards. To some degree it is reflected in (1). (2) and (3) clarify that future events and non contractual obligations arising from them are also covered by the Rome II Regulation. **1**

Art. 2 owns its existence to negotiations during the Justice and Home Affairs Council meeting in February 2006[2].[3] From there it made it into the compromise package presented by the Austrian Presidency in April 2006[4] and to the Council's Common Position.[5] The Commission explained to the Parliament that Art. 2 is a provision of a technical nature which intends to provide definition of certain concepts used throughout the Regulation with the intention to simplify the drafting of its individual provisions.[6] In general Art. 2 achieves **2**

533 *Heiss/Loacker,* JBl 2007, 613, 623; *Heiss*, in: Reichelt (ed.), 30 Jahre österreichisches IPR-Gesetz – Europäische Perspektiven (2009), p. 61, 64; *Jakob/Picht*, in: Rauscher, Art. 14 Rom II-VO note 54; *Spickhoff*, in: Bamberger/Roth, Art. 1 Rom II-VO note 20, Art. 14 Rom II-VO note 9; *Bach*, in: Peter Huber, Art. 14 Rom II-VO note 38; *Knöfel*, in: Nomos Kommentar BGB, Art. 1 Rom II-VO note 62.

534 *Knöfel*, in: Nomos Kommentar BGB, Art. 1 Rom II-VO note 62. *Contra Junker*, in: Münchener Kommentar BGB, Art. 1 Rom II-VO note 47, Art. 14 Rom II-VO note 43.

1 See Art. 9 (3), (4) Proposal, not yet containing a counterpart to what became Art. 12.

2 Doc. 6623/06, 2 (23 February 2006).

3 *Dickinson* para. 3.44; *Jessica Schmidt*, in: OGK BGB Art. 2 Rom II-VO note 2.

4 Doc. 7929/06 Art. A (10 April 2006).

5 OJ EC 2006 C 289E/68 Art. 2.

6 Communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251 (2) of the EC Treaty concerning the Common Position of the Council on the adoption of a Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ("Rome II"), COM (2006) 566 final p. 5.

its objective by avoiding constant reiteration in the individual conflict rules.[7] Art. 2 has not the benefit of an accompanying Recital. Obviously, the European legislator believed it to be self-explaining.

II. Non contractual obligations

3 The heading 'Non-contractual obligations' is a misnomer (even apart from the irritating hyphen appearing throughout the entire Rome II Regulation). On first blush it raises expectations that Art. 2 would contain a definition of non contractual obligations.[8] Such expectations are readily disappointed. Art. 2 does *not* contain a definition of non contractual obligations. In fact, (1) rather circumscribes 'damage' while (2) and (3) clarify that future events and non contractual obligations arising from them are also covered by the Rome II Regulation. It is still for Art. 1 (1) to contain some basic elements of a definition of 'non contractual obligations', emphasising the 'non' in 'non contractual'[9]and leaving the main work to the Rome I Regulation.[10]

4 If there are other non contractual obligations beyond those resulting from torts, delicts, unjust enrichment, *negotiorum gestio* or *culpa in contrahendo* Art. 2 does not address them expresssly. The Rome II Regulation does not contain any residual conflicts rule anymore which would specifically cater for those other non contractual obligations.[11] (1) does in particular not force courts and lawyers to squeeze every non contractual obligation under one of the four categories mentioned.[12] The listing of the categories is declaratory in nature and does not concretize anything beyond what could be already derived from Arts. 4–12.[13] (1) defines an element, but does not characterise any kind of non contractual obligations.[14] Although it appears in Part I 'Scope' it does not constitute a proper scope rule.[15] Overall, the relevance of (1) must not be overestimated.[16]

5 Art. 2 is rather a frontrunner of a legal technique and development which has fully blossomed only later-on in European private international law, although it has been fairly common in other fields of EU secondary law, namely to include definitions of important terms in phrases at an early place in the structure of a Regulation (or Directive, as the case may be), best immediately following the true scope rule. The catalogue of terms explicity

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7 *Dickinson* para. 3.45; *Bach*, in: Peter Huber, Art. 2 note 6; *Knöfel*, in: Nomos Kommentar BGB Art. 2 Rom II-VO note 1.

8 *Halfmeier*, in: Calliess, Art. 1 Rome II note 3.

9 In detail Art. 1 notes 29–75 (*Mankowski*).

10 Compare *Halfmeier*, in: Calliess, Art. 2 Rome II note 3.

11 This is the weak point to be held against *Halfmeier*, in: Calliess, Art. 2 Rome II note 5.

12 *Knöfel*, in: Nomos Kommentar BGB Art. 2 Rom II-VO note 1. See also *Halfmeier*, in: Calliess, Art. 2 Rome II notes 4–5. *Contra Heiss/Loacker*, JBl 2007, 613, 619.

13 *Knöfel*, in: Nomos Kommentar BGB Art. 2 Rom II-VO note 1. *Contra Ansgar Staudinger*, in: Gebauer/Wiedmann, Zivilrecht unter europäischem Einfluss (2nd ed. 2010) ch. 38 note 14.

14 *Knöfel*, in: Nomos Kommentar BGB Art. 2 Rom II-VO note 1. *Contra Hohloch*, IPRax 2012, 110 (112) fn. 18; see also *Thorn*, in: Palandt, Art. 2 Rom II-VO note 1.

15 Correctly distinguishing in this regard between (1) and (2), (3) *Unberath/Cziupka*, in: Rauscher, Art. 2 Rom II-VO notes 1, 4, 5.

16 *Unberath/Cziupka*, in: Rauscher, Art. 2 Rom II-VO note 4.

defined is small and does not remotely compete with the lexicality of, in particular, European legislation in the field of financial market law. In the field of European, PIL Arts. 3 Successions Regulation; 3 Matrimonial Property Regulation; 3 Parternship Property Regulation are models of the new blend.

III. Circumscription of 'damage', (1)

(1) circumscribes that for the purposes of this Regulation, the notion of 'damage' shall cover *any* (i.e. each and every) consequence arising out of tort/delict, unjust enrichment, *negotiorum gestio* or *culpa in contrahendo*. The technical use of the term 'damage' throughout the Rome II Regulation thus goes beyond its etymological meaning which is rather restricted to loss.[17] However, the European legislator might feel entitled to employ its idiosyncratic definitory device and might treat 'damage' as a term of its own legal art or as a kind of collectivising notion[18] for the sake of pursuing the objective to keep the drafting simple.[19] Some inconsequences appear in Arts. 10 (2); 17, though.[20] **6**

(1) introduces an autonomous meaning of 'damage' and thus goes beyond merely tidying up.[21] It is said to neatly sidestep the question whether (in tort) a particular injury is to be regarded as legally significant and to replace this question with a broad, fact-based concept requiring identification of the consequences of an event.[22] Moreover, the 'any' striving for comprehensiveness indicates that punitive and exemplary damages are included[23] despite their possibly punitive nature. **7**

(1) suffers from the same vices as does Art. 15. 'Damage' is a term germane to the law of torts and delicts, reappearing in the law of *culpa in contrahendo*. To stretch it to unjust enrichment and *negotiorum gestio* is overstretching it.[24] It attempts by bundling heterogeneous issues.[25] It does in particular not fit to the gestor's claims for reimbursement of his expenses or the beneficiary's claims for obtaining the gain from the *negotiorum gestio*.[26] **8**

IV. Future events and non contractual obligations arising from them

In some areas preventive and injunctory relief are clearly dominating compared to *ex post* actions for damages. This relates in particular to unfair competition as addressed by **9**

17 *Bach*, in: Peter Huber, Art. 2 note 6; see also *Knöfel*, in: Nomos Kommentar BGB Art. 2 Rom II-VO note 2.

18 *Knöfel*, in: Nomos Kommentar BGB Art. 2 Rom II-VO note 2.

19 *Junker*, in: Münchener Kommentar zum BGB Art. 2 Rom II-VO note 4; *Jessica Schmidt*, in: OGK BGB Art. 2 Rom II-VO note 4.

20 *Junker*, in: Münchener Kommentar zum BGB Art. 2 Rom II-VO note 6; *Jessica Schmidt*, in: OGK BGB Art. 2 Rom II-VO note 4 with fn. 8.

21 *Dickinson* para. 3.46.

22 *Dickinson* para. 3.46; *Jessica Schmidt*, in: OGK BGB Art. 2 Rom II-VO note 4.

23 *Halfmeier*, in: Calliess, Art. 2 Rome II note 8.

24 *Unberath*/*Cziupka*, in: Rauscher, Art. 2 Rom II-VO note 3.

25 *Unberath*/*Cziupka*, in: Rauscher, Art. 2 Rom II-VO note 3.

26 *Unberath*/*Cziupka*, in: Rauscher, Art. 2 Rom II-VO note 3. But cf. *Bach*, in: Peter Huber, Art. 2 note 6.

Art. 6 (1) and industrial action as addressed by Art. 9.[27] But intellectual property and environmental damages are also amongst the qualifiers, as would be libel, slander, defamation and their likes but for Art. 1 (2) (g).[28] Preventing is better, less costly and more effective than compensating and healing. Accordingly, (2) and (3) contain the valuable and welcome clarification that the Rome II Regulation extends to preventive relief, too.[29]

10 'Likely to arise' in (2) relates to obligations regarding future behaviour of future events.[30] Some criticism had been levelled against this phrase particularly be the German delegation,[31] but eventually did not succeed in banning it from (2). Only in (3) the Council attempted at satisfying the critics, eliminated the incriminated phrase and replaced it with "likely to occur" and "event giving rise to the damage".[32]

11 (2) and (3) happen to coincide with Art. 15 (d).[33] Another parallel may be found in Art. 6 (3) (a), (b) ("the market is, or is likely to be, affected").[34] But primarily (2) and (3) follow in the footsteps of Art. 5 pt. (3) *in fine* Brussels I Regulation/2007 Lugano Convention,[35] which were specifically designed to cover preventive actions,[36] and precede Art. 7 (2) *in fine* Brussels I*bis* Regulation to the same avail.[37]

12 However, there is a slight and, depending on interpretation, significate difference in the wording: Whereas the Brussels I family employs a simple "may occur", (3) (a) and (b) resorts to "that is likely to occur". This raises the question as to whether a certain minimum degree of likelihood is required and whether a certain percentage of probability constitutes a threshold. There is nothing in the wording of (2) to support the contention that concrete and

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27 Comprehensively on the context with Art. 9 *Knöfel*, in: Nomos Kommentar BGB Art. 2 Rom II-VO note 5.

28 *Bach*, in: Peter Huber, Art. 2 note 4; *Jessica Schmidt*, in: OGK BGB Art. 2 Rom II-VO note 5.1.

29 OGH GRUR Int 2012, 468, 470 = ecolex 2013/30, 65 with note *Horak*; LG Dortmund, BeckRS 2014, 19175; *von Hein*, VersR 2007, 440 (442); *Knöfel*, EuZA 2008, 228 (242); *Knöfel*, in: Nomos Kommentar BGB Art. 2 Rom II-VO note 3; *Bach*, in: Peter Huber, Art. 2 note 5; *Junker*, in: Münchener Kommentar BGB Art. 2 Rom II-VO note 7; *Unberath/Cziupka*, in: Rauscher, Art. 2 Rom II-VO note 5; *Jessica Schmidt*, in: OGK BGB Art. 2 Rom II-VO note 5.

30 *Halfmeier*, in: Calliess, Art. 2 Rome II note 9.

31 Doc. 16240/04, pp. 2–3.

32 *Bach*, in: Peter Huber, Art. 2 note 7.

33 *Knöfel*, in: Nomos Kommentar BGB Art. 2 Rom II-VO note 3.

34 *Unberath/Cziupka*, in: Rauscher, Art. 2 Rom II-VO note 6.

35 *Knöfel*, in: Nomos Kommentar BGB Art. 2 Rom II-VO note 3.

36 See only Commission Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and enforcement of judgments in civil and commercial matters, COM (1999) 348 final p. 15; *Verein für Konsumenteninformation v. Karl Heinz Henkel* (Case C-167/00), [2002] ECR I-8111, I-8142 para. 48; BGH WM 2006, 350 (351); *Markus*, SZW 1999, 205, 207; *Christian Kohler*, in: Gottwald (ed.), Revision des EuGVÜ/Neues Schiedsverfahrensrecht (2000), p. 1, 21; *Hausmann*, EuLF 2000–01, 40, 48; *Micklitz/Rott*, EuZW 2001, 325 (329); *Piltz*, NJW 2002, 789 (792); *Michailidou*, IPRax 2003, 223 (225); *Kropholler/von Hein*, Europäisches Zivilprozessrecht (9th ed. 2011) Art. 5 EuGVVO note 68; *Leible*, in: Rauscher, EuZPR/EuIPR, vol. I (3rd ed. 2011) Art. 5 Brüssel I-VO note 81.

37 See only *Mankowski*, in: Magnus/Mankowski, Art. 7 Brussels Ibis Regulation notes 395–398.

sufficient indications must persist.[38] Nothing in the wording indicates how close, how remote or how likely a future event must be.[39] It is for the substantive law finally determined to be applicable by virtue of the conflicts rules of the Rome II Regulation, to ascertain which degree of likelihood and probability is required.[40] Art. 15 (c) subjects the existence of the damage to be governed by the applicable law. 'Existence' comprises the necessary degree of likelihood of future 'damages' to qualify as damages.

(2) and (3) cover both first and reiterative or repetitive future events.[41] In their combination and seen as an ensemble, they aspire at encompassing every possible element of future events since (2) relates to the rise of the obligation, (3) (a) to the event giving rise to damage, and (3) to the future damage which is likely to occur.[42] **13**

V. Declaratory relief and negative declaratory relief

Declaratory relief is not expressly mentioned or addressed in Art. 2.[43] But giving the strive for comprehensiveness as to the kinds of relief which is evident from the very existence of (2) and (3) in particular, it ought to be covered by the Rome II Regulation. There is no limitation to compensatory relief with regard to damage that has already occurred. **14**

In *Folien Fischer*[44] the CJEU even recognised the admissibility of negative declaratory actions in tort under then Art. 5 pt. 3 Brussels I Regulation, to-date Art. 7 pt. 2 Brussels I*bis* Regulation. This ought to be transferred to the realm of the Rome II Regulation. **15**

Article 3: Universal application

Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.

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38 But favouring this *Knöfel*, in: Nomos Kommentar BGB Art. 2 Rom II-VO note 4; *Junker*, in: Münchener Kommentar BGB Art. 2 Rom II-VO note 8; *Spickhoff*, in: Bamberger/Herbert Roth, Art. 2 Rom II-VO note 2; *Unberath/Cziupka*, in: Rauscher, Art. 2 Rom II-VO note 5; *Lund*, in: jurisPK BGB Art. 2 Rom II-VO note 6.

39 *Halfmeier*, in: Calliess, Art. 2 Rome II note 10.

40 *Halfmeier*, in: Calliess, Art. 2 Rome II note 10; *Jessica Schmidt*, in: OGK BGB Art. 2 Rom II-VO note 6.

41 *Unberath/Cziupka*, in: Rauscher, Art. 2 Rom II-VO note 6; see also *Mankowski*, RIW 2008, 177 (183) with regard to Art. 6 (3) (a) and (b).

42 OGH GRUR Int 2012, 468, 470 = ecolex 2013/30, 65 with note *Horak*; *Knöfel*, in: Nomos Kommentar BGB Art. 2 Rom II-VO note 3.

43 *Bach*, in: Peter Huber, Art. 2 note 4 appears to be victim either of a *quaternatio terminorum* or of intermingling of preventive and declaratory relief.

44 *Folien Fischer AG and Fofitec AG v. Ritrama SpA* (Case C-133/11), ECLI:EU:C:2012:664 paras. 36–55. *Contra* A-G *Jääskinen*, ECLI:EU:C:2012:226 paras. 36–72. Discussed by e.g. *Idot*, Europe 2012 Décembre comm. 12 p. 37; *Bergé*, RLDA 77 (2012), 69; *Wittwer*, Eur. L. Rpter 2012, 325; *Sujecki*, EuZW 2012, 952; *Oró Martinez*, AEDIPr 2012, 846; *de Vecchi Lajolo*, Dir. ind. 2013, 52; *Strikwerda*, NJ 2013 Nr. 80; *Domej*, ecolex 2013, 123; *Vanleenhove*, NIPR 2013, 25; *Thery*, RTDciv 2013, 166; *Muir Watt*, RCDIP 102 (2013), 506; *Gebauer*, ZEuP 2013, 874; *Garavaglia*, Riv. dir. proc. 2013, 1248; *Rodriguez Pineau*, Rev. esp. der. eur. 47 (2013), 125; *Deghani/Di Meglio*, PHI 2014, 17.

I. Universal application

1 The Rome II Regulation does not distinguish between EU cases which bear connections only to Member States, and cases with connections to Third States outside the EU or to Denmark. It does not treat those two possible categories apart and differently, and it does not attribute a special role to Denmark.[1] Likewise, the United Kingdom will become a Third State after the execution of the Brexit, but that would not matter for the application of the Rome II Regulation by the courts of the remaining Member States in cases which bear a connection to the United Kingdom.[2] The application of the Rome II Regulation is not made dependent upon whether the law determined is the law of a Member State or of a Third State. The Rome II Regulation applies irrespective of whether the conflict rule at stake leads to the law of a Member State or of a Third State. Hence, it avoids splitting the conflict regime and caters for unity and uniformity. Practitioners have not to cope with two different regimes, but with only one.

2 The Rome II Regulation calls for its application wherever the events calling for consideration are staged and took place. In the extreme, it could apply to a traffic accident in Australia between a Chilenean and a Nigerian, bearing not the slightest connection to the EU but for the forum seised.[3]

3 Only, solely and exclusively a single basic requirement for the application of the Rome II Regulation exists: that the case is to be judged in a Member State (or from a Member State perspective, more precisely, thus covering also those instance where the Rome II Regulation is brought into play by the private international law of a Third State which exercises jurisdiction and clings to the principle of *renvoi*). Art. 3 is – as a kind of complementary sister rule – intertwined with Art. 1 and the scope of the Rome II Regulation.[4]

4 Art. 3 makes the Rome II Regulation a true *loi uniforme*. It stands in the grand tradition of every serious effort to harmonise and to unify conflict rules. In particular, numerous Hague Conventions have paved the way for this approach by promulgating uniform conflict rules.

5 There is nothing like a separate international scope of application of the Rome II Regulation as an own subject when applying the Rome II Regulation in a concrete case. That is different from the principle endorsed in Arts. 4 Brussels I*bis* Regulation; 2 Brussels I Regulation/Lugano Convention 2007,[5] but follows the same line as Arts. 2 Rome Convention; 2 Rome I Regulation; 20 Successions Regulation; 4 Rome III Regulation; 20 Matrimonial Property Regulation; 20 Registered Partnerships Regulation; 2 Hague Maintenance Protocol (as integrated into EU law *via* Art. 15 Maintenance Regulation) and the other Hague Conventions[6] (which do not form part of EU law, however). Conflict of laws follows a different line

1 *Unberath*/*Cziupka*, in: Rauscher, Art. 1 note 72; *Thorn*, in: Palandt, Art. 1 note 17; *Piltz*, IHR 2014, 68.

2 *Vlas*, WPNR 7114 (2016), 543, 544.

3 Compare the example given by *Bach*, in: Peter Huber, Art. 3 note 1: A Mexican injures a Canadian in a traffic accident on the roads of New York.

4 *Unberath*/*Cziupka*, in: Rauscher, Art. 3 note 1.

5 But cf. Commission Proposal, COM (2003) 427 final p. 10; *Ansgar Staudinger*, SVR 2005, 441, 442; *Unberath*/*Cziupka*, in: Rauscher, Art. 1 note 2.

6 See Commission Proposal, COM (2003) 427 final p. 10.

than jurisdiction. The principle is firmly rooted in the PIL of the EU.[7] Jurisdiction requires a basic connection, a genuine link, with the EU whereas conflict of laws as such does not. Given that jurisdiction must be asserted first it would be tantamount to doubling and duplicating if conflict of laws did.

The Rome II Regulation applies irrespective of the habitual residence, the domicile or the nationality of any of the parties. Moreover, it applies irrespective of any other circumstances affecting the extra-contractual relationship, for instance where the damage was sustained or where the event giving rise to the damage took place. **6**

Art. 3 backs up all conflict rules of the Rome II Regulation theoretically save for express exceptions and deviations which practically do not exist. It helps understanding them and serves in a supplementary function, for instance with regard to Art. 6 (3) (b) which lacks the utmost clarity since the accompanying Recital (23) – erroneously – refers to Member States only.[8] Generally, Art. 3 impliedly clarifies that any reference to "State" in the Regulation ought to be taken literally and without restricting qualifications. It prevents "State" to be equated with "Member State". **7**

The universal application diminishes the risk and attractiveness of forum shopping.[9] It rules out the possibility of discriminating against certain claimants or certain defendants based on their respective domicile.[10] Concerns about the functioning of law market gathered from the lack of competition in a race for the top of quality,[11] are negligible.[12] **8**

II. Legislative competence of the EU

In its making Art. 3 stirred some controversy as to whether the EU overstepped its competence and whether it would be imperialistic to regulate cases outside the Internal Market. In fact, that was rather a rearguard struggle of those who still wanted to adhere to the application of national conflict rules to extra-EU cases.[13] The strive for a natural monopoly and the benefit of the national legal industry were the motives behind such advance. The technical argument put forward on behalf of the resistance was that (then) Art. 65 EC Treaty (now Art. 81 TFEU) on whose basis the Rome II Regulation was promulgated, allowed only for EU measures which are necessary for the proper functioning of the Internal Market. The ambit of Art. 65 EC Treaty thus was in question.[14] Opponents argued that only Regulations for cross-border activity could **9**

7 Commission Proposal, COM (2003) 427 final p. 10.

8 *Mäsch*, in: Werner Berg/Mäsch, Deutsches und Europäisches Kartellrecht (2nd ed. 2015) § 130 GWB note 14.

9 *de Cesari*, Diritto internazional privato dell'Unione Europea (2011) p. 415; *Knöfel*, in: Nomos Kommentar BGB, Art. 3 Rom II-VO note 5.

10 *Knöfel*, in: Nomos Kommentar BGB, Art. 3 Rom II-VO note 5.

11 *Gerhard Wagner*, IPRax 2008, 3 (4).

12 See *Knöfel*, in: Nomos Kommentar BGB, Art. 3 Rom II-VO note 5.

13 Response of the Government of the United Kingdom to the Commission's Proposal http://ec.europe.eu/justice_home/news/consulting_public/rome_ii/govern_uk_en.pdf para. 4.

14 *Remien*, (2001) 38 CMLRev. 53, 75 *et seq.*; *Nourissat/Treppoz*, Clunet 130 (2003), 7, 12.

be necessary for the proper functioning of the Internal Market.[15] Opposition was mounted in particular by the United Kingdom,[16] but also even by the Council Legal Service.[17]

10 Politically, matters are settled in favour of the Regulation approach by the assertion as to be found in Recital (13) that uniform conflict rules may avert the distortions of competition between litigants and thus are necessary for the proper functioning of the Internal Market.[18] The Commission tried to exemplify, and back up, this assertion by the following example: "If there continue to be more than fifteen different systems of conflict rules, two firms in distinct Member States, A and B, bringing the same dispute between them and a third firm in country C before their respective courts, would have different conflict rules applied to them, which could provoke a distortion of competition as in purely intra-Community situations."[19]

11 The danger invoked and horrified is the danger of forum shopping.[20] Forum Shopping impedes the proper functioning of the internal market and jeopardizes the free movement of people within the EU as well as the other European freedoms of movement.[21] More restrictive laws in some countries will inevitably lead to forum shopping, creating, thus, an imbalance in the Internal Market.[22]

12 Furthermore, the judgment pronounced by a competent judge of a Member State in a litigation involving non-contractual obligations among individuals who do not have their habitual residence in the EU will freely circulate in the European Judicial Area. Therefore, a case affecting two persons or companies with habitual residence outside the EU will have an undeniable impact on the European Judicial Area, the Area of Freedom, Security and Justice in the EU.[23] Such a case produces a "European effect".[24] Free circulation of judgments is in better harmony with universal conflict rules.[25]

13 The case law of the ECJ interpreting the scope of then Art. 95 EC Treaty, today Art. 114 TFEU, is believed to support such conclusion as it could be transferred *mutatis mutandis* to Art. 65 EC Treaty, today Art. 91 TFEU:[26] The ECJ held this rule not to require a link with fee movement between the Member States in every situation covered by the measure adopted,

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15 *Angelika Fuchs*, GPR 2003–2004, 100, 101; *Jayme/Kohler*, IPRax 2003, 485 (494); *Dickinson*, (2005) 1 JPrIL 197, 222 *et seq*.; *Dickinson*, paras. 2.34 *et seq*., 2.110; see also *Gerhard Wagner*, IPRax 2006, 372 (389)-390.

16 Council Doc. 9009/04 ADD 15 (26 May 2004).

17 Advice of the Council Legal Service, Council Doc. 7015/04 (2 March 2004).

18 *Bach*, in: Peter Huber, Art. 3 note 2.

19 COM (2003) 427 final p. 10. Today the "fifteen" ought to be read as "twenty-eight".

20 See only *Halfmeier/Sonder*, in: Calliess, Art. 3 note 4.

21 *North*, RdC 220 (1990), 9, 152–205; *North*, [1980] JBL 382.

22 See only *Calvo Caravaca/Carrascosa González*, in: Magnus/Mankowski, Rome I Regulation (2016) Art. 2 Rome I Regulation note 10 with extensive references.

23 *Calvo Caravaca/Carrascosa González*, in: Magnus/Mankowski, Rome I Regulation (2016) Art. 2 Rome I Regulation note 11.

24 *Brière*, Clunet 135 (2008), 31, 36; *Franzina*, NLCC 2009, 606, 609; *Plender/Wilderspin*, para. 17–015.

25 *Unberath/Cziupka*, in: Rauscher, Art. 3 note 5.

26 *Plender/Wilderspin*, para. 17–016.

provided that the measure is actually intended to improve the conditions for the establishment and the functioning of the Internal Market.[27]

Finally, it is rather difficult to distinguish between "European" and "non-European" cases.[28] **14**
One would have to add a further dimension to the Regulation thus complicating matters and the handling of cases for practitioners and judges alike. Every cross-border scenario with Third State elements would have to be tested for a connection to the EU.[29] The criteria which were to be applied in such test would remain unclear, though.[30] Split conflict regimes would endanger previsibility which law is eventually applicable. This would do bad service particularly in complex and multi-faceted cases.[31] The *loi uniforme* approach avoids the complexity which would arise from any attempt to distinguish between intra-EU-disputes and extra-EU disputes.[32]

A wide and wholesale approach, accepting that the Rome II Regulation has to be applied to **15**
every situation concerning non-contractual obligations with a cross-border element raised before the authorities of the Member States, avoids this intricacy.[33] This approach relies on the idea that all contracts generating controversies that have to be solved before the tribunals of the Member States produce an impact on the good functioning of the Internal Market.[34] The Rome I and Rome II Regulations have adopted this wide focus. Hence, the conflict rules contained in both the Rome I and the Rome II Regulation are to be applied to all litigation before the courts and authorities of the Member States and related to international conflict of laws in the field of contracts and non-contractual obligations respectively.[35] A justification for a different treatment of Internal Market cases on the one hand and cases with an extra-EU element cannot be found,[36] the more so, if such treatment would run along different principles employing different, in the extreme opposing connecting factors.

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27 *Germany v. Euroepan Parliament and Council* (Case C-380/03), [2006] ECR I-11573 para. 80; *Rechnungshof, Neukomm and Lauermann v. Österreichischer Rundfunk* (Joined Cases C-465/00, C-138/01 and C-139/01), [2003] ECR I-4989; *Criminal Proceedings against Bodil Lindqvist* (Case C-101/01), [2003] ECR I-12971.

28 *Jayme/Kohler*, RCDIP 84 (1995), 1; *Sonnentag*, ZvglRWiss 105 (2006), 256, 263; *Kenfack*, Clunet 136 (2009), 3; *Lagarde/Tenenbaum*, RCDIP 97 (2008), 727; *Calliess/Halfmeier/Sonder*, Art. 3 note 9; *Calvo Caravaca/Carrascosa González*, in: Magnus/Mankowski, Rome I Regulation (2015) Art. 2 Rome I Regulation note 12.

29 *Sonnentag*, ZvglRWiss 105 (2006), 256, 262.

30 *Halfmeier/Sonder*, in: Calliess, Art. 3 note 6.

31 *Unberath/Cziupka*, in: Rauscher, Art. 3 note 4.

32 *Stone*, EuLF 2004, 213, 214.

33 *Magnus/Mankowski*, ZvglRWiss 103 (2004), 131.

34 *Peter Arnt Nielsen/Lando*, (2008) 45 CMLRev 1687.

35 Max Planck Institute for Comparative and Private International Law, RabelsZ 71 (2007), 225; *Francq*, Clunet 136 (2009), 41; *Ortiz Vidal*, Cuad. Der. Trans. 2 (2) (2010), 376; *Ballarino*, Riv. dir. int. 2009, 40; *Berlioz*, Clunet 135 (2008), 675; *Cebrián Salvat*, Cuad. Der. Trans. 5 (1) (2013), 125; *Calvo Caravaca/Carrascosa González*, in: Magnus/Mankowski, Rome I Regulation (2016) Art. 2 Rome I Regulation note 12.

36 Opinion of the European Economic and Social Committee on the Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (Rome II), EU-2004/C 241/01.

16 But for intertemporal reasons (the Rome II Regulation having been promulgated under Arts. 61; 65 (b) EC Treaty and the Treaty of Amsterdam), the questions and doubts possibly surrounding the EU's competence have been cured and rendered nugatory with the entry into force of the Treaty of Lisbon: A "particularly" has been inserted in what has now become Art. 81 (2) TFEU.[37] If there ever had been a strict requirement of necessity for the functioning of the internal market it has ceased to exist. If the Rome II Regulation was reintroduced and promulgated again today there would not be any serious question as to whether the EU has sufficient competence to do so.

17 The Rome II Regulation in its making took the brunt of politically motivated opposition against extension of European PIL to external situations simply since it pioneered amongst the Regulation establishing European PIL. Today, the Regulation approach ought to be accepted. Any doubts based on an alleged lack of legislative competence appear as a mere rearguard struggle and have lost all practical relevance. The Rome II Regulation has a universal approach as evidenced in Art. 3, and – as erecting a general regime unilaterally – is a cornerstone of the area of freedom, security and justice for the benefit of all parties concerned regardless where they are domiciled.[38]

III. Residual relevance of national conflict rules

18 Like every other EU Regulation, the Rome II Regulation enjoys prevalence and takes precedence over national rules by virtue of Art. 288 subpara. 2 TFEU. This results in solely the Rome II Regulation being applicable in any case within its scope of application to the exclusion of national conflict rules of the Member States. National conflict rules retain some residual relevance and are still aplicable only in those instances which fall outside the substantive scope of the Rome II Regulation pursuant to Art. 1 (2) or cannot be qualified as civil matters under Art. 1 (1).

IV. External perspective

19 Behind the claim for universal application of the Rome II Regulation there is a general approach. To an ever growing extent the EU, the Community, has occupied external competence, and the Rome II Regulation perfectly fits the bill if one is prepared to view PIL as a (remote) instrument also intertwined with external relations.

20 From the external perspective of Third States, Art. 3 displays a remarkable piece of foreign policy. It presents the Rome II Regulation as a monolith with a clear claim, not only as the piecemeal of a conflict regime for intra-EU cases.[39] Impliedly, the Rome II Regulation is drafted as a kind of role model possibly attractive for Third States. The Rome II Regulation has established itself as a central player in the global discourse.[40] There are many articles on the Rome II Regulation from Third State perspectives.[41] Third States cannot accede to the club, the

37 *Unberath/Cziupka*, in: Rauscher, Art. 3 note 3 fn. 7; *Plender/Wilderspin*, para. 17–017.

38 *Basedow*, in: Liber amicorum Krešimir Sajko (2012), p. 1, 9.

39 *Knöfel*, in: Nomos Kommentar BGB, Vor Art. 1 Rom II-VO note 6, Art. 3 Rom II-VO note 4.

40 See *Schoeman*, [2010] LMCLQ 81, 82.

41 See e.g. *Nishitani*, YbPIL 9 (2007), 175 (Japan); *Fresnedo de Aguirre/Fernandez Arroyo*, YbPIL 9 (2007), 193 (Latin America); *Mortensen*, YbPIL 9 (2007), 203 (Australia); *Schoeman*, (2011) 7 JPrIL 361 (former

closed shop of the Rome II Regulation, without joining the EU, but they are free to copy from the Rome II Regulation at their respective will. The Rome II Regulation might have direct or indirect impact whenever a Third State is deciding upon along which lines to rejuvenate its PIL for non-contractual obligations. The extent to which academics from the US have enriched and enlivened the drafting process of the Rome II Regulation[42] might be a first indication (although they clearly benefitted from *Diana Wallis'* personal preferences and thus a certain Anglo-Saxon bias on the side of the central player in the Parliament and in the middle stages of the drafting process). Hence, the Rome II Regulation could possibly generate positive externalities.

Chapter II: **Torts/Delicts**

Article 4: General rule

1. 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.

2. 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.

3. 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 preexisting relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

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42 See most prominently *Symeonides*, in: FS Erik Jayme (2004), p. 935; *Symeonides*, YbPIL 9 (2007), 149; *Kozyris*, (2008) 56 Am. J. Comp. L. 471.

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I. Subject matter and purpose of the Article

Art. 4 opens Chapter II of the Regulation which comprises the conflict of law-rules for tortious acts. The provision is the fundamental conflict rule for international torts if no prevailing international conventions, no choice of the parties and no more specific conflict rules of the Rome II Regulation or other European enactments are applicable. Although the provision thus fulfills a mere supplementary function, the number of situations and cases it covers is but small. For instance, all traffic accidents (but see Art. 28), all employment accidents, all household accidents fall within its scope. Moreover, Art. 4 is the catch-all-provision that always steps in where no more specific rules apply. **1**

2 Art. 4 (1) formulates the most general conflict rule for torts.[1] It adopts the widely accepted rule that the law of the place of the tort should govern all aspects of tortious liability (*lex loci delicti commissi*). There, the interests of the tortfeasor and the victim clash and it appears appropriate to generally apply the law of that place. Both parties have principally to observe the laws, rules and usages common at that place; they can usually trust the other party will respect them. Since torts in their majority are unplanned damaging contacts between parties, there is rarely another closer – and therefore preferable – connection than with the place where the tort occurs.

3 However, since the place of the tort can be, and is, defined and understood in different countries in different ways, Art. 4 (1) specifies that the relevant place is "the country in which the event giving rise to the damage occurred". Therefore, the law of the country where the victim suffered the damage (*lex loci damni*) shall generally prevail over the country where the tortfeasor acted. According to Recital 16 Rome II this solution "strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage." To achieve such a balance is the central aim of Art. 4 (1). For this reason and also for reasons of legal certainty, Art. 4 (1) has not adopted the solution that the victim may choose between the law of the place of action and the law of the place of damage which the CJEU accepted in the jurisdictional context.[2] On the other hand, Art. 4 (1) makes it clear that further 'indirect' consequences of the damaging event at other places do not influence the applicable law. Otherwise, the victim could easily choose a favourable country and await those further consequences there.

4 Art. 4 (2) Rome II Regulation provides for an exception from the general principle of para. (1).[3] Where tortfeasor and victim have their habitual residence – in the sense of Art. 23 – in the same country when the damage occurred the law of that country shall apply. This *lex domicilii communis* is regarded as the law with which the parties are more closely connected than with the law of another country where the damage occurred. The law of the common habitual residence constitutes the normal legal environment of both tortfeasor and victim, and for that reason this law shall apply.

5 Art. 4 (3) contains an escape clause.[4] Where there exists another law with which the parties of the tort are even more closely connected than the law determined under Art. 4 (1) or (2) that other law has to be applied. As Art. 4 (3) sent. 2 indicates this can be the law applicable to a contract between the parties which is closely linked to the tort. The provision is based on, and expresses, the general principle underlying the whole Regulation and Private International Law as such, namely to apply always the law most closely connected with the factual situation. It further allows for the necessary flexibility where the conflicts rules under para. (1) and (2) prove to be too rigid.

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1 See also Recital (16).

2 See *Bier v. Mines de Potasse d'Alsace* (Case 21/76) [1976] ECR 1735.

3 See Recital 18 sent. 2 Rome II Regulation: "Article 4 (2) should be seen as an exception to this general principle …"

4 See Recital 18 sent. 3 Rome II Regulation: "Article 4 (3) should be understood as an 'escape clause' from Article 4 (1) and (2) …"

Art. 4 (2) and (3) are exceptions from the general principle in para. (1) which have to be interpreted and applied restrictively. In particular, in para. (3) the hurdle for its application is high as the formulation "manifestly more closely connected" is intended to indicate.[5] Taken together, Art. 4 aims at legal certainty by establishing a clear conflicts rule for most, in particular the 'ordinary' cases, however, providing also sufficient flexibility if the individual case so requires. **6**

In applying the structure of Art. 4 its para. (2) prevails over its para. (1) and must be examined first. Para. (3) is always the last in the row and can only be applied if a result under para. (1) or (2) has been reached. **7**

Apart from its own specific scope of application, Art. 4 has considerable relevance for other provisions of the Regulation. Insofar, Art. 4 is indeed a general provision. Art. 4 and its interpretation give guidance and have implications for aspects of the following tort conflicts rules: for product liability cases the *lex domicilii communis*-rule of Art. 4 (2) remains applicable (Art. 5 (1)), further, the escape clause in both Articles is identical; where an act of unfair competition affects exclusively the interests of a specific competitor, it is Art. 4 that has to be applied (Art. 6 (2)); environmental damage claims are governed by Art. 4 (1) unless the claimant selects the law of the place where the damaging event occurred (Art. 7); for damages claims based on an industrial action, again, the *lex domicilii communis*-rule of Art. 4 (2) remains reserved (Art. 9). **8**

II. Legislative history of the Article

The legislative history of Art. 4 Rome II goes back to the early 1970ies and is rather straightforward. The earliest European predecessor of Art. 4 was its counterpart in the Preliminary Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations of 1972.[6] Art. 10 sent. 1 of that Draft already provided: "Non-contractual obligations arising out of an event which has resulted in damage or injury shall be governed by the law of the country in which that event occurred."[7] Art. 10 sent. 2 Draft Convention provided that in case of a more closely connected law that law should apply. It further prescribed that the closer connection must follow from factors common to the involved parties and that in case **9**

5 See COM (2003) 427 final, Explanatory Memorandum p. 12: "the exception clause really must be exceptional".

6 Commission of the European Communities Document No. XIV/398/72 Rev.: 1; the text is published in *Lando*/*von Hoffmann*/*Siehr* (eds.), European Private International Law of Obligations (1975) 220 *et seq*. (French version), 230 *et seq*. (English version) with a Rapport by *Giuliano*, *Lagarde* and *van Sasse van Ysselt* (p. 241 *et seq*.). For the prior history see, e.g., *Rühl*, in: BeckOGK Art. 4 Rom II-VO note 5 *et seq.* with further references.

7 The Commission (Explanatory Memorandum p. 11 *et seq*.) argued that this formulation would include the place where the tortfeasor acted as well as the place where the victim sustained the damage. The Commission inferred this understanding from the CJEU's decision in *Bier v. Mines de Potasse d'Alsace* (Case 21/76) [1976] ECR 1735 although this decision interpreted the place of damage only in the jurisdictional context and allowed the victim to sue at the own choice either at the place of tortious action or at the place where the damage was sustained. The Commission rejected this solution because of its uncertainty and because it "would go beyond the victim's legitimate expectations" (Explanatory Memorandum p. 11 *et seq*.).

of several victims the applicable law had to be determined separately for each of them. As is well-known, the Preliminary Draft Convention led to the Rome Convention on the Law Applicable to Contractual Obligations of 1980 whereas the attempt to unify the law applicable to non-contractual obligations failed by that time.

10 The EU revived her efforts only shortly before, and intensified them after, the millennium. The Commission presented a preliminary first proposal of 3 May 2002.[8] It contained an Art. 3 which resembled already widely the present Art. 4 Rome II. The same was even more true of the final Commission Draft of 22 July 2003[9] whose Art. 3 underwent mere redaction amendments to receive the form of the present Art. 4.

III. Scope of application and structure

1. Scope

a) Qualification: torts/delicts

11 Art. 4 – like the whole Chapter II of the Rome II Regulation – concerns torts/delicts. This double and synonymous expression is owed to the fact that Scottish law terms delict what English law terms tort. None of the other language versions of the Regulation uses two different terms for the same meaning.[10] The doubling has no substantive effect.

12 The Regulation does not explain what a tort is. As Recital (11) expresses and as indicated in the introduction to Chapter II of the Regulation the term tort/delict must be given a European-autonomous interpretation.[11] This interpretation should be generous in order to comprise as far as possible all factual situations which the different national laws regard as torts.[12]

13 For the qualification of a situation as a tort, the case-law of the CJEU on Art. 7 (2) Brussels I*bis* Regulation (and on the predecessors of that provision) which concerns the jurisdiction for "matters relating to tort, delict or quasi-delict" is of some, though limited help.[13] A minimum requirement that already follows from the text of Art. 4 (1) but can also be inferred from the CJEU's case-law is the condition that tort liability is a liability not based on a contract so that all contractual liability is excluded from Art. 4 – as well as from the other provisions of Chapter II of the Rome II Regulation.[14] The CJEU held that "'tort, delict

8 Draft Proposal for a Regulation on the Law Applicable to Non-Contractual Obligations; the English version is published in: Eur. Bus. L. Rev. 13 (2002) 382; the French version in: Kadner Graziano, Europäisches Internationales Deliktsrecht (2003) pp. 156 *et seq*.

9 COM (2003) 427 final.

10 See, e.g., the Dutch version (*onrechtmatige daad*), the French version (*fait dommageable*), the German version (*unerlaubte Handlung*), the Italian version (*fatto illecito*) or the Spanish version (*hecho danoso*).

11 See also *Dickinson* para. 4.06.1; *Bach*, in: Peter Huber Art. 4 note 1; *Junker*, in: MünchKommBGB Art. 4 Rom II-VO note 14.

12 For a broad construction of the term also *Dickinson* para. 4.06.6.

13 In the same sense *Dicey/Morris/Collins* para. 35–021.

14 See, more recently, *Marc Brogsitter v. Fabrication de Montres Normandes EURL and Karsten Fräßdorf* (C-548/12) ECLI:EU:C:2014:148 para. 20; *Harald Kolassa v. Barclays Bank plc* (C-375/13) ECLI:EU:C:2015:37 para. 44; see also *Dickinson* para. 4.06.2; *Rühl*, in: BeckOGK Art. 4 Rom II-VO note 38 *et seq*.

and quasi-delict' covers all actions which seek to establish the liability of a defendant and which are not related to a 'contract'".[15] Since the CJEU has defined a contract as an "obligation freely assumed by one party towards another"[16] tort liability must not be assumed freely but needs to be mandatorily imposed by statute or judge-made law. However, where the law imposes a contract (as may happen in monopoly situations etc.) the ensuing obligations still remain outside Rome II.[17]

14 The minimum condition that the liability need to be non-contractual does evidently not suffice for the demarcation between torts and other extra-contractual liabilities; otherwise, separate conflict rules for unjust enrichment, *negotiorum gestio* or *culpa in contrahendo* were superfluous. In order to constitute a tort it is further necessary that somebody shall be made liable for an act or omission that gives rise to damage, primarily meaning an injury to a person or damage to property.[18] Under a broad comparative perspective the essence of torts is the (non-contractual) infringement of a legally protected interest of another person combined with liability for damage caused, or threatening to be caused, by the infringement.[19] *In abstracto*, tort is thus an act or omission causing, or threatening to cause, damage that the law disapproves of and holds a person liable of. A good example is competition (specifically covered by Art. 6 Rome II) which necessarily leads to damage to other competitors. Most national economies strongly support the principle of unrestricted competition. The law disapproves of the resulting damage only if a competitor uses unfair means. Tortious liability is primarily result-oriented in that it aims at compensation of a loss the act or omission of the tortfeasor has caused; but to a considerable extent it is also behaviour-oriented in that it tries to already prevent behaviour that causes damage.

15 It is in particular the behavioural aspect that helps to distinguish torts from other non-contractual obligations. While torts require a wrongful invasion into the – legally protected – sphere of the victim this is no inherent condition for a claim based on unjust enrichment, *negotiorum gestio* or *culpa in contrahendo*.[20] In this sense Recital 17 refers to "where the

15 *Athanasios Kalfelis v. Bankhaus Schröder, Münchmeyer, Hengst & Co. and others* (C-189/87) ECLI:EU:C:1988:459 para. 17; *Mario Reichert v. Dresdner Bank AG* (C-261/90) ECLI:EU:C:1992:149 para. 16; *Réunion européenne v. Spliethoff's Bevrachtingskontoor und Kapitän des Schiffes "Alblasgracht V002"* (C-51/97) ECLI:EU:C:1998:509 para. 22; *Gabriel* (C-96/00) ECLI:EU:C:2002:436 para. 33; almost identical formulation also in *Holterman Ferho Exploitatie BV and others v. Friedrich Leopold Freiherr Spies von Büllesheim* (C-47/14) ECLI:EU:C:2015:574 para. 68.

16 *Handte v. TMCS* (C-26/91) [1992] ECR I-3967 para. 15; also *Réunion européenne v. Spliethoff's Bevrachtingskontoor und Kapitän des Schiffes "Alblasgracht V002"* (C-51/97) ECLI:EU:C:1998:509 para. 17; *Tacconi v. HWS* (C-334/00) [2002] ECR I-7357 para. 23; *Frahuil v. Assitalia* (C-265/02) [2004] ECR I-1543; *Engler v. Janus Versand GmbH* (C-27/02) [2005] ECR I-481 para. 26; *Ilsinger v. Dreschers* (C-180/06) ECLI:EU:C:2009:303 para. 51.

17 See thereto *Magnus*, in: Staudinger Art. 1 Rom I-VO note 34 with further references.

18 Probably differently *Dickinson* para. 4.06.5 who holds that there is a certain group of non-contractual obligations " (for example, monetary obligations attaching to immoveable property)" that Art. 4 does not cover.

19 For a broad comparative discussion see *Koziol* (ed.), Basic Questions of Tort Law from a Comparative Perspective (2015) in particular p. 697.

20 For the qualification of the latter see *infra* Art. 4 notes 42 *et seq.* (*Magnus*) and in detail the comments on Art. 10, 11 and 12 (*Tichy*).

injury was sustained or the property was damaged." The term 'damage' as used in Art. 4 is thus narrower than that of Art. 2 (1) according to which "damage shall cover any consequence arising out of tort/delict, unjust enrichment, *negotiorum gestio* or *culpa in contrahendo*." While damage under Art. 4 must arise from a violation, or threatened violation, of the victim's sphere, neither a mere unjustified moving of property from a person to another does suffice nor any damage arising from the acting in another's interest or in the preparation of a contract.[21]

16 It could be asked whether the terms 'torts/delicts' and 'damage' in Art. 4 even comprise infringements of pure financial (though protected) interests. For, Recital 17 sent. 2 Rome II merely speaks of "cases of personal injury or damage to property". However, the term 'property' does not necessarily exclude pure economic positions. It is broad enough to include non-material property interests as well. Furthermore, even if the term property as used in Recital 17 meant tangible things only, this Recital mentions "cases of personal injury or damage to property" not in an exclusive way but leaves room for further kinds of damage. Moreover, Arts. 6 and 9 concern special torts which regularly cause but pure economic loss. These Articles clearly indicate that torts causing pure economic loss shall fall under Chapter II and are therefore also covered by Art. 4.[22]

17 For the definition of torts it follows further from Art. 2 (2) and (3) and from Art. 15 (d) that damage need not already have happened. It is sufficient that a tortious obligation or damage is threatening ("is likely to occur", "to prevent … injury or damage").[23] Art. 4 therefore also covers situations where an injunction or similar remedy against threatened damage is sought.[24]

18 Art. 4 does not require that tortious liability is based on fault. As Recital 11 expresses and Recital 16 also indicates, "systems of strict liability" are covered as well.[25] The term tort does not presuppose that the activity is wrongful in a strict legal sense. It suffices that the law disapproves of the result of the activity as in case of strict liabilities.[26]

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21 Probably differently *Dickinson* para. 4.29; *Rühl*, in: BeckOGK Art. 4 Rom II-VO note 38 *et seq.* points to the fact that unjust enrichment and *negotiorum gestio* generally aim at other objectives than damages. However, their objective can be identical with the tort sanction (e.g. gain-stripping in case of infringement of personality right; compensation of damage caused through unauthorized acting in another's interest).

22 In the same sense *Ansgar Staudinger*, in: FS Jan Kropholler (2008), p. 691, 694; *Unberath*/*Ciupka*/*Pabst*, in: Rauscher Art. 1 Rom II-VO note 21.

23 Also *Dicey*/*Morris*/*Collins* para. 35–021.

24 See BGH NJW 2009, 3371 (3372) *et seq.* with critical note *Ansgar Staudinger*/*Czaplinski* (right of injunction of a consumer association against the use of unfair contract terms falls under Art. 4 Rome II); see further *Bach*, in: Peter Huber Art. 4 note 1; *Schaub*, in: PWW Art. 4 Rom II-VO note 3; *Wurmnest*, in: jurisPK-BGB Art. 4 Rom II-VO note 6.

25 See also *Matthias Lehmann*, in: NK BGB Art. 4 Rom I-VO note 42; *de Lima Pinheiro* II 480; *Wurmnest*, in: jurisPK-BGB Art. 4 Rom II-VO note 6.

26 Also *Matthias Lehmann*, in: NK BGB Art. 4 Rom I-VO note 42.

The notion of torts/delicts covers also claims of dependants and other close persons of someone who died due to the tortious activity of the tortfeasor.[27] **19**

b) Excluded torts

Art. 1 Rome II Regulation excludes a rather long list of specific torts, mostly because they are more closely related to areas to which other conflict of law-rules apply. All these torts also fall outside Art. 4. The exclusions are discussed in detail in the comment to Art. 1, though with respect not only to torts but to the Regulation as a whole. They merely need to be briefly recalled here. **20**

aa) State liability

Damage caused by *acta iure imperii* falls entirely outside the scope of the Rome II Regulation (Art. 1 (1)). Such acts do not only include sovereign acts of the state itself "where the public authority is acting in the exercise of its public powers."[28] According to Recital (9) they shall also include claims against "officials who act on behalf of the State and liability for acts of public authorities, including acts of publicly appointed office-holders." For acts in a sovereign capacity usually the law of the state is applicable under whose power the act has been executed.[29] A separate problem is possible state liability for military actions which also falls outside the scope of Rome II.[30] On the contrary, where a state organ committed a tort in the field of *acta iure gestionis* (acting like a private subject), Art. 4 remains applicable.[31] **21**

bb) Family torts

The Regulation does not cover claims that arise from a family relationship – or a relationship with similar effects – and have a non-contractual character Art. 1 (2) (a)). However, such claims are rare. An example is the tortious neglect to pay maintenance.[32] Here, the law governing maintenance governs the tortious neglect as well.[33] 'Normal' torts between family members, for instance the negligent or willful injury of one family member by the other, fall under Art. 4. **22**

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27 See Art. 15 (f) Rome II Regulation and the case *Florin Lazar v. Allianz SpA* (C-350/14) ECLI:EU:C:2015:802 para. 27.

28 *Eirini Lechouritou and others v. Dimosio tis Omospandiakis Dimokratias tis Germanias* (C-292/05) ECLI:EU:C:2007:102 para. 31 (claims against Germany for compensation for World War II massacre by German soldiers in Kalavrita/Greece, 1944).

29 See, e.g., for Austria: *Schwimann*, Internationales Privatrecht, 2nd ed. 1999, 67; for Germany: BGHZ 190, 301 (304 *et seq.*); for Poland: Art. 35 Polish Act on Private International Law of 2011; however *contra* – for the unrestricted application of the Rome II Regulation – *Knöfel*, in: FS Magnus 459 *et seq.*

30 For examples see ECLI:EU:C:2007:102 [Kalavrita]; BGHZ 155, 279 [Distomo, another massacre of German soldiers in Greece 1944 during World War II]; BGHZ 169, 348 [Varvarin, bombing of a bridge in Serbia by NATO airplanes during the Kosovo conflict, 1999]; BGH NJW 2016, 3656 [Kunduz, ISAF bombing of tanker lorries in Afghanistan, 2009]).

31 *Junker*, in: MünchKommBGB Art. 4 Rom II-VO note 66; *Wurmnest*, in: jurisPK-BGB Art. 4 Rom II-VO note 6.

32 See *Junker*, in: MünchKommBGB Art. 1 Rom II-VO note 28.

33 According to Art. 3 (1) Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, which applies in all EU-Member States except Denmark, the law of the state of the habitual residence of the maintenance creditor is the basically governing law.

cc) Torts with respect to matrimonial property or succession

23 Art. 4 does also not cover tortious obligations arising out of matrimonial property regimes, of comparable property regimes, of wills and succession (Art. 1 (2) (b)). Tortious obligations arising out of matrimonial property regimes are hardly imaginable.[34] Acts that damage matrimonial property are not meant. They fall under Art. 4 because they do not arise out of the property regime. Likewise, the intentional falsification of a will or of the inheritance order is covered by Art. 4 because this act is no obligation arising out of the will or succession.[35]

dd) Torts with respect to negotiable instruments

24 Tortious obligations arising under bills of exchange, cheques, promissory notes and other negotiable instruments are also excluded as far as they arise out of the negotiable character of such instruments (Art. 1 (2) (c)). The forgery of a bill of exchange or of a cheque is thus outside Art. 4 and must be determined usually in accordance with the respective Geneva Conventions. Tortious acts with respect to prospectuses are on the other hand neither excluded by Art. 1 (2) (c) nor – most likely – by Art. 1 (2) (d).[36]

ee) Torts with respect to companies

25 Tort claims rooted in company law are likewise excluded (Art. 1 (2) (d)). The claim must arise out of the law of companies or other associations; it must follow from the infringement of rules which concern the structure and inner organisation of companies.[37] The exclusion even covers the personal tortious liability of company officers and members and of auditors in respect of their specific duties towards the company or its members. However, torts which the company or its officers commit towards third parties fall under Art. 4.[38] The same is true for tortious liability claims based on a company's prospectus.[39]

ff) Torts with respect to trusts

26 This exclusion has relevance only for torts arising out of common law trusts (Art. 1 (2) (e)).[40] In practice, it is unimportant.

gg) Torts concerning nuclear damage

27 Art. 4 does not cover tortious claims arising out of nuclear damage, meaning damage that is caused by radioactive substances. The main reason is that international conventions, the Paris Convention of 1960[41] and the Vienna Convention of 1963[42] and a bridging Protocol,[43]

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34 Also *Dicey/Morris/Collins* para. 35–180; *Bach*, in: Peter Huber Art. 1 note 38; *Junker*, in: MünchKomm-BGB Art. 1 Rom II-VO note 31; *Knöfel*, in: NK BGB Art. 1 Rom II-VO note 39.

35 *Hohloch*, YbPIL 9 (2007) 16; *Junker*, in: MünchKommBGB Art. 1 Rom II-VO note 28; *Spickhoff*, in: Bamberger/Roth Art. 1 Rom II-VO note 13; *Thorn*, in: Palandt Art. 1 Rom II-VO note 10.

36 See *Arons*, NILR 2008, 481; *Peter Huber/Bach*, in: Peter Huber Art. 1 note 42; *Einsele*, ZEuP 2012, 27; *Junker*, in: MünchKomm BGB Art. 1 Rom II-VO note 35; *Knöfel*, in: NK BGB Art. 1 Rom II-VO note 44.

37 *Bach*, in: Peter Huber Art. 1 note 43.

38 *Thorn*, in: Palandt Art. 4 Rom II-VO note 12; *Gerhard Wagner*, IPRax 2008, 2 *et seq.*

39 *von Hein*, in: Beiträge für Klaus J. Hopt 381 *et seq.*; *Junker*, in: MünchKommBGB Art. 1 Rom II-VO note 40; *Knöfel*, in: NK BGB Art. 1 Rom II-VO note 46; *Wurmnest*, in: jurisPK/BGB Art. 1 Rom II-VO note 46.

40 See *Knöfel*, in: NK BGB Art. 1 Rom II-VO note 46.

41 (Paris) Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960.

regulate the liability for nuclear damage for the Contracting States of these Conventions.[44] Yet, the exclusion applies even if the Conventions are not applicable.[45] Then, the national conflict-of-law rule existing prior to the Rome II Regulation has to be applied.[46]

hh) Torts with respect to privacy and personality rights

Claims based on violations of privacy and personality rights fall also outside Art. 4 (Art. 1 (2) (g)). This excludes tortious infringements of the non-tangible personality aspects whereas all corporeal injuries are covered even if they additionally affect the personality rights of the victim.[47] As far as enterprises can have personality rights Art. 1 (2) (g) extends even to those cases. However, the exclusion does not cover loss of goodwill or commercial reputation of single persons or enterprises through commercial critique, rating, commercial assessment/judgment or the like in a mere commercial and competitive context.[48] For, these cases are regularly the province of Art. 6 and they are therefore covered by the Regulation. **28**

To the excluded cases, again, the pre-existing national conflict rule must be applied. **29**

c) Demarcation to specific torts (Artt. 5–9)

Art. 4 applies "(u)nless otherwise provided for in this Regulation". Artt. 5–9 are such other provisions which prevail over Art. 4 leading to the latter's inapplicability unless the special conflict rules explicitly refer to Art. 4.[49] Artt. 5–9 concern specific torts which must be distinguished from the general tort notion of Art. 4. The comments on Artt. 5–9 will go into details. Here, it is necessary to define the demarcation line that distinguishes them from Art. 4. **30**

aa) Product liability (Art. 5)

Product liability is specifically regulated in Art. 5 and supplants Art. 4.[50] It is characterised by the fact that a defective product caused damage for which a person, primarily though not necessarily the manufacturer of the product, shall be made liable. The damage must thus be caused by specific means, namely by a product in the common European sense as expressed in the Directive on product liability.[51] In contrast to the Directive, it is immaterial whether the product was used for private or professional purposes.[52] If the product **31**

42 (Vienna) Convention on Civil Liability for Nuclear Damage of 21 May 1963.

43 Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention of 21 September 1988.

44 An additional international instrument is the Convention on Supplementary Compensation for Nuclear Damage of 12 September 1997.

45 See *Junker*, in: MünchKommBGB Art. 1 Rom II-VO note 42; *Spickhoff*, in: Bamberger/Roth Art. 1 Rom II-VO note 16; *Unberath/Ciupka*, in: Rauscher Art. 1 Rom II-VO note 65.

46 For instance, in Germany this was a major reason to maintain the former provision on international torts (Art. 40 EGBGB) which differs from the solution established by Art. 4 Rome II Regulation.

47 See *Knöfel*, in: NK BGB Art. 1 Rom II-VO note 55.

48 In accord *Dutta*, IPRax 2014, 33 (37) for ratings.

49 See Artt. 5 (1), 6 (2), 7, 9 Rome II Regulation.

50 See *Siehr*, RabelsZ 73 (2010) 139 (144 *et seq.*).

51 See Artt. 2 and 6 Product Liability Directive.

52 The Directive does not cover damage that the product caused to not privately used property; Art. 9 (b) Product Liability Directive.

is, however, used to commit a tort, Art. 4 remains applicable irrespective whether or not the product was defective (e.g., throwing the defective product at a person who is thereby injured).[53]

bb) Unfair competition and acts restricting free competition (Art. 6)

32 Although Recital 21 provides that "(t)he special rule in Article 6 is not an exception to the general rule in Article 4 (1) but rather a clarification of it" it is nonetheless necessary to determine whether tortious conduct is covered by one or the other provision. For, at least Art. 6 (4) requires the distinction since party autonomy is excluded under Art. 6. In addition, Art. 6 does not provide for an escape clause.

33 Torts falling under Art. 6 Rome II are characterised by the object they affect, namely to impair fair and unrestricted competition. The tortious act must thus either infringe rules protecting fair behaviour between the market partners[54] or violate rules that secure the market against restrictive practices such as the abuse of a dominant position or agreements for the restraint of trade.[55] The market- and/or competitor-related direction of the tort qualifies it as falling under Art. 6.

34 In general, Art. 6 should be given a wide – autonomous – interpretation, in particular in respect of unfair competition.[56] This is necessary in order to cover divergent national concepts of unfair competition irrespective whether they are enshrined in specific statutes or in general tort law. For the understanding of restrictions of free competition Artt. 101, 102 TFEU and their interpretation can provide guidance.

35 As far as torts are market- or competitor-related, Art. 6 prevails over Art. 4. However, where an act of unfair competition e.g., unauthorised exploitation of another's reputation, "affects exclusively the interests of a specific competitor, Article 4 shall apply" (see Art. 6 (2)).

cc) Environmental damage (Art. 7)

36 The demarcation line between Art. 4 and Art. 7 is necessary because only under Art. 7 the claimant may choose between the *lex loci delicti commissi* and the *lex loci damni*. The line is again to be drawn with respect to the object that the tort violates. For Art. 7, the damage that attracts the application of the provision must be "environmental damage". According to Recital (24) this means any "adverse change in a natural resource, such as water, land or air,

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53 See also *Matthias Lehmann*, in: NK BGB Art. 5 Rom II-VO note 31; *Spickhoff*, in: Bamberger/Roth Art. 5 Rom II-VO note 3; *Unberath*/*Ciupka*, in: Rauscher Art. 5 Rom II-VO note 45 *et seq*.

54 The definition of "business-to-consumer commercial practices" in Art. 2 (d) of the Unfair Commercial Practices Directive ("any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to a consumer") may provide some help for the autonomous interpretation, if the Directive's B2C reference is neglected; see *Dickinson* paras. 6.17 *et seq*.; *Peter Huber*/*Illmer* Art. 6 note 7; *Mankowski*, in: MünchKomm zum Lauterkeitsrecht (2nd ed 2014) IntWettbR note 13; *Wurmnest*, in: jurisPK Art. 6 Rom II-VO note 5. For the required standard of unfairness in B2B relations the Directive's provisions are less helpful because of their direction to transactions with consumers.

55 See Recital 23 of the Regulation.

56 In the same sense *Illmer*, in: Peter Huber Art. 6 note 4; *Mankowski*, in: MünchKomm zum Lauterkeitsrecht (2nd ed 2014) IntWettbR note 11.

impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms." This definition summarises the more extended one in Art. 2 (1) and (2) of the Directive on environmental liability (2004/35/EC) which also can be referred to for the autonomous interpretation of "environmental damage". It is suggested that noise emissions do not fall under the definition.[57] However, "environmental damage" does not necessarily require a permanent or long-lasting adverse change of natural resources. At least for the purposes of this conflict rule a broad definition should apply that also includes damage that is temporary and repaired by natural processes either immediately or after a short while. Air pollution through noise can therefore qualify as environmental damage if it may or does cause further damage.[58]

The text of Art. 7 may raise doubts whether the provision covers the case of threatened environmental damage because its formulation "damage sustained by persons or property as a result of such *sc. environmental* damage" is more strictly bound to suffered damage than the parallel formulation in the other special conflict rules. However, the general rules of Art. 2 (2) and (3) apply also here so that Art. 7 includes threatened environmental damage and respective remedies, in particular preventive injunctions, the applicable law may provide.[59] **37**

dd) Infringement of intellectual property rights (Art. 8)

Where tortious conduct infringes an intellectual property right, Art. 8 ousts Art. 4. According to Recital (26), the autonomous term "intellectual property right" includes: "for instance, copyright, related rights, the *sui generis* right for the protection of databases and industrial property rights". This is no exhaustive list. Therefore, if not anyway directly applicable, EU instruments[60] and international conventions[61] on such rights provide further guidance for the definition of intellectual property rights.[62] However, e.g., trade secrets as well as personality rights do not fall under Art. 8. The former do not qualify as intellectual property rights,[63] the latter are excluded by virtue of Art. 1 (2) (g) Rome II Regulation. **38**

57 *Peter Huber*/*Fuchs* Art. 7 note 20; probably also – if they are exceptionally environmental damage in the sense of Recital 24 – *Junker*, in: MünchKommBGB Art. 7 Rom II-VO note 14.

58 See also *Spickhoff*, in: Bamberger/Roth Art. 7 Rom II-VO note 3.

59 See Recital (25) of the Regulation which refers to "the precautionary principle and the principle that preventive action should be taken".

60 Council Regulation (EC) No. 207/2009 of 26 February 2009 on the Community trademark (OJ 2009 L 78, p. 1; amended version OJ 2015 L 341, p. 21); Council Regulation (EC) No. 510/2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OJ 2006 L 93, p. 12); Council Regulation (EC) No. 6/20002 of 12 December 2001 on Community Designs (OJ 2002 L 3, p. 1); Council Regulation (EC) No. 2100/94 of 27 July 1994 on Community plant variety rights (OJ 1994 L 227, p. 1).

61 In particular, the Paris Convention for the Protection of Industrial Property of 20 March 1883 (with later amendments); the Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886 (with later amendments); the Patent Cooperation Treaty of 19 June 1970 (with later amendments); the European Patent Convention (EPC) of 5 October 1973; the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of 15 April 1994 [Annex 1C to the Marrakesh Agreement Establishing the World Trade Organisation]; the WIPO Copyright Treaty (WCT) of 20 December 1996 and further instruments.

62 See also *Peter Huber*/*Illmer* Art. 8 note 5 *et seq*.

ee) Industrial action (Art. 9)

39 The last special conflict rule that prevails over Art. 4 concerns industrial actions. Again, the distinction between torts falling under Art. 4 and those falling under Art. 9 is necessary because the main connecting point differs: in Art. 4 (1) *lex loci damni*, in Art. 9 the place of the action. Furthermore, Art. 9 does not contain an escape clause.

40 It is disputed whether the term "industrial action" in Art. 9 has to be interpreted autonomously[64] or in accordance with the relevant national law.[65] The reason for this dispute is Recital (27) which states: "The exact concept of industrial action, such as strike action or lock-out, varies from one Member State to another and is governed by each Member State's internal law." This is widely understood as a rejection of an autonomous interpretation.[66] However, it is not clear whether the sentence is merely a statement that describes the situation that the concepts of industrial action vary in the Member States and are *thus far* governed by the internal law. Or, whether the sentence is intended to formulate a conflict rule that each Member State's law *should* govern the contents of the term. The stronger reasons militate for the first view: (1) Contrary to the text of the Regulation, the Recitals do not finally determine the meaning of the Regulation's provisions but are mere additional explanations. Their authority is limited. (2) It is common opinion that the Regulation has generally to be interpreted autonomously.[67] Any deviation from this rule would be an exception that had to be made clear beyond doubt. The CJEU appears to require an "express reference" in the respective provision.[68] This is not the case with Art. 9 nor with Recital (27). (3) If the quoted sentence of Recital (27) is seen as referring to national law, it remains open to which national law. The solution of this problem is heavily disputed among those who support a non-autonomous qualification of the term 'industrial action'.[69] It could be argued that sentence 2 of Recital (27) fills this gap by referring to the law of the country where the industrial action was taken. However, this is a *circulus*

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63 Although they enjoy protection under Art. 39 TRIPS, this provision connects their protection with the protection against unfair competition. Insofar, if trade-related, the violation of trade secrets falls under Art. 6 (2), otherwise directly under Art. 4 Rome II Regulation.

64 In this sense, e.g., *Plender/Wilderspin* paras. 23–008 *et seq.*; also *Spickhoff*, in: NK BGB Art. 9 Rom II-VO note 1.

65 In this sense – with variations on the question which national law should apply – *Dicey/Morris/Collins* para. 35–240; *Dickinson* para. 9.19; *Heinze* RabelsZ 73 (2009) 782 *et seq.*; *Junker*, in: MünchKommBGB Art. 9 Rom II-VO note 14; *Knöfel* EuZA 2008, 241; *Morse*, in: Liber Fausto Pocar (2009), p. 727; *Temming*, in: NK BGB Art. 9 Rom II-VO note 34; *Unberath/Ciupka/Pabst*, in: Rauscher Art. 9 Rom II-VO note 7.

66 See preceding fn.

67 See *Florin Lazar, représenté légalement par Luigi Erculeo v. Allianz SpA* (C-350/14) ECLI:EU:C:2015:802 para. 21 (with respect to Art. 4 (1) Rome II); see also Recital (11).

68 *Florin Lazar, représenté légalement par Luigi Erculeo v. Allianz SpA* (C-350/14) ECLI:EU:C:2015:802 para. 21: "As a preliminary point, it must be noted, first, that, as regards the interpretation of Article 4 (1) of the Rome II Regulation, the need for a uniform application of EU law and the principle of equality require that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union (further quotation)."

69 For the application of the *lex fori*: *Knöfel*, EuZA 2008, 241 *et seq.*; *Thorn*, in: Palandt Art. 9 Rom II-VO note 2; for the *lex causae* (= the law of the country of action): *Dickinson* para. 9.19; *Dörner*, in: Hk-BGB Art. 9 Rom II-VO note 2; *Heinze* RabelsZ 73 (2009) 782; *Peter Huber/Illmer* Art. 9 note 9; *Junker*, in:

vitiosus since the first question is what counts as industrial action. Only then can it be decided in which country it took place. Furthermore, it is clear from this second sentence in connection with Recital (28) that here the general conflict rule for industrial actions is defined and not a mere rule on which law should decide on the qualification of an act as industrial action. (4) A further argument for an autonomous qualification is the fact that Art. 9 covers cases with third states as well as with Member States. It would be unfortunate if always the national law even of third countries has to be examined whether an action was an industrial action, in particular where the national law is hostile against any kind of protest against labour conditions. Moreover, Recital (27) merely mentions the Member States and differences between them. Taken as a qualification norm, it would leave open how third countries should be treated. (5) The non-autonomous interpretation neglects the aim of harmonisation and unification that the Regulation pursues in the interest of greater legal certainty. (6) Where the Regulation refers to national law it does so explicitly in its text, not merely in the Recitals and the respective Recital is much clearer (see Art. 1 (2) (a) and (b), Art. 15 (d) and Recital (10)). (7) There is no reason why Art. 9 as single provision should not follow the general approach of the other conflict rules. (8) An autonomous interpretation serves the purposes of the Regulation, and in particular those of Art. 9, much better than a reference to national law. (9) Art. 28 of the European Charter of Fundamental Rights guarantees the right of workers and employers, resp. their organisations, "in cases of conflicts of interest, to take collective action to defend their interests, including strike action." True, the provision grants this right under the reservation that it is exercised "in accordance with Community law and national laws and practices". However, there is a core of industrial actions which Art. 28 safeguards that provides a helpful fundament for an autonomous interpretation of what constitutes an industrial action. (10) It is no sufficiently convincing argument against an autonomous interpretation that industrial actions concern specifically sensitive national public policies. Other conflict rules (Arts. 6, 7, 8) are at least as sensitive. Moreover, Arts. 16 and 26 provide instruments that guarantee a fundamental standard.

The autonomous interpretation of the term "industrial action" certainly includes strike and lock-out as Recital (27) mentions. The Recital further provides "that the law of the country where the industrial action was taken should apply, with the aim of protecting the rights and obligations of workers and employers." The last half sentence ("with the aim …") is partly read as a reference to "the law of the country …" so that the conflict rule should serve the protection of the rights and obligations of workers and employers.[70] It is more convincing to refer this last part to the "industrial action" which must have "the aim of protecting the rights and obligations of workers and employers." Then, this part addresses the collective aspect industrial actions generally have, and requires that the action must concern the rights and obligations of workers and employers, thus the conditions of labour. This excludes actions that have mere political or other general aims from the scope of Art. 9. The provision should cover all actions which collectively articulate claims concerning the conditions for workers. Workers will regularly request improvements, whereas employers – or a single employer for all its workers – will insist on no change or even on a deterioration of condi- **41**

MünchKommBGB Art. 9 Rom II-VO note 14 *et seq.*; *Temming*, in: NK BGB Art. 9 Rom II-VO note 34; *Unberath/Ciupka/Pabst*, in: Rauscher Art. 9 Rom II-VO note 8.

70 *Peter Huber/Illmer* Art. 9 note 8.

tions. Besides strike and lock-out also actions like go-slow etc. should fall under Art. 9 and not under the general provision of Art. 4.

d) Demarcation to Chapter III

42 To distinguish between the torts covered by Art. 4 and the extracontractual obligations assembled in Chapter III is regularly easier than to define the delimitation between Art. 4 and the special conflict rules on tort (Art. 5–9) because the distinction is generally based on essentially different preconditions. Contrary to the distinction between the different torts, the liabilities arising under Art. 4 and Arts. 10–13 are not necessarily mutually exclusive but may concur although the legal categories Art. 4 and Arts. 10–13 cover are distinct.[71]

aa) Unjust enrichment (Art. 10)

43 Tort claims and unjust enrichment claims are generally based on different requirements: while responsibility for tortious conduct requires a reason (fault or created risk) that allows making the tortfeasor accountable for a damage of another person, unjust enrichment intends to correct movements of property in its widest sense from one person to another for which no justified reason existed.[72] On this basis, the distinction between Art. 4 and Art. 12 should generally pose no problem.

44 However, this may be different insofar as substantive tort law sometimes provides for gain-stripping remedies such as disgorgement, restitutionary damages etc.[73] Such remedies resemble closely those available under unjust enrichment concepts. The qualification problem should be solved in the following way: where such a claim is based on a wrong for which the defendant is accountable because of fault or created risk the conflict provisions on tort apply. Where the claim does not require any like responsibility of the defendant, Art. 10 is applicable.[74]

bb) *Negotiorum gestio* (Art. 11)

45 *Negotiorum gestio* is generally defined as the management of another's affairs without mandate.[75] It is the willful interference with another person's sphere generally in this person's interest but without the latter's explicit permission[76] whereas in tort the tortfeasor is generally not acting, nor intending to act, in the interest of another person, quite the opposite. The legal institute of *negotiorum gestio* may nonetheless – at least in some legal systems – entitle to damages, where the gestor infringed rights of the other person, and then concur with tort

71 Also *Dickinson* para. 4.08 ("mutually exclusive categories") and para. 4.20.

72 To the latter see *S. Meier*, in: The Max Planck Encyclopedia of European Private Law (2012) vol. II p. 1742 *et seq*.

73 On the remedy of disgorgement of profits under a comparative perspective see *Helms*, in: The Max Planck Encyclopedia of European Private Law (2012) vol. I p. 485 *et seq*.; to the qualification problem for Rome II extensively *Dickinson* para. 4.11 *et seq*.

74 In the same sense *Dickinson* para. 4.13.

75 *Jansen*, in: The Max Planck Encyclopedia of European Private Law (2012) vol. II p. 1114 *et seq*.

76 An example of an international *negotiorum gestio* is the following case (OLG Düsseldorf, RIW 1984, 481): A German private detective discovers by chance in a Spanish harbour a yacht that had been stolen; he takes hold of the yacht, informs the German owner with whom he had no prior contact and claims his expenditures from the latter (stay in hotel etc.).

claims which Art. 11 does not exclude.[77] However, principally both institutes have different aims and preconditions so that they can be distinguished without too great difficulty.

cc) *Culpa in contrahendo* (Art. 12)

Recital (30) proclaims that "*(c)ulpa in contrahendo* for the purposes of this Regulation is an autonomous concept" and should include "the violation of the duty of disclosure and the breakdown of contractual negotiations." Personal injury caused by the other party during the contractual negotiations but having no direct link to the negotiations shall not fall under Art. 12 but be covered by Art. 4 or, as the case may be, by another special tort conflict rule.[78] From the explanations in Recital (30) the scope of Art. 12 can be inferred and distinguished from Art. 4. **46**

e) Priority of international conventions

aa) In general

Art. 28 Rome II regulates the relationship between the Regulation and already existing international conventions concerning conflict rules for extracontractual obligations. The provision corresponds verbally with Art. 25 Rome I Regulation with the only exception that the latter concerns contractual obligations. Thus, international conventions on matters regulated in Rome II enjoy priority over the Regulation if among their Contracting States are both EU and Non-EU Member States; and the Regulation takes precedence where such (pre-existing) conventions have been concluded exclusively between EU-Member States. New rival conventions can only achieve priority if the EU so decides either by ratifying such convention or allowing the Member States to ratify them. **47**

bb) Conventions on private international law

There is one pure conflict-of-law-convention that certainly needs mentioning because it has relevance for Art. 4 Rome II: the Hague Convention on the Law Applicable to Traffic Accidents of 4 May 1971.[79] It is in force in 22 states,[80] of which Belarus, Bosnia and Herzegovina, Macedonia, Montenegro, Morocco, Serbia, Switzerland and Ukraine are no Member States of the EU while the other 14 Contracting States belong to the EU.[81] This Convention determines the applicable law for international road traffic accidents. As far as it is applicable, it therefore prevails over the Rome II Regulation (Art. 28 (1) Rome II). For details see *infra* note 183 *et seq.* **48**

cc) Conventions on substantive law

There exists a number of substantive law conventions which also contain conflict of law-rules that are relevant for tortious conduct covered by Art. 4. As far as the circle of their contracting states does not only consist of EU Member States, those conflict provisions supersede Art. 4. Among these priority conventions the following may be mentioned: Convention for the Unification of Certain Rules Relating to the Precautionary Attachment of **49**

77 *Dickinson* note 11.08 *et seq.*; *Jacob*/*Picht*, in: Rauscher, Art. 11 Rom II-VO note 6.

78 See Recital (30) sent. 4.

79 To find under assets.hcch.net/docs/abcf969d-bac2-4ad5-bf52-f1aabc0939ad.pdf.

80 See the status table hcch.net/en/instruments/conventions/status-table/?cid=81.

81 The following 14 EU Member States have ratified the Hague Traffic Convention: Austria, Belgium, Croatia, Czech Republic, France, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Slovakia, Slovenia, and Spain.

Aircraft of 29 May 1933 (Art. 6: liability in damages for wrongful attachment of aircraft is governed by the law at the place of proceedings); Convention Relating to the Arrest of Sea-Going Ships of 10 May 1952 (Art. 6: liability and damages for wrongful arrest follow the law of the place of arrest; the same solution in its successor: UN Convention on the Arrest of Ships of 12 March 1999 (Art. 6 (3)); Convention on Salvage of 28 April 1989 (Artt. 23 (3) and 24: law of the state of proceedings applicable to limitation of indemnity claim and to interest).

2. Structure and order of application

a) Structure of Art. 4

50 Art. 4 follows a clear structure; it consists of three elements, namely a general rule, an exception and an escape clause.[82] Para. 1 formulates the general rule[83] and basic principle[84] that "the law of the country in which the damage occurs" shall apply; in addition, para. 1 specifies what it means by "damage". Para. 2 provides for an exception to the general rule: where the parties are more closely connected by their habitual residence in the same country, the law of this country applies. Finally, the escape clause[85] of para. 3 allows for the application of a still another law where all the circumstances show that the case is "manifestly more closely connected" with the country of this law.

b) Order of application

51 The structure of Art. 4 does not preempt the order of application in practical cases. For practical purposes, the following order has to be observed:

(1) application of prevailing international conventions;
(2) application of an eventually chosen law as far as permitted by Art. 14 and the specific conflict provisions (Arts. 5, 7, 9);
(3) application of one (or more) of the special conflict provisions (Arts. 5–9);
(4) application of the law of an eventual common habitual residence, Art. 4 (2);
(5) application of the *lex loci damni*, Art. 4 (1);
(6) the final examination, whether a manifestly more closely connected law exists, and if so, its respective application, Art. 4 (3).[86]

52 This ladder for the determination of the applicable law must be examined step by step, beginning with step 1. In principle, if a step is answered in the affirmative, it becomes unnecessary to examine the following steps. There is an exception, though: if either the *lex communis domicilii* (step 4) or the *lex loci damni* (step 5) is applicable, it still remains necessary to examine whether a manifestly more closely connected law exists (step 6).[87]

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82 See Recital (18).

83 See Recital (14).

84 See also Recital (15): "basic solution".

85 See Recital (18).

86 Also, e.g., *Rühl*, in: BeckOGK Art. 4 Rom II-VO note 31; *Unberath/Cziupka/Pabst*, in: Rauscher Art. 4 Rom I I-VO note 8 *et seq.*; *Wurmnest*, in: jurisPK/BGB Art. 4 Rome II-VO note 6; similarly *Hohloch*, in: Erman Art. 4 Rom II-VO note 1 (four steps); *Thorn*, in: Palandt Art. 4 Rom II-VO para. 4.

87 An identical examination has to be made when Art. 5 Rome II (see Art. 5 (2)) or Art. 6 (2) is applicable while the other special provisions (Arts. 7–9) do not contain such an escape clause.

IV. Application of general provisions

1. Renvoi

The law designated by Art. 4 is the substantive national law. Like Art. 20 Rome I Regulation Art. 24 Rome II excludes any *renvoi*. Where the state whose law is applicable comprises different territorial units with different tort law, as for instance the United States, Canada, United Kingdom, Australia etc., then according to Art. 25 (1) the law of the relevant unit has to be applied directly. As under the Rome I Regulation[88] special conflict rules of that state for interlocal conflict cases need not be taken into account.[89] It is therefore decisive in which unit the damage in the sense of Art. 4 (1) occurred, the common habitual residence was located or to which unit the manifestly closer or closest connection exists. **53**

2. Ordre public

Art. 26 allows to disregard the applicable law if it is "manifestly incompatible with the public policy (ordre public) of the forum." The provision is verbally identical with Art. 21 Rome I Regulation and must be interpreted in the same cautious way. Thus, although national public policy considerations of the forum state can overturn the law that is actually applicable under Art. 4, this is and must remain the rare exception. Only if the application of the foreign law leads to a sharp and intolerable discrepancy with the forum's law can the latter prevail; all the more so as already the special conflict norms of Art. 5–9 take account of specific policy considerations. In addition, Art. 16 enables the forum to give priority to own fundamental mandatory provisions. **54**

3. Interpretation and qualification

The interpretation of Art. 4 and any qualification problem the provision may raise must be solved in accordance with the usual autonomous European method which besides the wording also takes account of the context (including relevant international conventions) and in particular of the objectives. An interpretation or qualification merely according to the national perspective is no longer permitted, where the respective provision "makes no express reference to the law of the Member States".[90] Art. 4 does not make such a reference. **55**

4. Relevant point in time

Apart from its para. (2) Art. 4 does not expressly state at which time the factors necessary for the determination of the applicable law must exist and whether a later change of those factors has to be taken into account. However, Art. 4 (2) which explicitly refers to "the time when the damage occurs" can be generalised. Thus, in principle the time of the occurrence of the damage is the relevant time and later changes of circumstances do not matter. This rule applies even, where the manifestly more closely connected law has to be determined. This **56**

88 See Art. 22 Rome I Regulation.

89 *Thorn*, in: Palandt Art. 25 Rom II-VO note 1.

90 See *Florin Lazar, représenté légalement par Luigi Erculeo v. Allianz SpA* (C-350/14) ECLI:EU:C:2015:802 para. 21 (although with respect to the general interpretation of Art. 4); also *Dickinson* para. 4.06 (for the term tort/delict).

solution is supported by the consideration that tort law establishes rules of conduct which must be possible to be known and observed when the conduct causes damage.

5. Intertemporal questions

57 The Rome II Regulation became applicable to international torts on 11 January 2009 (Art. 32). It applies "to events giving rise to damage which occur after" this date.[91] This means that the damage in the sense of Art. 4 (1) must have occurred on or after 11 January 2009.[92] Where this direct damage occurred before that date, the respective tort is governed by the conflict rules that were then in force in the respective country. For further details see the comments on Arts. 31 and 32.

6. Applicability of a state's law

58 The law that Art. 4 designates is always the state set law of the respective country, be it statute law or judge-made law. This follows from the expression "law of the (that) country" used in Art. 4 and the following conflict-of-law provisions. Art. 4 does, thus, not allow to apply non-state law as for instance religious laws (unless ordered applicable by the state), private codifications or habits of minorities.

7. Range of Art. 4

59 Art. 15 regulates which matters the law covers that applies under Art. 4.[93] The applicable law determines in particular the "extent of liability" and "the assessment of damage".[94] In principle, this includes the determination of the amount of damages. Generally, the applicable law alone decides how much the victim receives as compensation. However, Recital (33) recommends making an exception of that rule which is particularly relevant for Art. 4: in case of traffic accidents in another country than in the state of the victim's habitual residence, the assessment of damages for personal injury shall "take into account all the relevant actual circumstances of the specific victim, including in particular the actual losses and costs of after-care and medical attention." This recommendation shall avoid any over- or under-compensation of victims of such accidents and adapt the amount of damages to the true costs at the victim's living place.[95] This rule should be generalised for comparable cases where the victim of personal injury has to cope with the consequences in a country whose law is not the applicable law. Then, the amount of damages should reflect the costs there. This does not mean that the victim should not receive compensation for heads of damage that is foreseen by the applicable law but not by the law at the victim's habitual residence. For instance, if the applicable law grants compensation for pain and suffering to close relatives of a severely injured or killed victim while the law at the victim's

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91 *Deo Antoine Homawoo v. GMF Assurances SA* (C-412/10) ECLI:EU:C:2011:747.

92 In the same sense *Knöfel*, in: NK BGB Art. 31, 31 Rom II-VO note 10; differently – time of conduct decisive – *Junker*, in: MünchKommBGB Art. 32 Rom II-VO note 5; *Picht*, in: Rauscher Art. 31, 32 Rom II-VO note 1.

93 See the comment on Art. 15 .

94 Art. 4 (a) and (c) Rome II Regulation.

95 See *Christian Huber* SVR 2009, 9 *et seq.*; *Wurmnest*, in: jurisPK-BGB Art. 4 Rom II-VO note 12.

or its relatives' habitual residence does not, this is no reason to deny those persons compensation.[96]

Further, Art. 17 has to be taken into account where the applicable law and the rules of safety and conduct at the place of the event giving rise to the liability differ. **60**

8. No judicial *dépeçage*

The Rome II Regulation does not contain any hint whether or not the court may apply different law to different parts of the tort. This silence may indicate that such *dépeçage* is not permitted. Moreover, Art. 15 extends the scope of the applicable law to actually all aspects of tortious liability. A further and more stringent reason for the exclusion of a judge-made split of the applicable law is that a respective proposal of the European Parliament[97] was finally rejected. Also, the sister Regulation Rome I deliberately deleted the possibility of *dépeçage* that existed under the Rome Convention.[98] Therefore, under the Rome II Regulation as well, the judge cannot subject different parts of the damaging event to different laws.[99] **61**

On the other hand, the parties may select different law for a part or several parts of the damaging event. Although Art. 14 does not mention this possibility, it is the clearly prevailing view that Art. 3 (1) sent. 2 Rome I Regulation which permits *dépeçage* by the parties can be applied by way of analogy.[100] However, such *dépeçage* is only admissible for a reasonably separable part of the damaging event, for instance, for the compensation of immaterial damage whereas the law objectively applicable to the basic tort remains unaffected or is selected differently.[101] **62**

Anyway does Art. 17 lead in appropriate cases (in particular for traffic accidents) to a mixture of two different laws. **63**

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96 See also the case *Florin Lazar, représenté légalement par Luigi Erculeo v. Allianz SpA* (C-350/14) ECLI:EU:C:2015:802 (the CJEU held that the immaterial damage which the father who lived in Romania suffered when his daughter was killed in a traffic accident in Italy was indirect damage in the sense of art. 4 (1) Rome II. The father did thus not sustain direct damage in Romania. The consequence of this decision was that the question whether the father was entitled to damages for immaterial harm was to be decided according to Italian law which grants compensation in such a case).

97 The Parliament had proposed an additional Art. 4 (4): "In resolving the question of the applicable law, the court seised shall, where necessary, subject each specific issue of the dispute to separate analysis."

98 See Art. 4 (1) sent. 2 Rome Convention in contrast to Art. 3 (1) Rome I Regulation.

99 Also *Dickinson* para. 4.78 *et seq*.

100 See, e.g., *Gebauer*, in: NK BGB Art. 4 Rom II-VO note 31; *Heiss/Loacker* JBl 2007, 613 (623); *Hohloch*, in: Erman Art. 4 Rom II-VO note 7; *Bach*, in: Peter Huber Art. 14 note 10; *Junker*, in: MünchKommBGB Art. 14 Rom II-VO note 37; *Picht*, in: Rauscher Art. 14 Rom II-VO note 34 *et seq*.; *Spickhoff*, in: Bamberger/Roth Art. 14 Rom II-VO note 2; *Thorn*, in: Palandt Art. 14 Rom II-VO note 4; *contra*, e.g., *von Hein*, in: Calliess Art. 14 Rome II note 35.

101 See *Junker*, in: MünchKommBGB Art. 14 Rom II-VO note 37; *Leible*, RIW 2008, 257 (260).

V. The basic rule (Art. 4 (1))

1. In general

64 Art. 4 (1) is both the basic principle and the subsidiary catch-all provision[102] which steps in if none more specific conflict rule applies. It rests on the time-honoured maxim of the applicability of the *lex loci delicti commissi*.[103] However, para. (1) concretises this rule as the law of the country where the damage occurred thus fixing a specific interpretation of the *lex loci delicti* maxim. Before the Regulation entered into force, the EU Member States applied the *lex loci delicti* maxim in different ways: either the law at the place of conduct[104] or at the place of injury[105] was applicable or the more closely connected law of the two[106] or the victim could choose between the two laws.[107]

65 The justification for the *lex loci damni* is seen in the fact that "(a) connection with the country where the direct damage occurred (*lex loci damni*) strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage, and also reflects the modern approach to civil liability and the development of systems of strict liability."[108] Indeed, where tortfeasor and victim had no prior contact, the law at the place where the injury or damage occurred may be the natural point of legal relationship between them, at least, where the tortious conduct and the ensuing damage occurred at the same place. Both sides can be expected to know the commandments of the law of this place and to behave in accordance to it. This is quite evident for traffic rules which are in force at the place of accident and must be observed by both sides (and are anyway applicable via Art. 17).

66 The justification of the *lex loci damni* is less evident[109] where the place of conduct and the place of damage are located in different countries, as in the example of a shot across the border[110] or in the famous *Bier*-case of the CJEU where water was polluted in France but damage suffered by a gardener in the Netherlands.[111] Recital (16) of the Regulation refers as justification insofar to "the modern approach of civil liability and the development of strict liabilities." This consideration appears to address the tendency of tort law to intensify the protection of victims. In fact, there has been such an evolution over the last

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102 Also *Calvo Caravaca*/*Carrascosa González* cap. XXXI note 68 ("regla subsidiaria"); *Dicey*/*Morris*/*Collins* para. 35–022: "residual rule"; *Hohloch*, in: Erman Art. 4 Rom II-VO note 3.

103 To the history of the maxim see *Guerchoun*/*Piedelièvre* Gaz. Pal. 2007, v. 127 n. 294–296, 4 at 13 who report that the principle was developed in the 13th century but had its origins much earlier in Antiquity.

104 This was mainly the Austrian solution: § 48 (1) Austrian IPRG.

105 This was in essence the British solution: sec. 11 (1) and (2) Private International Law (Miscellaneous Provisions) Act 1995.

106 This was the French solution: Cass. civ., RCDIP 2007, 405 with note *Bureau*; also the Austrian and the British Regulation contained an escape clause; see extensively thereto *von Hein*, Das Günstigkeitsprinzip im Internationalen Deliktsrecht (1999) 15 *et seq*.

107 This was the German solution and is still applicable to torts not covered by Rome II; see Art. 40 (1) EGBGB.

108 Recital (16) of the Regulation.

109 For critique of the *lex loci damni* rule: see *Koziol*/*Thiede* ZVglRWiss 106 (2007) 235 *et seq*.

110 RGZ 54, 198 (shot fired in Badenia, man hit [probably] in Alsace).

111 *Handelskwekerij G.J. Bier B.V. v. Mines de Potasse d'Alsace SA* (C-21/76) [1976] ECR 1735.

century. It has been mainly achieved by steadily raising the standard of care and establishing an increasing number of duties of care within the fault concept, by introducing more and more strict liabilities where fault does no longer matter and by extending the field of recoverable losses.[112] The protection of victims rather than safeguarding the sphere of freedom of the members of a society (and potential tortfeasors) has become the primary focus of tort law.[113] This development supports that also the basic conflict-of-law rule may prefer the victim and therefore the place where the victim's rights and interests are infringed rather than the place where the tortfeasor acted. In cases of strict liability this rule may appear even more justified since the risk will only realise at the place of damage wherever the author of the risk may have created it. Further, the general aspect that persons shall be entitled to trust that the rules of behaviour are respected at the place where they (the persons) are, applies to victims with greater justification than to tortfeasors. For, by the invasion of their rights victims are generally more strongly affected than tortfeasors; and a tortfeasor as the active part can much more easily control and be expected to control whether and how the consequences of the own activities affect passive victims.[114]

67 On the other hand does the basic conflict rule for torts not go as far as to grant the victim the choice of the most favourable of the involved laws. This solution is accepted since the *Bier*-case[115] for European international procedural law: the claimant can choose to institute proceedings either at the place where the alleged tortfeasor acted or where the damage was sustained. Art. 4 (1) does not allow for such a choice; only Art. 7 permits the choice between the *lex loci damni* and the place where the tortfeasor acted. The norm giver of Art. 4 has deliberately deviated from the CJEU's concept for (now) Art. 7 no. 2 Brussels I*bis* Regulation. The main reason is legal certainty which is enhanced if the applicable law and accordingly the outcome of court decisions is easier foreseeable.[116] If the victim had the choice between the law at the place of damage or at the place of tortious conduct, the tortfeasor could not foresee which law would be finally applicable. The tortfeasor could try to comply with both laws which, however, would be impossible if both laws provide for contrary requirements.

68 A certain practical advantage of the *lex loci damni* is its simpler application in cases where damage is caused by omission. The rule does not require an answer to the often difficult question where the tortfeasor was obliged to observe a duty of care and omitted it.

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112 See *Koziol*, Comparative conclusions, in: Koziol (ed.), Basic Questions of Tort Law from a Comparative Perspective (2015) 714 ff.

113 *Kegel* had expressed this development in the sentence: "die Sympathie mit dem Opfer ist im allgemeinen größer als die mit dem Täter" ("the sympathy with the victim is generally greater than with the tortfeasor"): *Kegel*/*Schurig*, Internationales Privatrecht (9th ed. 2004) 725; crit. thereto *Unberath*/*Cziupka*/*Pabst*, in: Rauscher Art. 4 Rom II-VO note 29; *Gerhard Wagner*, IPRax 2006, 372 (376).

114 Similarly *de Lima Pinheiro* II 480 *et seq*.; *Rühl*, in: BeckOGK Art. 4 Rom II-VO note 53 (with arguments of economic efficiency); *Unberath*/*Cziupka*/*Pabst*, in: Rauscher Art. 4 Rom II-VO note 31 *et seq*.

115 *Handelskwekerij G.J. Bier B.V. v. Mines de Potasse d'Alsace SA* (C-21/76) [1976] ECR 1735.

116 See Recital (16).

2. The place of damage

69 Art. 4 (1) determines as applicable the law of the country "in which the damage occurs". This entails two questions: First, what does "damage" here mean, in particular when did it occur? For, only when the time is fixed at which the damage relevant for Art. 4 (1) occurred can the second question be answered: Where was the place of the damage at this time? The answer to the first question does not only matter for Art. 4 but for all conflict norms of Chapter II as far as they require "damage" in a general sense (see Arts. 5 and 7 and also to a certain extent Art. 9).

a) The notion and time of damage

70 The notion of damage and the time of its occurrence must be determined in accordance with the regular European-autonomous interpretation method. Any redress to national law is not only unnecessary but inadmissible. However, the case law of the CJEU and the national courts on Art. 7 (2) Brussels I*bis* Regulation (and its predecessors) and on Art. 5 (3) Lugano Convention provide some guidance for an EU-wide understanding.

71 In standard cases (such as traffic accidents) it will be easy to identify the damage that is relevant for Art. 4. However, there are frequent further situations where it is but easy to determine whether and when the relevant damage occurred.

aa) The principle

72 Art. 4 (1) clarifies that neither "the event giving rise to the damage" nor "the indirect consequences of that event" count. The relevant damage is solely the immediate and direct consequence of the violation of the right or interest of the victim (primary damage).[117] Neither events in the forefront of the damaging event qualify as relevant damage nor any consequences in its aftermath. For example, in a traffic accident the damage relevant for Art. 4 (1) is the bodily injury that the victim sustains and the damage to his or her car caused in the moment of the accident. Later costs for medical treatment, repair, litigation etc. are only indirect consequences which do not matter for Art. 4 (1).[118] With respect to events in the forefront, it was held that the damage only occurred when the victim took the advised wrong medicine, not when the doctor gave the wrong advice.[119]

bb) Developing damage

73 In particular, where the damage develops over a period of time, it can be difficult to identify precisely when the necessary direct damage occurred. A typical example is an infection with a long latency period after which the disease will necessarily break out (e.g., HIV). Another would be the poisoning with a poison that becomes effective only after a certain period.[120] In such cases already the infection or the taking of the poison should be regarded as the damage

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117 *Boskovic* Rép. int. Dalloz p. 9; *Hohloch*, in: Erman Art. 4 Rom II-VO note 7; *Bach* in: Peter Huber Art. 4 note 17; *Junker*, in: MünchKommBGB Art. 4 Rom II-VO note 20; *Matthias Lehmann*, in: NK BGB Art. 4 Rom II-VO note 81; *Rühl*, in: BeckOGK Art. 4 Rom II-VO note 59; *Thorn*, in: Palandt Art. 4 Rom II-VO note 7; *Unberath/Cziupka/Pabst*, in: Rauscher Art. 4 Rom II-VO note 35 *et seq*.

118 See further *infra* notes 85 *et seq*.

119 BGHZ 176, 342 (however in applying Art. 5 (3) Lugano Convention).

120 See the example in *Bach* Art. 4 note 23.

relevant for Art. 4 (1).[121] First, at this point of time the ground for the unavoidable later outbreak is laid; the corporeal integrity is infringed. Secondly, to fix the damage at this date allows granting preventive and injunctive measures from this date on (for instance, regular screening). True, this solution creates the problem that, because of the length of the latency period, limitation periods can long have lapsed, when the disease (less so the effect of poisoning) is actually discovered or became discoverable. However, this must be solved by adequate prescription periods of the applicable law for such cases. It should be noted that the European Court of Human Rights held that prescription periods must not end before the involved person could know, and had the opportunity to raise, his or her claim.[122] At least the Member States of the European Convention of Human Rights have therefore to adapt their limitation laws to the requirements of this decision.

A similar example for a developing damage constitute the asbestos cases.[123] A person who was exposed to asbestos may up to 50 years later develop a mesothelioma, a form of cancer caused by asbestos fibers. Again, it is the question whether the first exposure qualifies as the relevant damage for Art. 4 (1)[124] or the outbreak of the disease. In contrast to the infection and poisoning cases the exposition to asbestos frequently will, but need not always, lead to a mesothelioma. The exposition creates a high risk but not the unavoidable consequence of the disease. Nonetheless, for Art. 4 (1) again the date of first exposure is preferable for the same reasons as for infections or poisoning: The victim bears the risk from the date of exposure on and preventive measures should be available from that date on. **74**

Even, although regularly Art. 5 covers these cases, where medical devices such as pacemakers or defibrillators may become unexpectedly defective and may cause dramatic consequences[125] or where breast implants of poor quality were implanted which could cause severe damage later on,[126] the date of the first implantation of the respective device should be decisive. **75**

Another frequent case concerns the situation that an initial injury (for instance through a traffic accident) deteriorates afterwards and leads to further consequences such as an amputation or even death. Again, the solution should be the same as in the other cases of developing damage: the damage relevant for Art. 4 (1) is the initial injury whatever its further causal consequences may be.[127] **76**

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121 In the same sense for the poisoning example *Bach*, in: Peter Huber Art. 4 note 23; also, though reluctantly *Plender/Wilderspin* note 18–021 (discussing and cautiously rejecting the solution of respective English decisions on substantive English tort law that the time of outbreak should decide). Mainly in the same sense, tough with respect to a product liability case, *Allen a.o. v. Depuy International Ltd.* [2014] EWHC 753 (QB) (para. 14: the Court held that for product liability cases generally the date of manufacture/distribution should be decisive but in second line the date of implantation of the defective artificial hips which after some time may cause injury).

122 ECHR: *Howald Moor a.o. v. Switzerland*, 11 March 2014 http://hudoc.echr.coe.int/eng?i=001-141567.

123 As to this example see also *Dicey/Morris/Collins* para. 35–025.

124 In this sense *Dicey/Morris/Collins* para. 35–025.

125 See the case of the CJEU in *Boston Scientific Medizintechnik GmbH v. AOK Sachsen-Anhalt – Die Gesundheitskasse und Betriebskrankenkasse RWE* (C-503/13 and C-504/13) ECLI:EU:C:2015:148.

126 *Elisabeth Schmitt v. TÜV Rheinland LGA Products GmbH* (C-219/15) ECLI:EU:C:2017:128.

127 In this sense *Henderson v. Jaouen a.o.* [2002] 1 W.L.R. 2971 (C.A.) with respect to Art. 5 (3) Brussels

77 As to damage that permanently occurs anew see *infra* note 82.

cc) Pure economic loss

78 In cases of pure economic loss where mere financial interests are infringed it may be particularly difficult to determine when the damage – as far as relevant for Art. 4 (1) – occurred,[128] and even more so where it occurred.[129] Regularly the loss will occur at the moment when the fortune of the victim is directly diminished,[130] for instance: if the tortfeasor draws fraudulently on the victim's bank account, it should be decisive when the bank transfers the money from the account. Only then the loss has materialised even though the victim may still be able to recall the money. The situation that the tortfeasor already has all possibilities to cause pure economic loss but did not yet use them should not suffice because it is still uncertain whether or not any damage will realise (but see for preventive measures the following notes).

dd) Threatened damage

79 Art. 2 (3) (b) Rome II Regulation provides that "damage shall include damage that is likely to occur." Therefore, also merely imminent damage that is threatening to occur is relevant damage for Art. 4 (1) although only for preventive measures since as yet no damage has occurred. Here, the question is when this threatened damage is sufficiently likely to occur in order to be relevant for Art. 4 (1). As in general, this question must be answered autonomously. Some guidance can be drawn from the scarce case law on the comparable formulation in Art. 5 (3) Brussels I Regulation/Art. 7 (2) Brussels I*bis* Regulation ("where the harmful event … may occur"). Under this provision it has been held that a serious danger of damage is required. Its mere theoretical possibility does not suffice.[131] Furthermore, the judgment on the likelihood of damage must not be based on mere guesswork but needs to be supported by facts.[132] The same standard should apply with respect to threatened damage under Art. 4 Rome II Regulation. Thus, a rather high degree of probability of damage is required and it must be based on facts.

80 Therefore, for Art. 4 (1) the necessary probability of damage exists in particular in the following situations: (1) the same tort with similar damage had already been committed in the past and there are signs that it will be committed again; (2) the potential tortfeasor seriously announces that he or she will soon commit the damaging activity; (3) the tortfeasor has already done everything to realise the tort although thus far the damage did not yet occur

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Convention; *Dicey*/*Morris*/*Collins* para. 35–024; *Dickinson* para. 4.38; *von Hein* ZVglRWiss 102 (2003) 543; *Bach* in: Peter Huber Art. 4 note 22; *Matthias Lehmann*, in: NK BGB Art. 4 Rom II note 94; differently – in case of consequential death a new injury occurs – *Junker*, in: MünchKommBGB Art. 4 Rom II-VO note 30.

128 Also *Dicey*/*Morris*/*Collins* para. 35–026: "The test, however, is easier to state than to apply in practice."

129 See thereto *infra* notes 89 *et seq*.

130 Similarly *Dicey*/*Morris*/*Collins* para. 35–026; *Bach* in: Peter Huber Art. 4 note 17 (with the example of the release of a security due to a false representation); *Matthias Lehmann*, in: NK BGB Art. 4 Rom II-VO note 96, 115; *Thorn*, in *Palandt* Art. 4 Rom II-VO note 7; *Unberath*/*Cziupka*/*Pabst*, in: Rauscher Art. 4 Rom II-VO note 35 *et seq*.

131 CA Orléans RCDIP 93 (2004) 139 (146) with note *Gaudemet-Tallon*; also *Mankowski*, in: Magnus/Mankowski Art. 7 Brussels I*bis* Regulation note 398.

132 OLG Düsseldorf, WRP 1994, 877 (879).

(e.g., the bank has not yet transferred the money which the fraudster ordered to transfer from the account of the victim). (4) In a certain sense the cases of developing damage form a special group where preventive remedies are available against threatened damage.[133]

In all other cases the point of time when damage becomes so threatening that Art. 4 (1) is applicable is achieved when the risk is so likely to realise that a reasonable, not overly cautious person would no longer wait but apply for a remedy. **81**

ee) Permanent damage

Where damage is caused on a permanent basis, for instance, the permanent flooding of an email account with spam mails so that no regular use of the account is possible, the damage occurs when the first damage is done – in the example when the account is blocked for the first time. For Art. 4 (1) it is of no further relevance that the same damage is continuously repeated. This is only different, and the general rule applies,[134] where there are several independent acts which each lead to separate damage. **82**

ff) Accumulated damage

In contrast to the damage types discussed in the preceding notes there encounter cases where only the accumulation of actually harmless doses causes damage. An example is the exposure to substances which as such do not cause damage. However, if the exposure runs for some time the substances accumulate and at one point they reach a harmful level. Contrary to the solution for developing or permanent damage here the damage occurs not earlier than with the last event that is the straw that breaks the camel's back.[135] **83**

gg) Damage due to omission

When damage is caused through an omission no specific problem encounters as far as the moment is concerned when this damage occurs. The damage that is relevant for Art. 4 (1) occurs when the right or interest is directly infringed regardless whether by an omission or active conduct. **84**

hh) Indirect consequences of damage

Art. 4 (1) explicitly states that "indirect consequences" of the damaging event do not count for Art. 4 (1). The distinction between direct and indirect consequences follows the case law of the CJEU on Art. 5 (3) Brussels I Regulation, now Art. 7 (2) Brussels I*bis* Regulation.[136] In *Marinari v. Lloyd's Bank plc* the CJEU held that the concept of "harmful event" in Art. 5 (3) Brussels Convention does not cover "financial damage following upon initial damage".[137] This concept has been transposed to the Rome II Regulation.[138] The main reason is that the victim could otherwise easily influence where those consequences occur and thus after the damaging event determine the applicable law.[139] Therefore, the further, often financial con- **85**

133 See *supra* notes 73 *et seq.*

134 See *supra* note 72.

135 In accord *von Hein*, in: Callies Art. 4 Rome II note 17.

136 See *Dumez France SA and Tracoba SARL v. Hessische Landesbank* (Case 220/88) [1990] ECR I-49; *Antonio Marinari v. Lloyd's Bank plc and Zubaidi Trading Co.* (C-364/93) [1995] ECR I-2719; *Rudolf Kronhofer v. Marianne Maier* (C-168/02) [2004] I-6009.

137 *Antonio Marinari v. Lloyd's Bank plc and Zubaidi Trading Co.* (C-364/93) [1995] ECR I-2719 para. 15.

138 Explanatory Memorandum to the Commission proposal COM (2003) 427 final p. 11.

sequences of an injury (costs for medical treatment etc.) or of property damage (costs of repair etc.) are irrelevant for Art. 4 (1).[140]

86 The distinction between direct and indirect consequences is not always easy. The case that an initial injury (for instance through a traffic accident) deteriorates afterwards and leads to further consequences such as an amputation or even death has already been mentioned.[141] It is disputed whether the amputation or death is a mere indirect consequence of the initial injury or constitutes a new independent and primary tortious damage. As indicated above, the solution should be that the damage relevant for Art. 4 (1) is the initial injury whatever its further causal consequences are.[142] For the reasons for this solution see *supra* note 73.

ii) Damage to third persons

87 A special problem is raised by the case that a primary damage may affect third persons, for instance, dependants of a person who was killed in an accident for which the tortfeasor is responsible. The national tort laws vary considerably in the generosity towards secondary victims of damaging events.[143] Here, the question must be answered when (and where)[144] the damage of those secondary victims occurs. The CJEU has classified such damage as mere "indirect consequence" of the primary damage.[145] The relevant time for the damage of secondary victims is thus the occurrence of the damage of the first victim. The Court based its solution mainly on the argument that the formulation in Art. 15 (f) "persons entitled to compensation for damage sustained personally" (Art. 15 (f)) which determines the scope of the applicable law also includes third persons who may be so entitled.[146] In principle, reflective damage or damage

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139 *Bach* in: Peter Huber Art. 4 note 22; *Wurmnest*, in: jurisPK-BGB Art. 4 Rom II-VO note 13.

140 Explanatory Memorandum to the Commission proposal COM (2003) 427 final p. 11; *Boskovic* Rép. int. Dalloz note 28; *Dicey/Morris/Collins* para. 35–024; *Dickinson* para. 4.37; *von Hein* ZVglRWiss 102 (2003) 543; *Matthias Lehmann*, in: NK BGB Art. 4 Rom II note 94; *Spickhoff*, in: Bamberger/Roth Art. 4 Rom II-VO note 7.

141 See *supra* note 76.

142 In this sense *Henderson v. Jaouen a.o.* [2002] 1 W.L.R. 2971 (C.A.) with respect to Art. 5 (3) Brussels Convention; *Dicey/Morris/Collins* para. 35–024; *Dickinson* para. 4.38; *von Hein*, ZVglRWiss 102 (2003), 543; *Bach* in: Peter Huber Art. 4 note 22; *Matthias Lehmann*, in: NK BGB Art. 4 Rom II note 94; *Unberath/Cziupka/Pabst*, in: Rauscher Art. 4 Rom II-VO note 39; however *contra* – consequential death is a new primary injury – *Junker*, in: MünchKommBGB Art. 4 Rom II-VO note 30; in the jurisdictional context also *Mankowski*, in: Magnus/Mankowski Art. 7 Brussels I*bis* note 324.

143 See in particular the country reports and the comparative report in Winiger/Koziol/B.A. Koch/Zimmermann (eds.) Digest of European Tort Law. Vol II: Essential Cases on Damage (2011) 205 *et seq*., 287 *et seq*.

144 See thereto *infra* notes 102 *et seq*.

145 See the decision of the CJEU in *Florin Lazar*, *représenté légalement par Luigi Erculeo v. Allianz SpA* (C-350/14) ECLI:EU:C:2015:802 para. 30: "It follows … that Article 4 (1) of the Rome II Regulation must be interpreted, in order to determine the law applicable to a non-contractual obligation arising from a road traffic accident, as meaning that the damage related to the death of a person in such an accident which took place in the Member State of the court seised and sustained by the close relatives who reside in another Member State, must be classified as 'indirect consequences' of that accident, within the meaning of that provision."; see also the prior decision *Dumez France SA and Tracoba SARL v. Hessische Landesbank* (C-220/88) [1990] ECR 1–49 (in the same sense for pure economic loss with respect to Art. 5 (3) Brussels Convention).

par ricochet thus happens when the primary victim is injured.[147] The solution might, however, be different if the secondary victim sustains a direct personal injury such as a shock in the medical sense through, for instance, the message of the death of a close relative. For, in that case the 'secondary' victim becomes a direct 'first' victim whose own injury matters.

jj) Events giving rise to damage

According to Art. 4 (1) also "the event giving rise to the damage" is not the relevant damage itself and thus plays no role for determining the applicable law. It is clear from this formulation that the activity of the tortfeasor that leads to the infringement of the victim's rights or interests is immaterial for Art. 4 (1). This is not only true for any preparation the tortfeasor undertakes (buying of the poison etc.). Also, where the tortfeasor has completed all acts necessary for the tort this conduct has no influence on the applicable law. The prescription of the wrong medicine is only the event giving rise to the damage; in this case, the damage relevant for Art. 4 (1) does not occur until the victim takes the wrong medicine and sustains bodily injury.[148] Likewise, where the defrauded victim sends the cheque in favour of the fraudster to the bank this is only a step before the damage occurs. The damage occurs only when the bank debits the amount from the victim's account.[149] **88**

b) The place of the damage

Once the time of the entry of the damage relevant for Art. 4 (1) is fixed it can be determined where this occurred. For this purpose, the different factual situations must be distinguished. **89**

aa) The principle

Art. 4 (1) provides that "the law of the country in which the damage occurs" shall be applicable. Thus, the place decides where the relevant damage occurred (in the sense as discussed *supra* at notes 72 *et seq.*). For most, though not all situations falling under Art. 4 the localisation of the damage does not raise major problems once it is determined *when* the damage happened. Then, it is often simple to establish *where* this was the case. **90**

In general, the relevant place is the country where the primary violation of the victim's right or interest occurred.[150] For bodily injury or damage to tangible property this is the place where the person was injured or the property damaged.[151] Where indirect consequences such as costs for healing or repair occur is irrelevant. In situations of developing and **91**

146 *Florin Lazar représenté légalement par Luigi Erculeo v. Allianz SpA* (C-350/14) ECLI:EU:C:2015:802 para. 26 *et seq.*

147 Also *Dickinson* paras. 4.39 *et seq.*; *Rühl*, in: BeckOGK Art. 4 Rom II-VO note 62 *et seq.*; however differently *Rushworth/Scott* [2008] LMCLQ 274 (279).

148 BGHZ 176, 342 (in respect of Art. 5 (3) Lugano Convention).

149 Also BGH RIW 2008, 399 (for Art. 5 (3) Brussels Convention); *Spickhoff*, in: Bamberger/Roth Art. 4 Rom II-VO note 7; differently – the victim's act is the relevant damage because it seriously endangers the victim's fortune – *Schaub*, in: PWW Art. 4 Rom II-VO note 7.

150 "First impact-rule": *Bach*, in: Peter Huber Art. 4 note 17; *Matthias Lehmann*, in: NK BGB Art. 4 Rom II note 81; *Thorn*, in: Palandt Art. 4 Rom II-VO note 7 ("Primärschaden", "primary damage"); *Unberath/Cziupka/Pabst*, in: Rauscher Art. 4 Rom II-VO note 35; similarly *Plender/Wilderspin* note 18–021.

151 See Recital (17): "… where the injury was sustained or the property was damaged …"; in accord *Boskovic* Rép. int. Dalloz note 28; *Dicey/Morris/Collins* para. 35–024; *Dickinson* para. 4.47; *von Hein*, in: Calliess Art. 4 Rome II note 16; *Bach* in: Peter Huber Art. 4 note 17; *Junker*, in: MünchKommBGB Art. 4 Rom II-

permanent damage the place is decisive where the first invasion (exposure, infection etc.) occurred whereas in cases of accumulated damage the place at the time is relevant when the accumulated doses first cause a recognisable damage.[152]

92 Cases of omission require no principal extra-considerations. The damage occurs where the victim's right or interest is violated. It is irrelevant where the tortfeasor was obliged to, and did not, act. In a case where the defendant was requested by a consumer organisation to omit the use of an illegal standard contract term the German Federal Court held that the place of damage was where the term was, or was likely to be, used and did or would infringe the collective interests of consumers.[153]

93 Since the place of the infringed right or interest decides, it does not matter whether the tortfeasor is liable because of fault or of strict liability.[154] The different basis of claim does not influence where the damage occurs. This, too, holds true for the following, more difficult cases of determination of the place of damage.

bb) Pure economic loss

94 To determine the place of damage can be difficult in particular in cases of pure economic loss where neither the bodily integrity nor tangible property has been violated but mere financial interests are infringed. The prevailing view[155] adopts the approach which the CJEU applied in *Kronhofer v. Maier*[156] on the jurisdictional level. In that investment case, the alleged German tortfeasors made misstatements in reliance on which the Austrian victim transferred money to an account in Germany with which speculative trading at the London stock exchange was financed and lost. In a preliminary ruling on the issue of jurisdiction under Art. 5 (3) Brussels Convention the CJEU accepted that the "place where the harmful event occurred" was in Germany.[157] It was no sufficient reason to justify the jurisdiction of the Austrian courts that "the adverse consequences can be felt" in Austria where the victim's main assets were concentrated[158] or that the victim's domicile was in Austria.

95 Transferred to Art. 4 (1) Rome II Regulation this approach means that the place of pure

VO note 20; *Thorn*, in: Palandt Art. 4 Rom II-VO note 7; *Unberath*/*Cziupka*/*Pabst*, in: Rauscher Art. 4 Rom II-VO note 39; *Wurmnest*, in: jurisPK-BGB Art. 4 Rom II-VO note 13.

152 Also *von Hein*, in: Calliess Art. 4 Rome II note 13.

153 See BGH NJW 2009, 3371 para. 19 with note *Ansgar Staudinger*/*Czaplinski*; BGH, NJW 2010, 1958 para. 13; LG Frankfurt 29 March 2012 – Case 2–24 O 177/ 11, BeckRS 2013, 06099 (confirmed by OLG Frankfurt, NJW-RR 2013, 829).

154 *Junker*, in: MünchKommBGB Art. 4 Rom II-VO note 20; it can be also indirectly inferred from Recital (11).

155 In this sense also *Dickinson* para. 4.67; *Engert*/*Groh*, IPRax 2011, 458 (463); *Hohloch*, in: Erman Art. 4 Rom II-VO note 7; *Bach*, in: Peter Huber Art. 4 note 32; *Junker*, in: MünchKommBGB Art. 4 Rom II-VO note 21; *Matthias Lehmann* JPIL 7 (2011) 527 (549); *Matthias Lehmann*, in: NK BGB Art. 4 Rom II-VO note 115; *Spickhoff*, NJW 1999, 2209 (2213); *Thorn*, in: Palandt Art. 4 Rom II-VO note 9 (though with restrictions); *Wurmnest*, in: jurisPK-BGB Art. 4 Rom II-VO note 14; probably also *Dicey*/*Morris*/*Collins* para. 35–026; critical: *Rühl*, in: BeckOGK Art. 4 Rom II-VO note 68 *et seq*.

156 *Rudolf Kronhofer v. Marianne Maier a. o.* (C-168/02) [2004] ECR I-6009; see thereto *Mankowski*, in: Magnus/Mankowski, Brussels I*bis* Regulation Art. 7 note 323.

157 *Rudolf Kronhofer v. Marianne Maier a. o.* (C-168/02) [2004] ECR I-6009 para. 17.

158 *Rudolf Kronhofer v. Marianne Maier a. o.* (C-168/02) [2004] ECR I-6009 para. 17, 19.

financial damage is where this loss is sustained, in the *Kronhofer*-case and similar cases where the money account was located which was reduced or – more abstractly formulated – where the concrete asset is diminished. In the *Kronhofer*-case the damage was only caused when the account was reduced.[159]

96 However, some deviating approaches are also advanced. First, it is propagated that the place of damage should be at the domicile of the victim.[160] Secondly, according to a similar view the law at the "Vermögenszentrale" ("the centre of financial interests") shall be applicable and regularly this centre shall be the domicile of the victim.[161] Thirdly, it is suggested that the escape clause should be applied to these cases.[162] Fourthly, the place where the victim acted to his or her detriment shall be relevant.[163]

97 The deviating views are hardly reconcilable with the wording and purpose of Art. 4 (1). The wording requires the determination of the place of damage and this means to determine this place as concretely as possible because it is there where the interests of the parties clash. Art. 4 further intends "to ensure a reasonable balance between the interests" of the parties.[164] The deviating views tend, however, to favour the interests of the victim at the expense of those of the tortfeasor although no further justification for such preference is, and can be, advanced.

98 Moreover, it will often not be too difficult to localise the concrete place where the pure economic loss occurred. It is, for instance, the place where the bank account (respectively the bank) is located from which the money has been transferred due to a negligent or fraudulent misrepresentation.[165] Even in case of e-banking it is the seat of the bank which administers the e-account. Where, due to fraud, money is paid in cash the place of damage is where the payment took place. Where on an international auction the victim buys an object that has been negligently wrongly announced by the auctioneer[166] the place of damage is where the victim parts with the own money although in such a case it can be preferable to apply the *lex contractus* via Art. 4 (3).[167] Likewise, where a Norwegian citizen opened a bank account in England for placing bets and lost the money the place of damage is England[168] although again Art. 4 (3) should be taken into account.[169]

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159 Differently: *Plender*/*Wilderspin* note 18–075 (damage caused in England through the speculative trading there).

160 See, e.g., *Boskovic* Rép. Int. Dalloz note 28.

161 In this sense (which somewhat resembles the "centre of main interests" under the Insolvency Regulation) *Unberath*/*Cziupka*/*Pabst*, in: Rauscher Art. 4 Rom II-VO note 42.

162 E.g., *Halfmeier*, ZEuP 2012, 360 (374).

163 *von Hein*, in: Calliess Art. 4 Rome II note 23; *Schaub*, in: PWW Art. 4 Rom II-VO note 7.

164 Recital (16).

165 See also *Dickinson* para. 4.67; *Mankowski*, in: Magnus/Mankowski Art. 7 Brussels I*bis* Regulation note 331 (with respect to jurisdiction).

166 See the facts in *Morin v. Bonham & Brooks* [2003] EWCA Civ 1802; thereto *Plender*/*Wilderspin* note 18–077 *et seq*.

167 Preferring this latter solution: *Plender*/*Wilderspin* note 18–080. In the absence of a choice of law agreement the law at the place of the auction or the seat of the auctioneer would apply; see Art. 4 (1) (g) for the sale or Art. 4 (1) (b) Rome I Regulation for the contract with the auctioneer.

168 See *Hillside (New Media) Ltd. v. Baasland* [2010] EWHC 3336 (Comm.); as to critique see *Dicey*/*Morris*/*Collins* note 18–083, mainly because the High Court (*Smith* J.) though mentioning Art. 4 Rome II

99 In other cases, the determination of the place of damage is more difficult. Where, e.g., an enterprise or state looses goodwill and commercial reputation due to a wrong rating or other commercial assessment or judgment,[170] it is the enterprise or state as such whose commercial value is reduced. Whereas for the state's loss only this state can and should be the relevant place of damage,[171] the solution is more doubtful for enterprises. Here, the place should be decisive where the enterprise has its factual seat.[172] At this place the financial interests of the enterprise are accumulated which are affected by a wrong rating or other tortious commercial assessment/judgment. Moreover, it would not only be impractical if, for instance, each stock exchange at which the value of the enterprise's shares is reduced would be regarded as place of damage. For, the reduction in value could differ and the victim should not be allowed choosing among them at the expense of the tortfeasor.

100 The pre-mentioned solution for pure economic loss through negligently wrong rating can serve as model for similar cases (for instance, loss through wrong prospectus).[173] Where the economic loss concerns a specific asset that can be localised the place of damage is there. Where such loss affects the victim's fortune as a whole, then the place of damage should be where this fortune – the essential sum of the victim's financial interests – is located. This will often, though not necessarily, be the seat or domicile of the victim.[174]

cc) Threatened damage

101 In situations of threatened damage, the place of damage is generally where the "damage is likely to occur."[175] This is the *locus* at which it is sufficiently probable that damage will be caused. Where damage threatens to occur in several states, the law of each state should be applicable to preventive measures available in the respective state. A preventive mosaic system should apply (see further the following notes).

dd) Damage to third persons

102 The case has already been mentioned *supra* note 87 that a primary damage may affect third

Regulation based its decision on the former English conflict rule. However, in fact, the Regulation was not yet applicable.

169 In *Hillside (New Media) Ltd. v. Baasland* [2010] EWHC 3336 (Comm.) paras. 38 *et seq*. still the Rome Convention was applied for the determination of the applicable contract law.

170 The exclusion of privacy and rights of personality in Art. 1 (2) (g) Rome II Regulation does not extend to these kinds of immaterial losses; see *supra* note 28.

171 Also *Dutta*, IPRax 2014, 33 (39).

172 *Dutta*, IPRax 2014, 33 (39).

173 See thereto *von Hein*, in: FS Hopt 371 *et seq*.; *Bach* in: Peter Huber Art. 4 note 43 (place of purchase of securities due to an incorrect prospectus); *Uhink*, Internationale Prospekthaftung nach der Rom II-VO – eine neue Chance zur Vereinheitlichung des Kollisionsrechts? Zugleich eine rechtsvergleichende Untersuchung der deutschen, englischen und französischen Haftungstatbestände (2016); *Weber*, WM 2008, 1581 *et seq*.

174 In the same sense *Dutta*, IPRax 2014, 33 (39); *Mankowski*, in: Magnus/Mankowski Art. 7 Brussels I*bis* Regulation note 329 *et seq*. (in respect of jurisdiction); similarly – place where the separate asset respectively the main fortune is located – *Matthias Lehmann* JPIL 7 (2011) 522 (549); *Wurmnest*, in: jurisPK-BGB Art. 4 Rom II-VO note 14.

175 See the definition of threatened damage in Art. 2 (3) (b) Rome II Regulation; for the relevance of that place: *Matthias Lehmann*, in: NK BGB Art. 4 Rom II-VO note 105.

persons, for instance, dependants of a person who was killed in an accident for which the tortfeasor is responsible. But also pure economic loss of one person may lead to such a loss on the part of another person as, for example, in *Dumez France v. Hessische Landesbank*.[176] In that case the French claimants requested compensation for the financial loss they had suffered because their German subsidiaries went into insolvency because the German defendant bank had – allegedly unlawfully – cancelled an essential loan facility.[177] The question is where this reflective or *ricochet* damage occurs: at the place where the primary victim or where the secondary victim sustained the damage. In a case that involved the damage of a Romanian father (in particular for bereavement) whose daughter was killed in an accident in Italy, the CJEU classified the reflective damage of the father as mere "indirect consequence" of the primary damage.[178] This leads to the principle, that damage *par ricochet* happens where (and when) the primary victim is injured.[179] Consequently, in the case underlying the CJEU's preliminary ruling the place of the primary damage was in Italy so that Italian law determined whether and to which extent the father was entitled to compensation.

The distinction between primary and secondary victims – which must be drawn in an autonomous way without redress to a specific national law because it concerns the interpretation of the term "indirect consequences" in Art. 4 (1) – requires that the secondary victim has not sustained direct damage to own protected rights but derives his or her damage from such a violation of the primary victim as for instance the loss of maintenance through the death of the nourisher. However, if the secondary victim sustains a direct personal injury such as a shock in the medical sense through, for example, the message of the death of a close relative, this is a primary damage to which the law of the place applies where this shock occurs.[180] Although the distinction between primary and secondary victims may sometimes not be easy, it should generally pose no insurmountable difficulties. **103**

ee) Damage in more than one state

In few situations a tort falling under Art. 4 may cause damage not only in one state but in several states. The first question to be decided is whether primary damage occurred in the different states or only in one state while the consequences in the other states were mere indirect consequences.[181] In the latter situation there is only one relevant state whose law then **104**

176 *Dumez France SA and Tracoba SARL v. Hessische Landesbank* (C-220/88) [1990] I-49.

177 The CJEU was merely concerned with the jurisdictional issue where the place of damage was to be located under Art. 5 (3) Brussels Convention.

178 See the decision of the CJEU in *Florin Lazar représenté légalement par Luigi Erculeo v. Allianz SpA* (C-350/14) ECLI:EU:C:2015:802 para. 30: "It follows … that Article 4 (1) of the Rome II Regulation must be interpreted, in order to determine the law applicable to a non-contractual obligation arising from a road traffic accident, as meaning that the damage related to the death of a person in such an accident which took place in the Member State of the court seised and sustained by the close relatives who reside in another Member State, must be classified as 'indirect consequences' of that accident, within the meaning of that provision."

179 See also *Dickinson* para. 4.39 *et seq*.; *von Hein*, in: Calliess Art. 4 Rome II note 21; *Hohloch*, in: Erman Art. 15 Rom II-VO note 8; *Kadner Graziano* RabelsZ 73 (2009) 1 (32); also in effect *Calvo Caravaca/Carrascosa González* cap. XXXI note 73; differently – place of secondary damage relevant for secondary victims – *Unberath/Cziupka/Pabst*, in: Rauscher Art. 4 Rom II-VO note 53 *et seq*.

180 Also *Kadner Graziano* RabelsZ 73 (2009) 1 (32); *contra*: *Calvo Caravaca/Carrascosa González* cap. XXXI note 73.

applies to the entire damage. In the former situation there is a place of primary damage in each country. The victim may be the same being violated in all involved countries or there may be separate victims. Typical examples would be cases of defamation or water or air pollution; however, the former is altogether excluded from the scope of the Regulation (Art. 1 (2) (g)); the latter is exclusively covered by Art. 7. Also, torts falling under Arts. 6 or 8 may cause damage in two or more countries. On the other hand, cases of that kind ("Streudelikte", "spread torts") falling under Art. 4 are rare, even more so as indirect consequences of the primary damage are irrelevant for the determination of the applicable law. A suitable example may be the unlawful disclosure of confidential information in more than one state;[182] another example, the damage caused by hacking into the computer system of a multinational enterprise.

105 Where there are several victims of one and the same tort who sustain damage in different countries, this poses no specific problem. The place of damage and the applicable law have to be determined independently for each victim in the usual way. Only the case that one single victim suffers relevant – primary – damage in several countries (for instance, through unauthorised and negligent disclosure of confidential information) requires separate consideration.

106 For the determination of the applicable law in this latter case it appears to be common ground that the so called mosaic principle ("Mosaikbetrachtung") should be applied.[183] The court seised with the decision on the entire damage[184] must pursue the issue in the following way: it can decide on the entire damage; however, this damage is composed ('like a mosaic') of the different single losses which are governed by the law of the country where they happened. Therefore, for each loss in a specific country the substantive tort law there must be examined and applied. This view follows the lead of the CJEU in *Shevill v. Press Alliance* on the jurisdictional level – each state where damage occurred has jurisdiction only for the part of damage that occurred there.[185] Also the Commission propagated the mosaic principle for its Rome II Proposal.[186]

107 The main reason behind the mosaic principle is to avoid that the victim can select the most

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181 See *SPV Sam Dragon PLC v. GE Transport Finance Ltd.* [2012] IEHC 240 where the Irish High Court held that costs incurred in different states were mere indirect consequences in the sense of Art. 4 (1) Rome II. According to the Court the primary damage was caused only in one state (South Korea) where the defendant omitted to delete the entry of a ship mortgage in the Korean register so that the claimant had further costs. The Court therefore applied South Korean law to the entire damage allegedly sustained, except in South Korea, also in Belgium, Hong Kong, Panama and Switzerland.

182 See *Dickinson* para. 4.71.

183 See, e.g., *Brière*, Clunet (2008) 31 (42 *et seq.*); *Dickinson*, para. 4.71; *von Hein*, RabelsZ 73 (2009) 461 (475 *et seq.*); *von Hein*, in: Calliess Art. 4 Rome II note 15; *Hohloch* YbPIL 9 (2007) 1 (10); *Hohloch*, in : Erman Art. 4 Rom II note 7; *Junker*, in: MünchKommBGB Art. 4 Rom II-VO note 31 *et seq.*; *Kadner Graziano*, RCDIP 97 (2008) 445 (477); *de Lima Pinheiro* II 486; *Plender/Wilderspin*, note 18–026; *Rühl*, in: Beck-OGK Art. 4 Rom II-VO note 70.1 *et seq.*; *Schaub*, in: PWW Art. 4 Rom II-VO note 6; *Spickhoff*, in: Bamberger/Roth Art. 4 Rom II-VO note 9; *Gerhard Wagner*, IPRax 2008, 1 (4); *Wurmnest*, in: jurisPK-BGB Art. 4 Rom II-VO note 16; with doubts *Dicey/Morris/Collins*, para. 35–027 *et seq.*

184 This is usually only the court at the domicile of the tortfeasor; see Art. 4 Brussels I*bis* Regulation and the CJEU's decision in *Fiona Shevill v. Presse Alliance SA* (C-68/93) [1995] ECR I-415.

185 *Fiona Shevill v. Presse Alliance SA* (C-68/93) [1995] ECR I-415.

186 Explanatory Memorandum to the Proposal, COM (2003) 427 final, p. 12.

favourable of the different involved laws as applicable to the entire damage. For, a free selection would unjustifiedly favour the victim and distort the intended reasonable balance[187] between the interests of the tortfeasor and the victim.[188] By the choice, the victim could achieve a much higher compensation and protection than actually rendered in all involved countries for the damage sustained there. There is no justification for such preferential treatment.

The mosaic principle has aroused some criticism: that its application could lead to diverging decisions on the same tort;[189] that for claims for non-monetary remedies "the fragmented application of the laws of several countries may be impossible or exceedingly difficult."[190] However, where one single court is seised with the decision on the entire damage there is no danger of irreconcilable decisions; the only 'problem' may be that the final decision states that the conduct of the tortfeasor is a tort for one part of the damage but not for another – separate – part. If different courts in different countries are seised which adjudicate the damage sustained in their country this is even less a problem because they decide on different issues and are not obliged to reach a uniform decision on whether or not the conduct was a tort under their different substantive laws. Also, the issue of preventive measures will rarely, if at all, pose a real problem in those cases falling under Art. 4. The victim may apply for such measure in each state where damage sufficiently threatens (for instance, not to disclose confidential information). The measure will have effect only on the territory of the respective state. Even if the measure is applied for and ordered in the state where the tortfeasor primarily acted – in order to stop the tort at its source –, any spread of that information in other countries remains possible. And it seems hardly imaginable that there are other 'spread torts' ("Streudelikte") with different factual settings that nevertheless fall under Art. 4. Most, if not all of these situations fall within the scope of Arts. 5–9. **108**

The only justified criticism is the practical complexity to which the mosaic view may lead, depending on the number of involved laws and the possible difficulty to clarify their content with precision. However, this is a much lesser disadvantage than to allow the victim the choice between the different involved laws. **109**

ff) Damage in no state

In certain cases, torts occur outside the territory of a state, for instance on the High Seas, in the airspace or even in the outer space. Also, torts in Antarctica may raise problems, at least in those parts which are unclaimed territory. It is common ground that the Regulation covers these torts as well.[191] Partly it is argued that Art. 4 (1) does not cover such cases because no "country in which the damage occurs" exists. It is suggested to apply Art. 4 (3) instead[192] although this provision actually requires that first the law indicated in Art. 4 (1) or **110**

187 See Recital (16) Rome II Regulation.

188 In the same sense with respect to the mosaic principle on the jurisdictional level: *Mankowski*, in: Magnus/Mankowski, Brussels I*bis* Regulation, Art. 7 note 259 *et seq*.

189 *Schaub*, in: PWW Art. 4 Rom II-VO note 6.

190 *Dicey/Morris/Collins* para. 35–028; similarly *Dickinson* para. 4.70 *et seq*.; *Plender/Wilderspin* note 18–026 *et seq*. stressing the practical difficulties.

191 See, e.g., *Basedow* RabelsZ 74 (2010) 118 (129 *et seq*.); *Dicey/Morris/Collins* para. 35–053; *Junker*, in: MünchKommBGB Art. 4 Rom II-VO note 35; *Plender/Wilderspin* note 18–045.

(2) must be determined. The prevailing view therefore still applies Art. 4 (1) but relies on other links than the geographical place of damage to a certain country (and its law).[193] For maritime and aerial torts regularly the flag or the place of registration is such a link (for a detailed discussion see *infra* notes 200 *et seq*.). However, where this link does not exist or appears inappropriate, the most closely connected law – in certain analogy to Art. 4 (3) – must be determined.[194]

111 Torts in or to embassies are no case falling into the category of torts in no state. Although embassies are exterritorial, they nonetheless belong to the territory of the state where they are located and are regarded as part of the state that hosts them. Damage in an embassy or to it is thus governed by the law of the hosting state, not of the sending state.[195]

gg) Evidential problems to establish the place of damage

112 Generally, under the Regulation the application of the correct law is no matter of proof. The court must state which law applies and apply this law *ex officio*. However, where a party insists on the application of a specific law there is at least a factual burden to state the necessary facts. In particular, in cases of international transport it can be difficult or even impossible to establish where the place of damage was located. In such situations to reject claims would be too harsh a sanction. Likewise, it would be unconvincing to burden the claimant with the – formal, though impossible – proof of where the damage occurred. It has therefore been suggested that the courts should "develop autonomous solutions to locate the 'damage' by reference to facts which are both objectively ascertainable and have a close connection to the injury or damage suffered."[196] With respect to damage to cargo during an international transport it has been proposed to locate the damage in case of doubt "in the country where the carrier was contractually due to deliver the cargo."[197] However, in international transport cases the respective transport convention will often prevail which for most situations fixes the conditions and amounts of compensation and excludes tort claims for higher amounts.[198] For the remaining transport cases the proposed solution provides a reasonable last resort.

113 It is, however, a separate question whether there is a burden to prove the contents of an applicable foreign law and on whom such eventual burden rests. For an answer, first, it must be decided whether this issue should be resolved either autonomously under the Rome II Regulation or under national law. The Regulation does not contain any provision on the inquiry of foreign law. On the contrary, with the exception of Arts. 21 and 22 the Regulation excludes matters of evidence and procedure.[199] Therefore, national law must determine how

192 See, e.g., *Calvo Caravaca*/*Carrascosa González* cap. XXXI note 75; *Bach* in: Peter Huber Art. 4 note 62.

193 See *Junker*, in: MünchKommBGB Art. 4 Rom II-VO note 35; *Matthias Lehmann*, in: NK BGB Art. 4 Rom II-VO note 106 *et seq*.; *Plender*/*Wilderspin* note 18–050; *Thorn*, in: Palandt Art. 4 Rom II-VO note 21 *et seq*.; *Wurmnest*, in: jurisPK-BGB Art. 4 Rom II-VO note 53 *et seq*.

194 Also *Calvo Caravaca*/*Carrascosa González* cap. XXXI note 75; *Plender*/*Wilderspin* note 18–051; *Spickhoff*, in: Bamberger/Roth Art. 4 Rom II-VO note 10.

195 *Junker*, in: MünchKommBGB Art. 4 Rom II-VO note 36; *Matthias Lehmann*, in: NK BGB Art. 4 Rom II-VO note 108; *Rühl*, in: BeckOGK Art. 4 Rom II-VO note 78.

196 *Dicey*/*Morris*/*Collins* para. 35–025.

197 *Dicey*/*Morris*/*Collins* para. 35–025.

198 See for instance Art. 28 CMR, Art. 29 Montreal Convention, Art. 7 Hamburg Rules.

199 See Art. 1 (3) Rome II Regulation.

to establish the contents of the applicable law.[200] This is a matter of procedural law which is governed by the *lex fori*. While for instance in Germany it is the court that is under an obligation to clarify the contents of foreign law,[201] England follows the presumption that in case of doubt the foreign law is identical with English law, and the court need not, on its own, inquire into foreign law.[202]

3. Consequences

Once the place of damage has been ascertained in accordance with Art. 4 (1), in principle the substantive tort law in force at that place has to be applied to the tort case at hand. Yet, before applying the substantive law it is always necessary to examine whether the case is manifestly more closely connected with another law (Art. 4 (3)). Then, this law would be applicable. Further, rules of safety and conduct may exist which have to be taken into account (Art. 17). **114**

VI. The exception (Art. 4 (2))

1. The Principle

Art. 4 (2) constitutes an exception to Art. 4 (1).[203] Where both parties of a tort falling under Art. 4 have their habitual residence in the same country the law of that country shall be applicable irrespective wherever the place of damage is located. The *lex domicilii communis* prevails over the *lex loci damni*[204] and must be examined before Art. 4 (1) can be applied. **115**

The justification of the exception is seen in the special connection between the parties when they share the same legal environment.[205] This common legal background is regarded as being of greater weight for the determination of the applicable law than the often accidental place of damage. Moreover, the rule conforms to, or resembles essentially, the pre-existing law of most EU Member States[206] and, in the view of the Commission, reflects the legitimate expectations of the parties of a tort[207] although this latter reason of justification can be reasonably doubted, in particular for cases of traffic accidents in foreign countries.[208] In such cases, unless the parties already know each other, they will probably expect that the law of the place of accident applies and indeed Art. 17 ensures that at least the rules of safety and conduct at that place must be observed. Therefore, mainly practical considerations of easier administration of justice in tort cases have lent support to the development of the rule **116**

200 In the same sense *Brownlie v. Four Seasons Holdings Incorporated* [2015] EWCA Civ 665 para. 88 *et seq*.

201 See § 293 ZPO.

202 See *Brownlie v. Four Seasons Holdings Incorporated* [2015] EWCA Civ 665 para. 89.

203 See Recital (18) of the Regulation.

204 *Fröhlich* p. 52; *von Hein*, in: Calliess Art. 4 Rome II note 26; *Thorn*, in: Palandt Art. 4 Rom II-VO para. 4.

205 Recital (18) stresses the "special connection where the parties have their habitual residence in the same country"; *Rühl*, in: BeckOGK Art. 4 Rom II note 82 *et seq*. refers to the presumed common intention of such parties and the probable saving of costs if 'their' law – most likely in their state – is applied.

206 See, e.g., for Austria: Art. 48 (1) sent 2 IPRG; for Belgium: Art. 99 sent. 1 no. 1 PIL Code; for Germany: Art. 40 (2) EGBGB; for Great Britain: *Edmunds v. Simmonds* [2001] 1 W.L.R. 1003; for Italy: Art. 62 (2) PIL code (common nationality); for Portugal: Art. 45 (3) Codigo civil.

207 See Explanatory Memorandum to the Rome II Proposal COM (2003) 427 final, p. 12.

208 *Dickinson* para. 4.81; *Garcimartin Alférez* EuLF 2007, I-77 (I-83); *Bach*, in: Peter Huber Art. 4 note 64.

because it is most likely that litigation between victim and tortfeasor is also instituted in the country of their common habitual residence; then it is both for the parties as well as the court generally easier to proceed on the basis of the law of that country.[209] In addition, eventual insurance cover will also often exist in the country of the common habitual residence and correspond to the current tort law in force there.[210] However, where, e.g., two Frenchmen rent a car in Germany the automobile insurance will mostly be structured in accordance with German law.[211] Therefore, Art. 4 (2), assessed alone, will meet the general PIL-principle of the designation of the most closely related law only in a number of, but not in all covered situations.

117 However, Art. 4 (2) must be seen in its interplay with further rules. The rigidity of Art. 4 (2) ("the law of that country *shall* apply") which allows no discretion,[212] is to a certain extent reduced by Art. 4 (3) which provides for some – limited – flexibility and permits the application of another law if the latter is manifestly more closely connected with the tort than the law designated by Art. 4 (2) (see further *infra* notes 136 *et seq*). As mentioned Art. 4 (2) is further corrected by Art. 17 which preserves the rules of safety and conduct of the place of the damaging event. Finally, Recital (33) obliges the court in deciding on compensation for traffic victims to take into account the level of costs at the habitual residence of the victim.

118 Art. 4 (2) does not only apply to all cases covered by Art. 4 but also to all cases falling under Arts. 5 and 9 as well as to the special case addressed in Art. 6 (2). Moreover, the principle of *lex domicilii communis* encounters in Arts. 10 (2), 11 (2) and 12 (2) (b). It thus constitutes an important recurrent element of the Regulation. However, it has no gap-filling capacity; it cannot be applied to provisions which do not mention it. The applicable law Arts. 6 (1) and (3), 7 and 8 lead to cannot be replaced by the *lex domicilii communis*.[213]

2. Requirements

a) Relevant persons

119 Art. 4 (2) requires that "the person claimed to be liable and the person sustaining damage" are habitually resident in the same state. In particular, where several persons are involved, be it as tortfeasors, be it as victims, the determination of the applicable tort law can be problematic. Art. 4 (2) although not specifically addressing multi-party-constellations nevertheless covers them.[214]

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209 See also *Dörner*, in: Hk-BGB Art. 4 Rom II-VO note 4; *Dornis* EuLF 2007, I-152 (I-157); *Fröhlich* p. 55; *von Hein*, in: Calliess Art. 4 Rome II note 26; *Bach*, in: Peter Huber Art. 4 note 65; *Junker*, in: MünchKommBGB Art. 4 Rom II-VO note 37.

210 *von Hein*, in: Calliess Art. 4 Rome II note 26.

211 Also *Bach*, in: Peter Huber Art. 4 note 64.

212 Also *von Hein*, in: Calliess Art. 4 Rome II note 27 ("hard-and-fast blackletter conflicts rule") ; *Nuyts* Rev. dr. comm. belge 2008, 489 (497); *Schaub*, in: PWW Art. 4 Rom II-VO note 8.

213 Also *Junker*, in: MünchKommBGB Art. 4 Rom II-VO note 39.

214 *Dicey/Morris/Collins* para. 35–029; *Dickinson* para. 4.83; *Dornis* JPIL 2008, 237 (241 *et seq.*); *Hartley* ICLQ 57 (2008) 899 (900); *Kadner Graziano* RabelsZ 73 (2009) 1 (19); *Spickhoff*, in: Bamberger/Roth Art. 4 Rom II-VO note 11; *contra* – Art. 4 (2) only applicable if one tortfeasor and one victim is involved – *Bach*, IPRax 2005, 73 (76); *Bach* in: Peter Huber Art. 4 note 70.

aa) Person claimed to be liable

There will rarely be doubts about the person claimed to be liable. It is either the person who is requested to compensate the damage or the addressee of an injunction or other preventive measure.[215] If this person is not the actual tortfeasor but only a natural or legal person responsible for the tortfeasor (e.g., the employer), nonetheless the habitual residence of the actual tortfeasor (e.g., the employee) should be decisive, irrespective whether or not this person is also sued. For, the liability of the person responsible for the actual tortfeasor regularly depends on whether the latter committed an actionable wrong. Neither the wording nor the objective of Art. 4 (2) disallows an interpretation which qualifies only the direct generator of the damage as "the person claimed to be liable".[216] Further, relying solely on the liability of the direct tortfeasor corresponds to the primary damage that is relevant on the part of the victim.[217] **120**

Likewise, if the victim sues both the tortfeasor and his or her insurer, again, only the habitual residence of the actual tortfeasor matters for the determination of the applicable tort law as required under Art. 18 Rome II Regulation. **121**

The situation is different where there are several direct tortfeasors and only one or few of them have their habitual residence in the same country as the victim. It is the rightfully prevailing view that the *lex domicilii communis* applies to those tortfeasors who are habitually resident in the same country as the victim while in respect of the others the *lex loci damni* applies.[218] Thus, in these cases the court has to proceed on a party by party basis and to apply different law to the different direct tortfeasors. Any other solution would open the door for manipulation through tactical litigation strategies through choosing the applicable law by suing only the defendant(s) towards whom the more favourable tort law applies.[219] Therefore, if, for example, a football hooligan living in Germany and his friend (with habitual residence in England) hit and injure an English fan after an international football match in Germany, the liability of the German hooligan is governed by German law via Art. 4 (1) and that of the English hooligan by English law via Art. 4 (2). Any eventual redress claim between the two hooligans is to be decided in accordance with Art. 20 Rome II. **122**

In situations of the application of different laws to different persons who are claimed to be liable for the same damage, Art. 4 (3) must be particularly thoroughly examined and may lead to the application of a single law.[220] **123**

bb) Person sustaining damage

The "person sustaining damage" is the victim of the primary damage in the sense discussed **124**

215 For further possible meanings see *Dickinson* para. 4.83.

216 However differently – the habitual residence for each single party matters –, e.g., *Dicey/Morris/Collins* para. 35–029; *Hohloch*, in: Erman Art. 4 Rom II-VO note 13.

217 See also *infra* notes 124 *et seq*.

218 See *Dicey/Morris/Collins* para. 35–030; *Dickinson* para. 4.83; *Junker*, in: MünchKommBGB Art. 4 Rom II-VO note 42; *Schaub*, in: PWW Art. 4 Rom II-VO note 8; *Spickhoff*, in: Bamberger/Roth Art. 4 Rom II-VO note 11; *Unberath/Cziupka/Pabst*, in: Rauscher Art. 4 Rom II-VO note 77; *Wurmnest*, in: jurisPK-BGB Art. 4 Rom II-VO note 20.

219 *Dicey/Morris/Collins* para. 35–030.

220 See *Plender/Wilderspin* note 103.

supra note 87.[221] The exclusion of indirect consequences of the damaging event in Art. 4 (1) must also apply to para. (2) which is designed as a mere exception to para. (1).[222] It does, therefore, not matter where indirect victims such as dependants etc. have their habitual residence.[223] In addition, it is also not necessary that the person sustaining damage is the claimant in the court proceedings. For instance, the widow may claim damages for the death caused by the defendant; for Art. 4 (2) it is relevant where the deceased had his habitual residence.[224]

125 Where a tortfeasor caused damage to several victims, again, Art. 4 (2) requires a party by party approach.[225] Unless Art. 4 (3) allows for the application of one single law, those victims who have their habitual residence in the same country as the tortfeasor can claim compensation under that law whereas for the other victims the *lex loci damni* applies. This leads in principle to a split solution: if, for instance, a car driver (regularly living in France) negligently injures in Rome both a French tourist (living in Paris) and an inhabitant of Rome, the French tourist can claim compensation under French law, the person living in Rome under Italian law.[226]

126 Where several (direct) tortfeasors and several (primary) victims are involved, Art. 4 (2) applies to all pairs of claimants and defendants with a habitual residence in the same country while for the other pairs uniformly the law at the place of the damaging event is applicable.[227] Art. 4 (3) can replace this strange and impractical result by a single law only under the conditions stated in this provision.

b) Habitual residence

127 The term "habitual residence" is partly defined in Art. 23 Rome II which essentially corresponds to Art. 19 Rome I Regulation. The definition covers many but not all possible situations. Companies and other bodies, corporate and unincorporated, usually reside habitually at the place of their central administration, unless the tort takes place in the course of operation of a company's branch, agency or other establishment. Then, the latter's location is to be treated as the place of habitual residence.[228]

128 The habitual residence of natural persons who act in a professional capacity is their principal place of business.[229]

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221 *Dickinson* para. 4.83; *von Hein*, in: Calliess Art. 4 Rom II note 38; *Hohloch*, in: Erman Art. 4 Rom II-VO note 13; *Matthias Lehmann*, in: NK BGB Art. 4 Rom II-VO note 128.

222 See Recital (18) of the Rome II Regulation.

223 *Boskovic* Rép. int. Dalloz note 37; *Dickinson* para. 4.83; *Matthias Lehmann*, in: NK BGB Art. 4 Rom II-VO note 124.

224 Also *Dickinson* para. 4.83.

225 For an exclusion of Art. 4 (2) in such cases *Bach*, in: Peter Huber Art. 4 note 70 *et seq*.

226 See the similar example given by *Matthias Lehmann*, in: NK BGB Art. 4 Rom II-VO note 125 and *Wurmnest*, in: jurisPK-BGB Art. 4 Rom II-VO note 20.

227 See also *Junker*, in: MünchKommBGB Art. 4 Rom II-VO note 42; probably in the same sense *Calvo Caravaca/Carrascosa González* cap. XXXI note 64.

228 See Art. 23 (1) and the comment thereto *infra*.

229 See Art. 23 (2) and the comment thereto *infra*.

Art. 23 does not define the habitual residence of natural persons acting in a private, non-professional capacity. The necessary autonomous definition[230] must take account of the specific objectives of the Rome II Regulation but can borrow from case law in particular of the CJEU in related areas. In the context of the habitual residence of children the CJEU held that "in addition to the physical presence of the child in a Member State, other factors must also make it clear that that presence is not in any way temporary or intermittent and that the child's residence corresponds to the place which reflects some degree of integration in a social and family environment."[231] Such factors are, "inter alia, the duration, regularity, conditions and reasons for the stay in the territory of a Member State and for the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State."[232] If the "child" is replaced by "person" and the reference to a Member State left out, all these factors count as well for the general determination of the habitual residence of an adult person for whom then the school attendance of eventual own children can matter. Moreover, the person's intention to settle permanently in a certain state as manifested for instance by the purchase or lease of a residence there has to be taken into account.[233] For adults only their employment, social security and tax integration have to be added as further relevant factors. All these circumstances must be examined and weighed if private persons are involved and their common habitual residence has to be determined for Art. 4 (2). **129**

c) Habitual residence in same country

Art. 4 (2) rests on the assumption that the habitual residence connects the person so closely with the law at that place that it is justified to apply that law if both parties of a tort have their habitual residence in the same country. That is the case if both the tortfeasor and the victim live in a country that is a sovereign state with a uniform legal order. For instance, two drivers who both have their habitual residence in Germany collide with their cars in Austria. German law applies to their accident although the local Austrian traffic rules (and signs) must be observed.[234] **130**

However, if the state of the common residence comprises different territorial units with own rules of law in respect of non-contractual obligations, each unit is to be regarded as a separate country for the purposes of the Regulation (see Art. 26 (1)).[235] Then, the parties have a common habitual residence only if they both live in the same territorial unit. Therefore, if a driver who regularly lives in Scotland collides with a tourist in Paris who has his habitual residence in England French law applies.[236] **131**

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230 However, for the application of the national notion of habitual residence: *Calvo Caravaca*/*Carrascosa González* cap. XXXI note 63.4.

231 *C v. M* (C-376/14) ECLI:EU:C:2014:2268 para. 51.

232 *C v. M* (C-376/14) ECLI:EU:C:2014:2268 para. 52 referring to the decisions in *A* (C-523/07) ECLI:EU:C:2009:225 and *Barbara Mercredi v. Richard Chaffe* (C-497/10 PPU) ECLI:EU:C:2010:829.

233 *C v. M* (C-376/14) ECLI:EU:C:2014:2268 para. 52; for further details see the comment to Art. 23 *infra*.

234 See the case OLG München, NZV 2017, 53.

235 Examples of such states with certain different tort rules for separate territorial units are Australia, Canada, Great Britain, Hong Kong in China, some foral laws of Spain, the US.

236 See the example by *Hartley*, ICLQ 57 (2008) 899 (900 *et seq*.); also *von Hein*, in: Calliess Art. 4 Rome II note 40; further *Matthias Lehmann*, in: NK BGB Art. 4 Rom II-VO note 128.

132 On the other hand is Art. 4 (2) not applicable in situations where the tortfeasor and the victim habitually reside in countries which have the same or essentially the same tort law as for instance France and Belgium.[237] The contrary view,[238] even in the form of an analogous application,[239] is not reconcilable with the wording of Art. 4 (2) nor with its legislative history: a proposal of the Parliament was deliberately rejected that suggested to insert an addition in Art. 4 (3) listing factors relevant for the escape clause and among them also "that the relevant laws of the country of habitual residence of the person(s) claimed to be liable and of the country of habitual residence of the person(s) sustaining loss or damage are substantially identical."[240] Thus, the fact of entire or substantial identity of the laws in the parties' different countries of habitual residence can be taken into account under Art. 4 (3)[241] but does not count for Art. 4 (2). For Art. 4 (3) this fact does not have the same strength as the common habitual residence for Art. 4 (2). It is also immaterial whether or not the parties knew that they resided in the same country. Where the habitual residence – of the defendant – is unknown Art. 4 (2) should not be applied.

d) Relevant time

133 Art. 4 (2) expressly states that the common habitual residence must exist "at the time when the damage occurs." The provision fixes the applicable law unalterably at this point of time.[242] Any later change of the habitual residence of one or both parties does not affect the application of Art. 4 (2);[243] otherwise the respective party could influence and manipulate the applicable law.[244] The relevant damage is exclusively the primary damage; its indirect consequences are irrelevant.[245] Where the damage develops over a period of time, the residence situation at the first impact of damage should be decisive,[246] again, because otherwise each party could influence and manipulate the applicable law. However, any relevant alteration of the habitual residence can be given attention within Art. 4 (3).

e) No further requirements

134 For the application of Art. 4 (2), except the common habitual residence, no further conditions must be met.[247] In particular, it is irrelevant whether or not a further – contractual, family or other personal – relationship between the tortfeasor and the victim exists or

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237 In the same sense *Dicey/Morris/Collins* para. 35–031; *von Hein*, in: Calliess Art. 4 Rome II note 41; *Rühl*, in: BeckOGK Art. 4 Rom II note 98 *et seq.*; *Schaub*, in: PWW Art. 4 Rom II-VO note 8; *Unberath/Cziupka/Pabst*, in: Rauscher Art. 4 Rom II-VO note 69.

238 See *Symeonides* Am. J.Comp. L. 56 (2008) 173 (196).

239 *de Lima Pinheiro* Riv. dir. int. priv.proc. 44 (2008) 5 (18).

240 See the Position of the Parliament of 6 July 2005 (P6_TC1_COD(2003)0168).

241 In this sense also *Bach*, in: Peter Huber Art. 4 note 76 *et seq.*; *Stone* Ankara L. Rev. 4 (2007) 95 (109).

242 In accord *Dickinson* para. 4.83; *von Hein*, in: Calliess Art. 4 Rome II note 39; *Bach*, in: Peter Huber Art. 4 note 78; *Wurmnest*, in: jurisPK-BGB Art. 4 Rom II-VO note 19.

243 *Junker*, in: MünchKommBGB Art. 4 Rom II-VO note 44; *Thorn*, in: Palandt Art. 4 Rom II-VO note 5.

244 See *Wurmnest*, in: jurisPK-BGB Art. 4 Rom II-VO note 19.

245 *Dickinson* para. 4.83; *von Hein*, in: Calliess Art. 4 Rome II note 39; *Hohloch*, in: Erman Art. 4 Rom II-VO note 14.

246 Also *Dickinson* para. 4.83.

247 *Calvo Caravaca/Carrascosa González* cap. XXXI note 62; *Dicey/Morris/Collins* para. 35–031; *von Hein*, in: Calliess Art. 4 Rome II note 36; *Junker*, in: MünchKommBGB Art. 4 Rom II-VO note 45; *Kadner Graziano* RCDIP 97 (2008) 445 (462).

whether the parties have the same nationality.[248] These factors can play a role under Art. 4 (3) but do not matter for Art. 4 (2).

3. Consequences

If the tortfeasor and the victim habitually reside in the same country the law of that country applies instead of the law of the place where the damage occurred. However, Art. 4 (3) may still lead to another law. If the conditions of Art. 4 (2) are satisfied, the court must apply the law of the common habitual residence *ex officio*. **135**

VII. The escape clause (Art. 4 (3))

1. General considerations

a) Content and purpose

Art. 4 (3) allows for the application of another law than that ordinarily applicable under Art. 4 (1) or (2), if the tort is manifestly more closely connected with the country of this other law. The provision introduces a degree of flexibility in the determination of the otherwise rather rigid rules of Art. 4 in order to enable a reasonable balance between legal certainty and justice in the individual case.[249] On the other hand, it is clear from its wording as well as from its designation as 'escape clause'[250] that Art. 4 (3) formulates an exception that applies only if a rather high threshold is passed ("high hurdle").[251] The escape clause should therefore not be applied lightly. A merely closer connection does not suffice to displace the regularly applicable law; only a clearly and manifestly closer connection is sufficient.[252] Otherwise the legal certainty and foreseeability which Art. 4 (1) and (2) shall ensure would be endangered. **136**

The escape clause does not only enforce the general principle of the closest connection. It also provides a possibility to apply one single law in appropriate cases where otherwise different laws would be applicable as in case of primary damage to one victim in different countries or in multi-party situations, always provided that the connection to that single law is manifestly closer. **137**

Similar to the common residence principle of Art. 4 (2) the escape clause is an important and recurring element of the Regulation for the determination of the applicable law. Like Art. 4 **138**

248 Also *Dicey/Morris/Collins* para. 35–031; *von Hein*, in: Calliess Art. 4 Rome II note 36; *Junker*, in: MünchKommBGB Art. 4 Rom II-VO note 45; *Kadner Graziano* RCDIP 97 (2008) 445 (462).

249 Also *von Hein*, in: FS Jan Kropholler (2008), p. 553; *von Hein*, in: Calliess Art. 4 Rome II note 43; *Junker*, in: MünchKommBGB Art. 4 Rom II-VO note 46; *Matthias Lehmann*, in: NK BGB Art. 4 Rom II-VO note 137; *Thorn*, in: Palandt Art. 4 Rom II-VO note 10.

250 See Recital (18): "Article 4 (3) should be understood as an 'escape clause'…"

251 *Marshall v. the Motor Insurer's Bureau a.o.* [2015] EWHC 3421 (QB) para. 20 per *Dingemans* J.

252 See Explanatory Memorandum COM (2003) 427 final, p. 12 ("must remain exceptional"); general opinion: also, e.g., *Boskovic* Rép. int. Dalloz note 38; *Dickinson* para. 4.85 ("requiring strong and clear reasons for displacing the law otherwise applicable…"); *Bach* in: Peter Huber Art. 4 note 80; *Matthias Lehmann*, in: NK BGB Art. 4 Rom II-VO note 138; *Plender/Wilderspin* note 18–105; *Rühl*, in: BeckOGK Art. 4 Rom II note 105.

(2), it does not play a general gap-filling function but is applicable only where specifically mentioned, namely also in Arts. 5 (2), 6 (2), 10 (4), 11 (4) and 12 (2) (c).

b) The necessary connection

139 Art. 4 (3) requires that the tort is specifically ("manifestly") closely connected with a certain country. Taken verbally, only the tort must be connected with a country,[253] and there is little else than the place where the tort is effected and the damage sustained which constitutes such a connection. However, the provision's express reference to "all the circumstances of the case" which shall clearly indicate such a connection explains indirectly what in fact is meant: so many circumstances must point to a certain law that it appears profoundly justified to apply this law instead of the *lex loci damni* or the *lex domicilii communis*.[254] Also the example of "a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question" in Art. 4 (3) proves that circumstances outside the tort itself can be and must be taken into consideration. Insofar all relevant facts that usually indicate a connection between a case and a certain country and its law must be given attention (see thereto *infra* notes 157 *et seq.*).

140 Art. 4 (3) always requires a comparison between the connecting factors used in par. (1) and (2) with the circumstances relevant for par. 3. It follows therefrom that the place of the damaging event alone can never suffice to displace the place of the habitual residence and vice versa because these connecting factors constitute no closer, let alone a manifestly closer connection to another law than that designated by par. (1) and (2).[255] For the application of Art. 4 (3) there must be circumstances which in their weight are significantly more important and indicative for the applicable law than the place of damage and of the common habitual residence. This will often require a number of connecting factors militating in their cumulation for the application of the closer connected law.

141 It appears to be rather widely accepted that the circumstances that are relevant for Art. 4 (3) must be objective facts or objectifiable factors instead of personal intentions or internal expectations of one or both parties.[256] Objectifiable legitimate expectations which reasonable persons would have may, however, play a role.[257]

142 Although Art. 4 (3) requires a comparison with the place of damage and the place of habitual residence it would be too restrictive a view to include in the list of relevant circumstances in par. (3) likewise only territorial/geographical factors. Par. (3) sent. 2 in exemplifying "all the circumstances of the case" does not limit the relevant circumstances in a certain way. On the contrary, the example of "a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question" in Art. 4 (3) makes it clear that even legal circumstances must be taken into account. Therefore, "all the circumstances of the case" include besides territorial connecting factors also personal, situative, legal and like connecting factors.[258]

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253 For such an understanding evidently *Plender/Wilderspin* note 18–106.

254 In this sense also *Dicey/Morris/Collins* para. 35–032; *Dickinson* para. 4.86.

255 Similarly *Matthias Lehmann*, in: NK BGB Art. 4 Rom II-VO note 142.

256 See *Dickinson* para. 4.85; *von Hein*, in: Calliess Art. 4 Rome II note 54; *Matthias Lehmann*, in: NK BGB Art. 4 Rom II-VO note 148.

257 *Matthias Lehmann*, in: NK BGB Art. 4 Rom II-VO note 148.

According to the prevailing view Art. 4 (3) does not allow taking into account the material solutions under the substantive laws to which the necessary comparison leads.[259] True, the Regulation did not adopt a better law approach as can be found in the US. It is therefore not decisive which substantive law grants better protection; anyway, it would be unanswerable which party should be preferred. However, neither Art. 4 (3) nor any other provision of the Rome II forbids to recognise the substantive solutions as circumstances that for an overall assessment can be taken into account. The example of the accessory contract, that Art. 4 (3) gives, demonstrates that legal circumstances belong to those relevant for the provision. **143**

c) Relationship with Art. 4 (1) and (2)

Art. 4 (3) presupposes that first the law must be determined which is applicable under either Art. 4 (1) or (2). Only if this law is established, can it be displaced – under the conditions stated in par. (3).[260] Nonetheless, under practical aspects it is admissible to leave the place of damage or the place of common habitual residence open where it is entirely clear from all of the circumstances that there is a manifestly closer connection with another law.[261] **144**

It has been suggested that if par. (2) is to be displaced, par. (3) should not allow a return to the *lex loci damni*-rule of par. (1), mainly because the formulation seems to suggest that par. (3) shall displace par. (1) or (2) only by *another* law than that indicated in par. (1) or (2).[262] It is, however, the rightly prevailing view that this interpretation is too narrow and formalistic.[263] Par. (3) can therefore replace the law of the common habitual residence also by the *lex loci damni*. The main reason is that par. (3) is a general escape clause which – under its conditions – restores the principle of the closest connection; if the place of the damaging event is manifestly more closely linked with the tort than the place of the habitual residence, this overarching principle and objective of par. (3) takes precedence over a possible verbal interpretation. Moreover, even the wording of Art. 4 (3) allows an understanding that the law displacing the *lex domicilii communis* may be the law at the place of the damaging event because this is another law than that indicated by par. (2). However, in order to replace par. (2) by the *locus damni*, it will be regularly necessary that also further connecting factors point to the place of damage. **145**

It has been further suggested that Art. 4 (3) does not apply to cases with several places of damage because the provision speaks only of "a country" and "that other country".[264] Again, **146**

258 See *infra* notes 157 *et seq*.

259 *Garcimartín Alférez* EuLF 2007, I-77 (I-84); *von Hein*, in: Calliess Art. 4 Rome II note 52; *Matthias Lehmann*, in: NK BGB Art. 4 Rom II-VO note 150; *Unberath*/*Cziupka*/*Pabst*, in: Rauscher Art. 4 Rom II-VO note 85.

260 COM (2003) 427 final, p.13; *Matthias Lehmann*, in: NK BGB Art. 4 Rom II-VO note 140.

261 Although finally applying Art. 4 (1) Rome II partly in this sense *SPV Sam Dragon PLC v. GE Transport Finance Ltd.* [2012] IEHC 240 para. 18: "country most connected with the alleged wrong".

262 *Fentiman*, in: Ahern/Binchy pp. 98 *et seq*.; *Scott*/*Rushworth* [2008] LMCLQ 274 (281); *Unberath*/*Cziupka*/*Pabst*, in: Rauscher Art. 4 Rom II-VO note 84 (arguing with the ranking order between par. (1) and (2) which would not allow the precedence of (1) over (2)).

263 See *Dicey*/*Morris*/*Collins* para. 35–032; *Dickinson* para. 4.89; *von Hein*, in: Calliess Art. 4 Rome II note 44; *Hohloch*, in: Erman Art. 4 Rom II-VO note 14; *Junker*, in: MünchKommBGB Art. 4 Rom II-VO note 58; *Plender*/*Wilderspin* note 18–108.

264 *Scott*/*Rushworth* [2008] LMCLQ 274 (281).

such an interpretation narrows the objective of par. (3) far too much.[265] In particular, in cases with places of damage in several states – either with one or with several victims – the general principle of the closest connection requires that in appropriate cases a single law can be applied.[266]

d) Relationship with Art. 14

147 It follows from the structural context that Art. 4 (3) cannot displace the law the parties have chosen in accordance with Art. 14.[267] This would contradict the recognition of the parties' autonomy. As far as recognised in Art. 14, the parties' choice of law takes precedence over Art. 4 as a whole, including its par. (3). However, as to the effect of a choice of law agreement for an accessory contract on the law applicable to the tort in question see *infra* note 168.

e) No dépeçage

148 Like the Rome I Regulation also Rome II generally does not allow a judge-made dépeçage. This holds true for Art. 4 (3), too.[268] The parties may, on the contrary, choose the applicable law for reasonable parts of the tort, though only under the conditions stated in Art. 14 Rome II.[269]

f) The relevant point of time

149 Contrary to Art. 4 (2), Art. 4 (3) does not fix at which point of time the circumstances must exist which are relevant for the determination of the manifestly more closely connected law. For Art. 4 (3), a wider time frame than in par. (2) (time of occurrence of damage) appears necessary and reasonable to grant the flexibility that doing justice in the individual case requires. Therefore, it is rightly suggested to take account of all relevant circumstances until the time of determination of the applicable law.[270] This includes the indirect and even probable future consequences (see further *infra* notes 175 *et seq.*).

g) Burden of proof?

150 There is some disagreement whether or not Art. 4 (3) puts a formal burden of proof on the party relying on the law designated by par. (3).[271] The preferable view is that no such formal burden exists because under the Regulation it is not for the parties to formally establish

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265 In the same sense *Dickinson* para. 4.89.2.

266 Also *Dickinson* para. 4.89.2; *Thorn*, in: Palandt Art. 4 Rom II-VO note 10, 23; doubting, leaving decision open: *von Hein*, in: Calliess Art. 4 Rome II note 58.

267 Also *Rühl*, in: BeckOGK Art. 4 Rom II note 107; *Wurmnest*, in: jurisPK-BGB Art. 4 Rom II-VO note 22; see also the order of application *supra* note 51 *et seq.*

268 *Dickinson* para. 4.89.1; *von Hein*, ZEuP 2009, 6 (18 *et seq.*); *Junker*, in: MünchKommBGB Art. 4 Rom II-VO note 47; *Kozyris* Am. J. Comp. L. 56 (2008) 471 (477 *et seq.*); *Plender/Wilderspin* note 19–107; *Rühl*, in: BeckOGK Art. 4 Rom II note 126; *Unberath/Cziupka/Pabst*, in: Rauscher Art. 4 Rom II-VO note 89; *Wurmnest*, in: jurisPK-BGB Art. 4 Rom II-VO note 23.

269 Differently *von Hein*, in: Calliess Art. 4 Rome II note 51.

270 *Dickinson* para. 4.89.3; for the time of the entry of the first damage: *Rühl*, in: BeckOGK Art. 4 Rom II note 116.

271 For a formal burden of proof evidently: e.g., *Winrow v. Hemphill* [2014] EWHC 3164 para. 20; *Dicey/Morris/Collins* para. 35–032; *Dickinson* para. 4.88 (relying on *Dicey/Morris/Collins*); also *Plender/Wilderspin* note 19–109 speak of a burden of proof; against such a burden: e.g., *Matthias Lehmann*, in: NK BGB Art. 4 Rom II-VO note 140.

which law applies. The court shall determine the applicable law *ex officio*. Otherwise, the Regulation's system of uniform conflict rules would be considerably reduced in its importance and harmonisation effect if each national court being not satisfied by whatever kind of proof required under national law could apply the own or another, arbitrarily chosen law.

It is a different point that the party who wants to rely on a manifestly more closely connected law should adduce and, as the case may be, prove the facts that indicate such a connection.[272] However, if the party does not do so, the court is obliged to establish as far as possible the relevant facts and the party will not automatically loose its case for failure of proof. **151**

h) Discretion

Art. 4 (3) clothes the court with a certain degree of discretion, however, only in respect of the question whether there exists a manifestly closer connection to another law than that designated by Art. 4 (1) or (2).[273] Even insofar the court is obliged to consider all relevant circumstances. The court is also not free in giving the different circumstances any weight it likes. Weak or strong connecting factors must be taken into account at their face value; the court cannot change their typical weight. The court's discretion merely concerns the overall weighing of all relevant circumstances in the case at hand.[274] Once the court has found that the facts indicate a manifestly closer connection there is no further discretion to apply or disregard the thus indicated law. Then, the court has to apply the more closely connected law.[275] **152**

2. Accessory determination of the applicable law

a) Principle and purpose

Art. 4 (3) gives an example of a possible manifestly closer connection, namely "a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question." Where the parties are already connected by a pre-existing relationship the law governing this relationship can be applied to the tort as well if both are closely connected. The main purpose of this rule of accessory determination of the applicable law is to allow in such a situation the application of the same law to the relationship and the tort in order to avoid inconsistencies following from different laws applicable to both. The rule of accessory determination of the applicable law thus serves the easier and "sound administration of justice" and, in the view of the Commission, also "the parties' legitimate expectations".[276] **153**

It must be borne in mind that a "pre-existing relationship between the parties" is only one specific situation where the law actually applicable under Art. 4 (1) or (2) can be displaced. Art. 4 (3) sent. 2 does in no way mean that situations, where the relationship did neither pre-exist nor existed between the parties, cannot indicate a manifestly closer connection. Since **154**

272 See also *Matthias Lehmann*, in: NK BGB Art. 4 Rom II-VO note 140.

273 See Explanatory Memorandum COM (2003) 427 final, p. 12: "… the court enjoys a degree of discretion to decide whether there is a significant connection between the non-contractual obligations and the law applicable to the pre-existing relationship."; for no discretion at all: *Matthias Lehmann*, in: NK BGB Art. 4 Rom II-VO note 167.

274 This is most likely what the Commission meant with its consideration quoted in the preceding fn.

275 In the same sense *Matthias Lehmann*, in: NK BGB Art. 4 Rom II-VO note 167; *Rühl*, in: BeckOGK Art. 4 Rom II note 125.

276 See Explanatory Memorandum COM (2003) 427 final, p. 13.

all circumstances must be taken into account even in such situations the actually applicable law can be displaced if other relevant connecting factors point to another law.

b) Relevant relationships

155 Art. 4 (3) mentions a closely connected contract as concrete example which might, though not must, lead to the application of the contract law to the tort as well. Contracts are certainly the most prominent examples of an accessory determination of the applicable law, however, not the only ones.[277] The Commission mentioned in its Explanatory Memorandum to the Rome II Proposal of 2003 also family relationships.[278] In fact, torts between family members do not fall under the exclusion of Art. 1 (2) (a) because they are not "obligations arising out of family relationships".[279] They do not have their legal origin in the family relationship.[280] Thus, Art. 4 (3) applies to them. Depending on the respective family bond between the parties either the law applicable to the effects of marriage or the law applicable to the parent-child relationship can be applied if this law differs[281] from the law that would be applicable under Art. 4 (1) or (2). For other family constellations – siblings, grandparent-grandchild, uncle-niece etc. – generally no specific conflict rules exist. Here, it should be decisive in which country this relationship has its center.[282]

156 Inspired mainly by prior German law some writers suggest that the accessory connection to the applicable family law is not admissible in cases of traffic accidents because no specific duties of family law are at stake there.[283] Yet, the specific local duties of safety and conduct in traffic situations apply anyway (Art. 17), and the law that governs marriage and parenthood may be more appropriate than that of the accidental place of damage (in particular in case of family holidays etc). Often, the applicable family law will also be the law at the habitual residence of the family members.

157 Besides family relationships also other similar kinds of relationships[284] may lead to the application of their law to torts between the participants of that relationship, for instance, a community of heirs or members of a company.[285] It is, however, disputed whether the term "relationship" merely comprises legal relationships[286] or also includes factual rela-

277 See further *infra* notes 157 *et seq*.

278 Explanatory Memorandum COM (2003) 427 final, p. 13.

279 Art. 1 (2) (a) Rome II Regulation.

280 *Thorn*, in: Palandt Art. 4 Rom II-VO note 12.

281 Family members will often have the same habitual residence, though.

282 Also *Dickinson* para. 4.91.

283 *Junker*, in: MünchKommBGB Art. 4 Rom II-VO note 52; *Spickhoff*, in: Bamberger/Roth Art. 4 Rom II-VO note 16; *Schaub*, in: PWW Art. 4 Rom II-VO note 11; *Wurmnest*, in: jurisPK-BGB Art. 4 Rom II-VO note 27; but *contra Thorn*, in: Palandt Art. 4 Rom II-VO note 12.

284 The Explanatory Memorandum of the Commission speaks of "all their *sc. the parties*' relationships", COM (2003) 427 final, p. 13.

285 Also generally for all kinds of relationships *Dickinson* para. 4.91; *Junker*, in: MünchKommBGB Art. 4 Rom II-VO note 52.

286 In this sense, e.g., *Junker*, in: MünchKommBGB Art. 4 Rom II-VO note 54; *Matthias Lehmann*, in: NK BGB Art. 4 Rom II-VO note 157; *Nuyts*, Rev. dr. com. belge 2008, 489 (498 *et seq*.; *Ofner*, ZfRV 2008, 13 (17); *Gerhard Wagner*, IPRax 2008, 1 (6); also though reluctantly *Thorn*, in: Palandt Art. 4 Rom II-VO note 13.

tionships.[287] At the outset, it should be stressed that this question thus far has little, if at all practical relevance. In many cases Art. 4 (2) will provide a sufficient answer. An argument that seems to militate in favour of the exclusion of factual relationships is that the Parliament's proposal to expressly include "de facto relationships"[288] was finally not accepted.[289] On the other hand, also the Parliament's proposal to expressly include "*legal* or de facto relationship"[290] did not make it into the final (English) text. Further, already the Commission's Proposal of 2003 as well as the final English version – and many other language versions[291] – of the Regulation use the mere expression "relationship" which easily includes both legal and de facto relationships. It is true that often no generally accepted conflict rules for de facto relationships exist providing which law should be applicable.[292] However, this applies to some legal relationships as well, for instance, for the relationship of siblings etc. Moreover, also here, this gap can be filled either by the law that would be applicable if the factual relationship were a valid legal relationship or by the law of the country in which the factual relationship has its center.[293]

Yet, it will be rare that torts within factual relationships such as non-marital couples, travel groups etc. are governed by their own law that is neither the law of the place of damage nor the law of the place of their common habitual residence nor the law of an underlying contract. In a case where an English member of a team building exercise organised by his employer, a London bank, with the Club Mediterranee in France, suffered injuries when climbing an ice wall, the English High Court rightly held that the chosen English contract law applied to a claim against the Club.[294] The Court further stated *obiter* that under Rome II French law as the law of the place of damage would have applied; the fact that another team member held the rope to secure the claimant's climbing and that both worked in London would not have displaced the *lex loci damni*.[295] **158**

c) In particular contractual relations

The accessory determination of the applicable law has considerable importance with respect to contracts. Art. 4 (3) mentions contracts between the parties of the tort as a particular example for a manifestly closer connection. However, there is no automatism. The mere **159**

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287 In this sense *Dickinson* para. 4.91; *Dörner*, in: Hk-BGB Art. 4 Rom II-VO note 6; *von Hein*, in: Calliess Art. 4 Rome II note 65; *Heiss*/*Loacker* JBl 2007, 613 (627); *Hohloch*, in: Erman Art. 4 Rom II-VO note 19; *Rühl*, in: BeckOGK Art. 4 Rom II note 123; *Schaub*, in: PWW Art. 4 Rom II-VO note 12; *Spickhoff*, in: Bamberger/Roth Art. 4 Rom II-VO note 17; *Wurmnest*, in: jurisPK-BGB Art. 4 Rom II-VO note 28 (though only very cautiously); for relevance of factual relationships merely under Art. 4 (3) sent. 1: *Bach*, in: Peter Huber Art. 4 note 90.

288 See the proposed Art. 4 (3) (b) (P6_TC1_COD(2003)0168; OJ 2006 C 157 E/371): "a pre-existing legal or de facto relationship …"

289 Relying on this argument: *Matthias Lehmann*, in: NK BGB Art. 4 Rom II-VO note 157.

290 See Art. 4 (3) (b) (P6_TC1_COD(2003)0168; OJ 2006 C 157 E/371).

291 See, e.g., the French, Italian or Spanish version whereas, for example, the German and Swedish version use the equivalent for "legal relationship".

292 See *Matthias Lehmann*, in: NK BGB Art. 4 Rom II-VO note 157.

293 Also *Dickinson* para. 4.91.

294 *Committeri v. Club Mediterranee SA*, *Generali Assurances Iard SA* [2016] EWHC 1510 (QB).

295 *Committeri v. Club Mediterranee SA*, *Generali Assurances Iard SA* [2016] EWHC 1510 (QB) para. 57.

existence of an accompanying contract does not suffice. The contract and the tort must be so closely related, that it is reasonable to subject both to the same law.

aa) The necessary link between contract and tort

160 The necessary link between the tort and a contract will often exist where the breach of contract is altogether a tort; for instance, the doctor, in negligently treating the patient, infringes the latter's health.[296] For qualification purposes of the Rome I and II Regulations this is both a tort and a breach of contract irrespective whether the finally applicable substantive law allows – as, for instance, English and German law – or forbids concurrent claims in this situation (as French law does with its principle of *non-cumul*). It is evident that in such cases there are reasons of efficiency and consistency which often, though not automatically suggest to apply a single law to both the contract and the tort. In its Explanatory Memorandum to the Proposal of 2003 the Commission pointed in particular to the fact that such a solution can mitigate the tensions stemming from the different approaches to concurrent claims.[297]

161 The Commission further argued in the Explanatory Memorandum that even if the contract was merely contemplated but not yet concluded, a respective tort, for instance the unlawful breach of negotiations, should be treated as a relationship in the sense of (now) Art. 4 (3).[298] Since the case of *culpa in contrahendo* is now specifically covered by Art. 12 Rome II, the specific reference to the breach of contractual negotiations is no longer valid for Art. 4 (3) (although it has to be noted that under Art. 12 (1) also the law applicable to the intended contract governs). The Commission also stated that it were no mandatory requirement for (now) Art. 4 (3) that the contract be valid.[299] In fact, it can be inferred from these explanations that for the present Art. 4 (3) the contractual relationship need not necessarily be already formally concluded or legally valid. If a firm contractual relationship was intended and steps in that direction were undertaken the relationship can nonetheless serve as a basis for an accessory determination of the applicable law.[300] The relevant law is then the law that would apply to the intended or invalid contract.

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296 In order for becoming an international case it must be assumed, e.g., that the doctor renders medical services to a foreigner who usually lives in another country. Very often, though not necessarily, the place where the doctor renders the treatment will then also be the *locus damni* and the law at that place will be the law applicable to both the tort and the contract for medical treatment (the latter due to Art. 4 (1) (b) Rome I Regulation because the consumer protection under Art. 6 Rome I will mostly not apply since the services are usually exclusively supplied in another than the patient's home country [Art. 6 (4) (a) Rome I]). Different law to the contract on the one hand and to the tort on the other will only apply if the place of damage is not at the seat of the doctor but, for instance, in the home country of the patient (see the case BGH NJW 2008, 2344 where a Swiss doctor treated a German patient in Switzerland and advised the patient to take the medicine at home in Germany where it allegedly caused damage). Different law will also apply increasingly in cases of international tele-medicine. In those cases of different law for the contract and the tort it must always be answered whether Art. 4 (3) Rome II should lead to the application of the applicable contract law also to the tort.

297 See P6_TC1_COD(2003)0168, p. 13 (OJ 2006 C 157 E/371 *et seq.*).

298 See the Explanatory Memorandum to the Rome II Proposal of 2003: P6_TC1_COD(2003)0168, p. 13 (OJ 2006 C 157 E/371 *et seq.*).

299 Explanatory Memorandum to the Rome II Proposal of 2003: P6_TC1_COD(2003)0168, p. 13 (OJ 2006 C 157 E/371 *et seq.*); the Commission referred insofar to Art. 10 (1) (e) Rome Convention (now Art. 12 (1) (e) Rome I Regulation) which also extends the scope of that Regulation to invalid contracts.

The international case law gives some guidance on the application of Art. 4 (3) in respect of torts linked to contracts. From the CJEU's decision in *Verein für Konsumenteninformation v. Amazon EU*[301] it can be inferred that the mere existence of a choice of law clause in standard contract terms of one party to the tort is no circumstance that has to be taken into account for Art. 4 (3). The Court stated: **162**

"(46) In any event, the fact that Amazon EU provides in its general terms and conditions that the law of the country in which it is established is to apply to the contracts it concludes cannot legitimately constitute such a manifestly closer connection.

(47) If it were otherwise, a professional such as Amazon EU would de facto be able, by means of such a term, to choose the law to which a non-contractual obligation is subject, and could thereby evade the conditions set out in that respect in Article 14 (1) (a) of the Rome II Regulation."[302]

The decision underlines the almost self-evident principle that no party to a tort can unilaterally determine the applicable law. The situation is different where the parties agreed on the applicable law under the conditions of Art. 14 Rome II (see further thereon *infra* note 168 *et seq.*). **163**

The English Court of Appeal had to decide a case where the claimant had been injured and her husband killed in a traffic accident in Egypt – caused by a third person – on an excursion organised by the hotel which the English couple had booked (probably in England).[303] Although only deciding the jurisdictional issue on a preliminary level[304] the Court held that Egyptian law as the law of the place of damage applied to the claim of the widow for her personal injuries. The Court did not discuss whether the law governing the contract (probably English law) could displace the Egyptian tort law.[305] However, it is likely that the Court indirectly denied this because the Court expressly rejected to apply Art. 4 (3) Rome II to the widow's claim as close dependant.[306] Indeed, it appears to be the correct solution that a traffic accident which occurred on a tour organised by the tour organiser has no sufficient links with the travel contract and will in the absence of special circumstances generally not be 'infected' by the law that governs the travel contract. **164**

300 Mainly in the same sense *von Hein*, in: Calliess Art. 4 Rome II note 68; *Matthias Lehmann*, in: NK BGB Art. 4 Rom II-VO note 159.

301 *Verein für Konsumenteninformation v. Amazon EU Sàrl* (C-191/15) ECLI:EU:C:2016:612.

302 *Verein für Konsumenteninformation v. Amazon EU Sàrl* (C-191/15) ECLI:EU:C:2016:612 paras. 46 *et seq.*

303 *Brownlie v. Four Seasons Holdings Incorporated* [2015] EWCA Civ. 665.

304 The claimant had to show merely a "good arguable case" for jurisdiction purposes.

305 *Brownlie v. Four Seasons Holdings Incorporated* [2015] EWCA Civ. 665 para. 86.

306 *Brownlie v. Four Seasons Holdings Incorporated* [2015] EWCA Civ. 665 para. 87. Contrary to the CJEU's decision in *Florin Lazar, représenté légalement par Luigi Erculeo v. Allianz SpA* (C-350/14) ECLI:EU:C:2015:802 the English CA regarded the claim of a dependant for the death of his or her nourisher as an independent damage and no mere "indirect consequence" of the primary damage. This understanding is now overruled by *Lazar*.

165 It seems to be also common practice in Europe that in traffic accidents the law governing the insurance contract for the involved car that causes damage does usually not displace the law at the place of the accident or the law of the common habitual residence of the parties to the accident.[307]

166 On the other hand, in the already mentioned case of a climbing accident in the Club Mediterranee[308] the English High Court applied exclusively contract law (however erroneously qualifying the situation on the basis of the French substantive law on which the claimant had based his claim) and denied *obiter* that the chosen contract law could be applied via Art. 4 (3) Rome II to the tort as well. The possibility of an accessory determination of the applicable tort law was not mentioned. The Court merely rejected the view for Art. 4 (3) that the "centre of gravity" of the case was with English law.[309] The decision's solution to apply exclusively the law that governed the contract should nevertheless be supported because the accident occurred as part of the program offered by the Club and not only – as in the case of a traffic accident – merely accidentally and without further connection to the travel or the holiday stay.

167 The necessary link was explicitly accepted in a case where due to a misleading prospectus the Austrian claimant had become a shareholder of a German company and had invested money in this company which meanwhile went into insolvency proceedings.[310] The court applied Art. 4 (3) Rome II to the alleged tortious liability of the company. It held that the alleged tort was so closely linked with the contract with the company that the choice of law clause in that contract extended to the tort liability.

bb) Effect of a contractual choice of law by the parties

168 The law governing the contract that is linked to the tort in question may be either the law chosen by the parties or the objectively applicable contract law. Both the chosen law and the law in default of a choice by the parties must be principally determined in accordance with the provisions of the Rome I Regulation, in particular its Arts. 3 and 4. Therefore, even a tacit choice can be valid if "clearly demonstrated by the terms of the contract or the circumstances of the case."[311]

169 A problem arises, however, in regard of Art. 14 Rome II Regulation which restricts the possibility of a parties' choice of the applicable law. The provision admits a choice of law agreement in advance only if "all the parties are pursuing a commercial activity" and if the agreement was "freely negotiated before the event giving rise to the damage occurred." The normal effect of the provision is that under Art. 14 Rome II consumers, employees, passengers as well as (natural privately) insured persons cannot validly agree with their contract partners (and possible tortfeasors) in advance on the applicable tort law. This is

307 See, e.g., *Le Guevel-Mouly a.o. v. AIG Europe Ltd.* [2016] EWHC 1794 (QB) para. 19 (French resident responsible as driver for injuries of his French wife and children when on holiday in Scotland; claims of all involved against car insurer).

308 *Committeri v. Club Mediterranee SA*, *Generali Assurances Iard SA* [2016] EWHC 1510 (QB); *supra* note 158.

309 *Committeri v. Club Mediterranee SA*, *Generali Assurances Iard SA* [2016] EWHC 1510 (QB) para. 57.

310 See LG Hamburg 4 December 2015, BeckRS 2016, 06355.

311 Art. 3 (1) sent. 1 Rome I Regulation.

of practical relevance particularly for consumers and employees. The accessory determination would lead to a circumvention of Art. 14 Rome II. Both the Commission in its Explanatory Memorandum[312] as well as the CJEU in *Verein für Konsumenteninformation v. Amazon EU Sarl*[313] stressed that such a result must be avoided. Three solutions have been suggested: (1) to apply Art. 14 and to disregard any choice of law agreement that contradicts Art. 14 Rome II;[314] (2) to apply Art. 14 Rome II by analogy to those cases where Art. 4 (3) leads to the application of the contract law if that law has been chosen;[315] (3) to disregard Art. 14 Rome II and to apply the contract law designated by Arts. 3 and 5 – 8 Rome I Regulation.[316]

The first and the second solution should be rejected for the following reason: they deprive in particular consumers and employees of the possibility (under Arts. 6 and 8 Rome I) that the law is applied that is more favourable to them than the law that objectively would govern their contractual relationship and that might be even more favourable to them than the *lex loci damni*. There is no stringent reason for disfavouring them in such a way. Thus, the third solution is preferable: the governing contract law must be determined in full compliance with the Rome I Regulation including its Arts. 3 and 5–8. Art. 14 Rome II does not restrict in any way choice of law agreements for the applicable contract law which parties conclude in advance even if they are not all pursuing a commercial activity. For, Art. 14 Rome II does merely concern choice of law agreements which are immediately directed at the applicable tort law; the determination of the law applicable to contracts is exclusively regulated in Rome I. However, the flexible standard of Art. 4 (3) Rome II should allow taking into account whether the applicable contract law is in fact more favourable to victims who are consumers or employees, passengers or insured persons than the otherwise applicable tort law. **170**

312 Explanatory Memorandum to the Rome II Proposal of 2003: P6_TC1_COD(2003)0168, p. 13 (OJ 2006 C 157 E/371 *et seq.*).

313 *Verein für Konsumenteninformation v. Amazon EU Sarl* (C-191/15) ECLI:EU:C:2016:612 paras. 46 *et seq.* (*supra* note 162).

314 *Boskovic* Rép. Int. Dalloz note 40; *Unberath/Cziupka/Pabst*, in: Rauscher Art. 4 Rom II-VO note 106 *et seq.*

315 See *Kadner Graziano*, RabelsZ 73 (2009) 1 (21 *et seq.*); *Kadner Graziano*, in: Ahern/Binchy (eds.), The Rome II Regulation pp. 113 *et seq.*

316 *von Hein*, in: Calliess Art. 4 Rome II note 69; *von Hein*, ZEuP 2009, 6 (21); *Matthias Lehmann*, in: NK BGB Art. 4 Rom II-VO note 165; *Rühl*, in: BeckOGK Art. 4 Rom II note 108; probably also *Dickinson* para. 4.93, *Bach*, in: Peter Huber Art. 4 note 88 and *Plender/Wilderspin* note 18–116. Also the remarks of the Commission in its Explanatory Memorandum to the Rome II Proposal of 2003: P6_TC1_COD(2003) 0168, p. 13 (OJ 2006 C 157 E/371 *et seq.*) point in this direction: "But where the pre-existing relationship consists of a consumer or employment contract … the secondary connection mechanism cannot have the effect of depriving the weaker party of the protection of the law otherwise applicable. The proposed Regulation does not contain an express rule to this effect since the Commission considers that the solution is already implicit in the protective rules of the Rome Convention: Articles 5 and 6 …" (By the time of the Rome II Proposal [2004] only the Rome Convention existed for the determination of the applicable contract law. The contents of the Rome I Regulation was not yet clear. This explains why the Commission merely cites the predecessors of Arts. 6 and 8 Rome I Regulation and not yet Arts. 5 and 7 Rome I Regulation as well).

171 If the parties, as they may do under Art. 3 (1) sent. 2 Rome I, choose the applicable law to part only of the contract the court must determine whether this chosen law or the objectively applicable law is the law that governs the essential part of the contract and can and should be applied to the tort in question.

cc) Consequences

172 If a manifestly closer link between the tort and the contract is established, it is the regular consequence that the law applicable to the contract extends to the tort. The principle of party autonomy supports this consequence in particular where the parties have agreed on the applicable contract law. Then, the tort rules of this law must be applied. Less often, though not impossible is the vice versa decision that the tort law 'infects' the contract, too.[317]

173 However, an exception must be made where the applicable contract law is an international convention such as the CISG which does not contain tort rules but even expressly excludes tort cases.[318] It has been suggested that in such a case the applicable law is the national law that apart from the convention would apply (in accordance with Arts. 3 *et seq*. Rome I).[319] A contrary and prevailing view holds that in such cases Art. 4 (3) becomes inapplicable because the aim of the provision to apply the same law to the contract and the tort cannot be achieved.[320] In practice, the problem appears to be irrelevant;[321] at least no case law has been reported. However, since the national law additionally applicable to the convention may nevertheless better fit with the tort law of the same country than with the tort law at the place of damage, the first view is probably preferable.

d) The necessary connection between the pre-existing relationship and the tort

174 For pre-existing relationships other than contracts it is likewise necessary that a sufficiently close link between this relationship and the tort exists if the law governing the relationship shall displace the law that otherwise would be applicable under Art. 4 (1) or (2). Thus far, relevant cases are scarce and the respective decisions provide little guidance, if at all. Where the relevant relationship is based on family ties, it is regularly the law of the common habitual residence (Art. 4 (2)) that applies anyway to torts between family members.[322] Then, considerations whether the law applicable to the family relationship should displace the law at the common habitual residence are generally superfluous because they mostly lead to the same law. For the remaining cases the reported decisions concerning contracts (*supra* notes 160 *et seq*.) can be taken as examples how close the link must be.

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317 See thereto *Hohloch*, in: Erman Art. 4 Rom II-VO note 17 (where the tort primarily marks the whole situation).

318 See Art. 5 CISG.

319 See, e.g., *von Hoffmann*, in: Staudinger Art. 41 EGBGB note 11; *Bach*, in: Peter Huber Art. 4 note 87; *R. Koch,* VersR 1999, 1453 (1459).

320 In this sense *von Hein*, in: Calliess Art. 4 Rome II note 62; *Hohloch*, in: Erman Art. 4 Rom II-VO note 17; *Matthias Lehmann*, in: NK BGB Art. 4 Rom II-VO note 166.

321 See also *von Hein*, in: Calliess Art. 4 Rome II note 62, who rightly points to the fact that under Art. 14 Rome II professional parties can choose the applicable tort law in advance; therefore the need for an accessory determination of the applicable law is reduced.

322 See, e.g., *Le Guevel-Mouly a.o. v. AIG Europe Ltd.* [2016] EWHC 1794 (QB) para. 19 (the negligent driver of an accident in Scotland, his injured wife and children all lived in France).

e) Further relevant circumstances

There is an open number of further circumstances which are relevant for the application of Art. 4 (3). They do not all have the same weight; some are rather weak indications with respect to a specific law, for instance, the nationality of one party, or, in traffic accidents, the country where a car is insured or registered.[323] However, an accumulation of several weak connecting factors may overcome the hurdle that Art. 4 (3) establishes. Other connecting factors have a stronger weight, for example the common nationality of the parties (although this factor is again less weighty than the common habitual residence).[324] **175**

Further connecting factors are, e.g., the place where indirect consequences of the tort were or still are sustained;[325] the place where the tortfeasor acted; a later change of the habitual residence (though before the last hearing in the proceedings).[326] **176**

However, in cases where a first accident occurred in one country and a later accident in another country increased the first injuries, this is as such no reason to apply the law governing the first accident also to the second accident.[327] **177**

It is also no relevant connecting factor which law the other involved countries would apply. Otherwise a *renvoi* would be indirectly permitted which Art. 24 Rome II explicitly excludes.[328] **178**

3. Consequences

If the court is satisfied that a manifestly closer connection exists to another than the ordinarily applicable law it must apply this other law. As mentioned (*supra* note 152) the court has no discretion whether or not to apply the manifestly more closely connected law[329] although there is discretion in the weighing of the relevant circumstances.[330] In fact, the **179**

323 *Winrow v. Hemphill* [2014] EWHC 3164 para. 60 ("not a strong connecting factor"); *Schaub*, in: PWW Art. 4 Rom II-VO note 12; *Spickhoff*, in: Bamberger/Roth Art. 4 Rom II-VO note 17; similarly *Junker*, in: MünchKommBGB Art. 4 Rom II-VO note 57.

324 See *Winrow v. Hemphill* [2014] EWHC 3164 para. 54 *et seq*.; also *Matthias Lehmann*, in: NK BGB Art. 4 Rom II-VO note 147; however *contra Schaub*, in: PWW Art. 4 Rom II-VO note 12 (with the unconvincing argument that this connecting factor is not mentioned in the Regulation. For, many are not mentioned; Art. 4 (3) expressly says "in particular" thus giving a non-exhaustive example); *Wurmnest*, in: jurisPK-BGB Art. 4 Rom II-VO note 29; for almost no relevance of the common nationality: *Spickhoff*, in: Bamberger/Roth Art. 4 Rom II-VO note 17.

325 *Winrow v. Hemphill* [2014] EWHC 3164 para. 59.

326 *Contra Matthias Lehmann*, in: NK BGB Art. 4 Rom II-VO note 145 because only a valid choice of law agreement could change the applicable law. However, the taking into consideration of a later change of the habitual residence does not change the applicable law but is a factor among others which in their sum lead to the determination of the applicable law.

327 See, e.g., *XP v. Compensa Towarzystwo SA a.a.* [2016] EWHC 1728 (QB) para. 55 (although the issue was not expressly discussed).

328 *Dickinson* para. 4.86.

329 *Matthias Lehmann*, in: NK BGB Art. 4 Rom II-VO note 167.

330 See Explanatory Memorandum COM (2003) 427 final, p. 12: "… the court enjoys a degree of discretion to decide whether there is a significant connection …"

escape clause degrades Art. 4 (1) and (2) to strong though sometimes rebuttable presumptions.[331]

VIII. Specific torts

180 The following part deals with certain specific torts in greater detail because the determination of the applicable tort law raises special difficulties. Typically, most kinds of international transport can pose the question which law should be applied, in particular, if the precise place of damage remains unclear or lies outside an area under national sovereignty. A similar situation can arise where the tort is committed via the Internet.

1. Road traffic accidents

181 Road traffic accidents are the group of torts that have the greatest practical importance within the scope of Art. 4.

a) International Regulations

aa) Unification of substantive law

182 Thus far, the substantive law of tort liability for road traffic accidents is internationally not unified. The Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD) of 10 October 1989 which provides for strict liability of the carrier (with few grounds of exoneration)[332] is not yet in force and it seems unlikely that it will ever enter into force. The CMR[333] and the CVR[334] regulate the contractual liability of carriers by road and extend their limits of compensation also to their tortious liability towards their contract partners. However, they do not cover the liability resulting from traffic accidents with third persons.

bb) Unification of conflict of law rules

183 The Hague Convention on the Law Applicable to Traffic Accidents of 4 May 1971 unifies which law applies to traffic accidents with vehicles on public or publicly used private grounds.[335] The Convention is in force in 20 European States (plus Morocco), 13 of which are EU Member States.[336] According to Art. 28 (1) Rome II the Hague Convention takes precedence over the Rome II Regulation. Thus, almost half of the EU Member States follow the conflict rules of the Hague Convention, the other half is bound by Rome II. They can join the Hague Convention only if the EU so allows. For the EU States which have not ratified the

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331 The Explanatory Memorandum COM (2003) 427 final, p. 12 states that – now – Art. 4 (1) and (2) were "drafted in the form of rules and not of mere presumptions." Nonetheless, in exceptional cases they can be displaced by par. (3) and function in fact as strong presumptions.

332 See Art. 5 (4) CRTD.

333 Convention on the Contract for the Carriage of Goods by Road (CMR) of 19 May 1956; in force in most European and some Non-European countries and in all EU Member States.

334 Convention on the Contract for the International Carriage of Passengers and Luggage (CVR) by Road of 1 March 1973.

335 See Art. 1 Hague Convention of 1971.

336 Austria, Belgium, Croatia, Czech Republic, France, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Slovakia, Slovenia and Spain.

Hague Convention this instrument is without relevance. They apply exclusively Art. 4 Rome II. Since Art. 24 Rome II forbids a *renvoi*, the Convention can also not be applied indirectly.[337]

184 The basic rule of the Hague Traffic Accidents Convention complies with Art. 4 (1) Rome II: Art. 3 Hague Convention designates as applicable "the internal law of the State where the accident occurred." However, Art. 4 Hague Convention establishes some exceptions in favour of the law of the state where the involved vehicle is registered. Where only one vehicle is involved the law at the place of its registration governs the liability towards the driver, owner or other person in control of the vehicle, the liability towards a passenger as victim if he or she does not habitually reside in the state where the accident occurred and liability towards a victim outside the vehicle who habitually resides in the state of registration. Where two or more persons or vehicles are involved the law at the place of registration applies only if all persons have their habitual residence in the registration state or if all cars are registered in the same state. These rules differ significantly from those of Art. 4 Rome II where the common place of registration constitutes merely a weak connecting factor.[338] The Convention does neither provide for the possibility to agree on the applicable law nor for the application of the *lex domicilii communis*, but – like Art. 17 Rome II – it prescribes that "rules relating to control and safety of traffic" shall be taken into account.[339]

b) Road traffic accidents under Rome II

aa) The sequence of examination

(1) Choice of law agreement

185 Under the Rome II Regulation the determination of the law applicable to a road traffic accident has to start with the question whether the parties expressly or impliedly (with sufficient certainty) agreed on the applicable law and whether the further conditions of Art. 14 Rome II for such a choice are met. In normal traffic accidents such an agreement will be rare although a subsequent choice is always admissible, even if non-professional parties are involved.[340]

186 The parties' choice can, however, not alter the local rules of safety and conduct (Art. 17). Those rules apply to the public at large and cannot be privately disposed of.

(2) Common habitual residence

187 In the absence of any choice of law agreement the next stage is the examination of an eventual common habitual residence of the parties (Art. 4 (2)). Cases are not infrequent where family members with a common habitual residence – at the time of the accident – are involved in an accident abroad, e.g., the family father drives and causes negligently an accident in which his wife and the children are injured.[341] Art. 4 (2) applies as well if both

337 See also *Junker*, in: MünchKommBGB Art. 4 Rom II-VO note 93.

338 See *supra* note 175.

339 Art. 7 Hague Convention of 1971.

340 See Art. 14 (1) (a) Rome II Regulation.

341 See, e.g., *Le Guevel-Mouly a.o. v. AIG Europe Ltd.* [2016] EWHC 1794 (QB).

parties of an accident abroad have nothing in common except their habitual residence in the same – other – country.[342] Then, the law of that country governs the tortious liability (including an eventual contributory negligence of the victim).

188 The parties meant by Art. 4 (2) are the parties directly involved in the traffic accident as tortfeasor who caused the damage and victim who sustained it. A tortfeasor in this sense is not only the actual driver of the involved car but also the owner or holder who is responsible for the car under national strict liability law. On the other hand is it therefore irrelevant where the insurer of the tortfeasor has its habitual residence; this is also true where the victim has, or alleges to have, a direct claim against the insurer.[343] Likewise, where the tortfeasor cannot be identified the agency which then may have to compensate the victim does not become a party relevant for Art. 4 (2).[344] In such cases, merely the *lex loci damni* applies. However, whether a direct claim against the insurer exists can be inferred either from the law governing the tort or governing the insurance contract (see Art. 18 and the comments there).

189 Even if the parties have a common habitual residence, Art. 4 (3) must be taken into account and may, though in exceptional cases only, lead to another law, even to the law at the place of damage, if, for instance, all involved vehicles are registered and insured in that state[345] and the surviving dependants of the victim also live there.

(3) Place of damage

190 In the absence of a choice of law agreement and of a common habitual residence of the parties the basic rule of Art. 4 (1) has to be applied. Thus, in most cases the general rule of *lex loci damni* governs tortious liability for road traffic accidents.[346] The place of damage is the place where the primary victim sustained the damage; where further – indirect – consequences happened, is irrelevant. The material and immaterial loss of dependants of a deceased person is therefore a mere indirect damage.[347] It is regularly uncontroversial where the road accident occurred.

191 In exceptional cases, though slightly more often than under Art. 4 (2), it may become necessary to consider whether the law found under Art. 4 (1) should be displaced by a manifestly more closely connected law (Art. 4 (3)). It is however regularly no such significantly closer connection if all involved vehicles are registered and insured in the same state

342 E.g., OLG München 4 November 2016, BeckRS 2016, 19435 (two German drivers collide in Austria).

343 In this sense also *Jacobs v. Motor Insurers Bureau* [2010] EWHC 231 (QB).

344 See *Jacobs v. Motor Insurers Bureau* [2010] EWHC 231 (QB) para. 42 *et seq*.

345 This fact alone would not suffice to displace the *lex domicilii communis*; see already *supra* note 175; see also *Thorn*, in: Palandt Art. 4 Rom II-VO note 14 (where the cars were rented in the state of the accident where they were registered and insured); in the same sense *Unberath/Cziupka/Pabst*, in: Rauscher Art. 4 Rom II-VO note 161; under the prior law *Sieghörtner*, NZV 2003, 105 (106).

346 See, e.g., *Florin Lazar représenté légalement par Luigi Erculeo v. Allianz SpA* (C-350/14) ECLI:EU:C:2015:802 (Italian law); OLG München 1 December 2017, NJW-RR 2018, 82 (Italian law); OLG München 21 October 2016, NJW 2017, 338 (Portuguese law); LG Saarbrücken 11 May 2015, NJW 2015, 2823 (French law); *Jacobs v. Motor Insurers Bureau* [2010] EWHC 231 (QB) (Spanish law).

347 *Florin Lazar représenté légalement par Luigi Erculeo v. Allianz SpA* (C-350/14) ECLI:EU:C:2015:802; see also *supra* note 87.

being not the country of damage.[348] On the other hand, where a single driver collides with a bus with passengers from different countries some of them residing in the same country as the driver, Art. 4 (3) should allow applying to all passengers the law of the place of accident instead of partly the law of the common habitual residence. This appears justified also because the level of compensation has to take into account the circumstances at each victim's habitual residence.[349] The same may hold true for mass collisions where some victims and tortfeasors share a common habitual residence while others do not, in particular in cases where it is difficult or even impossible to identify who was tortfeasor and who victim.

bb) Special aspects

The following special rules must be taken into consideration for all steps in the sequence of examination. **192**

(1) Rules of safety and conduct

Local traffic and safety rules at the place of the accident remain always applicable (Art. 17). They determine, for instance, whether a party had a right of priority or which speed limit had to be observed. **193**

(2) Assessment of damages

Further, in case of compensation for personal injury the assessment of damages shall take into account the actual losses and costs the victim sustains at his or her habitual residence in order to avoid any over- or undercompensation.[350] **194**

(3) Direct claim against insurer

Since motor vehicles must be insured in EU Member States, it is an often vital question whether the victim of a traffic accident has a direct claim against the insurer of the tortfeasor. The victim can direct his or her claim against the insurer of the tortfeasor if either the law designated by Art. 4 (1) – (3) or, alternatively, the law that governs the respective insurance contract provides for such a direct claim.[351] The content of the claim depends, however, still on the law applicable to the victim's claim against the tortfeasor. For details see *infra* the comment on Art. 18. **195**

(4) Recourse action and distribution of damage between several tortfeasors

Also, the law that governs a recourse action against other tortfeasors is the law applicable to the tort claim which the victim has against the tortfeasor who requests contribution. See further *infra* Arts. 19 and 20. **196**

(5) International jurisdiction

The courts either in the state of the defendant's domicile or in the state where the road traffic accident occurred have jurisdiction to hear the case.[352] Although the CJEU allows the victim **197**

348 *Matthias Lehmann*, in: NK BGB Art. 4 Rom II-VO note 169; *supra* note 175.

349 See Recital (33) Rome II Regulation.

350 See Recital (33) Rome II Regulation; thereto *Czaplinski* 79 *et seq*.; see further *Rühl*, in: BeckOGK Art. 4 Rom II note 128 *et seq*.; *Wurmnest*, in: jurisPK-BGB Art. 4 Rom II-VO note 12.

351 LG Saarbrücken 11 May 2015, NJW 2015, 2823 (collision between German and French owned cars in France; French tort law applicable).

352 See Arts. 4 and 7 (2) Brussels I*bis* Regulation.

of a tort to choose between the courts at the place where the tortfeasor acted and the courts at the place where the – primary – damage was sustained,[353] in road traffic accidents this possibility plays regularly no role since both places are the same. That in a car accident the driver acted on one side of the border and the damage was sustained on the other side has evidently not yet happened. If so, the victim could choose between the courts of both countries.

198 According to Art. 13 (2) Brussels I*bis* Regulation the victim of a traffic accident can sue the insurer of the tortfeasor in the state of the own (the victim's) domicile if the applicable law provides for a direct claim and if the insurer has its seat in an EU Member State.[354]

(6) Matters of proof

199 The tort law that is applicable in accordance with Art. 4 (1) – (3) governs also presumptions of law and the burden of proof (Art. 22 (1)). Other issues of evidence – the admissible means of proof, the necessary degree of conviction etc. – are purely procedural matters which are regulated by the *lex fori*.[355] A disputed issue is the qualification of the prima facie evidence. The probably prevailing opinion classifies it as a matter of substantive law to which the *lex causae* applies.[356] Others regard it as part of the procedural law.[357] It appears preferable that prima facie evidence and comparable legal institutes (e.g., *res ipsa loquitur*) belong to the province of substantive law since they function like presumptions and concern the burden of proof which they usually place on the party who attacks them.

2. Maritime torts

200 Maritime torts are torts which are committed aboard ships or with ships as, for instance, collisions. Their peculiarity follows from the fact that such torts can happen on the high seas which are under no sovereign government of a particular state whose law can be applied. However, also on inland water(ways) or in zones of the sea which are attributed to a specific state, international torts can occur. Many of those torts fall within the scope of international conventions which mostly provide for uniform substantive law among the contracting states.[358] As far as they reach, the conventions principally prevail over the conflict of law rules of the Rome II Regulation (Art. 28 (1) Rome II). The crux of the conventions is, however, that they regularly apply only if the situation is linked to one or often two contracting states and that by far not all states have ratified the conventions.[359] In some cases only few countries are contracting states of the respective instrument. The international

353 See *Bier v. Mines de Potasse d'Alsace* (Case 21/76) [1976] ECR 1735.

354 See *FBTO v. Jack Odenbreit* (C-463/06) ECLI:EU:C:2007:792.

355 See Art. 22 (2) Rome II Regulation.

356 In this sense: e.g., AG Geldern, NJW 2011, 686 (687); see, e.g., *Dörner*, in: Hk-BGB Art. 22 Rom II-VO note 1; *Junker*, in: MünchKommBGB Art. 22 Rom II-VO note 8; *Limbach*, in: NK BGB Art. 22 Rom II-VO note 2a; *Picht*, in: Rauscher Art. 22 Rom II-VO note 8; *Thorn*, in: Palandt Art. 22 Rom II-VO note 1.

357 In this sense: e.g., LG Saarbrücken 11 May 2015, NJW 2015, 2823; *Hohloch*, in: Erman Art. 22 Rom II-VO note 4; *Altenkirch*, in: Peter Huber Art. 22 note 9; *Spickhoff*, in: Bamberger/Roth Art. 22 Rom II-VO note 3.

358 For relevant conventions see, e.g., *Basedow*, RabelsZ 74 (2010) 118 *et seq*.; *Hartenstein*, TranspR 2008, 143 *et seq*.; *Junker*, in: MünchKommBGB Art. 4 Rom II-VO note 124 *et seq*.

359 The status of the maritime conventions can be found under: www.imo.org.

conventions therefore form a global net with many holes. Even within the EU, the status of ratifications is far from uniform.

a) International conventions

International conventions with relevance for maritime torts exist for collisions of ships, for damage through pollution and for damage due to transport of persons or goods on waterways. Only those conventions which are already in force will be mentioned. **201**

Collisions between sea-going ships or between such ships and vessels of inland navigation, in whatever waters the collision takes place,[360] are regulated by the (Brussels) Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels of 23 September 1910.[361] In general, this Convention applies when all involved vessels belong to – different – Contracting States.[362] A ship belongs to a state if it flies her flag. The Convention determines the conditions of liability for damage. The Convention is supplemented by two further conventions including their amendments: the (London) Convention on Limitation of Liability for Maritime Claims (LLMC) of 19 November 1976 which permits shipowners and salvors to limit their liability under the 1910 Collisions Convention to certain maximum amounts and the (Brussels) Convention for the Unification of Certain Rules concerning Civil Jurisdiction in Matters of Collision of 10 May 1952 which in principle grants jurisdiction to the courts at the defendant's habitual residence or place of business.[363] Rather similar Regulations have been concluded for collisions on inland waterways, namely the (Geneva) Convention relating to the Unification of Certain Rules of Law concerning Collisions in Inland Navigation of 15 March 1960 with its accompanying Convention on Limitation of Liability in Inland Navigation (CLNI) of 4 November 1988 and its successor CLNI 2012. **202**

In the field of pollution, the Convention on Civil Liability for Oil Pollution Damage (CLC) of 29 November 1969 with its successor in the form of the Protocol of 27 November 1992 provides for strict liability – with few exemption grounds – of an owner whose oil-transporting ship caused damage by pollution of the transported oil. The Convention allows the ship-owner to limit its liability to certain maximum amounts if the owner constitutes a fund of reasonable means. In addition, the accompanying Convention on the Establishment of an International Fund for the Compensation for Oil Pollution Damage (FUND 1992) of 1992 provides (like its predecessor of 1971) for further means through an International Fund **203**

360 See Art. 1 Collisions Convention of 1910; thus, the Convention covers collisions on inland waterways if used by sea-going ships.

361 The Convention is in force in all EU Member States except Bulgaria, Czech Republic, Lithuania and Slovakia.

362 See Art. 12 Collisions Convention; this provision prescribes further: Where persons from non-contracting states are interested the involved contracting state can insist on reciprocity for the application of the Convention's provisions. Where all interested persons belong to the same state as the court seised then the national law of that state applies.

363 See Art. 1 (1) (a) Collision Jurisdiction Convention; further jurisdiction is granted to the courts at the place where a ship of the defendant was arrested or could have been arrested if no security had been furnished; also the courts at the place of collision have jurisdiction if the collision occurred on the territory of a – contracting – state. The plaintiff may choose where to sue, and the parties can agree on the jurisdiction (see Arts. 1 and 2).

where compensation under the Liability Convention does not fully restore the victim. Later Protocols and amendments updated these instruments. A further Convention on Civil Liability for Bunker Oil Pollution Damage of 23 March 2001 provides for compensation for pollution damage caused by the escape of oil that is used for the operation of a ship.

204 There exist several international conventions on the carriage of persons and goods by sea or inland waters. Although they regulate aspects of the contracts for such transports, they are of relevance for tort claims. For, regularly, they limit the liability of the carrier by maximum amounts and these limits usually apply as well to tortious claims for damage caused to passengers or goods. With respect to the transport of persons this is so provided for by the (Athens) Convention Relating to the Carriage of Passengers and their Luggage by Sea (PAL) of 13 December 1974,[364] its Amending Protocol of 1 November 2002 and the (Geneva) Convention on the Contract for the International Carriage of Passengers and Luggage by Inland Waterway (CVN) of 6 February 1976[365] and its Amending Protocol of 5 July 1978. Also, for the transport of goods by sea the limits of liability (and the defences) apply to tort claims under the Visby Rules of 23 February 1968[366] and under the Hamburg Rules of 31 March 1978[367] and exclude any more far-reaching tort claim. The same solution is provided for by the (Budapest) Convention on the Contract for the Carriage of Goods by Inland Waterways (CMNI) of 22 June 2001.[368] The Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material (NUCLEAR) of 17 December 1971 deals with liability for damage due to the transport of nuclear material. Since damage through nuclear energy is excluded from the scope of the Rome II Regulation the Convention needs nothing more than being mentioned here.

b) The Rome II Regulation

205 Where none of the international conventions applies, Art. 4 Rome II Regulation steps in unless the parties agreed on the applicable law in accordance with Art. 14 Rome II.

aa) Collisions

206 For collisions of vessels within territorial waters[369] Art. 4 (1) designates as applicable the law of the country to whose sovereignty the territorial waters are subject[370] except that all of the

364 See Art. 12 (1) Athens Convention.

365 See Art. 13 Geneva Convention.

366 Art. 3 Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading ("Visby Rules") which introduces a new Art. 4 *bis* (1) which extends the limits of liability to all claims in respect of loss or damage to goods "whether the action be founded in contract or in tort."

367 See Art. 7 (1) United Nations Convention on the Carriage of Goods by Sea (Hamburg Rules). The successor of the Hamburg Rules, the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules) of 2008 is not yet in force.

368 See Art. 22 CMNI.

369 Arts. 2 and 3 United Nations Convention on the Law of the Sea (UNCLOS) define the "territorial sea" to which the sovereignty of coastal states extends. These are up to 12 nautical miles from the coastal baseline.

370 *Basedow*, RabelsZ 74 (2010) 118 (137); *von Hein*, in: Calliess Rome II note 72; *Hohloch*, in: Erman Art. 4 Rom II-VO note 28; *Plender/Wilderspin* note 18–052; *Spickhoff*, in: Bamberger/Roth Art. 4 Rom II-VO note 23; *Thorn*, in: Palandt Art. 4 Rom II-VO note 22; *Wurmnest*, in: jurisPK-BGB Art. 4 Rom II-VO note 54.

involved ships carry the same flag. Then, the law of the flag state decides.[371] It will be rare though not impossible that in accordance with Art. 4 (3) still another law may be significantly more closely connected which becomes applicable.

207 For collisions on the high seas, again the common flag of the involved vessels determines the applicable law in analogy to Art. 4 (2).[372] In the absence of a common flag and since no *locus damni* in a specific country exists the principle of the closest connection should apply – in analogy to Art. 4 (3). Therefore, a common place of registration or the common habitual residence of the owners in the same state or other connecting factors that all involved persons or ships have in common should determine the applicable law.[373] The prevailing view, however, appears to prefer the law of the flag or of the place of registration of the damaged ship instead.[374] This latter rule can lead to – as the case may be, insurmountable – difficulties if each of the involved ships is damaged and has contributed to the damage of the other(s).

bb) Torts on board

208 Torts aboard a ship may occur within the groups of crew members, of passengers, of visitors or even of pirates who entered the ship and, probably more so, between members of the different groups. In a number of situations an accompanying – employment or transport – contract may exist.

209 In the absence of a valid choice of law agreement torts aboard a ship are generally governed by the law of the ship's flag which is regularly also the law of the state where the ship is registered (for flags of convenience see *infra* notes 213 *et seq.*). This holds at least true as long as the ship sails on the high seas.[375] This was as well the solution which the Commission's Rome II Proposal of 2003 suggested.[376] Although the final Regulation deleted the respective provision it is agreed that its essence should not be rejected, in

371 See *von Hein*, in: Calliess Rome II note 72; *Hohloch*, in: Erman Art. 4 Rom II-VO note 28; *Junker*, in: MünchKommBGB Art. 4 Rom II-VO note 141; *Spickhoff*, in: Bamberger/Roth Art. 4 Rom II-VO note 23; *Thorn*, in: Palandt Art. 4 Rom II-VO note 22; *Wurmnest*, in: jurisPK-BGB Art. 4 Rom II-VO note 54.

372 See the references in the preceding fn.; also *Dicey/Morris/Collins* para. 35–198 *et seq.*; *Dickinson* para. 4.55; *Rühl*, in: BeckOGK Art. 4 Rom II-VO note 77; however, differently – only the common habitual residence of the shipowners is relevant – *Bach* in: Peter Huber Art. 4 note 97.

373 Also *Plender/Wilderspin* note 18–051 (though with the exception that clearly one ship is "innocent"; then, the law of this ship's flag state shall apply); *Rühl*, in: BeckOGK Art. 4 Rom II-VO note 77.

374 *von Hein*, in: Calliess Rome II note 72; *Thorn*, in: Palandt Art. 4 Rom II-VO note 22; *Wurmnest*, in: jurisPK-BGB Art. 4 Rom II-VO note 55; probably also *Dickinson* para. 4.56; for the application of the *lex fori*: *Basedow* RabelsZ 74 (2010), 118 (134 *et seq.*).

375 *Bach* in: Peter Huber Art. 4 note 101; *Junker*, in: MünchKommBGB Art. 4 Rom II-VO note 35; *Matthias Lehmann*, in: NK BGB Art. 4 Rom II-VO note 106; *Plender/Wilderspin* note 18–050; *Thorn*, in: Palandt Art. 4 Rom II-VO note 23; *Wurmnest*, in: jurisPK-BGB Art. 4 Rom II-VO note 56; see also, although in the jurisdictional context and with respect to an industrial action, the CJEU in *DFDS Torline A/S v. SEKO Sjöfolk Facket för Service och Kommunikation* (C-18/02) [2004] ECR I-1417 para. 44: "The nationality of the ship can play a decisive role only if the national court reaches the conclusion that the damage arose on board the *Tor Caledonia* sc. the ship in question. In that case, the flag State must necessarily be regarded as the place where the harmful event caused damage."

376 COM (2003) 427 final, Art. 18 (c).

particular since it reflected a widely accepted rule.[377] The flag, respectively the place of registration constitutes the link to the country where the place of damage is deemed to be located in such cases.[378] This does, however, not mean that the ship – as in former days – should be regarded as a mobile part of that country. However, if both parties of a tort on board have their habitual residence in the same state, the law of this country applies (Art. 4 (2)).

210 Some dispute concerns the law applicable to torts aboard a ship in territorial waters. Partly, it is argued that the place of damage is in the state which exercises sovereignty over these waters so that the law of that state applies.[379] Others prefer the law of the ship's flag.[380] The latter view is preferable since even in a harbour torts aboard a ship are more closely connected with the ship (and the law to be observed on it) than with the harbour or other place in territorial waters where the ship anchors for – regularly – a limited time. This is particularly evident for cruises where the ship enters other territorial waters and harbours every second or third day. It would lead to arbitrary results if the tort within the ship would be governed by the law of the state where the ship just happens to anchor and by the law of the flag state if the ship has already left the territorial waters; let alone that it may be difficult to establish whether the tort occurred inside or outside territorial waters. Further, every other day the law would change that persons on board would have to observe.

211 Where the tort is at the same time a breach of contract or is closely connected with an employment or transport contract the accessory determination of the applicable law under Art. 4 (3) Rome II may lead to the law that governs this contract.[381]

cc) Stationary maritime installations

212 It is further common ground that torts on drilling platforms, fire-ships, wind power installations and the like which are stationed within the territorial waters, the economic zone or over the continental shelf which a state is entitled to use are governed by the law of that state. The place of damage is still in that country.[382] This solution follows the CJEU'S decision in *Herbert Weber v. Universal Ogden Services* on the jurisdictional issue (under Art. 5 (3) Brussels Convention).[383]

377 See for instance for England: *Roerig v. Valiant Trawlers* [2002] EWCA Civ. 21; for Germany: OLG Hamburg IPRspr 1935–1944 no. 89.

378 *Dicey/Morris/Collins* para. 35–198 *et seq*.; *Dickinson* para. 4.55.

379 *Plender/Wilderspin* note 18–053 (mainly relying on former English precedents); *Wurmnest*, in: jurisPK-BGB Art. 4 Rom II-VO note 56 (however, only if the ship there anchors); probably also *von Hein*, in: Calliess Rome II note 72 and *Junker*, in: MünchKommBGB Art. 4 Rom II-VO note 143.

380 See, e.g., *Basedow* RabelsZ 74 (2010) 118 (133); *Magnus*, in: FS Willibald Posch (2011), p. 443 (457); *Schaub*, in: PWW Art. 4 Rom II-VO note 16; *Thorn*, in: Palandt Art. 4 Rom II-VO note 23.

381 For usual application of the law governing the contract: *von Hein*, in: Calliess Art. 4 Rome II note 72.

382 *Basedow* RabelsZ 74 (2010), 118 (133); *Junker*, in: MünchKommBGB Art. 4 Rom II-VO note 34; *Matthias Lehmann*, in: NK BGB Art. 4 Rom II-VO note 106; *Plender/Wilderspin* note 18–046.

383 *Herbert Weber v. Universal Ogden Services Ltd.* (C-37/00) [2002] ECR I-2013.

dd) Problems with the flag

It is a wide-spread practice in shipping circles that owners register their ships in another country than that of their business seat in order to save costs.[384] The ships then fly the flag of the state of registration (flag of convenience, for instance of Liberia, Panama, Malta and others) although those who own, manage and operate the ship have no further connection with the flag state. Whenever, according to Art. 4 Rom II, the law of the flag state is the applicable law and this flag is a flag of convenience it becomes questionable whether this law should in fact be applied. In order to ensure the observance of the general principle of the closest connection it appears preferable to apply instead of the law of the flag the law that is most closely connected to the situation.[385] For the determination of this law all relevant connecting factors have to be taken into account, in particular, where the ship owner's place of business is located, where the ship's regular homeport is situated, the nationality of the ship's crew etc.[386] **213**

Where the flag state consists of separate territorial units with different tort law (as, for instance, the US), the law of that unit should be applicable where the ship is registered.[387] **214**

If the ship flies no flag at all, the law at its home port should replace the law of the flag state. **215**

3. Aerial torts

Aerial torts are wrongs either committed in airplanes or comparable objects[388] flying in the atmosphere or committed through them by damaging persons or property outside the aircraft. **216**

a) International conventions

The most important international conventions with relevance for aerial torts are the Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air of 12 October 1929 with several Protocols and its successor, the Montreal Convention of 28 May 1999 which gradually replaces the Warsaw regime. Both Conventions unify essential aspects of contracts for air transport but they also apply to cases of air carriage where no valid contract was concluded.[389] The Conventions provide for the – licensed[390] – air carrier's liability for death or bodily harm of passengers and for damage to their baggage or to cargo **217**

384 For a recent case of the CJEU where a flag of convenience was involved see, e.g., *Fonnship A/S v. Svenska Transportarbetareförbundet*, *Facket för Service och Kommunikation (SEKO)* (C-83/13) ECLI:EU:C:2014:2053 (flag of Panama).

385 *Basedow* RabelsZ 74 (2010), 118 (133); *Magnus*, in: FS Willibald Posch (2011), p. 443 (457); *Temming*, in: NK BGB Art. 9 Rom II-VO note 57 suggests a correction of the law of a flag of convenience via Art. 16 and 26 Rome II (in the context of industrial actions).

386 See also *Basedow* RabelsZ 74 (2010), 118 (133).

387 Also *Dickinson* para. 4.55 fn. 158.

388 E.g., helicopters, autogyros, zeppelins etc.

389 See expressly Art. 29 Montreal Convention; in *Eleonore Prüller-Frey ./. Norbert Brodnig and Axa Versicherung AG* (C-240/14) ECLI:EU:C:2015:567.

390 See the case *Eleonore Prüller-Frey ./. Norbert Brodnig and Axa Versicherung AG* (C-240/14) ECLI:EU:C:2015:567 where the carrier was no licensed air carrier.

as well as for damage through delay.[391] The liability is limited to specified amounts.[392] These limits apply to concurring tort claims under national law as well.[393] The EU has extended the application of the Montreal Convention even to inland flights in the EU operated by air carriers seated in the EU.[394] The Convention does not cover such internal flights.

218 A further instrument regulates the liability for damage sustained on the ground through aircrafts, namely the (Rome) Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface of 7 October 1952. The operator is strictly liable – with certain grounds of exoneration – for any damage which its aircraft in flight causes on the ground to third persons.[395]

b) The Rome II Regulation

219 Where no international convention applies, aerial torts have to be dealt with in accordance with Art. 4 Rome II Regulation. Unless the Montreal Convention covers the case, civil liability for an air crash is thus governed by the law that Art. 4 designates.[396] In essence, the principles applicable to maritime torts under the Rome II Regulation apply *mutatis mutandis* also to aerial torts.

aa) Collisions

220 In case of collisions over national territory and in the absence of a choice of law by the parties the law at the place of the accident is applicable,[397] except where both aircraft are registered in the same country and carry the same national emblem which for aircrafts represents the connection to a specific country.[398]

221 For collisions of aircrafts over the high seas or over an area outside any country's sovereignty, if there is no choice of law agreement and no common national emblem of the involved aircraft, the prevailing view favours the law that is indicated by the national emblem of the damaged plane.[399] For the reasons given *supra* note 207 again the most closely connected law should be applied.[400]

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391 See Arts. 17 *et seq*. Warsaw as well as Montreal Convention.

392 See Art. 22 Warsaw Convention; Arts. 21 and 22 Montreal Convention.

393 See also *Junker*, in: MünchKommBGB Art. 4 Rom II-VO note 105.

394 See Art. 1 no. 4 Regulation No. 889/2002 of 13 May 2002 amending Council Regulation (EC) No. 2027/97 on air carrier liability in the event of accidents, OJ 2002 L 140, p. 2.

395 See Art. 1 of this Convention.

396 See the CJEU in *Eleonore Prüller-Frey ./. Norbert Brodnig and Axa Versicherung AG* (C-240/14) ECLI:EU:C:2015:567 para. 37 *et seq*.

397 See *Junker*, in: MünchKommBGB Art. 4 Rom II-VO note 101; *Plender/Wilderspin* note 18–060; *Unberath/Cziupka/Pabst*, in: Rauscher Art. 4 Rom II-VO note 136; *Wurmnest*, in: jurisPK-BGB Art. 4 Rom II-VO note 58.

398 *Bach*, in: Peter Huber Art. 4 note 97; *Wurmnest*, in: jurisPK-BGB Art. 4 Rom II-VO note 58.

399 *Dickinson* para. 4.56; *Junker*, in: MünchKommBGB Art. 4 Rom II-VO note 101; *Thorn*, in: Palandt Art. 4 Rom II-VO note 24; *Unberath/Cziupka/Pabst*, in: Rauscher Art. 4 Rom II-VO note 136; *Wurmnest*, in: jurisPK-BGB Art. 4 Rom II-VO note 58.

400 Also *Calvo Caravaca/Carrascosa González* cap. XXXI note 80.2.

bb) Torts on board

Torts aboard an aircraft are governed first by the law chosen by the parties (Art. 14 Rome II). In the absence of an agreement, secondly, the law of the common habitual residence of the parties to the tort applies (Art. 4 (2)).[401] Thirdly, where the board delict leads to an air crash on national territory, for instance, the willful steering of the aircraft against a mountain, the place of the crash should determine the applicable law. It is the place of damage in the sense of Art. 4 (1). Fourthly, where the flight passes no borders or the tort is committed during the aircraft's stay on the ground, the law of that country should apply.[402] Fifthly, to all other situations – air crash into the ocean, tort during international flight, hijacking of aircraft – the law indicated by the national emblem of the aircraft should apply.[403] However, where the tort is closely linked with the contract of carriage (stewardess pours negligently hot coffee on passenger during service) it will often be appropriate to apply the law governing the contract to the tortious liability of the air carrier (Art. 4 (3) sent. 2 Rome II). **222**

4. Railway torts

Railway torts are primarily those where the tort is committed on passengers or transported goods during rail transport. Often, though not necessarily a contract of carriage will exist. In many cases, for instance collisions or other events that bring the train to a halt, the place where the damage occurred can be identified. In others, this may be impossible (during voyage from Paris to Amsterdam a terrorist attacks and injures passengers of the train, open whether in France or in the Netherlands). Accidents at crossings of the railway with roads generally follow the rules for road accidents. **223**

a) International conventions

Like in the other areas of transport, the substantive law of transport contracts by rail has been widely unified by international instruments. Although they do not regulate torts, they extend the limits and defences applying to contracts also to torts in or to trains and thus affect railway torts indirectly. The central act is the Convention concerning International Carriage by Rail (COTIF) in its version of 9 March 1999 with later amendments.[404] The Convention has several annexes which regulate specific parts of rail transports, in particular Appendix A (Uniform Rules concerning the Contract of International Carriage of Passengers by Rail – CIV) and Appendix B (Uniform Rules concerning the Contract of International Carriage of Goods by Rail – CIM). The Appendices provide for strict liability (with certain grounds of exemption)[405] of the carrier for damage to passengers or transported goods; the amount of damages is limited. The defences, limitations and prescription periods of the Convention apply to all kinds of claims including those in tort.[406] Further, the – **224**

401 *Thorn*, in: Palandt Art. 4 Rom II-VO note 25.

402 In the same sense *Schaub*, in: PWW Art. 4 Rom II-VO note 17; *Thorn*, in: Palandt Art. 4 Rom II-VO note 25; *Unberath*/*Cziupka*/*Pabst*, in: Rauscher Art. 4 Rom II-VO note 137.

403 *Junker*, in: MünchKommBGB Art. 4 Rom II-VO note 102; *Thorn*, in: Palandt Art. 4 Rom II-VO note 25; *Wurmnest*, in: jurisPK-BGB Art. 4 Rom II-VO note 59.

404 COTIF, including its Appendices A and B, is in force in all EU Member States and further States in Europe, North Africa and Near East.

405 See Art. 26 § 2 CIV and Art. 23 § 2 and § 3 CIM.

406 See Art. 52 CIV and Art. 41 CIM.

contractual – liability of passengers towards their carrier is regulated.[407] Torts between passengers are not covered.

225 The EU has enacted a special Regulation of 23 October 2007 (No. 1371/2007) on rail passengers' rights and obligations. Its Annex I reproduces and makes applicable CIV to domestic passengers, too.

b) The Rome II Regulation

226 If passengers or transported goods on an international rail transport sustain damage due to a railway accident, in Europe most consequences also in tort will thus be regulated by the COTIF and its Appendices A and B.[408] The Rome II Regulation steps in, only if the damage occurs in situations where the Convention is inapplicable as, for instance, to torts between passengers. In this latter case, in the absence of a choice of law agreement between the parties (Art. 14) and if the parties do not have their habitual residence in the same state (Art. 4 (2)), the place decides where the damage occurred (Art. 4 (1)).[409] In most cases it is likely that this place can be ascertained. Where this is impossible, the law applies that is most closely connected with the case (Art. 4 (3)). In particular, where the same law governs the contract of carriage of both parties this law may constitute the most closely connected law. As last resort the law of the habitual residence of the victim should be applicable.

227 For torts between passenger and carrier and vice versa, as far as not covered by COTIF and its appendices, the normal sequence of examination must be followed: an eventual choice of law agreement; an eventual common habitual residence; the place of damage; an eventually closer connection, for instance, because of the contract of carriage.[410]

5. Space torts

228 Although still rare it has become more and more real that torts are being committed in the orbit (outside the atmosphere of our globe) or from there.[411] Objects collide in the orbit; astronauts onboard a spaceship may injure each other; objects or debris from the orbit may reach the earth and cause damage there.

a) International conventions

229 The Convention on International Liability for Damage Caused by Space Objects of 29 March 1972 unifies the substantive law of liability for damage through space objects, however, only between states. The state which launches a space object is strictly liable for any

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407 Art. 53 CIV.

408 *Hohloch*, in: Erman Art. 4 Rom II-VO note 29; *Junker*, in: MünchKommBGB Art. 4 Rom II-VO note 120, 122; *Wurmnest*, in: jurisPK-BGB Art. 4 Rom II-VO note 44.

409 Also *Junker*, in: MünchKommBGB Art. 4 Rom II-VO note 123; *Wurmnest*, in: jurisPK-BGB Art. 4 Rom II-VO note 45.

410 See also *Schaub*, in: PWW Art. 4 Rom II-VO note 15; *Spickhoff*, in: Bamberger/Roth Art. 4 Rom II-Vo note 30; *Wurmnest*, in: jurisPK-BGB Art. 4 Rom II-VO note 45.

411 For instance, on 10 February 2009 the Russian satellite "Kosmos 2251" collided with the satellite "Iridium 33" of a private operator. Both satellites were entirely destroyed and left two clouds of altogether more than 100.000 fragments each of which can cause serious damage to other space objects.

damage "on the surface of the earth or to aircraft flight"[412] and liable in fault for damage to other space objects or persons therein.[413] The Convention does not provide for direct claims of natural or legal persons who suffer damage through space objects. Only their state or another involved state can claim compensation for their damage.[414] For this reason the Convention leaves national tort law unaffected.[415]

230 For the International Space Station (ISS) a special Intergovernmental Agreement of 29 January 1998 provides that each state which cooperates in this project[416] "shall retain jurisdiction and control over the elements it registers and over personnel in or on the Space Station who are its nationals".[417] Further, the participating states agreed that they waive any claims against the other cooperating states and that the pre-mentioned Liability Convention of 1972 shall apply.[418] Tort claims of individuals remain unaffected.

b) The Rome II Regulation

231 Thus, the law applicable to space tort claims of natural or legal persons must generally be determined in accordance with the Rome II Regulation except where the space mission constitutes an *actus iure imperii* and falls outside the scope of Rome II.[419] Then, the remaining national conflicts rules apply.

232 Under the Regulation a choice of law agreement takes precedence (Art. 14 Rome II). In the absence of such an agreement, if damage is done on national territory by falling parts of space objects, the law of the country should apply where this happens (Art. 4 (1)).[420] Where such debris falls on a ship on the high seas and causes damage, the law of the ship's flag state should decide – in analogous application of Art. 4 (1).

233 For collisions in the orbit it is suggested to apply the law of the state that launched the space object.[421] Where the involved objects (for instance, spaceships and/or satellites) were launched by the same state, indeed, this state's law should apply (Art. 4 (2)). Where they were launched by different states, the most closely connected law should apply. Only as last resort the law of the damaged space object should be applicable.

234 For torts within or on a space object, in the absence of a choice of law agreement and where tortfeasor and victim have no common habitual residence, the law of the state should apply that launched the object or from where it was launched.[422] For, this is the

412 Art. II of the Convention.

413 Art. III of the Convention.

414 See Arts. VII *et seq*. of the Convention.

415 See Art. XI (2) of the Convention; also *Junker*, in: MünchKommBGB Art. 4 Rom II-VO note 114.

416 These are the United States, Russia, the European Partner (Belgium, Denmark, France, Germany, Italy, the Netherlands, Norway, Spain, Sweden and Switzerland), Japan and Canada.

417 Art. 5 Intergovernmental Agreement.

418 Arts. 16 and 17 Intergovernmental Agreement.

419 See *Junker*, in: MünchKommBGB Art. 4 Rom II-VO note 114.

420 Also *Junker*, in: MünchKommBGB Art. 4 Rom II-VO note 115.

421 *Junker*, in: MünchKommBGB Art. 4 Rom II-VO note 115.

422 Left open by *Junker*, in: MünchKommBGB Art. 4 Rom II-VO note 115 (either law of launching state or of state where the object was registered).

rule which governs liability both under the Space Liability Convention as well as under the Intergovernmental Agreement concerning the ISS. Space objects are seen as belonging to the state from where they started. For the ISS it is therefore decisive, in or on which module the tort occurred, because the different modules of which the ISS consists belong to different nations.[423]

6. Torts on the Internet

235 Internet or cyber torts are those torts which are committed by using in one way or the other the Internet. It is therefore primarily a special mode of committing a tort that characterises them.[424] Internet torts can have enormous impacts, for instance, if a tortfeasor intrudes on the computer system steering the power grid of a huge power station and cuts off the energy provision of thousands of households, shops, a number of hospitals and other public facilities.

236 Thus far, no international convention exists which unifies the substantive law or the conflict of law rules for such torts. Therefore, in principle, the Rome II Regulation determines the law applicable to these torts.

237 However, Internet torts with the probably greatest practical importance, namely defamation and infringement of privacy via the Internet are excluded from the scope of the Rome II Regulation.[425]

238 Other Internet torts are covered although not only by Art. 4 but often by the special provisions of Arts. 6 and 8 which take precedence over Art. 4. This latter provision therefore covers 'normal' Internet torts without specific relation to competition or intellectual property rights. Such 'normal' Internet torts include, inter alia, 'email bombing' (overflooding with unwanted emails that block the use of the computer), data theft via the Internet by hacking and the like, destruction of programs of the target computer by viruses, worms etc., unauthorised change or use of data of others for the own benefit by hacking, trojans etc.

239 For Art. 4 Rome II the usual order applies: Unless the parties of the respective Internet tort have agreed on the applicable law (Art. 14) and unless a common habitual residence of tortfeasor and victim exists (Art. 4 (2)), the place of damage determines the applicable law (Art. 4 (1)). This place depends on the kind of damage. Where the damage consists of destroyed programs of the attacked computer, the law at the place should decide where this computer is usually used.[426] For, the electronic programs and the functioning of the device resemble strongly movable property.[427] Where the capacities of mobile devices (laptop, i-phone etc.), which are used wherever the user just is, are damaged via the Internet, the law at

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423 Differently – for a balancing test in accordance with Art. 4 (3) Rome II – *Calvo Caravaca/Carrascosa González* cap. XXXI note 80.3 (case 1).

424 See *Mankowski*, RabelsZ 63 (1999), 203 (256 *et seq.*); *Spickhoff*, in: Bamberger/Roth Art. 4 Rom II-VO note 34; *Thorn*, in: Palandt Art. 4 Rom II-VO note 28.

425 See Art. 1 (2) (g) Rome II Regulation.

426 Also (place of the location of the attacked computer) *Schaub*, in: PWW Art. 4 Rom II-VO note 19; *Thorn*, in: Palandt Art. 4 Rom II-VO note 29; *Unberath/Cziupka/Pabst*, in: Rauscher Art. 4 Rom II-VO note 133; *Wurmnest*, in: jurisPK-BGB Art. 4 Rom II-VO note 63.

427 In the same sense *Unberath/Cziupka/Pabst*, in: Rauscher Art. 4 Rom II-VO note 133.

the habitual residence of the usual user should apply because the place where the device happens to be when damaged would be too accidental, and the devices tend to be used most at the habitual residence of the user. Under Art. 4 in no event is the place relevant where the tortfeasor acted, e.g., uploaded the detrimental program.[428]

If the – primary – damage consists of pure economic loss the place of damage is located where this loss materialises; for instance, a transfer from the victim's bank account by misusing the victim's online banking data leads to damage at the place of the bank that administers the account. **240**

Torts in respect of data assembled in a cloud pose special problems. The mere theft of data from a cloud has no place of damage in a specific country. It has been suggested to apply via Art. 4 (3) Rome II the law that governs the contract between the cloud user and the cloud supplier.[429] This can be the appropriate solution for torts between the two. The solution is less convincing if a third person is the tortfeasor. Then, in the absence of a choice of law agreement and a common habitual residence and other elements common to the parties the law at the victim's place of habitual residence seems most closely connected with the damage.[430] Where the unauthorised use of cloud data causes pure economic loss to another person, the place of damage under Art. 4 (1) is be determined in the usual way where the victim sustained this – primary – damage. **241**

Where an Internet tort causes damage to the same victim in several countries, the mosaic principle applies unless the parties have agreed on the applicable law or have their habitual residence in the same country (see *supra* notes 104 *et seq.*).[431] Does the tortfeasor cause damage to different persons who sustain damage in different countries the applicable law must be determined separately in respect to each of them. **242**

Article 5: Product liability

1. Without prejudice to Article 4(2), the law applicable to a non-contractual obligation arising out of damage caused by a product shall be:

(a) the law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred, if the product was marketed in that country; or, failing that,

(b) the law of the country in which the product was acquired, if the product was marketed in that country; or, failing that,

(c) the law of the country in which the damage occurred, if the product was marketed in that country.

However, the law applicable shall be the law of the country in which the person claimed to be liable is habitually resident if he or she could not reasonably foresee the marketing of the

428 Also *Unberath*/*Cziupka*/*Pabst*, in: Rauscher Art. 4 Rom II-VO note 132.

429 *Nordmeier*, MMR 2010, 151 (153 *et seq.*); *Schaub*, in: PWW Art. 4 Rom II-VO note 19; *Wurmnest*, in: jurisPK-BGB Art. 4 Rom II-VO note 63.

430 Also *Spickhoff*, in: Bamberger/Roth Art. 4 Rom II-VO note 35.

431 *Thorn*, in: Palandt Art. 4 Rom II-VO note 29; *Unberath*/*Cziupka*/*Pabst*, in: Rauscher Art. 4 Rom II-VO note 134; *Wurmnest*, in: jurisPK-BGB Art. 4 Rom II-VO note 63.

product, or a product of the same type, in the country the law of which is applicable under (a), (b) or (c).

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 paragraph 1, 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.

I. General remarks

1. Justification for implementation of a special product liability rule

1 Damage caused by a product is one of five examples of liability in tort excluded from the scope of application of the general rule (Art. 4) and regulated differently. A justification for this decision should be provided, particularly since it was disputed during the legislative process.[1] While standardization of conflict of laws rules in and of itself is desirable,[2] differ-

[1] The work done on Art. 5 was very eventful, and the final wording of the provision is significantly different, at least at the linguistic level, from the Commission's, initial proposal. The legislative process is discussed, in detail by *Kadner Graziano*, The Law Applicable to Product Liability: The Present State of the Law, in: Europe and Current Proposals for Reform, 54 ICLQ (2005), 475 *et seq.*; *Jagielska*, in: Ogiegło, Popiołek, Szpunar (eds), Rozprawy prawnicze: Księga pamiątkowa Profesora Maksymiliana Pazdana, Zakamycze 2005, 111 *et seq.* [cited hereinafter as Lib. Am. Pazdan]; *Huber*/*Illmer*, International Product

entiated treatment of product liability and other cases involving liability may be viewed with scepticism. Therefore it is necessary not only to explain the need for establishing a special rule (insufficiency of the general rule), but also to elaborate on its utility in light of the harmonization of EU law concerning product liability (Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administration provisions of the Member States concerning liability for defective products).[3]

2 Damage resulting from a product is frequently – more so than in the case of other torts – a multilocal or complex tort. The event giving rise to damage occurs in a different time and place than the damage itself. This is the result of both the extensive system of production (design and assembly) and distribution which allows products to be prepared in one or in multiple countries, after which they are then distributed to still other areas, as well as of the fact that a purchased product moves about together with its user.[4] Both of these phenomena are particularly prevalent among the Member States of the European Union, owing to the free movement of persons and goods within the EU. It is for these reasons that the criterion adopted in Art. 4 for determining the applicable law, that is, the place where the damage occurred, should not be applied to damage resulting from a product, as this would lead to arbitrary conclusions which would be unforeseeable to liable persons, and which would also often turn out to be surprising and unfavourable for the victim.[5]

3 The full harmonization of the law of product liability undertaken in the European Union is only a partial solution to the conflict of law issue. First and foremost, the Rome II Regulation is of universal application, governs conflicts of law where non-EU countries are also involved, and the Regulation's provisions may designate as the applicable law also the law of a non-Member State (Art. 3). In addition, the Regulation in the Product Liability Directive is limited in its subjective scope, if not also personally – it only addresses limited category of products, only damage caused by death or by personal injuries and damage to property (other than the defective product itself) ordinarily intended for private use or consumption and actually used this way, and only damage which exceeds a certain minimal value. In the remaining scope the laws of the Member States remain unharmonized. Also not subjected to harmonization are other liability regimes than strict liability, as well as special liability regimes for some categories of products that remain in force pursuant to Art. 13 of the Product Liability Directive. Indeed, even within the harmonized product liability regimes

Liability: A Commentary on Article 5 of the Rome II Regulation, YPIL vol. 9 (2007), 31, 33 *et seq*.; *Plender/Wilderspin*, The European Private, international Law of Obligations, Sweet&Maxwell 2009, paras. 19–009 *et seq*.; *Illmer*, The New European Private, international Law od Product Liability – Steering Through Troubled Waters, 73 RabelsZ (2009), 269, 272 *et seq*.; *Illmer*, in: Huber (ed.), Rome II Regulation: Pocket Commentary, Sellier 2011, paras. 1&2.

2 Concerning the diversity of previously-applied solutions see *Kadner Graziano*, 54 ICLQ (2005), 478 *et seq*.

3 Similarities and differences, in the aims and workings of EU, instruments, in the area of private, international law and substantive law are discussed by *Whittaker*, The Product Liability Directive and Rome II Article 5: 'Full Harmonisation' and the Conflict of Laws, CYELS (2011), vol. 12, 435 *et seq*.

4 See *Kadner Graziano*, 54 ICLQ (2005), 476; *Jagielska*, in: Lib. Am. Pazdan, 111 *et seq*.

5 See the Explanatory Memorandum of the Commission's Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("ROME II"), COM (2003) 427 of 22 July 2003, p. 13 *et seq*.; *Kadner Graziano*, 54 ICLQ (2005), 477.

there may be differences resulting from the use of regulatory options provided for under the Directive, differences in the understanding of various terms not defined in the Directive (damage, causation, damages) or even discrepancies among domestic laws resulting from differences in language versions of the Directive.[6]

2. Objectives of the Regulation

4 The objectives of the provisions contained in Art. 5 of the Regulation are not only the general aims of the entire act as expressed in Recital (6), but also the particular objectives set forth in Recital (20). General objectives are improvement in the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, all of it with a view to the proper functioning of the internal market. Particular objectives are fairly spreading the risks inherent in a modern high-technology society, protecting consumers' health, stimulating innovation, securing undistorted competition and facilitating trade. The content of Art. 5 is designed to ensure the proper balance between these particular objectives.

3. Relation to the Hague Products Liability Convention

5 Alongside the Rome II Regulation, also in force is the Convention on the Law Applicable to Products Liability of 2 October 1973 (Hague Products Liability Convention), which has been signed and ratified by some of the EU Member States (Croatia, Finland, France, Luxembourg, Netherlands, Slovenia and Spain), while other parties come from outside the EU. Under Art. 28 (1) Rome II, this convention takes precedence over the Regulation. As a result, Art. 5 Rome II will not indicate the applicable law in those countries for which this is achieved by the Hague Products Liability Convention. However, other provisions of the Regulation will be in effect concerning matters not regulated by the Convention.[7] Nevertheless, the primary objective of the Regulation – standardizing conflict of law rules within the EU concerning non-contractual obligations – has not yet been fully achieved.

4. The applicable law and jurisdictional issues

6 Art. 5 Rome II indicates the applicable law for product liability, while jurisdiction is resolved by Art. 7 (2) Brussels I Regulation. Unfortunately, these provisions are not harmonized.[8]

5. The place of Art. 5 within the structure of the Regulation

7 Article 5 contains one of the specific conflict of laws rules governing liability in tort. Important in its interpretation and application are the provisions of Chapter I of the Regulation, freedom of choice expressed in Art. 14, and also the common rules placed in Chapter V of the Regulation along with the other provisions in Chapter VI. The scope of the applicable law is defined by Art. 15, permissibility of direct action against the insurer in Art. 18, sub-

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6 See *Whittaker*, CYELS (2011), vol. 12, 442 *et seq*.; *Stone*, Product Liability under the Rome II Regulation, in: Ahern, Binchy (eds.), The Rome II Regulation on the Law Applicable to Non-Contractual Obligations: A New, in:ternational Litigation Regime, Leiden-Boston 2009, 183 *et seq*.; *Illmer*, RabelsZ (2009), 269, 279 *et seq*.; *Plender/Wilderspin*, paras. 19–006 *et seq*.

7 See *Illmer*, in: Huber (ed.), Rome II Regulation, Art. 5 para. 9.

8 See *Illmer*, RabelsZ (2009), 269, 306 *et seq*.

rogation is addressed by Art. 19, and the applicable law for contribution claims between jointly liable persons is indicated by Art. 20.

If determining the existence or the scope of a producer or other entity's liability involves assessment of that party's behaviour from the perspective of rules of safety and conduct, Art. 17 requires consideration of the rules which were in force at the place and time of the event giving rise to the liability. This means the time and place of action consisting in the marketing of a product (or its component), as this is the key event in the genesis of liability.[9] **8**

II. Scope of application and fundamental concepts

1. The concept of 'product liability'

a) General remarks

The fundamental difficulty in determining the scope of application of the rule in Art. 5 Rome II results from the fact that it makes use of terms which have slightly different meanings in the legal systems of different states, and does not attempt to define these terms. This affects key concepts in interpreting the provision, which should be viewed as a flaw. It is therefore necessary to establish the meaning of 'product liability' and 'damage caused by a product', for which a special conflict of laws rule has been composed. The legal systems of individual states regulate this liability in different ways, yet the interpretation of the Regulation must be autonomous. It is therefore worth making an attempt at capturing the constitutive characteristic of the product liability regime which determines its falling under the scope of Art. 5. **9**

In my view, this fundamental characteristic is the causing of damage by a product and the placing of liability on an individual who participates in the marketing of the product – generally this is the producer, but it is also frequently other people participating in the production process or the sales chain.[10] A detailed listing of liable entities, the scope of individuals afforded protection, the standard of liability, the type and scope of damage subject to remedy – these are all secondary issues and not important in qualifying the liability regime as one of product liability as understood by Art. 5. **10**

b) Private law liability

Article 1(1) Rome II establishes that obligations to provide remedy for damage caused by a product in respect of which Art. 5 is applicable must be private law obligations. The article under discussion is thus not applicable to the obligation to remedy damage regulated by public law. However, this is not decided by the qualification of the liable entity[11] as a private or public entity, but rather by the nature of the legal relationship linking the parties. The Regulation's scope of application excludes *inter alia* liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*), thus Art. 5 will also not be **11**

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9 See *Plender/Wilderspin*, paras. 19–133 *et seq*.

10 Marketing as the key to the application of Art. 5 is, indicated by *Whittaker*, CYELS (2011), vol. 12, 449 *et seq*.

11 For purposes of simplicity, this entity will be referred to at times as a "producer". It will also sometimes be referred to as a "respondent", as this is the role usually played during a process. However, this label is also not entirely precise, as *e.g.* in the case of a negative declaratory action it will be the claimant.

applicable to damage caused by a product used in the exercise of State authority if the entity exercising such power would be liable.[12]

c) Non-contractual liability

12 There is no doubt, as it results directly from Art. 1 (1) Rome II, that the conflict of law rules contained in Art. 5 address only non-contractual liability. This may involve claims from persons who acquired the product directly from the responsible entity, of later purchasers, and also claims from third parties. In respect of the first category of persons having suffered damage, Art. 5 is applicable to tort claims while claims arising out of breach of contract are governed by the law indicated in the provisions of the Rome I Regulation. However, the existence of a contract concerning a product between the parties of a tort obligation will usually constitute the manifestly closer connection referred to by Art. 5 (2).

13 Whether a claim is a claim in tort is a matter determined autonomously on the basis of the Rome II Regulation, and does not depend on the qualification of a given claim under national law. An oft-cited example is the French *action directe* of a subsequent purchaser against an entity placed higher in the chain of sale, which French law holds to be an element of liability in contract, while Art. 5 Rome II considers it to be non-contractual liability.[13]

14 Within the framework of non-contractual liability it is no longer important whether the applicable law makes this liability fault-based, defect-based or strict.[14]

d) Product

15 The Rome II Regulation does not define the concept of a product. The Explanatory Memorandum to the Commission's first draft explained that for the definition of a product Article 2 of Product Liability Directive will apply.[15] This position is supported by many authors.[16] However, it is not without its critics.[17] Article 2 of the Product Liability Directive defines 'products' as '*all movables even if incorporated into another movable or into an immovable*' and adds that

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12 Cf. *Whittaker*, CYELS (2011), vol. 12, 448 *et seq*.

13 See *Illmer*, in: Huber (ed.), Rome II Regulation, Art. 5 para.11; *Illmer*, RabelsZ (2009), 269, 282 *et seq*. Cf. judgment of the ECJ of 17 June 1992, Jakob Handte & Co. GmbH v. Traitements Mécano-chimiques des Surfaces SA, case C-26/91, ECR 1992, I-03967, where the Court held that the phrase 'matters relating to a contract', in: Article 5 (1) of the Brussels I Convention must be interpreted independently and is not to be understood as covering a situation in which there is no obligation freely assumed by one party towards another. Cf. also *Whittaker*, CYELS (2011), vol. 12, 452 *et seq*.

14 See *Illmer*, RabelsZ (2009), 269, 281 *et seq*.

15 See Explanatory Memorandum, p. 13.

16 See *Huber*/*Illmer*, YPIL vol. 9 (2007), 31, 38; *Leible*/*Lehmann*, Die neue EG-Verordnung über das auf außervertragliche Schuldverhältnisse anzuwendende Recht ("Rom II"), RIW (2007), vol. 10, 721, 727; *Dickinson*, The Rome II Regulation: The Law Applicable to Non-contractual obligations, OUP 2008 (main work) & 2010 (Supplement), paras. 5.10–5.12; *Stone*, 181; *von Hein*, Europäisches Internationales Deliktsrecht nach der Rom II-Verordnung, ZEUP (2009) vol. 1, 6, 26; *Illmer*, in: Huber (ed.), Rome II Regulation, Art. 5 para. 12; *Illmer*, RabelsZ (2009), 269, 283 *et seq*.; *Spickhoff*, Die Produkthaftung im Europäischen Kollisions- und Zivilverfahrensrecht, in: Baetge/von Hein/von Hinden (eds), Die richtige Ordnung: Festschrift für Jan Kropholler zum 70. Geburtstag, Mohr Siebeck 2008, 671, 678 *et seq*.; *Schaub*, in: Prütting/Wegen/Weinreich (eds) BGB Kommentar, Luchterhand 2011, para. 2.

17 See *Jagielska*, in: Lib. Am. Pazdan, 119; *Plender*/*Wilderspin*, paras. 19–018 *et seq*.

the notion of products '*includes electricity*'. In the jurisprudence of the CJEU, this provision has been used to hold as products such things as non-industrially produced goods and goods used within the context of providing a service.[18] The jurisprudence of Member States has applied product liability Regulations to such things as human bodily fluids.

16 The advantage of Art. 2 PLD is, in the opinion of those authors writing in support of it, the rather broad definition of 'product'; reference to this provision when interpreting Art. 5 Rome II should lead to a relatively broad expression of the discussed rule's scope of application. It is, however, doubtful whether Art. 2 of the Product Liability Directive is in fact the proper frame of reference.[19] First and foremost, while defined broadly and interpreted with flexibility by the CJEU, it remains limited in two respects. It excludes real property and non-material things from the definition of a product. Regarding the former exclusion, its origins are not entirely clear, but whatever reasons existed for doing so, they certainly remain valid today. However, the situation concerning non-material things has changed since 1985. The development of technology has led to the spread of various products linking the characteristics of a material object and non-material content (software, digital content), in which it is precisely the non-material element that determines the product's usability, as well as its safety or danger. It is particularly unhelpful that data carriers (DVD discs, pen drives) can be classified as movables, as such a label is rather a way of skirting around the problem instead of solving it. Indeed, what is important is that it is not the carrier but rather its contents that cause the damage. It can therefore not be excluded that individual states will introduce liability rules for damage caused by a non-material product based on the same model as that in which liability rules for a traditionally understood product are grounded.[20] Because this type of rule is subject to the same argumentation that favours exclusion of product liability from the general rule expressed in Art. 4 Rome II, it should be encompassed by the scope of application of Art. 5.

17 This is why I think that the proper relation of Art. 5 Rome II to Art. 2 Product Liability Directive is that whatever is a product under the Directive is also one under the Regulation, yet the reverse does not hold – norms of domestic law which extend the principles of product liability to non-material products (and immovables) are encompassed by Art. 5 Rome II.

18 Another issue which remains unresolved in the Regulation is the limitation of the application of Art. 5 to cases in which damage is caused by a product that is either faulty or dangerous. The Commission's draft made use of the phrase "defective product", yet the requirement of defectiveness was then removed in the course of later legislative work. However, it would seem necessary to introduce some sort of limitation, as the literal wording of Art. 5 would lead to the conclusion that it applies to every situation in which the event giving rise to the damage involved some product, and this would make it impossible to delineate the boundaries between Art. 4 and Art. 5.[21]

19 From the justification for introducing a separate product liability conflict of laws regime, as well as from the shape of the provision itself, one should draw the conclusion that it refers to

18 See esp. judgment of the ECJ of 10 May 2001, *Henning Veedfald*, C-203/99, ECR2001, I-3569.

19 See *Plender/Wilderspin*, paras. 19–018 *et seq*.

20 It can also not be excluded that, interpretation of the directive will follow a similar path.

21 See *Dickinson*, para. 5.13.

damage caused by products which are commonly referred to as defective or dangerous. This defectiveness or dangerousness may result from the characteristics of the product itself (its design or manufacturing), its description or instructions for use, or even the manner in which it is installed by the responsible entity. It can even be a danger inherent to a given category of product (e.g. medicine, weapon).[22] This does not, of course, determine whether liability will arise under the applicable law; this depends on the concept of defectiveness, or more generally the conditions for liability under that regime. The idea is that the applicable law should be identified on the basis of Art. 5 Rome II, if the demand to remedy damage is based on a claim of defectiveness or dangerousness of the product as well as the participation of the respondent in bringing it to market. It is so because the characteristics of that liability which determined its exclusion from the general rule and the creation of particular connections (damage caused by the product and liability of the person participating in this product's marketing) refer in equal measure to defective products and to products which are dangerous *per se*.

20 One should not rely on the previously cited statement contained in the Explanatory Memorandum that for the definition of defective product Article 6 of Product Liability Directive applies. Firstly, this statement referred to the initial version of the draft, which contained a direct reference to defective product. Secondly, even in the context of the initial draft, this statement was open to discussion. The concept of defectiveness adopted under Article 6 Product Liability Directive (a product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account) is only one of the potential ways of solving this problem and should not limit the scope of application of Art. 5 Rome II, which can indicate the applicable law as one under which product liability is grounded in a different understanding of defectiveness (e.g. based on a risk-utility analysis). The objective of the definition in Art. 6 PLD is harmonization of that condition of liability in the substantive law of EU Member States in order to achieve an optimal balance between the demands of the common market and protection of consumers. This is not directly linked to the search for the law applicable to liability.

e) Marketing

21 When examining the entirety of Art. 5, one may conclude that an important role in the construction of a special rule indicating the applicable law was played by the criterion of marketing a product.[23] This criterion performs a very important function. Its application creates legal certainty for all parties, not favouring any of them while satisfying their expectations as to the applicable law. First and foremost, when a proper definition of the term 'marketing' is used (which is not, however, an easy task and is problematic against the backdrop of Art. 5 of the Regulation), determining the applicable law in a specific case is, in most of the cases, a simple operation. The legal predictability this criterion assures consists in the producer and its insurer being able to assume that the law of the place where the product is marketed will be applicable. Also the user of a product will, or at least should,

[22] Cf. *Dickinson*, paras. 5.14 and 5.15. The dominant view is different and refers solely to the defectiveness of the product; see *Illmer*, in: Huber (ed.), Rome II Regulation, Art. 5 para. 12; *Kozyris*, Rome II: Tort Conflicts on the Right Track! A Postscript to Symeon Symeonides' "Missed Opportunity", AJCL vol. 56 (2008), 471, 488; *von Hein*, ZEUP (2009), 6, 26. However, a relatively broad interpretation of the liability is proposed by *Plender/Wilderspin*, paras. 19–034 *et seq*.

[23] See *Dickinson*, para. 5.13.

expect that the law of the country in which the product was brought to market will be applied in the first place. The fairness of this criterion can be perceived when viewing things from the position of a product's user. It is not advisable that a producer bringing goods to a given market be able to avoid liability by citing the lower standard of liability in the producer's home country. It is similarly unadvisable that a user moving from the place in which she acquired a product, at a price that accounted for the level of tort protection offered in a given country, then make use of or lose that protection in the country of residence considering it was not reflected in the price of the product. The marketplace criterion also creates equal competitive conditions for all producers competing on the same market, as they are subject to the same liability principles. In addition, it facilitates the establishment of tort law as an element of domestic product safety policy, for it gives each state a guarantee that the established standard of tort liability will be taken into consideration by all producers marketing their products in this state, since this will be the applicable law for their damages obligations.

22 However, it should be emphasized that the advantages of applying the marketing criterion are only partially applicable to aggrieved parties other than the product's purchaser and those in close relations also using the product (e.g. family members), in other words people referred to as bystanders. While argumentation referring to the expectations of the producer, level playing field and domestic product safety policy remains relevant to damage suffered by a bystander, elements such as expectations of the purchaser and the link between the standard for liability and price paid become less significant. However, the expectations and the necessity of protection of the innocent third party gain in importance, and those point to the correctness of applying the law of the place where the event giving rise to damage occurred.[24]

23 Marketing of a product is defined in various ways throughout the literature. The narrow definition holds that marketing is the delivery of a product to its end user,[25] while there is a broader one encompassing a range of activities preceding sale. There are also conflicting opinions expressed as to whether the application of Art. 5 (1) is impacted by the marketing of the product that caused damage, or also marketing of a product of a given type.[26] This last issue arises out of the wording of Art. 5 (1), whose first sentence reads 'the product was marketed', while the criterion of foreseeability in the second sentence refers to 'the marketing of the product, or a product of the same type'. These issues are intertwined, as marketing in the form of providing the opportunity to acquire a product can be spoken of in respect of a certain category or type of product rather than a particular unit. The question also arises as to whether the fact that some language versions use the phrase 'put into circulation'[27] as it appears in the Product Liability Directive means that both expressions should be given the same meaning, i.e. the one which emerges from CJEU jurisprudence pertaining to the Directive.[28]

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24 See *Kadner Graziano*, 54 ICLQ (2005), 481 *et seq*. and the literature indicated therein. The issue is approached differently by *Kozyris*, 488 *et seq*.

25 *Schaub*, para.6. A similarly narrow definition is used by *Stone*, 189.

26 In respect of the various positions, see, in particular *Plender/Wilderspin*, paras. 19–088 *et seq*.

27 'In Verkehr gebracht', 'wprowadzony do obrotu'; some language versions of the Regulation and Directive use similar, but not identical phrases.

28 This is answered in the negative by *Illmer*, in: Huber (ed.), Rome II Regulation, Art. 5 para. 30; *Illmer*, RabelsZ (2009), 269, 290; *Schaub*, para.6. Opposed, *Plender/Wilderspin*, paras. 19–106 *et seq*.

24 Before we proceed to these issues, it should be emphasized that in contemporary commerce a product is not generally marketed directly by the producer, but its acquisition by the end user is rather the end result of a complex chain of sale. We may speak of marketing as understood by Art. 5 (1) also when activities involved in bringing a product to market were performed by other entities than the producer. Protection of producer's interests in such a case is ensured by application of the unforeseeability clause contained in Art. 5 (1) sentence 2.[29]

25 In my opinion, all of the aforementioned issues should be addressed while taking into consideration the objective in injecting the marketing criteria into Art. 5 Rome II. This objective, as indicated earlier, is primarily to balance the interests of the parties and ensure the foreseeability of the applicable law. Thus, if the requirement of marketing of the product means that the producer can count on the possibility of bearing liability according to the law of a specified state, in order to achieve this effect it is sufficient that a given product be offered to potential purchasers (end users) in that state, that it be placed up for sale. This could be in the form of advertising messages (e.g. ad campaigns) designed to hook customers.[30] What is more, in my view the criterion of marketing is also fulfilled when advertising messages are not followed by the creation of a real opportunity to acquire the product. In conditions of the free movement of persons, a producer who has directed promotional efforts at a specific country should be aware that potential customers whose place of habitual residence is in that country will also acquire the product in other places. Directing an advertising campaign at a particular country also leads to the addressee's expectation that the law of the country in which the product is offered for sale will be the applicable law.

26 Furthermore, I think that the function of the marketing criterion does not necessarily require marketing of this particular product. In order to satisfy this criterion, it is sufficient that an enterprise on a given market (either directly or through a distribution chain) makes available or promotes a product with the same characteristics important from the perspective of user safety and safety of the surrounding environment as those of the product having caused the damage, but not necessarily that very product itself.[31] Differences between versions of a product distributed on various markets which concern characteristics of little importance to safety (generally these are name, packaging, manner of presentation or minor cosmetic details) do not exclude the possibility of determining that the product was brought to market in a country referred to in Art. 5 (1) (a)–(c). It is correctly noted that if the matter concerned the marketing of the particular product which gave rise to damage, the system of

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29 See *Stone*, 188; *Illmer*, RabelsZ (2009), 269, 290 *et seq*.

30 Cf. *Kadner Graziano*, 54 ICLQ (2005), 482; *Dickinson*, para. 5.20; *Plender/Wilderspin*, para.19–108 *et seq*.; *Illmer*, in: Huber (ed.), Rome II Regulation, Art. 5 para. 29; *Illmer*, RabelsZ (2009), 269, 290 *et seq*. A narrower view is presented by *von Hein*, ZEUP (2009), 6, 26, who requires product to be delivered to the end user.

31 Cf. *Huber/Illmer*, YPIL vol. 9 (2007), 31, 42 *et seq*.; *Dickinson*, para. 5.21; *Leible/Lehmann*, RIW (2007), 721, 728; *Wagner*, Die neue Rom II-Verordnung, IPRax (2008), vol. 1, 1, 7; *Plender/Wilderspin*, para. 19–091 *et seq*.; *Illmer*, in: Huber (ed.), Rome II Regulation, Art. 5 para. 31 *et seq*.; *Illmer*, RabelsZ (2009), 269, 292 *et seq*.; *Spickhoff*, 685; *Schaub*, para. 6; *Czepelak*, Międzynarodowe prawo zobowiązań Unii Europejskiej, LexisNexis Polska 2012, para. 4.45. The aforementioned authors propose various tests of the similarity of products. Opposed is *Hein*, ZEUP (2009), 6, 27; *Stone*, 193, whose opinion the connections from 5 (1) (a)–(c) refer to marketing of the product that caused the damage.

three connections present in Art. 5 (1) sentence 1 would be unnecessary, and the foreseeability clause in Art. 5 (1) sentence 2 would be essentially deprived of meaning.[32]

27 In respect of the question of whether interpretation of Art. 5 (1) Rome II should be influenced by the ruling of the CJEU regarding the concept of 'put into circulation' as used in the Product Liability Directive, first and foremost it should be observed that identical terminology occurs in only a handful of language versions, and is clearly accidental. Furthermore, it should be kept in mind that this phrase serves various functions in various contexts. The Product Liability Directive uses the expression 'put into circulation' for defining the conditions of liability (Art. 7 (a) PLD, expressed negatively as a defence of the producer), for indicating the moment in time at which the defectiveness of a product as well as the state of scientific and technical knowledge should be assessed (Art. 7 (b) and (e) PLD) and for indicating the beginning of the 10-year extinction period (Art. 11 PLD). In this last case, it is specified that what is meant is the 'date on which the producer put into circulation the actual product', and this date is relevant to the temporal limitation of the producer's liability. In light of what has been stated in the preceding paragraphs, these reservations render interpretation of Art. 11 PLD unhelpful in interpreting the concept of marketing in Art.5 Rome II.[33] Other instances where the criterion of 'putting into circulation' is applied for determining the relevant moment (Art. 7 (b) and (e) PLD) are not relevant to the interpretation of Art. 5 (1) Rome II.

28 It cannot be excluded that interpretation by the Court of the concept of marketing in Art. 5 (1) Rome II will at times be similar to interpretation of the phrase 'put into circulation' in Art. 7 (a) PLD, yet this similarity will largely be coincidental. 'Put into circulation' in Art. 7 (a) PLD serves to determine the primary condition for producer liability, i.e. the creation of a threat through the putting into circulation of a defective product. This is why it is held that a producer does not bear liability for damage caused by a product when a person other than the producer has caused the product to leave the process of manufacture and the use of the product was contrary to the producer's intention.[34] On the other hand, the criterion of 'marketing' in Art. 5 (1) indicates the place used in determining the applicable law. It is not associated with the creation of the risk by the producer, but with the possibility to foresee the application of a given liability rule.

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32 See *Illmer*, in: Huber (ed.), Rome II Regulation, Art. 5 para. 32–33; *Illmer*, RabelsZ (2009), 269, 292.

33 Interpretation of this concept against the backdrop of Art. 11 PLD was performed by the CJEU in its verdict, in Case C-127/04, *Declan O'Byrne v Sanofi Pasteur MSD Ltd and Sanofi Pasteur SA* [2006] ECR I-1313 (paras. 23–26). The issue concerned whether the time limit, in Art. 11 PLD can run from the moment of a transaction within the chain of supply, between the producer and its wholly-owned subsidiary. The Court said that Art. 11 PLD is to be interpreted as meaning that a product is put into circulation when it is taken out of the manufacturing process operated by the producer and enters a marketing process in the form in which it is offered to the public in order to be used or consumed. What is, however, the most important here, the CJEU seemed to accept that the expression "put into circulation" has a different meaning under Art. 11 PLD as related to the time limit than under Art. 7 PLD in excluding producer liability, and thus it can be interpreted differently.

34 See decision of the CJEU of 10.05.2001, Henning Veedfald v. Århus Amtskommune, Case C-203/99, ECR [2001] I-03569, paragraphs 14–22. See also *S. Whittaker*, Liability for Products: English Law, French Law and European Harmonisation, OUP 2005, p. 516 *et seq*.

f) Damage

29 Under Art. 2 (1), the term damage covers any consequence arising out of tort/delict. The same broad understanding of damage must be used in determining the scope of application of Art. 5. It thus indicates the applicable law for assessing claims of remedy for pecuniary and non-pecuniary loss, direct damage, consequential economic loss and pure economic loss. The applicable substantive law determines in individual cases which particular categories of damage are eligible for remedy. The narrower understanding of the concept of damage for the needs of the Product Liability Directive (Art. 9 of Directive 85/374) is justified by the objectives of that Directive and the legal basis for its issuance, yet it has no relevance to interpretation of Art. 5 Rome II.[35]

30 In turn, when constructing individual connections referring to the point in time when the damage occurred, the Regulation has in mind damage understood only as the violation of the aggrieved's legally protected interests (direct damage), but not the further consequences of such a violation (consequential loss).[36] The point in time of the damage may be difficult to establish. The negative effects of a product's influence can grow with time, and it can be difficult to capture the precise moment. At times there can be factual difficulties in determining the existence of damage, such as when the damage is discovered at a time after its occurrence. If it is not possible for these or other reasons to establish the point in time at which the damage occurred, the connection referring to that moment cannot be applied.[37]

2. Objective and territorial scope of application

31 Any entity can be either the individual demanding remedy for damage as well as the individual potentially liable. The application of Art. 5 is not limited to consumers, although some domestic product liability regimes may introduce this limitation (including EU Member State regimes based on the Product Liability Directive). It is also irrelevant whether the person suffering damage is the user of a product, employee or member of the household of the user, or even a third party not associated with the product in any way.

32 The liable individual is also indifferent from the perspective of application of Art. 5. The Explanatory Memorandum lists producer, producer of a component, intermediary, retailer and importer into EU, yet this list (based on Art. 3 Product Liability Directive) is neither exhaustive nor binding, and is not even particularly helpful.[38] This is because the applicable law may assign liability for damage caused by a product to various individuals who made a range of contributions to the product being marketed.

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35 Correctly *Dickinson*, paras. 5.07 and 5.08; *Plender/Wilderspin*, paras. 19–037 *et seq*.; *Whittaker*, CYELS (2011), vol. 12, 459 *et seq*.; conversely *Stone*, 181 *et seq*.

36 See Art. 4 (1) Rome II, Recital 16 and 17 Rome II; Explanatory Memorandum, 11; *Dickinson*, para.5.30; *Illmer*, in: Huber (ed.), Rome II Regulation, Art. 5 para. 24; *Illmer*, RabelsZ (2009), 269, 287.

37 Cf. *Dickinson*, paras. 5.31 *et seq*. Conversely *Plender/Wilderspin*, para. 19–074, whose opinion the point in time of occurrence of damage should be held as the moment when the aggrieved party was exposed to the negative impact of the product, even if the damage has not yet been revealed. Rejection of this view as the proper interpretation of Art. 5 does not exclude a court taking it into account in determining the fact of occurrence of damage.

38 Cf. *Whittaker*, CYELS (2011), vol. 12, 458 *et seq*.; *Stone*, 182 *et seq*.; *Illmer*, RabelsZ (2009), 269, 284.

Damage resulting from one event involving a product can be incurred by many people, and liability for such an event can also be borne by many people. The differentiation of connections in Art. 5 leads to the necessity of the applicable law being determined for each obligation in liability, and this need not be the law of only one state.[39] **33**

The rule in Art. 5 must be applied by all Member States except for those which have ratified the Hague Products Liability Convention (see section A.III above). In turn, the law indicated by the provision under discussion may be both the law of a Member State and that of another state (Art. 3). **34**

3. Relation to other liability rules

a) Art. 5 and the general rule (Art. 4)

Article 5 is a special Regulation in respect of Art. 4, as it refers to only one category of tort. If, therefore, a given set of facts is qualified as a case of product liability, the general rule from Art. 4 does not apply. Product liability as understood under Art. 5 does not arise when the damage is caused by a product which has not yet been marketed. In such a case, the applicable law is indicated by Art. 4.[40] **35**

b) Art. 5 and liability for Environmental Damage (Art. 7)

If the damage caused by a product takes the form of environmental damage, a more appropriate conflict rule is that of Art. 7 Rome II. This provision represents a more important value from the perspective of the Union's functioning – protection of the natural environment and of the interests of victims of environmental damage; in addition, it lays down more narrow criteria for classification (consisting exclusively in a particular form of damage), whose application facilitates determination of the law most closely linked to a tort in question.[41] **36**

c) Art. 5 and culpa in contrahendo (Art. 12)

It is possible for product liability and pre-contractual liability to occur concurrently, particularly when the defect in a product consists in a faulty description or instructions issued in fulfilment of pre-contractual obligations. However, these are two separate grounds of liability, and for each of them there is a specific rule that indicates the applicable law. Nonetheless the application of an escape clause is not excluded (Art. 5 (2) or Art. 12 (2) (c)).[42] **37**

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39 See *Stone*, 192.

40 Correctly: *Plender/Wilderspin*, para. 19–049.

41 This is the generally accepted view, see *Dickinson*, para. 5.17; *Illmer*, in: Huber (ed.), Rome II Regulation, Art. 5 para. 13; *Plender/Wilderspin*, para. 19–053.

42 See *Spickhoff*, 679; *Illmer*, in: Huber (ed.), Rome II Regulation, Art. 5 para. 14.

III. Connections

1. Connection types and hierarchy

38 The provisions of Art. 5 create a rather complex structure of conflict rules, and in addition they should be interpreted within the context of the entire Regulation, particularly of Arts. 4 and 14.[43] For this reason, absolute priority in application must be given to the choice of law made by the parties.

39 In the absence of a chosen law, the law will be applied of the state in which the person claimed to be liable and the person sustaining damage both have their habitual residence at the time when the damage occurs (Art. 4 (2), incorporated into Art. 5 (1) by reference).

40 If there is no common state of habitual residence, the applicable law is determined using the criterion of marketing of the product, applied in sequence to three areas (Art. 5 (1) *in principio*) and limited by the requirement that the marketing be reasonably foreseeable (Art. 5 (1) *in fine*). Thus, the applicable law will be that of the country of the victim's habitual residence, if the product was marketed there and its marketing was reasonably foreseeable for the (potentially) liable person (Art. 5 (1) (a)). If the product was not foreseeably marketed in that country, the applicable law will be that of the country in which the product was acquired, if the product was marketed there and its marketing was reasonably foreseeable for the (potentially) liable person (Art. 5 (1) (b)). If the requirement of foreseeable marketing of the product in that country is not met, the applicable law will be that of the country in which the damage occurred, if the product was marketed in that country and its marketing was reasonably foreseeable for the (potentially) liable person (Art. 5 (1) (c)).

41 If the person claimed to be liable could not reasonably foresee the marketing of the product in the country the law of which is applicable under Art. 5 (1) (a), (b) nor (c), the law applicable is the law of the country in which this person is habitually resident (Art. 5 (1) *in fine*).

42 By way of exception, the applicable law can be that of a state other than those indicated in Article 5 (1), if it is clear from all the circumstances of the case that the delict is manifestly more closely connected with this other country (Article 5 (2)).

43 Two issues require elaboration. Firstly, while the wording of Art. 5 (1) *in fine* would seem to be limited to determining the applicable law in the event none of the laws indicated in (a), (b) and (c) can be applied, it logically follows that the criterion of foreseeability of the marketing of the product must also serve to decide from among the laws indicated in (a), (b) and (c). Thus, the absence of the potential to reasonably foresee the marketing of a product in a country named in the list from the first sentence of Art. 5 (1) results in the necessity to examine whether the law of another country given later down that list may be applied, and not to simply reach for the law applicable on the basis of the respondent's place of habitual residence. Considering the

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[43] On the hierarchy of connections see *Stone*, 184 *et seq*.; *Dickinson*, paras. 5.18 *et seq*.; *Spickhoff*, 680 *et seq*.; *Plender/Wilderspin*, paras. 19–043 *et seq*. and 19–066 *et seq*.; *Illmer*, in: Huber (ed.), Rome II Regulation, Art. 5 paras. 5&6; *Illmer*, RabelsZ (2009), 269, 284 *et seq*.; *Whittaker*, CYELS (2011), vol. 12, 445 *et seq*.; *Schaub*, paras. 3 *et seq*.; *Czepelak*, para. 4.42.

Regulation contains a hierarchy of the three connections ordered, as one might expect, from the most appropriate, the fourth of them may only be applied after exclusion of the preceding three. To put it differently, the place of habitual residence of the producer is to be applied only after it has been demonstrated that the marketing of the product could not be foreseen in respect of all of the places listed in Art. 5 (1) (a)–(c), not simply after it is shown that marketing was not foreseeable in one of those places.[44]

44 The second issue concerns whether the manifestly closer connection clause (Art. 5 (2)) can only block the application of the connections indicated in Art. 5 (1) (a)–(c) as well as in the second sentence of Art. 5 (1), or also the application of the law of both parties' place of habitual residence. In my opinion, the theoretically correct (yet undoubtedly applied infrequently) solution is the second one.[45] This results from both linguistic interpretation of the provision as well as from the character of the escape clause. Indeed, Article 5 (2) excludes application of the law of the state indicated in Art. 5 (1), and the country indicated in that article should also be understood as the country indicated by the reference in Art. 4 (2). In addition, the provision which provides for consideration of a "manifestly closer connection" serves to assist in identifying the law most closely related to specific factual circumstances, thus it cannot be excluded that in some situations there will be an element that binds a delict even more closely with a particular law than the parties' shared place of habitual residence.

45 The burden of proving facts necessary for the application of particular connections rests on the party wishing to apply the law of a given state. Thus the person suffering the damage will typically seek to demonstrate the conditions listed in Art. 5 (1) (a)–(c), while the person potentially liable will either refute these statements or prove the unforeseeability of marketing of the product in the places listed therein. The existence of a manifestly closer connection will be demonstrated by the party which desires to apply a different law than that indicated by Art. 5 (1).[46]

46 The connections provided in Art. 5 (1) are content neutral, which renders it difficult to achieve the intended aim of fairly spreading the risk.[47] Depending on one's point of view as to the role of private international law, failure to take into account the content of the indicated substantive law in a conflict rule can be considered either a benefit or a drawback of the Regulation. Some authors present the view that in practice the selection of connections in Art. 5 leads most frequently to the application of the law more beneficial to the entity with its habitual residence in a better-developed country, to the detriment of the entity from a less developed country.[48]

2. Choice of law

47 The choice of law performed by the parties insofar as allowed by Art. 14 takes precedence

44 See *Dickinson*, para. 5.26; *Plender/Wilderspin*, para. 19–046.

45 Correctly: *Plender/Wilderspin*, para. 19–129; *Illmer*, in: Huber (ed.), Rome II Regulation, Art. 5 paras. 6 and 21. Opposed, *Dickinson*, para. 5.46.

46 See *Dickinson*, para. 5.28; *Illmer*, in: Huber (ed.), Rome II Regulation, Art. 5 paras. 45 *et seq*.

47 See *Stone*, 190 *et seq*.

48 See *Symeonides*, Rome II and Tort Conflicts: A Missed Opportunity, AJCL vol. 56 (2008), 173, 208 *et seq*. This viewpoint is argued against by *Kozyris*, AJCL vol. 56 (2008), 471, 486 *et seq*.

over all objective connections. In respect of the permissibility, mode and limitations as to the effectiveness of choice of law, the reader is referred to remarks on Art. 14.

48 In particular, attention should be paid to the limitations in the effects of such a choice set forth in Art. 14 (3). Under this provision, where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in one or more of the Member States, the parties' choice of the law applicable other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement. Among the EU legal Regulations implemented in the Member States which cannot be derogated from by agreement are the product liability rules contained in Directive 85/374 (see Art. 12 Product Liability Directive).

3. Common habitual residence

49 The reference in Art. 5 (1) that the connections indicated in that article are to be applied without prejudice to Article 4 (2) means that in the event of failure to choose the law, the connection of common habitual residence takes precedence over those based on the marketing of the product criteria. Thus, if both parties to the obligation (the person claimed to be liable and the person sustaining damage) have their habitual residence in the same country at the time when the damage occurs, the law of that country applies.

50 The concept of habitual residence in respect of companies and other bodies, as well as natural persons acting in the course of their business activity, is defined by Art. 23. As to the interpretation of these concepts, and determining the place of habitual residence of natural persons not conducting business activity, the reader is referred to the commentary on Art. 23.

51 The practical difficulty in applying the criterion set forth in Art. 4 (2) consists in the manner in which it indicates the 'time when the damage occurs' as the relevant moment. In many cases it is difficult to establish this time; see B.I.6 above.

4. Marketing

a) Initial remarks

52 As mentioned earlier, the three connections found in Art. 5 (1) are based on the common criterion of marketing of the product. The meaning of this expression has been elaborated in B.I.5. above. In addition, it should be recalled that each of the three connections can be applied only when the marketing of the product in a given country was reasonably foreseeable for the potentially liable entity. The application of this criterion ensures that an entity participating in marketing will bear liability under rules which he could foresee when taking the decision to market the product. Within the framework of this criteria a hierarchy (cascade) of connections has been established, composed of the three places where the product was marketed.

b) Marketing in the country of the victim's habitual residence

53 The primary applicable law is that of the country of the victim's habitual residence, if the product was marketed in that country and its marketing was reasonably foreseeable for the

respondent. This is the most appropriate connection considering that its application reduces the costs involved with the victim establishing the content of the appropriate law. For the two parties it is thus the most beneficial of all the neutral connections (not taking into account the substantive content of individual laws and the level of protection afforded to victims therein).

As for understanding the concept of "habitual place of residence", the reader is referred to remarks on Art. 23. Of legal significance is the victim's place of residence when the damage occurred, which, as demonstrated earlier, means the occurrence of direct damage; however, that moment can be difficult to pinpoint (see B.I.6 above). **54**

c) Marketing in the country of acquisition of the product

If the product has not been marketed in the place of the victim's habitual residence, or it was unforeseeable by the respondent, the applicable law will be that of the country in which the product was acquired, if it was marketed in this country and its marketing was reasonably foreseeable. This obviously refers to the acquisition of that particular specimen of the product which caused the damage, by the person who became the victim. Acquisition should be understood as a broader term than purchase, as it can also consist in acquiring a product for free, or only for use.[49] What is more, the acquisition by the victim of ownership rights in the product is not of significance, but rather the fact of having it in one's possession.[50] In the case of separation of the transfer of title and release (such as distance sale or retention of title), the latter is decisive. Furthermore, nullity of the contract transferring ownership does not exclude application of the connection under discussion. **55**

In my opinion, the connection of place of acquisition of the product may also be applied to those individuals who jointly make use of the product along with the person who acquired it, such as family members, other members of the household, etc. However, if the injured was a third party (bystander) in respect of whom there can be no mention of acquisition in even the broadest sense, Art. 5 (1) (b) can find no application.[51] **56**

d) Marketing in the country in which the damage occurred

If the product was not marketed in the victim's place of habitual residence, nor in the place where the product was acquired, or if its marketing was unforeseeable for the respondent, the appropriate law will be that of the country in which the damage arose if the product was marketed in this country and its marketing was reasonably foreseeable. The connection set forth in Art. 5 (1) (c) is thus based on the same criterion applied in the general rule (Art. 4) – the place where the direct damage occurred. Its application, however, is dependent on the condition of marketing of the product. **57**

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49 The French version of the Regulation is problematic here.

50 See *Illmer*, in: Huber (ed.), Rome II Regulation, Art. 5 para. 25; *Dickinson*, para.5.38; *Plender/Wilderspin*, para. 19–076.

51 See *Illmer*, in: Huber (ed.), Rome II Regulation, Art. 5 para. 25; *Illmer*, RabelsZ (2009), 269, 287; *Dickinson*, para. 5.40 (these authors define a bystander more narrowly). Some authors even exclude entirely the application of connections from Art. 5 (1) (a)–(c) to bystanders (*Schaub*, para. 9).

e) Unforeseeability of marketing

58 In the event the person potentially liable could not reasonably foresee the marketing of the product, or a product of the same type, in the country specified in the first sentence of Art. 5 (1), the applicable law will be the law of that person's habitual residence.

59 Whether the marketing of the product could reasonably be foreseen must be determined objectively, with consideration given to all of the circumstances, including the type of the product, scale and reach of the producer's activity, actions taken by the producer to limit access to the product in certain regions or countries,[52] international agreements in effect in particular regions designed to reduce barriers to international trade, or alternatively bans on import or export, embargo etc.[53]

60 Determination of the law of the producer's habitual residence as the applicable law may come as a surprise to a product's user, yet it is not entirely impossible to guess. As evaluation of the foreseeability of marketing is objective, and the person incurring liability can be identified by the victim, then the victim could make an independent attempt to determine whether it is reasonable to require that individual to foresee the marketing of the product in a given country. Indicating the law of the habitual residence of the person potentially liable as the applicable law is not, however, a surprise for that individual, as such entities usually (or even primarily) market products on their domestic market, and must be familiar with the standard for liability applied in domestic law.[54]

61 The wording of the provision leads to the conclusion that unforeseeability of the marketing is a defence available to the potentially liable person, thus that person is responsible for proving that fact in order to effect the application of his/her own domestic law. However, if the applicable law under Art. 5 (1) (a)–(c) is more favourable for that person, there is no need to raise this defence.[55]

f) Lack of marketing

62 Article 5 does not indicate the applicable law for cases in which damage is caused by a product which was not marketed in any of the places listed in Art. 5 (1) (a)–(c). There are two proposals for closing this loophole. Some authors propose applying Art. 5 (1) sentence 2 by way of analogy, with the result that the applicable law is that of the producer's habitual residence.[56] This results *a fortiori* from the provision – if that law is applicable when marketing was unforeseeable for the producer, then it should all the more so be applicable when there was no marketing at all. Such a solution is also supported by the conclusiveness of the connection.

63 The alternative view requires the application of the general rule expressed in Art. 4, which is

52 See *Illmer*, in: Huber (ed.), Rome II Regulation, Art. 5 para. 37 *et seq.*; *Illmer*, RabelsZ (2009), 269, 298 *et seq.*

53 See also the list of important circumstances given by *Plender/Wilderspin*, para. 19–116.

54 Compare to the reservations concerning the earlier version of the provision, referring to the consent of the person liable for marketing a product, as voiced by *Kadner Graziano*, 54 ICLQ (2005), 485.

55 Cf. *Illmer*, in: Huber (ed.), Rome II Regulation, Art. 5 para. 37; *Schaub*, para. 7; *Czepelak*, para. 4.47.

56 *Huber/Illmer*, YPIL vol. 9 (2007), 31, 43 *et seq.*; *Leible/Lehmann*, RIW (2007), 721, 728; *Dickinson*, para. 5.45; *Plender/Wilderspin*, paras. 19–050 *et seq.*; *Illmer*, in: Huber (ed.), Rome II Regulation, Art. 5 para. 36; *Illmer*, RabelsZ (2009), 269, 296 *et seq.*; *Wagner*, IPRax (2008), 1, 7.

more beneficial for the victim and should lead to application of the law most closely associated with the circumstances of the case.[57] This second view is not without its weaknesses. Firstly, this would lead to application of the law appropriate for the place where the damage occurred; this possibility was taken into consideration in Art. 5 (1) (c), and was excluded in the provision for the very reason of lack of marketing of the product.[58] Secondly, the place where the damage occurred is not necessarily tightly coupled with the circumstances of the tort. This depends on the determination of what the essence is of a delict consisting in damage caused by a product. If one accepts the proposition that this essence, because of which the special rule in Art. 5 was introduced, consists in damage being done by a product and liability being born by one who participated in its marketing, then the place where the damage occurred is not, in fact, the most tightly coupled with the delict. What is more, application of the connection of place of damage was rejected considering that, in respect of this type of delict, it generates arbitrary decisions. This connection was made permissible under Art. 5 (1) (c) only after the arbitrariness of the determination was corrected by the criterion of marketing of the product in a given country, giving both parties the potential to foresee the application of a given law.

64 In addition, setting aside the criterion of marketing in exclusive favour of the criterion of place of damage would allow a user to acquire products in countries which do not ensure sufficient protection under tort law (and thus the product would be purchased at a lower price), and then take advantage of the better protection provided by the state in which the damage occurred (this, however, could be important only in an unlikely event of acquisition of the product in a state where it was marketed unforeseeably). For these reasons, the more appropriate (or rather the less inappropriate) choice is to apply the law of the habitual residence of the person liable.

65 As indicated earlier (C.IV.3), the place of product acquisition connection should not be applied when a bystander is injured. Thus, a situation may arise in which, from among the three places indicated in Art. 5 (1) (a)–(c), the product was only marketed in the place of its acquisition, yet the victim is neither the person acquiring it nor an individual using it jointly, but rather an innocent third party. In this case, the argument for applying Art. 5 (1) sentence 2 by way of analogy is slightly weakened. It is not influenced by the consideration about the potential to foresee the applicable law by the victim, nor the argument concerning the threat of a user deriving benefits from differences in levels of protection and prices of products. Indeed, we may continue to assume that the applicable law will be that of the habitual residence of the person liable, but this will be frequently modified by Art. 5 (2).

5. Manifestly closer connection (escape clause)

66 The escape clause of Art. 5 (2) is the same as the one used in Art. 4 (3).The application of the law of the country indicated by Art. 5 (1) is therefore excluded where it is clear from all the circumstances of the case that the tort is manifestly more closely connected with another country. This may also be the law of one of the countries indicated by those elements of Art. 5 (1) which were not invoked in a given set of circumstances.

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57 See *Spickhoff*, 685 *et seq*.; *Schaub*, para. 9.

58 See *Illmer*, in: Huber (ed.), Rome II Regulation, Art. 5 para. 36.

67 The provision indicates that such 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 in question. Therefore, if the victim and the person liable are linked by a contract of sale or rental for the product that caused the damage, the applicable law for that contract should also be applicable for evaluating delict claims. At times it is said that the same effect is generated by the issuing of a warranty by the producer,[59] but this is a point open to debate. It is brought into question by the fact that a warranty generally encompasses the proper operation of a product, and provides a claim for its repair or exchange but not remedy for damage caused by it.[60] In addition, while the selection of the applicable law for a sale or rental contract can be influenced by the user of the product, that person's influence over the selection of the appropriate law for a guarantee is frequently illusory.

68 The second category of circumstances in which it is proposed to use Art. 5 (2) is the incurring of damage by a bystander – an individual who neither acquired a product nor used it, but by a pure twist of fate was located within the impact zone of an event giving rise to damage. The need to make reference to Art. 5 (2) arises, in my view, only when it is not possible to apply Art. 5 (1) (a) or (c).[61] It can also not be said categorically that in each case we should skip over the law indicated by Art. 5 (1) sentence 2, as this would interfere with the extraordinary and elastic nature of the escape clause. It is vital to assess the specific circumstances. They will often lead to the conclusion that the law of another state is the most appropriate – generally the one where the damage occurred.[62]

69 Another case in which it is possible to apply Art. 5 (2) is a situation where the parties are habitually resident in different countries whose relevant substantive rules are identical.[63]

Article 6: Unfair competition and acts restricting free competition

1. The law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected.

2. Where an act of unfair competition affects exclusively the interests of a specific competitor, Article 4 shall apply.

3. (a) The law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected.

(b) When the market is, or is likely to be, affected in more than one country, the person seeking compensation for damage who sues in the court of the domicile of the defendant, may instead choose to base his or her claim on the law of the court seised, provided that the market in that Member State is amongst those directly and substantially affected by

59 *Schaub*, para. 8.

60 See *Illmer*, in: Huber (ed.), Rome II Regulation, Art. 5 para. 43.

61 Similarly *Illmer*, RabelsZ (2009), 269, 291 *et seq*. Taking the opposite side, as it would seem, is *Spickhoff*, 689; *Schaub*, para. 9.

62 See *Leible*/*Lehmann*, RIW (2007), 721, 728; *Spickhoff*, 689; *Illmer*, in: Huber (ed.), Rome II Regulation, Art. 5 para. 44; *Illmer*, RabelsZ (2009), 269, 302.

63 See *Stone*, 196.

the restriction of competition out of which the non-contractual obligation on which the claim is based arises; where the claimant sues, in accordance with the applicable rules on jurisdiction, more than one defendant in that court, he or she can only choose to base his or her claim on the law of that court if the restriction of competition on which the claim against each of these defendants relies directly and substantially affects also the market in the Member State of that court.

4. **The law applicable under this Article may not be derogated from by an agreement pursuant to Article 14.**

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I. Overview and structure

Art. 6 addresses two related fields of non-contractual obligations: unfair competition and acts restricting free competition. To that end, it provides for two separate conflict rules which might as well have been split up into two articles.[1] The first conflict rule, contained in Art. 6 (1) and (2), concerns acts of unfair competition, and the second one, contained in Art. 6 (3), concerns acts restricting free competition.[2] The Commission's initial proposal was limited to a conflict rule on unfair competition[3] whereas the conflict rule on acts restricting free competition was introduced only at a later stage by the Council.[4] Art. 6 (4) excludes a choice of law comprehensively in both fields. Due to the unclear relationship of Art. 6 (2) to Art. 4, it is, however, disputed whether the exclusion applies to competitor-related acts of unfair competition.[5] **1**

1 For a potential merger of the two rules into one single rule (but with exceptions) in a future, reformed Rome II Regulation see *Fabig*, Internationales Wettbewerbsprivatrecht nach Art. 6 Rom II-VO (2016); equally critical with regard to the distinct conceptualization of the two conflict rules Staudinger/*Fezer*/*Koos* [2015] IntWirtschR note 392 *et seq.* and 403.

2 For a comprehensive account of the legislative history of both conflict rules see *Plender*/*Wilderspin*, The European Private International Law of Obligations (4th ed. 2014), note 20–001 *et seq.*; *Dickinson*, The Rome II Regulation (2008), note 6–01 *et seq.*

3 See Art. 5 of the initial proposal (COM(2003) 427 final), likewise Art. 7 of the amended proposal (COM (2006) 83 final).

4 See the Common Position (EC) No. 22/2006 of 25 September 2006, OJ 2006 C 289E/68; for further details on the background of Art. 6 (3) see *infra* note 95 *et seq.*

5 For details see *infra* note 87.

II. Unfair competition

1. Genesis

2 The conflict rule in Art. 6 (1) and (2) on unfair competition was one of the most disputed in the genesis of the Rome II Regulation.[6] The Commission and the European Parliament disagreed already on the very basic question of whether to provide for a special rule concerning unfair competition at all. While the Commission had provided for a special conflict rule on unfair competition in its initial proposal, the Parliament's rapporteur, Diana Wallis from England, suggested to abandon it in favour of applying the general conflict rule on tort/delict. Even though her view was disputed amongst the members of the European Parliament, the majority followed her. The Commission, however, resisted Parliament's request to abstain from a special rule. It explained, however, that its slightly amended special conflict rule on unfair competition was a clarification of the general conflict rule with regard to unfair competition rather than a completely diverging and self-standing rule.[7] The Council in its Common Position rejected Parliament's request and backed the Commission's position in favour of a special conflict rule on unfair competition, which led to Art. 6 (1) and (2) as they now stand.

2. Traditional conceptualization

3 The conflict rule in Art. 6 (1) and (2) follows the traditional conceptualization of unfair competition in private international law: it is a *lex specialis* or even only a clarification of the general conflict rule on delict/tort. This is clearly expressed by Recital 21. The conceptualization is reflected in the different sub-rules of Art. 6 (1) and (2). The general conflict rule on unfair competition in Art. 6 (1) has emancipated itself from the general conflict rule on delict/tort in Art. 4 to a certain extent. It is closer to a competition-related conflict rule similar to the one on acts restricting free competition in Art. 6 (3)(a), which attaches to the respective market where competition is affected. By contrast, Art. 6 (2), covering exclusively competitor-related acts of unfair competition, refers to Art. 4 as Art. 6 (2) is conceptually linked to the protection of individuals, particularly individual competitors. Since the two sub rules will often point to different laws, the determination of the law applicable to an act of unfair competition depends to a large extent on the scope afforded to the two sub rules and the respective interplay between them.

3. Structure and relationship between Art. 6 (1) and 6(2)

a) Market- and competitor-related acts

4 The two types of acts of unfair competition covered by Art. 6 (1) and 6 (2), respectively, are market-related and competitor-related acts.

5 A market-related act affects not only an individual competitor's position on the market but the proper functioning of the affected market as such, i.e. several competitors and the consumers at large. Accordingly, Art. 6 (1) provides for the affected market as the connect-

6 For a detailed account of the legislative history of the conflict rule on unfair competition see *Mankowski*, in: Münchener Kommentar/Lauterkeitsrecht, IntWettbR (2nd ed. 2014), note 19 *et seq*.

7 COM(2006) 83 final p. 6.

ing factor, reflecting the institutional interests protected by the law of unfair competition, i.e. competitive relations and the collective interests of consumers.

A competitor-related act affects exclusively the interests of one single competitor. Instances of such acts are the disclosure of a competitor's business secrets,[8] acts of sabotage or espionage and enticing away a specific competitor's staff. By referring to the general conflict rule on tort/delict in Art. 4, Art. 6 (2) rejects a considerable difference to any other tort/delict capable of justifying a deviation from the general conflict rule.[9] **6**

b) Relationship between Art. 6 (1) and 6 (2)

Considering that Art. 6 (2) constitutes the exception to the general rule in Art. 6 (1), and considering that unfair competition law is increasingly regarded as part of a comprehensive market-protection system, Art. 6 (2) should be interpreted narrowly, resulting in a very limited substantive scope.[10] **7**

First, its application is limited to acts that do not even slightly affect the market – or more specifically, further competitors and consumers; instead, it is focused on acts that affect the interests of only one specific competitor. Still, an application of Art. 6 (1) requires a direct effect on the market, so that indirect consequences on the market do not render Art. 6 (2) inapplicable.[11] **8**

Second, Art. 6 (1) and (2) pursue a purely objective, effect-based approach to distinguish between rule and exception. The subjective target of the act in question is irrelevant.[12] In particular, Art. 6 (2) does not apply to acts that are targeted at a specific competitor but operate via consumers or other competitors, e.g. a publicly announced boycott of specific competitors and other forms of denigration of specific competitors.[13] An example of a purely competitor-related act is the unfair use of another party's documents in a case where the documents are not protected by any intellectual property rights.[14] **9**

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8 For the relationship with Art. 8 in that regard see Art. 8 note 20 *et seq*. and *Wadlow*, EIPR 2008, 309, 310.

9 *Leistner*, in: Basedow/Drexl/Kur/Metzger (eds.), Intellectual Property in the Conflict of Laws (2005) 129, 137; *Lindacher*, GRUR Int 2008, 453, 457; *Mankowski*, in: Münchener Kommentar/Lauterkeitsrecht, IntWettbR (2nd ed. 2014), note 243.

10 Concurring *Augenhofer*, in: Callies (ed.), Rome Regulations (2nd ed. 2015), Art. 6 Rome II note 29; critical in that regard *Sack*, GRUR Int. 2012, 601, 604 *et seq*.

11 Similar *Sack*, WRP 2008, 845 (850); *Leistner*, Intellectual Property in the Conflict of Laws at 149; *Hellner*, 9 YbPIL (2007) 49, 56; *Dickinson*, note 6.28; *Köhler*, in: Köhler/Bornkamm (eds.), UWG (35th ed. 2017), Einl UWG, note 5.44a; *Leistner*, in: Basedow/Drexl/Kur/Metzger (eds.), Intellectual Property in the Conflict of Laws (2005) 129, 149; BGH, NJW 2010, 3780 note 19; for a detailed analysis of the rationale and scope of Art. 6 (2) see *Lindacher*, GRUR Int. 2008, 453, 457 *et seq*.; for examples under English law see *Dickinson*, note 6.30; for examples under German law see *Sack*, WRP 2008, 845 (851) and *Sack*, GRUR Int. 2012, 601, 606 *et seq*.

12 A subjective approach as initially suggested by the Commission (see Explanatory Report to the initial proposal COM(2003) 427 final, p. 16: "… where an act of unfair competition targets a specific competitor") is rightly rejected by *Dickinson*, The Rome II Regulation (2008), note 6.29; *Plender/Wilderspin*, The European Private International Law of Obligations (4th ed. 2014), note 20–035.

13 *Sack*, GRUR Int. 2012, 601, 607 *et seq*.; see BGH, GRUR 2014, 601 note 37 (concerning an internet publication denigrating a specific competitor vis-à-vis the market public).

14 For further illustration see OGH GRUR Int. 2012, 468, 472.

10 In borderline cases, where the range of effects is unclear, one may approach the matter not by looking at the range of the effects of the act in question but by looking at the respective connections and the laws applicable according to them in order to determine which one fits better in the individual circumstances. Often, this will come down to the question of whether the application of Art. 4 (2) and (3) appears to be desirable and justified in order to apply the law that is most closely connected to the case, as the principle underlying all connections of the Rome Regulations, since those two provisions are invoked only by Art. 6 (2).[15]

4. Scope

a) Substantive scope

aa) Qualification: Act of unfair competition

11 Just what constitutes an "act of unfair competition" within the meaning of Art. 6 is not defined by the provision itself. As is standard in the field of EU Regulations, the term must not be interpreted by way of adopting national concepts, but autonomously in order to ensure the uniform application of the conflict rule throughout the EU.[16] Despite this postulate for an autonomous interpretation, national laws have to be taken into account.[17] First, Art. 6 covers a field where the national laws, intra- and extra-EU,[18] differ considerably.[19] This implies a rather wide and flexible autonomous interpretation of unfair competition for the purposes of Art. 6, which is further supported by Recital 21 as it refers comprehensively to

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15 For further details on this matter see *infra* note 39 *et seq*.

16 *Köhler*, in: Köhler/Bornkamm (eds.), UWG (35th ed. 2017), Einl UWG, note 5.31; *Wiegandt*, in: jurisPK, Bürgerliches Gesetzbuch (2017), Art. 6 Rom II-VO (2017), note 10; *Glöckner*, in: Harte/Henning (eds.), UWG (4th ed. 2016), Einl C, note 89; *Dickinson*, The Rome II Regulation (2008), note 6.17; *Handig*, GRUR Int 2008, 24, 26; *Sack*, WRP 2008, 845 (846); *Mankowski*, in: Münchener Kommentar/Lauterkeitsrecht, IntWettbR (2nd ed. 2014), note 11; *Dicey/Morris/Collins*, The Conflict of Laws (15th ed. 2012), note 35–054; *Mankowski*, GRUR Int. 2005, 634, 635; misleading *Drexl*, in: Münchener Kommentar, BGB, Vol. 11, IPR II, IntLautR (6th ed. 2015), note 109 (referring to EU law as constituting the *lex fori* in case of European Regulations).

17 *Luciani*, La Semaine Juridique – Entreprise et Affaires, 2008, no. 48, 18, 20; *Plender/Wilderspin*, The European Private International Law of Obligations (4th ed. 2014), note 20–011 *et seq*. point out rightly that despite an autonomous interpretation the ECJ will look at the national laws.

18 Due to the universal scope of application of the Regulation (see Art. 3), not only the Member States' laws on unfair competition have to be taken into account.

19 The national laws range from no general tort of unfair competition in England (see *L'Oreal SA v Bellure NV* [2007] EWCA Civ 968 at note 135 *et seq*.; instead protection by single torts such as passing off, inducing breach of contract, interference with contractual relations, breach of confidence, slander, libel and defamation; for a discussion of characterization issues see *Fitchen*, 5 J. Priv. Int. L. (2009) 337, 348 *et seq*.; *Fawcett/Torremans*, Intellectual Property and Private International Law (2nd ed. 2011), note 16.04 *et seq*.) to an application of the general law of torts in France (case law evolving around Art. 1382, 1383 Code civil); and on to a specific tort of unfair competition in Germany (Gesetz gegen den unlauteren Wettbewerb [UWG], particularly Art. 3 with the very wide general tort of unfair competition and Art. 4 providing for the most common instances); for more detailed accounts of foreign substantive laws of unfair competition see *Köhler*, in: Köhler/Bornkamm, UWG (35th ed. 2017), Einl UWG, ch. 4; briefly in relation to various EU Member States also *Plender/Wilderspin*, The European Private International Law of Obligations (4th ed. 2014), note 20–011 *et seq*.

the protection of competitors, consumers and the general public as well as the proper functioning of the market economy. Accordingly, quite different national concepts of unfair competition law have to fit into the autonomous European concept under Art. 6. Second, even an autonomous concept of a European Regulation is not delocalized from the Member States' laws and concepts but rather builds upon them. As a consequence, the national concepts of the Member States form one of the bases of the autonomous concept of Art. 6 in so far as they pursue the goals set out by Recital 21.

Against this background, acts of unfair competition cannot be defined abstractly in a precise manner. There is a long history of failed attempts to do so.[20] Rather, in line with the concept's flexibility and wide range, one can only establish several characteristic elements of an act of unfair competition in order to concretize the concept and its boundaries. Such characteristic elements can be drawn from the Commission's Explanatory Memorandum,[21] Art. 10bis of the 1883 Paris Convention for the Protection of Intellectual Property[22] (to which all Member States are parties), Art. 1 of the Conflict-of-Laws Rules on Unfair Competition by the Institut de droit International (Cambridge Session 1983)[23] and Arts. 1 to 6 of the WIPO Model Provisions on Protection against Unfair Competition.[24] **12**

The Commission's Explanatory Memorandum refers to "acts calculated to influence demand (misleading advertising, forced sales, etc.), acts that impede competing supplies (disruption of deliveries by competitors, enticing away a competitor's staff, boycotts), and acts that exploit a competitor's value (passing off and the like)" as well as industrial espionage, disclosure of business/trade secrets and inducing breach of contract. These instances comprise market-related as well as competitor-related acts of unfair competition. **13**

Pursuant to Art. 10bis(2) of the Paris Convention "[a]ny act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition." This abstract definition is illustrated by examples in Art. 10bis(3), such as acts creating confusion and acts containing false, discrediting allegations as to the establishment, the goods or the industrial or commercial activities of a competitor as well as indications or allegations misleading the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose or the quantity of the goods offered. Art. 1 of the WIPO Model Provisions contains a definition very similar to the one laid down in Art. 10bis (2) of the Paris Convention, and Art. 2 to Art. 6 of the WIPO Model Provisions classify acts of unfair competition in a similar fashion as Art. 10bis(3). Art. 1 of the Conflict-of-Laws Rules on Unfair Competition by the Institute de droit International (Cambridge Session 1983) refers explicitly to the definition in Art. 10bis(2) of the Paris Convention, but it adds further **14**

20 Concurring *Plender/Wilderspin*, The European Private International Law of Obligations (4th ed. 2014), note 20–031; *Mankowski*, GRUR Int. 2005, 634, 635; *Glöckner*, in: Harte/Henning (eds.), UWG (4th ed. 2016), Einl C, note 87.

21 See COM(2003) 427 final at p. 17.

22 Art. 10bis itself does not constitute a conflict rule which would prevail over Art. 6 Rome II under Art. 28 (1) Rome II.

23 Concurring *Hellner*, 9 YbPIL (2007) 49, 68; *Dicey/Morris/Collins*, The Conflict of Laws (15th ed. 2012), note 35–054.

24 WIPO Publication No. 832(E) of 1996.

examples such as unfair price competition (in this area there may be overlap with antitrust[25]) and defamation or disparagement of a competitor in relation to his products or business.

15 Drawing from these sources, one may set out four key elements of an act of unfair competition: the competitive context of the act; its dishonest and/or misrepresenting nature; the direction of the act vis-à-vis competitors, consumers or the public at large; and its detrimental effect on a competition on the merits. If all four elements are present, the act in question clearly qualifies as an act of unfair competition within the meaning of Art. 6. If certain aspects of these elements or even an element as a whole are not present, the act in question may still constitute an act of unfair competition within the meaning of Art. 6. Whether this is the case will then, however, depend on the individual circumstances, such as the presence of additional competition-related elements, the assessment of the act as a whole and the qualification under the Member States' or even third states' laws.

16 Beyond those characteristic elements, clear instances of unfair competition within the meaning of Art. 6 are provided by European secondary legislation concerning the harmonization of the Member States' laws on unfair competition. The Unfair Commercial Practices Directive[26] and the Directive on Misleading and Comparative Advertising[27] are of particular relevance in this context.[28] In particular, it is not an obstacle that the term "unfair commercial practices" was considered[29] but rejected[30] during the legislative process of Rome II. The term was rejected merely against the background that Art. 2 (d) of the Unfair Commercial Practices Directive defines it specifically with regard to *b2c* relationships (reflecting the personal scope of the Directive) while Art. 6 lacks such a restriction. Accordingly, unfair practices as defined by Art. 5 (2) to 5 (5) in connection with Arts. 6 to 9 and Annex 1 of the Unfair Commercial Practices Directive as well as unlawful advertising under the Directive on Misleading and Comparative Advertising constitute acts of unfair competition within the meaning of Art. 6 Rome II.[31] Furthermore, the Directives' national implementations and their application by the national courts may be taken into account. The acts of unfair competition established by those Directives are, however, neither exhaustive nor restrictive for the purposes of Art. 6.[32]

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25 For a solution regarding such overlap constellations see note 47 *et seq.*

26 Directive (EC) No. 2005/29, OJ 2005 L 149/22.

27 Directive (EC) No. 2006/114, OJ 2006 L 376/21.

28 *Honorati*, in: Malatesta (ed), The Unification of Choice of Law Rules on Torts and Other Non-Contractual Obligations in Europe (2006), 127, 142 suggests that "[t]he … Directive [Dir. 2005/29] helps to overcome such a situation by providing first of all a European and binding definition of what it is intended to be covered by 'unfair competition'"; *Mankowski*, in: Münchener Kommentar/Lauterkeitsrecht, IntWettbR (2nd ed. 2014), note 13 simply adapts the definition of unfair commercial practices to the partly deviating context of the Rome II Regulation (in particular with regard to B2B-relationships).

29 See Art. 7 of the amended proposal (COM(2006) 83 final).

30 See Art. 6 of Common Position (EC) No. 22/2006 of the Council.

31 Concurring: *Dickinson*, The Rome II Regulation (2008), note 6.23; *Köhler*, in: Köhler/Bornkamm (eds.), UWG (35th ed. 2017), Einl UWG, note 5.31.

32 *Mankowski*, in: Münchener Kommentar/Lauterkeitsrecht, IntWettbR (2nd ed. 2014), note 14; *Plender/Wilderspin*, The European Private International Law of Obligations (4th ed. 2014), note 20–027; Hüßtege/Mansel/*Weller*, BGB, Vol. 6 (2014), Art. 6 note 6.

bb) Preparatory acts

Whether acts in preparation of competitive activity on the market are covered by the conflict rule in Art. 6 (1) and (2) or, alternatively, by the general conflict rule in Art. 4 depends on the circumstances and on the claim concerned. This requires the drawing of distinctions along the following lines: **17**

Since preparatory acts do not yet affect the proper functioning of the market economy (cf. Recital 21), they cannot be regarded as market-related acts of unfair competition under the market effects approach of Art. 6 (1). There is only one exception: a claim for injunctive relief prior to an impending act of unfair competition. Since the application for injunctive relief aims at preventing an impending act of unfair competition, it appears justified to apply the conflict rule on unfair competition in Art. 6 (1) to acts preceding the actual act of unfair competition. The direction of the claim towards unfair competition in the future is decisive. Accordingly, the applicable law is not the law of the country where the preparatory act(s) took place but instead the law of the country whose market the prepared act of unfair competition was likely to affect.[33] **18**

While Art. 6 (1) can be applied only to the injunctive relief-scenario, Art. 6 (2), addressing purely competitor-related acts of unfair competition, may be applied to preparatory acts as such since it does not require effects on the market but simply a competitive context vis-à-vis a competitor, something which will regularly be present in cases of such preparatory acts.[34] Whether the preparatory act does already constitute an act of unfair competition or is otherwise banned by unfair competition law specifically addressing such preparatory acts, is a matter of the substantive law determined by Art. 6 (2), i.e. in effect by Art. 4 to which Art. 6 (2) merely refers. Under many national regimes on unfair competition as well as the general law of tort/delict, preparatory acts are not prohibited as such though. **19**

Overall, the scope of the conflict rules in Art. 6 (1) and (2) with regard to preparatory acts and the scenarios in which preparatory acts trigger legal sanctions under most national substantive laws coincide. Preparatory acts are under most national laws not prohibited as such – neither by unfair competition law nor by the general law of delict/tort. Hence, they are also not sanctioned by damages. Rather, preparatory acts may spark injunctive relief in relation to the prepared act (not the preparatory act) by the other party under the substantive law determined by Art. 6 (1) based on the impending effect of the prepared act on a national market. **20**

cc) Injunctions under Directive 2006/114 and Directive 2005/29 by qualified entities

Under Art. 5 (1) Directive 2006/114 as well as under Art. 11 (1) Directive 2005/29, Member States shall provide for adequate and effective means to combat unfair commercial practices and misleading advertising. One of the means to achieve this goal is legal provisions enabling persons or organizations regarded under national law as having a legitimate interest in **21**

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33 *Drexl*, in: Münchener Kommentar, BGB, Vol. 11, IPR II, IntLautR (6th ed. 2015), note 116; OLG Hamm MMR 2011, 523 (524) dealing with injunctive relief and stating that Art. 6 Rome II refers to the law of the country where consumer interests are affected or are *likely to be affected*.

34 Hüßtege/Mansel/*Weller*, BGB, Vol. 6 (2014), Art. 6 note 14; *Drexl*, in: Münchener Kommentar, BGB, Vol. 11, IPR II, IntLautR (6th ed. 2015), note 117.

combating unfair commercial practices or misleading advertising to take legal action against such acts of unfair competition, either before the courts or administrative authorities.

22 In cross-border scenarios the problem arises whether the *locus standi* of such interested persons or organizations under the national laws implementing the two Directives is a matter of substantive law governed by the *lex causae* determined by Art. 6 Rome II or whether it is a matter of procedure, which is under Art. 1 (3) Rome II governed by the *lex fori*. The answer to this question has practical implications. If it is regarded as a matter governed by the *lex causae*, such persons or organizations may not be able to prevent acts of unfair competition spreading over several Member states since their right to bring an action may differ under the applicable laws. If it is regarded as a matter of procedure governed by the *lex fori*, the right to bring the claim is determined according to one single law regardless of the number of different laws applicable to the claim on the merits under Art. 6 Rome II. On the other hand, a person or organization having *locus standi* in its home country or under the applicable substantive law may lack *locus standi* in the forum country such that certain fora are *a priori* excluded. The issue is disputed, and the CJEU has not yet had the possibility to give an authoritative answer.[35] Some take the view that the *locus standi* is a matter exclusively governed by the *lex fori*.[36] They argue in particular that the decision whether to grant *locus standi* to such persons or organizations not affected in their own right is a general one based on and linked to policy decisions and the respective general design of the civil procedural system. Furthermore, they often refer to the Member States' choice to provide for relief before an administrative authority, which also supports the view that the matter is a procedural one. Others take the opposite view that the *locus standi* is governed exclusively by the *lex causae*. This accords with the general notion that substantive law governs personal entitlement to bring a claim when it comes to individuals, and it follows at least indirectly from Art. 15 Rome II addressing the scope of the applicable law. Pursuant to Art. 15 lit. f Rome II, the applicable substantive law governs, inter alia, the determination of the persons entitled to compensation for damage sustained personally. While the damages in this case are not suffered personally in a strict sense, the provision makes clear that the question of who is entitled to bring a claim, be it in the form of a damages claim or injunctive relief, is not an aspect of procedural law but one of the substantive law as determined by the conflict rules of the Rome II Regulation, such as Art. 6 (1).[37] There is even a third view arguing for a cumulative application of the *lex fori* and the *lex causae*.[38] This cumulative approach appears to be over-ambitious and too restrictive. It will often result in a lack of *locus standi* with regard to certain Member States. This leads to a

35 Equally, Member State courts have not yet decided the matter. It came up in several cases but appears to never have been decisive for the solution of the case, see e.g. OGH, GRUR Int 2015, 481 (discussing, but not determining the matter at 483 *et seq*.

36 *Mankowski*, in: Münchener Kommentar/Lauterkeitsrecht, IntWettbR (2nd ed. 2014), note 483; Staudinger/*Fezer*/*Koos* [2015] IntWirtschR note 831.

37 *Drexl*, in: Münchener Kommentar, BGB, Vol. 11, IPR II, IntLautR (6th ed. 2015), note 195; *Ohly*, in: Ohly/Sosnitza, UWG (7th ed. 2016), Einf. B III. note 19; *Tzakas*, International Litigation and Competition Law: the Case of Collective Redress, in: Basedow/Francq/Idot (ed.), International Antitrust Litigation, 2012, 161, 174 *et seq.* (with regard to the comparable issue under Art. 6 (3) Rome II); BeckOGK/*Poelzig*/*Windorfer* (2017), Art. 6 Rome II note 45.

38 See e.g. (partly in other contexts) *Glöckner*, in: Harte/Henning (eds.), UWG (4th ed. 2016), Einl C, note 196; *Ahrens*, WRP 1994, 654 (657); *Lindacher*, in: FS Lüke, 377, 385 *et seq*.

fragmented state of the law which would be very unsatisfactory and clearly contrary to the intention of EU legislators not only with regard to the Rome II Regulation but also with regard to the respective EC/EU Directives providing for the *locus standi* of interested persons or organizations.

The choice between *lex causae* and *lex fori* depends largely on the perspective. From the perspective of the Rome II Regulation, in particular its Art. 15 lit. f, it appears nearly inevitable that substantive law should govern the *locus standi*. In contrast, viewed from the perspective of the respective EU Regulations requiring the Member States to grant *locus standi* to specific persons or organizations, the matter is less clear and the arguments in favour of the *lex fori* are more powerful. Overall, it appears more convincing to apply the law determined by Art. 6 Rome II, i.e. the *lex causae*, to the *locus standi*. While the respective EC/EU Regulations do not take account of a cross-border scenario, the Rome II Regulation does. Furthermore, the *lex causae*-view avoids forum shopping which would be unjustified given the aim of achieving a level playing field for competitors on the national markets. Finally, one should at least mention that the *locus standi* of non-individual persons or organization, often consumer protection organizations, is a problem under an increasing number of EU Directives. The time appears right to consider the matter from a general perspective considering all those legal instruments together. **23**

dd) Injunctions for the Protection of Consumers' Interests by Qualified Entities

More generally than Directives 2006/114 and 2005/29, Directive 2009/22[39] establishes a system of injunctive relief for the protection of the collective interests of consumers by qualified entities (not limited to unfair competition law complaints). Where a qualified entity seeks such injunctive relief in relation to the use of standard contract terms affecting fair competition, one has to distinguish between the different aspects of such an application.[40] **24**

In so far as the application for injunctive relief is concerned with an alleged breach of a law aimed at protecting consumers' interests with respect to the use of unfair provisions in general terms and conditions, the applicable law concerning an injunction's availability, prerequisites and consequences (but not procedural aspects, which are according to Art. 1 (3) not covered by the *lex causae* as determined by Rome II but by the *lex fori*[41]) is determined by Art. 6 (1) Rome II,[42] not by Art. 4 Rome II.[43] As the CJEU pointed out correctly, "unfair **25**

39 Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, OJ 2009 L 110/30.

40 Case C-191/15, *Verein für Konsumenteninformation v. Amazon EU Sàrl* [2016] ECLI:EU:C:2016:612, note 48 *et seq*.

41 This is explicitly stressed by Case C-191/15, *Verein für Konsumenteninformation v. Amazon EU Sàrl* [2016] ECLI:EU:C:2016:612, note 48.

42 Case C-191/15, *Verein für Konsumenteninformation v. Amazon EU Sàrl* [2016] ECLI:EU:C:2016:612, note 39 *et seq*.; see *Baetge*, ZEuP 2011, 933 (937); Ulmer/Brandner/Hensen/*Witt*, AGB-Recht (12th ed. 2016), § 4a UKlaG note 9.

43 BGH, NJW 2009, 3371 note 17 *et seq*.; NJW 2010, 1958 note 12 *et seq*.; and NJW 2010, 2719 note 16 *et seq*. applied Art. 4, stating in some of the judgments that Art. 6 was only a concretization of Art. 4 and that in the given scenarios the same criteria would have to be applied under Art. 4 and Art. 6 (1). This case law has now been overturned by the CJEU's judgment in Verein für Konsumenteninformation (see *supra*), but the practical consequences are minimal, as the BGH had pointed out correctly.

competition within the meaning of Article 6(1) of the Rome II Regulation covers the use of unfair terms inserted into general terms and conditions, as this is likely to affect the collective interests of consumers as a group and hence to influence the conditions of competition on the market."[44] The CJEU adds that the country where the collective interests of consumers are affected within the meaning of Art. 6 (1) Rome II is the country where the consumers whose interests are protected by the request for injunctive relief reside.[45] This accords with Recital 21 Rome II, which sets out the competitors', the consumers' and the general publics' protection alongside a proper, i.e. fairly functioning, market economy as the primary goal of the conflict rule in Art. 6 (1) Rome II.

26 In contrast, the applicable law with regard to the unfairness of terms in consumer contracts in the course of an application for injunctive relief is determined pursuant to Art. 6 (1) Rome I, where the application aims to prevent the creation of contractual obligations by the inclusion of such terms in consumer contracts. Otherwise, i.e. if the validity of the respective terms were also to be judged by the law applicable under Art. 6 (1) Rome II, the law applicable to the validity would depend on whether the issue was raised in the context of a collective action brought by a qualified entity (Rome II) or in the context of an individual action (Rome I).[46] Still, the application of Art. 6 (1) Rome I can raise difficult problems since there is no contract concluded yet, which is the situation that Rome I is tailored to.

27 In practice, this combined approach of Rome I and Rome II may create problems as to where exactly the dividing line runs. As a rough guideline, one may consider whether the aspect of the claim concerns, on the one hand, the validity of the term as not being unfair (Rome I) or, on the other hand, all other aspects of the application for injunctive relief in the consumers' collective interests (Rome II). Accordingly, most aspects of an application for injunctive relief will be governed by the law determined by Art. 6 (1) Rome II. Art. 6 (1) Rome I only comes into play as far as the invalidity of the term for unfairness is concerned, since it does not matter whether this issue comes up in a collective action or in an individual contractual claim between a consumer and the business that has set those terms.

ee) Defamation

28 Defamation is explicitly excluded from the Regulation's substantive scope by Art. 1 (2)(g) Rome II ("violations of privacy and rights relating to personality, including defamation").[47] This exclusion is, however, not a comprehensive one; instead, it is closely linked and by its wording limited to violations of privacy and personality rights, particularly in the mass media context.[48] Defamation serves only as one – prominent – instance of violating privacy and personality rights. The United Kingdom, in particular, strongly opposed the inclusion of defamation in the media and press sector in order to protect its yellow press form being

44 Case C-191/15, *Verein für Konsumenteninformation v. Amazon EU Sàrl* [2016] ECLI:EU:C:2016:612, note 42.

45 Case C-191/15, *Verein für Konsumenteninformation v. Amazon EU Sàrl* [2016] ECLI:EU:C:2016:612, note 43.

46 Case C-191/15, *Verein für Konsumenteninformation v. Amazon EU Sàrl* [2016] ECLI:EU:C:2016:612, note 49 and 54 *et seq*.

47 Cf. Art. 1 note 165 *et seq*.

48 See the Explanatory Report by the Commission as to its initial proposal COM(2003) 427 final p. 17 *seq*.

subjected to foreign laws under the Rome II regime. Against this background, defamation is not excluded as such from the substantive scope of Rome II but only to the extent that it serves as a cause of action in relation to violations of privacy and personality rights. To the extent that it serves as a cause of action in the business context between competitors, defamation does not vindicate those rights. Rather, it protects competitors and the functioning of the market as such by prohibiting attacks directed at the competitors' reputation. Hence, Art. 6 covers actions such as defamation and malicious falsehood in the business context under English law, *Verleumdung* or *Anschwärzung* pursuant to §§ 4 No. 7, 8, 10 of the German *Gesetz gegen den unlauteren Wettbewerb* (UWG) and comparable acts under other national laws.

ff) Criminal law provisions

Under several national unfair competition laws, specific acts of unfair competition such as disclosure of business/trade secrets and breach of confidence are not only sanctioned by private but also by criminal law provisions. Often, these provisions are contained in the national legislation protecting against unfair competition instead of in the Criminal Code or other criminal law acts. Regardless of their localization in the national laws, these criminal law provisions are not covered by Art. 6 Rome II – even under an autonomous interpretation of the article's material scope – since the empowering provisions of the EC Treaty (Arts. 61, 65 in particular, which are now Art. 81 TFEU) are limited to private (international) law.[49] Whether criminal law provisions concerned with unfair competitive behaviour apply is a matter exclusively for the conflict rules of criminal law. This requires a two-step qualification. First, one has to determine whether the act in question is one of unfair competition. Second, one has to distinguish between private law and criminal law sanctions and the corresponding rules applicable to the given act of unfair competition. **29**

b) Personal scope

Art. 6 (1) and (2) Rome II are not restricted to *b2c* relationships as is the case with the Unfair Commercial Practices Directive.[50] As long as the act in question occurs in a competitive context, it may be committed by anyone towards anyone. This reflects the range of protected interests. **30**

c) Territorial scope

As with the other provisions of the Regulation, Art. 6 is a *loi uniforme*.[51] Suggestions to distinguish between intra-EU (country-of-origin principle) and extra-EU constellations (market effects principle as it is now embodied in Art. 6)[52] were not embraced during the drafting of the Rome II Regulation. **31**

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49 *Köhler*, in: Köhler/Bornkamm (eds.), UWG (35th ed. 2017), Einl UWG, note 5.30; *Handig*, GRUR Int 2008, 24, 25; *Hausmann/Obergfell*, in: Fezer/Büscher/Obergfell (eds.), UWG (3rd ed. 2016), IntLautPrivR, note 42.

50 See *supra* note 16.

51 See Art. 3 note 1 *et seq*.

52 See *Hamburg Group for Private International Law*, 67 RabelsZ (2003) 1, 19 *seq.*

5. Relationship with the conflict rules on contractual obligations in Rome I

32 When a market-related behaviour involves contractual as well as non-contractual obligation-based issues, it is crucial to clearly distinguish those issues in order to allocate them to the conflict rules of Rome I and Rome II respectively.

33 The boundary between pre-contractual acts (non-contractual, i.e. Rome II) and acts occurring from the formation of the contract onwards (contractual, i.e. Rome I) has been blurred by several acts of secondary EC/EU legislation. The Unfair Commercial Practices Directive's[53] scope is not limited to behaviour prior to the conclusion of individual contracts but also concerns behaviour in the course of the execution of the contract (see Art. 2 lit. d and Art. 5 of the Directive), i.e. acts traditionally governed by the law applicable to the contractual relationship. The Consumer Sales Directive[54] refers to "any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling" with regard to the conformity of the goods (see Art. 2 (2) lit. d). Finally, the E-Commerce Directive sets out the information to be provided by the service provider prior to and in the course of the conclusion of the contract. Consequently, one can no longer rely on the primary or general subject matter of the Directives involved, nor can one draw clear-cut boundaries along the dividing line of those Directives or along the traditional dividing aspect of the conclusion of the contract (prior Rome II, subsequently Rome I).

34 Instead, a functional approach is required in order to determine whether an issue has to be regarded as contractual or non-contractual: In so far as the primary function of the national law provisions addressing the issue in question is to regulate the "bilateral" relationship between the parties to the contract, they have to be qualified as being of a contractual nature. Hence, they can only be applied if the conflict rules of the Rome I Regulation identify the respective national law as the applicable one. In so far as the primary function of the national law provisions addressing the issue in question is to protect fair competition on the market (cf. Recital 21: "ensure that the market economy functions properly") by setting behavioural standards applicable to all competitors operating on the market and by sanctioning disregard of those standards independent of any contractual relationships, the law determined by the Rome II Regulation – namely Art. 6 (1) – applies.

35 Considering these criteria, the following guidelines apply: If the issue or claim at stake is concerned with the formation process in the narrow sense (offer and acceptance, agency etc.), the validity of the contract, the rights and obligations of the parties arising under the contract, non-performance of the contract, the remedies available in case of non-performance or similar issues concerned with the individual relationship of the parties to the contract, the applicable law is determined by Rome I. In contrast, if the issue in question concerns duties of information or other general requirements ensuring fair market behaviour by competitors, the issue is of a non-contractual nature so that the law determined by Art. 6 (1) Rome II will determine whether the act in question constitutes one of unfair competition and, if that is the case, what kind of sanctions apply. Particularly in the context of duties with regard to the formation and execution of a contract addressed by the Con-

53 Directive (EC) No. 2005/29, OJ 2005 L 149/22.

54 Directive (EC) No. 1999/44, OJ 1999 L 171/12.

sumer Rights Directive,[55] the distinction may be quite difficult. As a general rule, most of the national provisions implementing the Directive will have to be qualified as contractual in nature, so that the law determined by Rome I applies. In particular, the issues in relation to the right of withdrawal (Art. 9 *et seq*. of the Directive) and in relation to the obligations of the consumer in the event of withdrawal under Art. 14 of the Consumer Rights Directive have to be qualified as being of a contractual nature, resulting in an application of Rome I, even in so far as they are associated with a failure to comply with information requirements laid down in Arts. 5 and 6 of the Directive.[56]

In addition, it should be noted that claims by qualified entities under the national laws implementing Directive 2009/22 will always be qualified as non-contractual, so that Art. 6 (1) Rome II applies, since those claims are not concerned with the contractual relationship but by their very nature with the general conduct of competitors on a market and thus aim at a level playing field based on fair competition.[57] **36**

Equally, in cases of lotteries or prize draws associated with the purchase of a product (e.g. "Buy ten packages and win one of three Mini Cooper convertibles" or "Answer the following question and win tickets for a Bayern Munich football match"), one has to distinguish between the issues at stake. The contractual relationship between the distributor and the consumer who took part in the lottery – regarding in particular formation, rights and obligations, performance etc. amongst the contracting parties – is governed by the law determined by the conflict rules of the Rome I Regulation, namely Arts. 3 and 6 Rome I addressing consumer contracts. By contrast, in so far as the distorting effect of such a lottery or prize relate to the proper functioning of the market, claims by competitors or qualified entities are governed by the national unfair competition law rules determined by Art. 6 (1) Rome II.[58] **37**

Overall, the functional approach of distinguishing the substantive scope of Rome I and Rome II rests on two interrelated central aspects, one associated with the function of the national law provisions on which the claim is based and the other one associated with the person or entity pursuing the claim. If the national law provisions regulate the contractual **38**

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55 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ 2011, L 304/64.

56 The distinction drawn by *Drexl*, in: Münchener Kommentar, BGB, Vol. 11, IPR II, IntLautR (6th ed. 2015), note 131, and by Hüßtege/Mansel/*Weller*, BGB, Vol. 6 (2014), Art. 6 note 8, between several duties and sanctions under the Consumer Sales Directive is not convincing since it appears to be random and does not follow the postulated functional approach (this becomes particularly apparent when considering that *Drexl's* argument for an application of Art. 6 (1) Rome II to the sanctions in the event of a violation of information duties under the Consumer Sales Directive is linked to claims by qualified entities and competitors, i.e. parties standing outside the contractual relationship, so that Rome II applies simply for this latter reason.

57 See *supra* note 24 *et seq*.

58 Concurring *Mankowski*, in: Münchener Kommentar/Lauterkeitsrecht, IntWettbR (2nd ed. 2014), note 11; *Thorn*, in: Palandt, Bürgerliches Gesetzbuch (76th ed. 2017), Art. 1 note 4 considers only the issue of contractual liability for the announced prize, which he rightly qualifies as contractual.

relationship between the parties to the contract, it will usually be one of them pursuing the claim. Rome I governs the applicable law. If the national law provisions are concerned with the competitive behaviour on the market, it will usually not be one of the parties to the contract, but competitors or consumer protection entities bringing the claim. Rome II governs the applicable law.

6. Relationship with the general conflict rule in Art. 4

39 Since Art. 6 (2) declares Art. 4 applicable in its entirety to competitor-related acts of unfair competition, a need to distinguish the substantive scopes of application arises only as between Art. 6 (1) and Art. 4.[59] There are two potential scenarios:

40 If the act in question interferes only with the interests protected by Art. 6 (1), it is exclusively governed by the law determined by Art. 6 (1) as *lex specialis* to Art. 4.[60] In particular, the act may not be regarded as unlawful by the law applicable under Art. 4 if it is lawful under the law applicable by virtue of Art. 6 (1).

41 If a single act interferes with interests protected by Art. 6 (1) and with interests not protected by Art. 6 (1), but by Art. 4, such as real property or the right to a name, Art. 6 (1) and Art. 4 will apply respectively. Since the majority of those acts will be competitor-related, they are eventually governed in their entirety by the law determined by Art. 4 since Art. 6 (2) simply declares Art. 4 applicable. According to the (correct) majority view, even the exclusion of a choice of law under Art. 6 (4) does not apply to competitor-related acts of unfair competition within the meaning of Art. 6 (2).[61]

7. Relationship with the special conflict rule on intellectual property in Art. 8

42 Despite their common origin in trademark law and the overlaps between the law of unfair competition and intellectual property law, both fields are now distinct areas of law. This is shown not least by the existence of two different conflict rules in Arts. 6 and 8 of the Regulation. The qualification as unfair competition vis-à-vis intellectual property is often not easy in practice, such that it is worth mentioning that the distinction is irrelevant whenever Arts. 6 and 8 identify the same law as governing both unfair competition and intellectual property rights.

a) General considerations

43 If the same act, e.g. comparative advertising, constitutes unfair competition and infringes an intellectual property right, neither Art. 6 (1) nor Art. 8 prevail so as to govern all claims with regard to that act.[62] Instead, a claim-based approach is required:[63] In so far as the claim is based

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59 The sometimes alleged difference between a direct application of Art. 4 and one via Art. 6 (2) with regard to the exclusion of a choice of law according to Art. 6 (4), see e.g. *Drexl*, in: Münchener Kommentar, BGB, Vol. 11, IPR II, IntLautR (6th ed. 2015), note 110, does not exist since according to the correct majority view, Art. 6 (4) does not apply to competitor-related acts addressed by Art. 6 (2); see *infra* note 87.

60 *Drexl*, in: Münchener Kommentar, BGB, Vol. 11, IPR II, IntLautR (6th ed. 2015), note 119.

61 See in greater detail *infra* note 87.

62 Concurring *Drexl*, in: Münchener Kommentar, BGB, Vol. 11, IPR II, IntLautR (6th ed. 2015), note 128; *Sack*, WRP 2008, 845 (859); but see in contrast: *Thorn*, in: Palandt, Bürgerliches Gesetzbuch (76th ed.

on the infringement of an intellectual property right, Art. 8 will determine the law applicable to that claim. As to the other side of the coin, in so far as the claim is based on unfair comparative advertising or some other act of unfair competition, Art. 6 (1) will determine the law applicable to that claim; this includes the question of whether the existence of an intellectual property right bars a claim based on unfair competition.

b) Supplementary protection under unfair competition law

Under several national laws, technical innovations, ideas or other achievements which cannot be protected by an intellectual property right but which do require protection against exploitation and blatant acts of copying are protected by the law of unfair competition.[64] Accordingly, the law applicable to such a claim is not determined by Art. 8 but by Art. 6 (1).[65] Since the availability, scope and conditions of supplementary protection under national unfair competition laws are intertwined with the law of intellectual property, since there will often be a combination of a claim based on the infringement of an intellectual property right and a subordinate claim based on unfair competition law and since the availability of specific remedies and/or the assessment of damages is dependent on the intellectual property infringement proceedings (in particular to avoid double recovery), it appears desirable to apply the same law to both claims. In practice, this goal is regularly achieved: If the same act allegedly infringes intellectual property rights and/or constitutes unfair competition, Art. 8 and Art. 6 (1) will regularly identify the same national law as applying to both claims, i. e. the law of the country for which intellectual property protection is claimed and whose market is affected by the infringing act. In the event of different acts, one allegedly infringing intellectual property rights and the other one allegedly merely constituting an act of unfair competition, there is no need to apply the same national law to both claims. Rather, different laws may be applied to those different acts. **44**

c) Protected designations of origin and geographical indications

Protected geographical indications and designations of origin[66] are regarded as intellectual property rights by Art. 1 (2) in conjunction with Art. 22 *et seq*. TRIPS as well as Art. 2 (1)(c)(iv) of the EC Product Piracy Regulation.[67] Furthermore, under Arts. 1(2), 10 of the Paris Convention for the Protection of Intellectual Property as well as under CJEU case law on Art. 30 EC Treaty/Art. 36 TFEU,[68] geographical indications are regarded as industrial prop- **45**

2017), Art. 6 Rom II, note 4; *Grünberger*, 108 ZVglRWiss (2009) 134, 142; *Dickinson*, The Rome II Regulation (2008), note 6.34.

63 *Sack*, WRP 2008, 845 (859).

64 For instance, under German law, this is referred to as "ergänzender wettbewerbsrechtlicher Leistungsschutz", codified under § 4 No. 9 UWG.

65 *Sack*, WRP 2008, 845 (859); *Sack*, GRUR Int. 2012, 601, 608 *et seq*. with further considerations relating to the common scenarios; *Rosenkranz/Rohde*, NIPR 2008, 435, 437; *Grünberger*, 108 ZvglRWiss 2009, 134, 141 *seq*.; *Drexl*, in: Münchener Kommentar, Bürgerliches Gesetzbuch, IntUnlWettbR, note 122; *Heinze*, Einstweiliger Rechtsschutz im europäischen Immaterialgüterrecht (2007) 30.

66 As protected by Regulation (EU) No. 1151/2012 of the European Parliament and the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs, OJ 2012 L 343/1.

67 Regulation (EC) No. 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights, OJ 2003 L 196/7.

68 ECJ, Case C-87/97 – *Gorgonzola* [1999] ECR I-1301 note 20; ECJ, Case C-216/01 – *Budějovický Budvar*

erty rights, and pursuant to Art. 1 of the Enforcement Directive[69] intellectual property rights include (although only for the purposes of the Directive) industrial property rights. In relation to their nature and protection, they are therefore regarded as intellectual property rights, i.e. as special absolute rights allowing the authorized users (there does not exist an owner as such as in the case of trademarks) to prevent any unauthorized use by others. In contrast, however, misrepresentations in relation to designations of origin and geographical indications as well as the exploitation of good will attached to the geographical origin are regarded as acts of unfair competition pursuant to Art. 6 (1) (b) Unfair Commercial Practices Directive.

46 Against this background, the application of Art. 8 Rome II versus Art. 6 (1) Rome II depends – following the general considerations above – on the subject matter of and the goal pursued by the claim: In so far as it is concerned with a vindication of an absolute right to use the designation of origin or geographical indication (i.e. claims typically involving the infringement of a geographical indication or a designation of origin by unauthorized use of such indication or origin; for instance, labelling ham stemming from the Netherlands as "Prosciutto di Parma"), Art. 8 determines the law governing the alleged infringement.[70] In so far as the claim is based on a misrepresentation in relation to the geographical origin (e.g. by advertising sausages from Bavaria as sausages from Nuremberg or by advertising Dutch ham as Parma ham, in both cases without using the designation of origin or the geographical indication as such),[71] Art. 6 will determine the law applicable to this act of misleading advertising. In addition, gaps in the system of intellectual property rights in relation to geographical indications and designations of origin may be filled by unfair competition law, in which case the law for such claims is determined by Art. 6 (1) Rome II.[72]

8. Relationship with the conflict rule in Art. 6 (3)

47 Since Art. 6 covers two fields, unfair competition in Art. 6 (1) and (2) on the one hand and acts restricting free competition in Art. 6 (3) on the other hand, a distinction between the substantive scopes of application is required. Potential overlap between the two fields may occur primarily with regard to boycotts, discrimination and the protection of distribution

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[2003] ECR I-13617 note 99 *et seq*.; ECJ, Case C-469/00 – *Ravil v Bellon and Biraghi (Grana Padano)* [2003] ECR I-5053 note 49; ECJ, Case C-108/01 – *Prosciutto di Parma* [2003] ECR I-5121, note 64.

69 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ 2004 L 195/16 (including the corrigendum).

70 *Sack*, WRP 2008, 845 (860) *seq*.; *Heinze*, in: jurisPK, Bürgerliches Gesetzbuch (2017), Art. 8 Rom II-VO note 25; the opposite view (applying Art. 6 generally to geographical indications and designations of origin) is taken by *Plender/Wilderspin*, The European Private International Law of Obligations (4th ed. 2014), note 22–019.

71 Similar cases can be found in the English law of passing off, for the purposes of Rome II to be qualified as an act of unfair competition under Art. 6; see e.g. *Bollinger v Costa Brava* [1960] Ch 262; *Chocosuisse Union des Fabricants Suisses de Chocolat v Cadbury Ltd* [1998] RPC 117 (Ch.) and [1999] RPC 826 (CA); *Diageo North America Inc v InterContinental Brands Ltd* [2010] EWHC 17.

72 *Drexl*, in: Münchener Kommentar, BGB, Vol. 11, IPR II, IntLautR (6th ed. 2015), note 128; *Sack*, WRP 2008, 845 (862).

systems,[73] in all three instances particularly by competitors having a significant degree of market power.

It has been suggested that the two conflict rules are mutually exclusive[74] and that in an overlap scenario Art. 6 (3) should prevail.[75] There is, however, no good reason for such prevalence. Instead, one should pursue a functional approach as appears generally appropriate with regard to the conflict rule's substantive scope. **48**

Under a functional approach, both conflict rules may apply to the same act. The scope of the substantive laws determined by those conflict rules is, however, limited to provisions in the respective field. This requires an autonomous qualification of the national law provisions addressing the issues in question. In so far as their primary function is to regulate competitors' behaviour on the market, they have to be qualified as unfair competition law provisions for the purposes of Rome II. Hence, the provisions may only be applied if they belong to the national law determined by Art. 6 (1) and (2). In so far as their primary function is to maintain the foundations of a competitive market, in particular by prohibiting the abuse of market power, they have to be qualified as competition law provisions prohibiting acts restricting free competition. Consequently, the respective provisions may only be applied if they belong to the national law determined by Art. 6 (3). If a provision of national law covers aspects of both fields, the centre of gravity will determine whether it falls under Art. 6 (1) or Art. 6 (3).[76] If aspects of antitrust law arise as preliminary issues of a claim based on unfair competition, e.g. in case of restrictive distribution systems, both conflict rules similarly apply with the scope of each limited to the respective field. Therefore, there is a certain mutual exclusivity as between Art. 6 (1) and (2) on the one hand and Art. 6 (3) on the other hand. This exclusivity does not, however, give rise to a prevalence of either of the two conflict rules. Rather, they operate side-by-side in protecting different aspects of fair and effective competition. In any event, it is important to note that in the majority of cases the distinction is of little practical relevance since the applicable law determined by Art. 6 (1) and Art. 6 (3) will concur in cases where a single act both infringes antitrust law and constitutes an act of unfair competition.[77] **49**

9. Relationship with the country-of-origin principle in the E-Commerce and Audiovisual Media Services Directives

a) The rationale of the country-of-origin principle in the two directives

Amongst other regulatory aspects, the E-Commerce Directive[78] and the Audiovisual Media **50**

73 *Henning-Bodewig/Schricker*, EIPR 2002, 271, 272.

74 In that direction *Dickinson*, The Rome II Regulation (2008), note 6.31.

75 *Henning-Bodewig/Schricker*, EIPR 2002, 271, 272.

76 *Mankowski*, in: Münchener Kommentar/Lauterkeitsrecht, IntWettbR (2nd ed. 2014), note 7; *Hausmann/Obergfell*, in: Fezer/Büscher/Obergfell (eds.), UWG (3rd ed. 2016), IntLautPrivR, note 32.

77 *Fitchen*, 5. J. Priv. Int. L. (2009) 337, 350 overlooks that in regretting that it "… is unfortunate that the structure of Art. 6 cannot be relied upon to allow the domestic court to 'consolidate' the different choice of law in such a situation …"

78 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), OJ 2000 L 178/1.

Services Directive[79] contain sector-specific provisions on marketing and advertising via internet or on audiovisual media services (mainly television and video on demand-services) as potential acts of unfair competition. Both directives pursue the country-of-origin principle (see Art. 3 (1) E-Commerce-Directive and Art. 2 Audiovisual Media Services Directive). It is closely linked to the basic freedoms of the TFEU, namely the freedom of establishment and the free movement of services, and operates as an instrument for the realization of the internal market. Providers of internet and audiovisual media services are not obliged to comply with the national laws of all Member States where they provide their services but instead only with the national law of the country where they are established. Hence, they may choose a Member State for their establishment where the standards are lower than in others since the Member States' laws in this field are not fully harmonized. At the same time, Art. 3 (4)–(6) E-Commerce Directive and Art. 3 (2) (a) Audiovisual Media Services Directive allow for exceptions from the country-of-origin principle by allowing other Member States to restrict the freedom to provide information society services or audiovisual media services for reasons of public policy, these including the protection of minors, combatting incitement to hatred on grounds of race, sex, religion or nationality, and preventing injuries to the human dignity of individuals.

b) General limitations of the two directives

51 The scope of application of the Audiovisual Media Services and the E-Commerce Directives' country-of-origin principle is limited in relation to acts of unfair competition in various ways, which significantly reduces the practical relevance of the highly contested relationship of the Directives' country-of-origin principle with Art. 6 Rome II.

52 The territorial scope of application of both Directives is limited to cases where the provider of information society or audiovisual media services operates from an establishment in a EU Member State (in cases of audio visual media services this means where the services are rendered by a provider under the jurisdiction of a Member State, thus encompassing providers established in the respective Member State but also those using a satellite up-link situated in or satellite capacity belonging to the respective Member State). As a consequence, if the service provider operates from outside the EU, both Directives do not apply from the outset, so that any conflict-of-law issues regarding unfair competition are governed exclusively by Art. 6 (1) Rome II given that Rome II claims universal application (Art. 3).

53 The substantive scope of application of both Directives is limited to their coordinated fields. The Audiovisual Media Services Directive's coordinated field concerns mainly media-specific aspects but not unfair competition aspects,[80] particularly misleading and comparative advertising.[81] Hence, nearly all aspects of unfair competition in relation to audiovisual media services are governed exclusively by the law determined by Art. 6 Rome II. The E-Commerce Directive's coordinated field[82] is broader so as to effectively enable EU-wide online market-

79 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (codified version), OJ 2010 L 95/1.

80 *Sack*, WRP 2008, 845 (857); *Schricker*, GRUR Int. 1999, 771, 775.

81 See CJEU, Case C-34/95 – *de Agostini* [1997] ECR I-3843 note 37 *et seq*.

ing and advertising being subject to a single standard of unfair competition – the one of the country of origin.[83]

Finally, the personal scope of the Audiovisual Media Services Directive is limited considerably in relation to unfair competition since the Directive does not apply to the person responsible for the marketing or advertising but only to the audiovisual media service provider.[84] **54**

c) The country-of-origin principle as a conflict rule

Considering the varying overlap between the Directives' country-of-origin principle and the conflict rule in Art. 6 (1) Rome II, the question whether the former constitutes a conflict rule is problematic mainly with regard to the E-Commerce Directive. If Art. 3 (1) E-Commerce Directive constituted a conflict rule, it would – pursuant to Art. 27 Rome II – replace the conflict rule in Art. 6 (1) Rome II to the extent that the scopes of application overlap, i.e. particularly with regard to online marketing and advertising provided throughout the EU from an establishment in a Member State. **55**

aa) The E-Commerce Directive's country-of-origin principle as a conflict rule

The question whether the E-Commerce Directive's country-of-origin principle constitutes a conflict rule was and is highly contested despite a clarifying judgment by the CJEU.[85] From the numerous views and variations one may extract two main lines of argument. **56**

According to the first line of argument, the E-Commerce Directive's country-of-origin principle does not constitute a conflict-of-law rule but instead forms part of the EU's substantive law.[86] Hence, it does not affect the determination of the applicable law on the level of **57**

82 Whether the country-of-origin-principle extends even beyond the coordinated field is not clear, pro *Mankowski*, in: Münchener Kommentar/Lauterkeitsrecht, IntWettbR (2nd ed. 2014), note 56; *contra*: *Köhler*, in: Köhler/Bornkamm (eds.), UWG (35th ed. 2017), Einl UWG, note 3.47.

83 *Thorn*, in: Palandt, Bürgerliches Gesetzbuch (76th ed. 2017), Art. 6 Rom II note 15; *Köhler*, in: Köhler/Bornkamm (eds.), UWG (35th ed. 2017), Einl UWG, note 3.47.

84 *Sack*, WRP 2008, 845 (858); *Mankowski*, in: Münchener Kommentar/Lauterkeitsrecht, IntWettbR (2nd ed. 2014), note 100.

85 For a detailed account of the discussion and the views put forward see *Drexl*, in: Münchener Kommentar, BGB, Vol. 11, IPR II, IntLautR (6th ed. 2015), note 65 *et seq*; *Mankowski*, in: Münchener Kommentar/Lauterkeitsrecht, IntWettbR (2nd ed. 2014), note 48 *et seq*.

86 *Plender/Wilderspin*, The European Private International Law of Obligations (4th ed. 2014), note 18–031 *et seq*.; *Drexl*, in: Münchener Kommentar, Bürgerliches Gesetzbuch, IntUnlWettbR, note 72 *et seq*. (with one exception in note 77: if the advertising and marketing activities in question are exclusively addressed to a foreign market (and not also the market of the country of origin), then the law of the country of origin plays no role (proposing a restrictive interpretation of Art. 3 (2) E-Commerce Directive in such constellations); *Augenhofer*, in: Callies (ed.), Rome Regulations (2nd ed. 2015), Art. 6 Rome II note 40; *Ahrens*, in: Festschrift für Winfried Tilmann (2003) 739, 745; *Schack*, MMR 2000, 59 (61); *Halfmeier*, ZEuP 2001, 837 (864) *et seq*.; *Glöckner*, in: Harte/Henning (eds.), UWG (4th ed. 2016), Einl C, note 34; *Sack*, WRP 2008, 845 (855); Sack EWS 2011, 513; *Pfeiffer*, IPRax 2014, 360; *Leible*, in: Reichelt (ed.), Europäisches Gemeinschaftsrecht und IPR, 2007, 31, 47 *seq*.; *Wilderspin*, NIPR 2008, 408, 409 *seq*.; *de Lima Pinheiro*, Riv. dir. int. priv. proc. 2008, 5, 36; *Dietrich/Ziegelmayer*, CR 2013, 104 (107); in that direction also OLG Köln, GRUR-RR 2014, 298 *et seq*. (even though the court left the matter open despite applying Art. 6 (1) Rome II since the country-

conflict of laws, which is exclusively a matter for Art. 6 (1) Rome II. Rather, it operates on the level of substantive law once the applicable law has been determined. In order to foster the internal market and to ensure free movement of services and establishment, the substantive law of the country of origin prevails over the substantive law determined by Art. 6 (1) Rome II. The proponents of this view mainly argue on the basis of Art. 1 (4) E-Commerce Directive, which clearly states that the Directive does not establish additional rules of private international law.

58 According to the second line of argument,[87] the country-of-origin principle as laid down in Art. 3 (1) E-Commerce Directive constitutes a conflict rule. Pursuant to Art. 27 Rome II it replaces the conflict rule in Art. 6 (1) Rome II with regard to acts of unfair competition within the coordinated field, i.e. mainly in case of online marketing and advertising. The proponents of this view argue that Art. 1 (4) E-Commerce Directive is irrelevant for the characterization of Art. 3 (1) of the Directive as a conflict rule.[88] Additionally, they argue (i) with the country-of-origin principle having a conflict-of-law purpose aiming to reduce the costs of online marketing and advertising, (ii) with the nature of the conflict solved by the country-of-origin principle, which is said to be on a conflict-of-law level regarding the two potentially applicable laws, namely the law of the country of origin and the law of the country of destination, rather than on the level of substantive law, and (iii) with the transposition of the Directive's country-of-origin principle in other Member States.[89]

59 The CJEU decided the matter in its *e-date Advertising and Martinez* judgment in 2011 following a request for a preliminary ruling by the German Supreme Court (Bundesgerichtshof).[90] The Bundesgerichtshof posed the question whether the country-of-origin principle as laid down in Art. 3 (1) and (2) E-Commerce Directive has "the character of a conflict-of-laws rule in the sense that … they also require the exclusive application … of

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of-origin principle did not apply for the area that was harmonized by EU secondary legislation); KG Berlin, MMR 2016, 608 and KG Berlin MPR 2016, 134, 136 (in both judgments the court did not decide the matter since the law of the country of origin was not applicable anyway due to Art. 3 (4)(a)(i) of the E-Commerce-Directive); the BGH (GRUR 2012, 850 and recently affirmed in WRP 2017, 434 note 36 *et seq.*) has explicitly taken this view ("sachrechtliches Beschränkungsverbot"); see likewise OGH, GRUR Int. 2013, 1163, 1166 (deviating explicitly from an earlier decision of the OGH, MR 2012, 207).

87 See for that view e.g. *Höder*, Die kollisionsrechtliche Behandlung unteilbarer Multistate-Verstöße (2002) 200 *et seq.*; *Thünken*, 51 ICLQ (2002) 909, 940 *seq.*; *Grundmann*, 67 RabelsZ (2003) 246, 273; *Mankowski*, in: Münchener Kommentar Lauterkeitsrecht, IntWettbR (2nd ed. 2014), note 97; *Mankowski*, 100 ZVglRWiss (2001) 137, 179; *Lurger/Vallant*, MMR 2002, 203 (207); OGH MR 2012, 207 (consider the subsequent decision to the contrary in OGH GRUR Int 2013, 1163).

88 Very strong wording is used by *Mankowski*, in: Münchener Kommentar/Lauterkeitsrecht, IntWettbR (2nd ed. 2014), note 48 *et seq.* where he states that the normative content of Art. 1 (4) E-Commerce Directive is not very well thought through or is even intentionally misleading and that the European institutions cannot declare something as not constituting a conflict rule when in reality it does so; in that respect he speaks of a legislative falsa demonstratio (non nocet).

89 *Mankowski*, in: Münchener Kommentar/Lauterkeitsrecht, IntWettbR (2nd ed. 2014), note 54, 57 and 73 (some of the other arguments raised by Mankowski are specifically German in nature since they relate to German principles of private international law or the German transposition of the E-Commerce Directive).

90 CJEU, Case C-509/09 – *e-date Advertising and Martinez* [2012] ECR I-3843.

the law in force in the country of origin, to the exclusion of national conflict-of-laws rules, or whether they operate as a corrective to the law declared to be applicable pursuant to the national conflict-of-laws rules in order to adjust it in accordance with the requirements of the country of origin."[91] The CJEU took account of the aim pursued by the country-of-origin principle on the one hand and its unequivocal statement in Art. 1 (4) that it "does not establish additional rules on private international law…" on the other hand. On this basis, the court (sitting as a Grand Chamber) gave a clear answer to the question referred to it, one which leaves no room for manoeuvring and puts an end to the dispute over the nature of the country-of-origin principle. It held that the country-of-origin principle "does not require transposition in the form of a specific conflict-of-laws rule"[92] but "that [subject to the derogations set out in Article 3(4)] the provider of an electronic commerce service is not made subject to stricter requirements than those provided for by the substantive law applicable in the Member State in which that service provider is established."[93] In addition to this clear verdict that the country-of-origin principle does not constitute a conflict-of-law rule, the reasoning of the CJEU also makes it very clear that the country-of-origin principle operates on the level of the substantive law(s) and not on the level of conflict of laws. This becomes particularly apparent when the CJEU states that "Article 3 of the Directive precludes, subject to derogations authorized in accordance with the conditions set out in Article 3(4), a provider of an electronic commerce service from being made subject to stricter requirements than those provided for by the substantive law in force in the Member State in which that service provider is established"[94] in connection with the reasoning that "the fact of making electronic commerce services subject to the legal system of the Member State in which their providers are established pursuant to Article 3(1) does not allow the free movement of services to be fully guaranteed if the service providers must ultimately comply, in the host Member State, with stricter requirements than those applicable to them in the Member State in which they are established."[95] The reasoning is based on the varying standards of the conflicting substantive laws and prohibits the imposition of stricter standards by the substantive host state law, i.e. the law of destination of the online marketing and advertising, in comparison with the substantive law of the country of origin, i.e. regularly the country where the advertising and marketing entity is established. If the E-Commerce Directive's country-of-origin principle were a conflict-of-law rule, only one substantive law would apply.

Under the CJEU's substantive law approach in *e-date Advertising and Martinez*, which deserves full support, the relationship between Art. 3 E-Commerce Directive and Art. 6 (1) Rome II is not governed by Art. 27 with the effect of a derogation from Art. 6 (1) Rome II by Art. 3 E-Commerce Directive. Rather, the country-of-origin principle and the conflict rule in Art. 6 (1) Rome II operate on different levels. Once the applicable law is determined pursuant to Art. 6 (1) Rome II, the substantive law of the country of origin prevails under Art. 3 E-Commerce Directive only in so far as the law determined pursuant to Art. 6 (1) Rome II imposes further restrictions upon the online marketing or advertising in question. Hence, any restrictions under the applicable law within the coordinated fields **60**

91 CJEU, Case C-509/09 – *e-date Advertising and Martinez* [2012] ECR I-3843 note 53.

92 CJEU, Case C-509/09 – *e-date Advertising and Martinez* [2012] ECR I-3843 notes 63 and 68.

93 CJEU, Case C-509/09 – *e-date Advertising and Martinez* [2012] ECR I-3843 note 68.

94 CJEU, Case C-509/09 – *e-date Advertising and Martinez* [2012] ECR I-3843 note 67.

95 CJEU, Case C-509/09 – *e-date Advertising and Martinez* [2012] ECR I-3843 note 66.

and scope of the E-Commerce Directive will apply only up to the level of the law of the country of origin. Conversely, however, the law of the country of origin does not add further restrictions so as to lower standards of the applicable law as determined by Art. 6 (1) Rome II.[96] This approach of applying the substantive law as determined by Art. 6 (1) Rome II up to the standards of the law of the country of origin accomplishes the single market goal of the E-Commerce Directive without imposing unnecessary restrictions upon the provider of E-Commerce services in instances where it wants to make use of lower standards in certain Member States as compared to the country of origin.[97] Hence, the provider may either rely on the standards of the country of origin for all its E-Commerce activities throughout the Member States or differentiate in order to make use of the different unfair competition law standards in the Member States. Varying levels of consumer protection, varying product liability standards and language issues may be other factors rendering an adaptation of online marketing and advertising to varying national standards more favourable than a single uniform standard. This interplay between Art. 6 (1) Rome II as the one and only conflict rule and Art. 3 E-Commerce Directive (i.e. its national implementations) as the cap on potential restrictions on online marketing and advertising with regard to unfair competition accords with Recital 35 (2) Rome II, which sets out that "[t]he application of provisions of the applicable law designated by the rules of this Regulation should not restrict the free movement of goods and services as regulated by Community instruments, such as Directive 2000/31/EC … (Directive on electronic commerce)."

61 Even though the matter was fiercely discussed especially right after the enactment of the E-Commerce Directive and came up again after the enactment of the Rome II Regulation, the dispute appears highly overstated not only because of the CJEU's judgment in *e-date Advertising and Martinez* but also since it has become clear over the years that the differences in practice between the two interpretations – conflict-of-law rule versus substantive law rule – are minimal. Under both interpretations of the country-of-origin principle, the substantive law of the country of origin sets the limit for restrictions on EU-wide online marketing and advertising based on unfair competition law. The only practical difference (at least EU-wide) is the effect of stricter standards by the law of the country of origin as compared to the law(s) applicable under Art. 6 (1) Rome II. Whereas the conflict-of-laws understanding would apply such stricter standards since the law of the country of origin is the applicable law, the substantive law understanding of the country-of-origin principle would not. A scenario where the country-of-origin principle also plays no role was recently before the Oberlandesgericht Köln: The court determined the applicable law under Art. 6 (1) Rome II and left open the role of the country-of-origin principle since the area of law was harmonized by EU Directives, which left no room for the application of a more liberal approach by the law of the advertising party's home country.[98]

62 There is an important exception to the E-Commerce Directive's country-of-origin principle: It does not apply where the online advertising and marketing activities do not take effect on the market where the service provider is established, i.e. the country of origin, but exclusively on other Member States' markets. In that case, the applicable law(s) will be determined

96 *Köhler*, in: Köhler/Bornkamm (eds.), UWG, Einl UWG (35th ed. 2017), note 3.47.

97 *Drexl*, in: Münchener Kommentar, BGB, Vol. 11, IPR II, IntLautR (6th ed. 2015), note 70.

98 OLG Köln, GRUR-RR 2014, 298 *et seq*.

exclusively by Art. 6 (1) Rome II.[99] There are two scenarios. In the first scenario, the online marketing or advertising is directed at one specific Member State other than the country of origin. The application of that law does not constitute a restriction of the freedom to provide services, which the country-of-origin principle aims to avoid, since it does not create a need to adapt to different substantive laws. In the second scenario, the online marketing and advertising is directed at several Member States, excluding the country of origin. The solution of this scenario is slightly more problematic since there is a multiplication of the applicable laws being one of the reasons behind the country-of-origin principle. While it would still be advantageous for the service provider to be able to base his cross-border online marketing and advertising on a single law, there is no apparent reason why this law should be the one of the country of origin. The E-Commerce activity has no connection to the country of origin apart from the service provider's establishment. The establishment, however, conveys a close connection to the law of the country of establishment only when the E-Commerce activity is foremost or at least also directed at this country and spreads from that country to other Member States. It is only then that the service provider adapts his online marketing and advertising to his home country's unfair competition standards in the first place before considering other countries and their unfair competition laws. If the online marketing and advertising is directed only at countries other than the country of the service provider's establishment, there is a much closer connection to the laws determined by Art. 6 (1) Rome II as the laws of the countries where the competitive activities take effect. The crucial question is whether one favours one single law under all circumstances and regardless of the scenario or whether such single law is justified only if it represents the closest connection with the dispute. The answer should be that it is better to have several laws closely connected to the alleged act(s) of unfair competition than a single law that has no connection to the case. Hence, the application of the country-of-origin principle rests on two assumptions: First, E-Commerce activities such as online advertising and marketing take effect in several Member States, and second, one of those states is the country of origin, so that the service provider aligns its online marketing and advertising activities to this country's unfair competition law before extending his activities to other countries. As soon as one of the assumptions is not present, the justification for an application of the country-of-origin principle is lacking such that Art. 6 (1) Rome II governs the determination of the applicable law free from any restrictions by the law of the country of origin.

bb) Audiovisual Media Services Directive's country-of-origin principle as a conflict rule

Since the role and effect of the country-of-origin principle becomes practically relevant particularly in relation to the E-Commerce Directive, the question whether the Audiovisual Media Services Directive's country-of-origin principle constitutes a conflict rule is far less disputed. The discussion follows more or less the same lines as the ones regarding the E-Commerce Directive. The majority view, however, seems to favour a classification as a conflict-of-law rule, based on the wording of Art. 2 (1) and Art. 3 (1) and (2) of the Audiovisual Media Services Directive as well as on Recitals 33 and 36.[100] Others, however, **63**

[99] *Sack*, EWS 2011, 513 (515) *et seq*.; *Drexl*, in: Münchener Kommentar, BGB, Vol. 11, IPR II, IntLautR (6th ed. 2015), note 79; this view is also supported by Art. 2 (6) Audiovisual Media Services Directive, which declares the Directive – with the country of origin-principle forming its core – non-applicable if the audiovisual media services are intended exclusively for reception in third countries.

[100] See inter alia *Drexl*, in: Münchener Kommentar, BGB, Vol. 11, IPR II, IntLautR (6th ed. 2015), note 59; *Mankowski*, in: Münchener Kommentar/Lauterkeitsrecht, IntWettbR (6th ed. 2015), note 99; *Hausmann*/

argue similarly (as with regard to the E-Commerce Directive) that the law of the country of origin operates only as a cap on the level of the substantive laws while the applicable law is determined by Art. 6 Rome I without recourse to the Audiovisual Media Services Directive's country-of-origin principle.[101] The difference in practice is again the role of the law of the country of origin as the exclusively applicable law or as a mere cap on restrictions imposed by the law determined under Art. 6 (1) Rome II.

10. Relationship with the basic freedoms of the TFEU

64 The basic freedoms of the TFEU, particularly the free movement of goods (Art. 34 TFEU) and services (Art. 56 TFEU), neither constitute a conflict rule providing for the law of the country of origin themselves nor do they require one or the other principle (country of origin versus country of destination) to be adopted in a uniform EU-wide conflict rule.[102] Rather, the national (substantive) unfair competition laws of the Member States (while Rome II claims universal application!) have to accord with the basic freedoms, in particular the free movement of goods, as developed by the CJEU in a line of cases starting with *Cassis de Dijon*[103] via *Oosthoek*[104] and *GB-INNO*[105] to *Keck and Mithouard*[106] and the subsequent case law.[107] In case of incompatibility, the respective provisions of national law are rendered inapplicable. This accords with the understanding of the country-of-origin principle in European secondary legislation, in particular the E-Commerce Directive.[108]

11. Relationship with EC directives on unfair competition

65 The EC Directives concerning unfair competition, i.e. the Directive on misleading and

Obergfell, in: Fezer/Büscher/Obergfell (eds.), UWG (3rd ed. 2016), IntLautPrivR, note 120; *Roth*, RabelsZ 55 (1991) 623, 670 *et seq*.; *Thünken*, IPRax 2001, 15 (19).

101 See inter alia *Halfmeier*, ZEuP 2001, 837 (858); *Sack*, WRP 2008, 845 (858); Staudinger/*Fezer*/*Koos* [2015] IntWirtschR Rn 572.

102 *Köhler*, in: Köhler/Bornkamm (eds.), UWG (35th ed. 2017), Einl UWG, note 5.3; *Glöckner*, in: Harte/Henning (eds.), UWG (4th ed. 2016), Einl C, note 22 *et seq*.; *Mankowski*, in: Münchener Kommentar/Lauterkeitsrecht, IntWettbR (2nd ed. 2014), note 123 *et seq*. and 148 *et seq*.; *Drexl*, in: Münchener Kommentar, Bürgerliches Gesetzbuch, IntUnlWettbR, note 44 *et seq*.; *Honorati*, in: Malatesta (ed), The Unification of Choice of Law Rules on Torts and Other Non-Contractual Obligations in Europe (2006), 127, 140 *et seq*.; *Ahrens*, in: FS Winfried Tilmann (2003) 739, 742 *et seq*.; *Halfmeier*, ZEuP 2001, 837 (853); *Ohly*, GRUR Int. 2001, 899, 901; *Sack*, WRP 1994, 281 (284) *seq*.; for the opposing view that the basic freedoms provide for the law of the country of origin to apply see in particular: *Basedow*, 59 RabelsZ (1995) 1, 12 *et seq*.; *Bernhard*, EuZW 1992, 437 (440); *Grandpierre*, Herkunftsprinzip contra Marktortanknüpfung (1999), 106, 118; *Hamburg Group for Private International Law*, 67 RabelsZ (2003) 1, 19 *et seq*. (only with regard to intra-community constellations).

103 ECJ, Case 120/78 – *Cassis de Dijon* [1979] ECR 649, see for a detailed account of the case law *Körber*, Grundfreiheiten und Privatrecht (2004) 136 *et seq*.

104 ECJ, Case 286/81 – *Osthoek* [1982] ECR 4575 (concerning a provision of Dutch unfair competition law).

105 ECJ, Case C-362/88 – *GB-INNO-BM* [1990] ECR I-683.

106 ECJ, Joined Cases C-267/91 and C-268/91 – *Keckund Mithouard* [1993] ECR I-6097.

107 See in particular ECJ, Case C-405/98 – *Gourmet International Products* [2001] ECR I-1795; ECJ, Case C-322/01 – *Doc Morris* [2003] ECR I-14887.

108 See *supra* note 56 *et seq*.

comparative advertising[109] and the Directive on unfair commercial practices,[110] neither directly nor indirectly set up conflict rules themselves. Rather, they are solely concerned with a harmonization of the Member States' substantive laws of unfair competition. Likewise, the Directive on privacy and electronic communications,[111] the Directive on injunctions for the protection of consumers' interests[112] and the Regulation on consumer protection cooperation[113] do not contain any conflict rules.

III. Determination of the applicable law

As laid down above, in relation to the determination of the applicable law Art. 6 distinguishes between market related acts of unfair competition governed by the conflict rule in Art. 6 (1) and (purely) competitor-related acts of unfair competition governed by the conflict rule in Art. 6 (2). **66**

1. Market-related acts

Pursuant to Art. 6 (1), market-related acts of unfair competition are governed by the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected. **67**

a) Structure of the conflict rule in Art. 6 (1)

Art. 6 (1) is an inflexible conflict rule.[114] Although it is only a clarification of the general conflict rule in Art. 4 (see Recital 21), neither the common habitual residence connection of Art. 4 (2) nor the escape clause of Art. 4 (3) are applicable to market-related acts of unfair competition.[115] Likewise, a choice of law pursuant to Art. 14 is excluded by Art. 6 (4). The rigidity of the conflict rule is linked to its market protection function, i.e. its purpose to ensure – in the interests of competitors and consumers collectively – the proper functioning of the market.[116] It leaves no room for deviations in the common interests of the parties, on the one hand, while it also justifies the exception in Art. 6 (2) in relation to acts of unfair competition which are exclusively competitor-related without affecting the proper functioning of the market. An *argumentum e contrario* in relation to Art. 5 which explicitly refers to Art. 4 (2) and replicates the escape clause of Art. 4 (3) in Art. 5 (2) supports this narrow view of Art. 6 (1). **68**

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109 Directive (EC) No. 2006/114, OJ 2006 L 376/21.

110 Directive (EC) No. 2005/29, OJ 2005 L 149/22.

111 Directive (EC) No. 2002/58, OJ 2002 L 201/37.

112 Directive (EC) No.1998/27, OJ 1998 L 166/51.

113 Regulation (EC) No. 2006/2004, OJ 2004 L 364/1.

114 *Cheshire*/*North*/*Fawcett* (14th ed. 2008), p. 810; *G. Wagner*, IPRax 2008, 1 (8); *Sack*, WRP 2008, 845 (849).

115 Case C-191/15, *Verein für Konsumenteninformation v. Amazon EU Sàrl* [2016] ECLI:EU:C:2016:612, note 44 *et seq*. (in relation to Art. 4 (3) only, but with considerations that apply also in relation to Art. 4 (2)); *Dickinson*, The Rome II Regulation (2008), note 6.12 *et seq*.; *Dicey*/*Morris*/*Collins*, The Conflict of Laws (15th ed. 2012), note 35–057; *Glöckner*, in: Harte/Henning (eds.), UWG (4th ed. 2016), Einl C, note 125 *et seq*. and 129.

116 *Honorati*, in: Malatesta (ed), The Unification of Choice of Law Rules on Torts and Other Non-Contractual Obligations in Europe (2006), 127, 135 and 145 *seq*.

b) The market effects principle under Art. 6 (1) as compared to Art. 6 (3)

69 In contrast to Art. 6 (3), the conflict rule in Art. 6 (1) does not mention the term *market*. Nevertheless, the reference in Art. 6 (1) to the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected, refers to the traditional effects[117] or market effects principle[118] as the connecting factor which was predominant in the national conflict laws of the Member States.[119] In that regard, competitive relations and the collective interests of consumers are synonyms for the affected market, with an emphasis, however, on the microeconomic function of the conflict rule in Art. 6 (1) that regulates the effect on market players.[120] To what extent this reading of Art. 6 (1) aligns the connecting factors of Art. 6 (1) (concerning acts of unfair competition) and Art. 6 (3) (concerning acts restricting free competition) is contested; moreover, inconsistent terminology adds to the uncertainty surrounding the market effects principle in relation to both conflict rules.

70 The majority favours a differentiation: The market effects principle under Art. 6 (1) refers to the law of the country where the competitive interests collide, i.e. the country where the act of unfair competition takes effect vis-à-vis competitors and consumers. This focus on the effect on competitors and consumers reflects the microeconomic function of unfair competition law. In contrast, the market effects principle under Art. 6 (3) refers to the law of the country where free competition is restricted as a result of the anti-competitive act.[121] The different connecting factors reflect the different goals pursued by the two fields of law: Unfair competition law regulates the competitive *conduct* on a market; antitrust law concerns the *consequences* of anti-competitive behaviour on the market.[122] The rationale of unfair competition law, *par conditio concurrentium*, requires a connection to the country where the market players compete for customers, i.e. where the competitive interests collide, instead of the country where the consequences for (free) competition are finally felt.[123]

71 Others favour a uniform principle assuming that both Art. 6 (1) and 6 (3) provide for the law of the country where the effects of the unfair or anti-competitive acts materialize.[124] The focus is rather on the macroeconomic function of unfair competition law which brings it closer to antitrust law.

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117 *Hamburg Group for Private International Law*, 67 RabelsZ (2003) 1, 19.

118 *Honorati*, in: Malatesta (ed), The Unification of Choice of Law Rules on Torts and Other Non-Contractual Obligations in Europe (2006), 127, 148 *et seq*.; *Huber/Bach*, IPRax 2005, 73 (78).

119 For an overview see *Buermeyer*, in: Liber amicorum Thomas Rauscher (2005), 15, 23 *et seq*.; *Kadner Graziano*, Gemeineuropäisches Internationales Privatrecht (2002), 324 *et seq*.

120 *Hellner*, 9 YbPIL (2007) 49, 56; *Plender/Wilderspin*, The European Private International Law of Obligations (4th ed. 2014), note 20–050.

121 *Drexl*, in: Münchener Kommentar, Bürgerliches Gesetzbuch, IntUnlWettbR, note 131 and 134; *Hausmann/Obergfell*, in: Fezer/Büscher/Obergfell (eds.), UWG (3rd ed. 2016), IntLautPrivR, note 224 *et seq*.; *Mankowski*, in: Münchener Kommentar/Lauterkeitsrecht, IntWettbR (2nd ed. 2014), note 142 *et seq*.; *Sack*, WRP 2008, 845 (846) *seq*.; according to *R. Wagner*, in: FS Jan Kropholler (2008) 715, 723, this was also the position of the Council.

122 *Mankowski*, in: Münchener Kommentar/Lauterkeitsrecht, IntWettbR (2nd ed. 2014), note 142; *Dickinson*, The Rome II Regulation (2008), note 6.31.

123 *G. Wagner*, IPRax 2008, 1 (8); see also the Commission's Explanatory Memorandum COM(2003) 427 final at p. 16.

124 *Fabig*, Internationales Wettbewerbsprivatrecht nach Art. 6 Rom II-VO (2016), 85 *et seq*., in particular 204

Overall, the differentiating view is more convincing. It mirrors the different wording of Art. 6 (1) and Art. 6 (3), and it reflects the corresponding triple objective of Art. 6 (1) in contrast to the single objective pursued by Art. 6 (3). By specifically referring to the competitive relations and the collective interests of consumers, the conflict rule on unfair competition goes beyond the macroeconomic market protection function. Still, the strong market protection element of Art. 6 (1) regularly points to the law of the national market(s) where the effects of the unfair competitive behaviour are felt, as is the case with acts restricting free competition under Art. 6 (3). The line between the effect on competitors and consumers and the effect on the market is a very thin one. As explained above, the *collective* interests of competitors and consumers are characteristic of a properly functioning market as they are the counterparts on such market, horizontally (competitors amongst each other) and vertically (competitors in relation to consumers). Against this background, it is not surprising that, in the vast majority of cases, the country where the unfair act interferes with the protected interests of competitors and consumers and the country where the consequences of anti-competitive acts are felt, is one and the same.[125] Rare instances where those countries differ could occur in (i) advertising and sales activities abroad that address customers on holiday and feature subsequent delivery in their home country (act of unfair competition takes effect abroad, but consequences materialize back home)[126] and (ii) domestic advertising activities for products to be acquired abroad.[127] However, at least in the first example one could apply the market effects principle in a way that would result in no practical difference between the two conflict rules by arguing that it is not only the collective interests of consumers and competitors that are affected abroad, but also the affected market itself that is abroad since the sales contracts are concluded there while delivery back home is merely the fulfilment of such contracts, which is irrelevant in determining the country where free competition is restricted. In the second example, things lie differently, and it appears far more difficult to negate a difference between the two conflict rules. **72**

Hence, one may refer to the term "market effects principle" in relation to the conflict rules of both Art. 6 (1) and Art. 6 (3) as long as one takes account of the slightly but still noticeably different aims pursued by the two conflict rules, even if they materialize only in exceptional cases. **73**

By pursuing the market effects principle, the conflict rule in Art. 6 (1) rejects the country-of-origin principle as a general conflict rule.[128] In doing so, it subordinates the free movement of **74**

et seq. (summary); Staudinger/*Fezer*/*Koos* [2015] IntWirtschR note 644; *Glöckner*, in: Harte/Henning (eds.), UWG (4th ed. 2016), Einl C, note 104 *et seq*. (particularly in light of the rise of private enforcement of antitrust law); *Honorati*, in: Malatesta (ed), The Unification of Choice of Law Rules on Torts and Other Non-Contractual Obligations in Europe (2006), 127, 149; similar also *Hellner*, 9 YbPIL (2007) 49, 56 (with reference to the legislative history).

125 Particularly when considering that Art. 6 (1) Rome II does by no means attach to the indirect consequences of the act of unfair competition or the act restricting free competition (cf. Art. 4 and Recital 17).

126 *Drexl*, in: Münchener Kommentar, Bürgerliches Gesetzbuch, IntUnlWettbR, note 135.

127 *Rosenkranz*/*Rohde*, NIPR 2008, 435, 437; in that regard, it has to be stressed though that the country where the advertising is developed and designed is in any event irrelevant since Art. 6 (1) refers to the law of the country where the advertising influences consumers and affects competitive relations (see further *infra* note 79 *et seq*.).

128 For the relationship with the country-of-origin principle in the E-Commerce and the Audiovisual Media

services and sales activities realized by the country-of-origin principle to a level playing field for competitors on the national markets (*par conditio concurrentium*) as realized by the market effects principle.[129] Competitors are prohibited from exporting to a foreign market their home country's regime of unfair competition like an attachment to their products or services. Instead, all competitors entering a national market play the competitive game according to the same rules. Additionally, the market effects principle concurs with the general conflict-of-laws concept of the closest connection since an act of unfair competition is regularly most closely connected to the country where the protected interests are affected as opposed to the country where the act of unfair competition originates. Of course, things lie differently in case of online advertising and marketing within the substantive scope of the E-Commerce Directive. As explained above,[130] such advertising and marketing is governed by the law determined by Art. 6 (1) Rome II which, however, on the level of the substantive laws must not impose stricter standards than the law of the country of origin, i.e. the country where the advertising and the marketing provider are established.

c) Connecting factor: the country where the protected interests are affected

aa) The relevant country

75 The country where the protected interests are affected is the country where the act of unfair competition exerts its influence on competitors or consumers collectively, i.e. the affected market.[131] The country where the person claimed to be liable acts or even only takes preparatory steps and the country where indirect consequential effects of the direct influence on competitors or consumers are felt is irrelevant.[132]

76 Acts directly affecting traders, distributors and other persons along the distribution chain will regularly also directly affect competitors or consumers, so that they are also covered by Art. 6 (1).[133] Acts disrupting distribution may hit competitors just as acts directly targeted at them would do. They merely operate less visibly. Consumers as the final element in the chain

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Services Directive see *supra* note 50 *et seq.*; for a general discussion of the country-of-origin principle versus the country-of-destination principle (which reflects the effects principle) see *Drasch*, Das Herkunftslandprinzip im internationalen Privatrecht (1996); *Bruinier*, Der Einfluss der Grundfreiheiten auf das internationale Privatrecht (2002); *Körber*, Grundfreiheiten und Privatrecht (2004) 432 *et seq.*

129 *Sack*, WRP 2008, 845 (847); *G. Wagner*, IPRax 2008, 1 (8); *Garcimartín Alferéz*, EuLF 2007, I-77, 86.

130 See *supra* note 56 *et seq.*

131 *Drexl*, in: Münchener Kommentar, Bürgerliches Gesetzbuch, IntUnlWettbR, note 133 *et seq.*; *Hausmann/Obergfell*, in: Fezer/Büscher/Obergfell (eds.), UWG (3rd ed. 2016), IntLautPrivR, note 224; *Mankowski*, in: Münchener Kommentar/Lauterkeitsrecht, IntWettbR (2nd ed. 2014), note 142 *et seq.*; *Sack*, WRP 2008, 845 (846) *seq.*; *Thorn*, in: Palandt, Bürgerliches Gesetzbuch (76th ed. 2017) Art. 6 Rom II, note 9; *G. Wagner*, IPRax 2008, 1 (8); *Rosenkranz/Rohde*, NIPR 2008, 435, 437.

132 *Sack*, WRP 2008, 845 (847).

133 *Köhler*, in: Köhler/Bornkamm (eds.), UWG (35th ed. 2017), Einl UWG, note 5.32 assumes an analogous application of Art. 6, but it may well apply directly considering that Recital 21 provides for a proper functioning of the market economy as the underlying rationale of the protected interests; *Dickinson*, The Rome II Regulation (2008), note 6.24 applies Art. 6 in this case directly, as it is suggested here, but requires "some (appreciable) effect either on a specific competitor or upon a class of market participants, whether competitors or consumers". Whether this aims at establishing two categories of cases or an appreciability threshold is not clear.

of distribution will likewise be hit by disruptions of this chain. Via this disruptive effect on both competitive relations as well as the consumers' collective interests, a proper market functioning is affected just as it is by acts directly targeted at competitors or consumers.

Applying the market effects principle one may distinguish several scenarios: **77**

With regard to acts of unfair competition concerning advertising or other marketing activities, it is disputed in which countries the protected interests are affected within the meaning of Art. 6 (1). The dispute mirrors the discussion on the interpretation of the market effects principle in Art. 6 (1) vis-à-vis Art. 6 (3). According to some of the proponents of the uniform interpretation of the market effects principle under Art. 6 (1) and 6(3), the country whose market is affected is not only the country where the marketing and advertising is perceived by customers (one may refer to this country or national market as the advertising country or advertising market) but also the country where the advertised goods or services are sold (one may refer to this country or market as the distribution country or distribution market). In their view, competitive relations are also affected in the distribution country since it is this country where competitors compete for customers and where the consequences of the unfair advertising or marketing activities are felt. To be regarded as lawful, the marketing or advertising activities have to meet the unfair competition law standards of both laws.[134] In contrast, according to the proponents of the differentiating view the only country whose market is affected by advertising or marketing activities is the advertising country. The effects in the distribution country are regarded as indirect consequences which are irrelevant for the determination of the applicable law such that they do not trigger the applicability of a second legal regime.[135] Finally, and rather pragmatically, some proponents of a uniform interpretation of the market effects principle argue that the advertising and the distribution country are regularly the same so that it is pointless to differentiate between the two.[136] **78**

In the vast majority of cases, the advertising and the distribution country will indeed be the same since advertising and marketing are linked to distribution given their supportive function. Apart from a few exceptional scenarios it makes little sense to advertise goods or services on a market where they are not distributed. Hence, it is practically irrelevant whether one applies the substantive laws of both countries or only the law of the advertising country. Only in rare, exceptional cases where the two markets differ, e.g. in the scenario of domestic advertising activities for products to be acquired abroad, do the different views matter. The decision favouring one view or the other will then depend on the interpretation of the market effects principle for the purposes of Art. 6 (1) versus Art. 6 (3) as discussed above.[137] **79**

Following the differentiating view, the connecting factor is the perception of the advertising activities (visually or audibly) by customers (not necessarily consumers). Regularly, this relates to the country where the advertising activities physically take place, e.g. by **80**

134 *Fabig*, Internationales Wettbewerbsprivatrecht nach Art. 6 Rom II-VO (2016), 180.

135 Hüßtege/Mansel/*Weller*, BGB (2014), Vol. 6, Art. 6 note 18; in that direction also OGH GRUR Int. 2013, 1163 and BGH WRP 2016, 586 (587).

136 *Glöckner*, in: Harte/Henning (eds.), UWG (4th ed. 2016), Einl C, note 144; Staudinger/*Fezer*/*Koos* [2015] IntWirtschR note 649.

137 See *supra* note 69 *et seq*.

displaying adverts on walls or other special advertising spaces (perimeter advertising in football stadiums, adverts alongside roads, at bus stops, airports etc.); by handing out flyers to people, whether randomly on the street, directly at the point of sale or by inserting them into magazines; by offering free give-aways to customers; or by approaching people in the course of other marketing activities. In the case of advertising or marketing activities via television, radio or internet, it is the country or countries where the advertising or marketing is receivable by customers if the product or service that is marketed or advertised is also distributed in the respective country (often indicated by disclaimers or the language used).[138]

81 In the case of advertising or marketing via internet, a scenario that is increasingly relevant, the possibility of receiving and taking notice of the advert or marketing activity appears to be too broad since this would regularly cover nearly every country in the world. Accordingly, the courts have, with the approval of most commentators, developed slight restrictions in order to avoid the applicability of an unforeseeable number of laws. The main restrictive filter is the requirement that the advertising or marketing activity be directed at the market of the respective country. Indications of such a directing are the language of the act in question, the question of whether the advertised products are distributed in the respective country, the domain (e.g. "fr" or "de") and the number of potential customers in the respective country.[139] Distribution does not require physical shops in the respective country. Rather, a product is also distributed if it is offered solely by online shops for delivery in the respective country.[140] The requirement of distribution in the advertising country is justified for two reasons. First, pure marketing and advertising without any sales activities will hardly interfere with the proper functioning of the respective market, which is what the market effects principle as the connecting factor of the conflict rule in Art. 6 (1) aims to protect. Customers will usually not take particular note of marketing activities related to products not available in the respective country. Second, the number of countries would otherwise be exorbitantly high – potentially worldwide – raising the problem of multi-state torts/delicts without any justification for such an extension of the applicable laws.[141] In any event, in the case of online advertising or marketing activities throughout the EU the risk of multiple standards under multiple laws is significantly reduced by the E-Commerce Directive's country-of-origin principle.[142]

82 The connecting factor of the affected market raises far less problems with regard to acts of unfair competition in relation to the distribution process, i.e. the sale of goods and the supply of services. The country where the protected interests are affected is the country where the goods or services are sold and supplied. Examples of such unfair acts are

138 *Sack*, WRP 2008, 845 (852).

139 See from the case law e.g. BGH GRUR 2014, 601 note 38 (implicitly: German users of a website who are directed or at least guided to press releases in English language for the purpose of reading them); GmS-OGB NJW 2013, 1425 note 15; OLG Köln, NJW-RR 2014, 932 (933); OLG Hamm, MMR 2014, 175 (176); KG Berlin, MPR 2016, 134.

140 It is not uncommon that distribution of products or services offered online is limited – for a variety of reasons – to certain countries.

141 On the difficult issue of multi-state torts/delicts see *infra* note 88 *et seq.*

142 For the way the country of origin-principle operates in connection with Art. 6 see *supra* note 60.

distribution contrary to market regulatory laws, misrepresentations in distributing the goods or services (such as passing off)[143] and the sale of copies (where the original creation is not protected by an IP right so that it may amount to an act of unfair competition). The country or countries where the goods are actually delivered to or where the services are actually performed are irrelevant as are the countries where the goods are produced.[144] In so far as the act of unfair competition concerns the contract formation process, the country where the protected interests are affected will usually be the country where the relevant representation or other act in the course of the contract's formation was brought to the attention of the other party[145] since it is in this country where the unfair act takes effect vis-à-vis the contracting partner.

bb) Affected or are likely to be affected

Affected or are likely to be affected refers to actual as well as imminent interference with the protected interests.[146] This covers a wide array of actions ranging from damages claims in relation to past acts to injunctive relief concerning impending acts of unfair competition (*ex parte* and interim as well as final injunctions, including cease and desist orders).[147] **83**

cc) Appreciability

Art. 6 (1) contains no appreciability threshold. Considering that earlier drafts of the conflict rule on unfair competition had provided for such a threshold[148] and considering that those drafts were abandoned in the version finally adopted, any attempts to argue *de lege lata* in favour of such an appreciability threshold[149] are bound to fail.[150] As a consequence, the applicability of a national law does not depend on the gravity of the effects of the act of **84**

143 If the misrepresentation takes places in the course of advertising, it will be the country of advertising, which will usually but not necessarily be identical with the country of sale.

144 *Sack*, WRP 2008, 845 (850).

145 *Köhler*, in: Köhler/Bornkamm (eds.), UWG (35th ed. 2017), Einl UWG, note 5.35 *et seq*.

146 For an example of imminently pending acts see KG Berlin MPR 2016, 134, 136.

147 *Thorn*, in: Palandt, Bürgerliches Gesetzbuch (76th ed. 2017), Art. 6 Rom II note 8.

148 See Art. 5 of the Commission's (initial) proposal and Art. 7 of the Commission's amended proposal ("direct and substantial effect").

149 *Cheshire*/*North*/*Fawcett* (14th ed. 2008), p. 810 mistakenly still refer to the Commission's Explanatory Memorandum to justify the requirement of a direct substantial effect; *Dickinson*, The Rome II Regulation (2008), note 6.55 suggests that spillover effects are indirect consequences which are irrelevant for determining the applicable law – a solution which still sits uncomfortably with the deletion of the appreciability threshold by the Council in the Common Position; *Glöckner*, in: Harte/Henning (eds.), UWG (4th ed. 2016), Einl C, note 152 and *Rosenkranz*/*Rohde*, NIPR 2008, 435, 437 argue that the appreciability threshold is inherent in the requirement of effects on the respective market (drawing mainly from an alleged parallelism of the antitrust and unfair competition law connections in Art. 6); *Leible*/*Lehmann*, RIW 2007, 721 (729); *Handig*, GRUR Int. 2008, 24, 28 would welcome an appreciability threshold by way of case law; *Spickhoff*, in: Bamberger/Roth, Art. 42 Anh EGBGB note 59 requires an appreciable effect by drawing a reverse conclusion from Art. 4 (3); *Plender*/*Wilderspin*, The European Private International Law of Obligations (4th ed. 2014), note 20–032 concur that appreciability is a matter for the applicable substantive law, not for the conflict of laws, but they suggest on the level of conflict of laws a *de minimis*-filter, which is, however, for similar reasons equally unconvincing.

150 *Fabig*, Internationales Wettbewerbsprivatrecht nach Art. 6 Rom II-VO (2016), 193 *et seq*.; *Augenhofer*, in: Callies (ed.), Rome Regulations (2nd ed. 2015), Art. 6 Rome II note 55; *Sack*, WRP 2008, 845 (854);

unfair competition on the respective market. Even if they appear negligible, the law of the respective country is applicable from the conflict-of-laws perspective. Whether those minimal effects give rise to liability on grounds of unfair competition is another matter determined by the respective national law.[151] Spillover protection is therefore not granted by the conflict rule in Art. 6 (1) but instead by the applicable substantive law(s).

2. Competitor-related acts

85 The law applicable to a competitor-related act of unfair competition[152] is, pursuant to Art. 6 (2), determined by the general conflict rule of Art. 4. The reference to Art. 4 is based on the proposition that competitor-related acts are delicts/torts not affecting an entire market in its proper functioning, but instead being limited to inflicting harm on another person. Against this background, Art. 4 applies in its entirety, including Art. 4 (2) and (3).[153]

86 The country where the damage occurs within the meaning of Art. 4 (1) is the country where the specific competitor's interests, i.e. his competitive position vis-à-vis the acting competitor, is affected. This may be the country of his seat (e.g. in case of espionage at the seat);[154] in the case of a subsidiary, the seat of the subsidiary is decisive,[155] but it may also be the country to which an employee has been enticed away.[156]

87 Despite the wording of Art. 6 (4), its exclusion of a choice of law does not apply in relation to competitor-related acts under Art. 6 (2).[157] First, the exclusion of a choice of law is justified with regard to Art. 6 (1) and Art. 6 (3) since they are both concerned with the proper functioning of the affected market(s) as such, which cannot be at the disposition of the

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Hellner, 9 YbPIL (2007) 49, 64; *Pfeiffer*, IPRax 2014, 360 (364) *et seq*. (*de lege ferenda* he regards an appreciability threshold as desirable).

151 *Thorn*, in: Palandt, Bürgerliches Gesetzbuch (76th ed. 2017), Art. 6 Rom II note 13; *Hellner*, 9 YbPIL (2007) 49, 64; *Sack*, WRP 2008, 845 (854); *Dicey/Morris/Collins*, The Conflict of Laws (15th ed. 2012), note 35–057.

152 For the relationship with Art. 6 (1) see *supra* note 7 *et seq*.

153 For specific problems and potential modifications of Art. 4 (2) and (3) when applied in connection with Art. 6 (2) see *Sack*, GRUR Int. 2012, 601, 602 *et seq*.

154 *Lindacher*, GRUR Int. 2008, 453, 457 *et seq*.; *Sack*, WRP 2008, 845 (850); critical in that regard *Glöckner*, in: Harte/Henning (eds.), UWG (4th ed. 2016), Einl C, note 118 *et seq*.

155 *Sack*, GRUR Int. 2012, 601, 602; OGH GRUR Int. 2012, 468, 472.

156 *Hellner*, 9 YbPIL (2007) 49, 57.

157 Concurring *G. Wagner*, IPRax 2008, 1 (8); *Leible/Lehmann*, RIW 2007, 721 (730) *seq*.; *Thorn*, in: Palandt, Bürgerliches Gesetzbuch (76th ed. 2017), Art. 6 Rom II note 19; *Plender/Wilderspin*, The European Private International Law of Obligations (4th ed. 2014), note 20–053; *Dickinson*, The Rome II Regulation (2008), note 6.75; *Rosenkranz/Rohde*, NIPR 2008, 435, 438; *Wiegandt*, in: jurisPK, Bürgerliches Gesetzbuch (2017), Art. 6 Rom II-VO note 49; an exclusion of a choice of law even in relation to Art. 6 (2) is, however, favoured by *von Hein*, ZEuP 2009, 6 (23); *Handig*, GRUR Int. 2008, 24, 29; *Sack*, GRUR Int. 2012, 601, 603 *et seq*. (*Sack* argues that even in the event of bilateral competitor-related acts the interests of third parties may be affected).

parties by way of a choice of law.[158] Competitor-related acts, however, do not affect the proper functioning of the market on which the competitors operate and on which the competitor-related act takes effect. Secondly, party autonomy is a central element of the Rome II Regulation. Its exclusions must be interpreted narrowly. This holds true particularly in relation to Art. 6 (2). By providing for the application of the general conflict rule in Art. 4, Art. 6 (2) in effect excludes competitor-related acts from the special market-related regime of Art. 6 as a whole.[159] Thirdly, the non-applicability of Art. 4 (2) and 4 (3) under Art. 6 (1) follows the same rationale as the exclusion of party autonomy. Therefore, if Art. 4 (2) and 4 (3) apply under Art. 6 (2), Art. 14 providing for a choice of the applicable law must equally apply.[160]

3. Multi-state acts

a) The mosaic of applicable laws as a concept

If an act of unfair competition affects protected interests in more than one country, the market effects principle of Art. 6 (1) may result in a mosaic of several applicable laws.[161] In particular, Art. 6 (3)(b) is not applicable. In accord with its wording and its systematic structure (being only lit. b of sub-paragraph 3 instead of a separate sub-paragraph 5), its substantive scope is limited to restrictions of free competition.[162] **88**

Multi-state acts of unfair competition occur regularly in cases of advertising and/or sale via television, internet and print media. In the case of internet and, to a lesser extent, television advertising, the difficulties associated with the mosaic of applicable laws are reduced on the level of the substantive law by the country-of-origin principle in so far as the unfair competition law of the country of origin sets the maximum restrictions for such advertising.[163] To be on the safe side, it is therefore sufficient to adapt the advertising to the unfair competition law of the country where the entity responsible for the advertising activities is established. In cases of physical advertising in print media or at points of sale, however, a mosaic of applicable laws is inevitable. **89**

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158 *G. Wagner*, IPRax 2008, 1 (8); *Plender*/*Wilderspin*, The European Private International Law of Obligations (4th ed. 2014), note 20–053.

159 See *supra* note 6.

160 *Thorn*, in: Palandt, Bürgerliches Gesetzbuch (76th ed. 2017), Art.6 Rom II note 19.

161 *Köhler*, in: Köhler/Bornkamm (eds.), UWG (35th ed. 2017), Einl UWG, note 5.38 *et seq*.; *Sack*, WRP 2008, 845 (851) *seq*.; *Wiegandt*, in: jurisPK, Bürgerliches Gesetzbuch (2017), Art. 6 Rom II-VO note 30; for an illustrative example see OGH GRUR Int. 2013, 580.

162 *Wiegandt*, in: jurisPK, Bürgerliches Gesetzbuch (2017), Art. 6 Rom II-VO note 30; *Glöckner*, in: Harte/Henning (eds.), UWG (4th ed. 2016), Einl C, note 154a; *Sack*, WRP 2008, 845 (851) *seq*.; *Fabig*, Internationales Wettbewerbsprivatrecht nach Art. 6 Rom II-VO (2016), 227 *et seq*.; *Thorn*, in: Palandt, Bürgerliches Gesetzbuch (76th ed. 2017), Art. 6 Rom II note 21; *Plender*/*Wilderspin*, The European Private International Law of Obligations (4th ed. 2014), note 20–051; *Dicey*/*Morris*/*Collins*, The Conflict of Laws (15th ed. 2012), note 35–057; *R. Wagner*, in: FS Jan Kropholler (2008) 715, 724; *G. Wagner*, IPRax 2008, 1 (8), however, argues in favour of an analogous application of Art. 6 (3)(b) to Art. 6 (1); *Heiss*/*Loacker*, JBl 2007, 613, 630 would *de lege ferenda* generally welcome an extension of Art. 6 (3)(b) to all multi-state cases in tort/delict.

163 See *supra* note 60 and note 63.

b) The mosaic of applicable laws in practice

90 The extent to which multi-state acts result in a mosaic of applicable laws depends in practice on the number of acts in question and on the relief sought by the claimant.

91 In the event of several concurrent acts of unfair competition, each of which affects a different market, e.g. the large distribution of concurrent marketing e-mails sent to customers in various countries or an advertising campaign published in print magazines distributed in various countries, Art. 6 (1) is applied separately to each of those acts.[164] Hence, only one national law, namely the law where the act affects competitive relations and customers' interests, applies to each of the acts of unfair competition, but this results in a number of different laws being applicable to the same (though not single!) act. Hence, there is no mosaic of applicable laws in the strict sense of different laws being applicable to one single tort/delict. Nevertheless, the same – though not single – act may be unlawful in one country but lawful in another one, such that damages claims and injunctive relief may be limited to some of the countries whose markets are affected. Accordingly, the amount of damages is limited to the loss incurred by the respective act materializing in the respective country, and injunctive relief results only in a prohibition of the act in the respective country.

92 In cases of a single act of unfair competition affecting competitive relations and consumer interests in several countries, e.g. online misrepresentation on a company website or misleading keyword advertising on Google, the consequences differ with regard to damages and injunctive relief.

93 The law applicable to a damages claim is, similar to the scenario of several concurrent acts, determined for each country whose market is affected separately by the respective national law. The amount of damages under each claim is then limited to the loss incurred in the respective country. Hence, the claimant faces the classic mosaic of applicable laws, each limited to portions of the damage he suffers. With regard to jurisdiction, CJEU case law offers a choice to the plaintiff. On one hand, he may bring the claim at the domicile or seat of the defendant under Art. 2 Brussels I*bis*; this court may comprehensively determine the damages claim by applying the different laws proportionally. Alternatively, he may bring the claim under Art. 5 (3) Brussels I*bis* in the country where the act of unfair competition takes effect; the courts of this country are then, however, limited to determining the damages claim in relation to the loss that occurred in the forum state.[165]

94 The law applicable to an application for injunctive relief is also determined separately for each country whose market is affected. Nevertheless, in practice the claimant usually does not face the difficulties of a mosaic of applicable laws. The reason for this is that the claimant may apply for injunctive relief under the strictest unfair competition law (note that there is no appreciability threshold under Art. 6 (1)[166]). This will result in a prohibition of the act in that country. Since the single act is inseparable, the prohibition in one country will put an end to the alleged act of unfair competition world-wide.[167] This holds true even in online

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164 *Sack*, WRP 2008, 845 (852); *Köhler*, in: Köhler/Bornkamm (eds.), UWG (35th ed. 2017), Einl UWG, note 5.38.

165 ECJ, Case C-68/93 – *Shevill* [1995] ECR I-415 note 33.

166 See *supra* note 84.

167 *Augenhofer*, in: Callies (ed.), Rome Regulations (2nd ed. 2015), Art. 6 Rome II note 57 *et seq.*; *Thorn*, in:

advertising cases covered by the E-Commerce Directive's country-of-origin principle since the universal consequences of the injunction are tied to the inseparability of the respective act regardless of the law that applies to it.

IV. Acts restricting free competition

1. Genesis

95 The conflict rule concerning acts restricting free competition has a troubled history.[168] The Commission's preliminary draft proposal of 2002 contained a conflict rule on restrictions of free competition. It was, however, abandoned in the Commission's initial and amended proposals due to the parallel initiative by the Commission on private enforcement of competition law, which led to a Green and a White Paper on damages actions.[169] At the time when the Commission published its amended proposal on Rome II, the consultation phase of the Green Paper on private enforcement of competition law was still running, and the Commission was cautious not to interfere with the controversial debate.[170] However, the Commission reserved the right to re-introduce a special conflict rule on restrictions of free competition at a later stage during the co-decision procedure.[171]

96 In the Council, the conflict rule on restrictions of free competition was fiercely debated from early 2006 onwards. Finally, the market effects rule, which is now laid down in Art. 6 (3)(a), was adopted and became part of the Council's common position in September 2006.[172] The additional conflict rule in Art. 6 (3) (b) addressing multi-state acts was introduced at a very late stage in the co-decision procedure by the European Parliament. It was based on criticism in relation to a pure market effects rule and drew on proposals made by the Commission for a solution of the mosaic problem (as the Commission had indicated in its amended proposal). As a result, there is very little guidance on the operation and interpretation of Art. 6 (3) (b) in the legislative materials.

97 Against this background, it is not surprising that the conflict rule in Art. 6 (3) is supportive of the Commission's aim to strengthen private enforcement of EU antitrust law,[173] although pursuant to Rome II's universal application the rule applies also to

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Palandt, Bürgerliches Gesetzbuch (76th ed. 2017), Art. 6 Rom II note 9; *Wiegandt*, in: jurisPK, Bürgerliches Gesetzbuch (2017), Art. 6 Rom II-VO note 21; *Sack*, WRP 2008, 845 (852); *Köhler*, in: Köhler/Bornkamm (eds.), UWG (35th ed. 2017), Einl UWG, note 5.41; *Lindacher*, GRUR Int. 2008, 453, 455.

168 For a detailed account of the legislative history see *Mankowski*, RIW 2008, 177 (178) *seq.*; *Roth*, in: FS Kropholler (2008) 623, 632 *et seq.*; *Dickinson*, The Rome II Regulation (2008), note 6.01 *et seq.*

169 Green Paper on Damages actions for breach of the EC antitrust rules of 19 December 2005, COM(2005) 672 final, supplemented by a Commission Staff Working Paper of 19 December 2005, SEC(2005) 1732 as an annex to the Green Paper; White Paper on Damages actions for breach of the EC antitrust rules of 2 April 2008, COM(2008) 165 final, supplemented by a Commission Staff Working Paper of 2 April 2008, SEC(2008) 404 as an annex to the White Paper.

170 See Amendment 29 (p. 6) of the amended proposal (COM(2006) 83 final).

171 See again Amendment 29 (p. 6) of the amended proposal (COM(2006) 83 final).

172 Common Position (EC) No. 22/2006 of 25 September 2006, OJ 2006 C 289 E/68.

173 For a brief, but concise outline see *Pineau*, 5 J. Priv. Int. L. (2009) 311, 312 *et seq.*; for further details on the private enforcement policy of the EU see *Basedow* (ed.), Private Enforcement of Competition Law (2007).

damages claims governed by non-EU antitrust laws. The most obvious illustration is the optional rule of Art. 6 (3) (b).

2. Structure

98 Art. 6 (3) consists of the general conflict rule in lit. a and a supplementary, optional rule for multi-state and multi-party constellations in lit. b. The general, multilateral conflict rule in Art. 6 (3) (a) contains the affected market principle as connecting factor without any appreciability or substantiality threshold. In contrast, most Member States' laws contain unilateral conflict rules pursuing the effects doctrine regardless of public or private enforcement.[174] The supplementary rule in Art. 6 (3) (b) allows the claimant to opt for the application of a single law to the entire damages claim even if the market of more than one country is affected. It aims to avoid the mosaic approach in certain multi-state and multi-party private enforcement actions as advocated by the European Parliament and the Commission without enabling abusive forum shopping as advocated by the Council. The result is a complex compromise between those aims.

99 Art. 6 (3) is complemented by two extensive Recitals (22 and 23) which provide some guidance on several issues arising under the rule.

100 A choice of law is excluded by Art. 6 (4).[175]

3. Scope

a) Substantive scope

aa) Qualification: acts restricting free competition

101 The central element determining the material scope of Art. 6 (3) is the concept of "acts restricting free competition". With regard to the required autonomous interpretation, Recitals 22 and 23 provide useful guidance.

102 According to Recital 23, prohibitions on agreements between undertakings, decisions by associations of undertakings and concerted practices as well as the abuse of a dominant position are covered by the concept of restrictions of free competition within the meaning of Art. 6 (3). The non-exhaustive[176] list corresponds with the acts prohibited by Arts. 101 and 102 TFEU and implies that CJEU case law on those provision's substantive scope also serves as a source for an autonomous interpretation of the concept of acts restricting free competition.[177] However, Recital 23's reference to acts prohibited by Arts. 101 and 102 TFEU merely serves as a starting point: If the prohibition in question is conceptually close to the prohibitions of the TFEU or national Member States' competition laws, it is in any case covered by Art. 6 (3) Rome II. If it differs conceptually, but still pursues the same goals as the

174 *Adolphsen*, 1 J. Priv. Int. L. (2005) 151, 158; *Pineau*, 5 J. Priv. Int. L. (2009) 311, 318.

175 For a critical analysis of this absolute ban see *Pineau*, 5 J. Priv. Int. L. (2009) 311, 326 *et seq.* (generally endorsing it) and *Fitchen*, 5 J. Priv. Int. L. (2009) 337, 344 *et seq.* (rejecting an absolute ban).

176 *Mankowski*, RIW 2008, 177 (179); *Roth*, in: FS Kropholler (2008) 623, 643 *et seq.*; *Rosenkranz/Rohde*, NIPR 2008, 435, 436.

177 Concurring *Wiegandt*, in: jurisPK, Bürgerliches Gesetzbuch (2017), Art. 6 Rom II-VO note 20.

prohibitions in Arts. 101, 102 TFEU, Art. 6 (3) Rome II may still apply to determine the applicable law. As Recital 23 itself states, Art. 6 (3) Rome II has a broader scope than Arts. 101, 102 TFEU in comprehensively covering any act that has as its "object or effect the prevention, restriction or distortion of competition within a Member State or within the internal market." The final reference to Member States and the internal market is in that regard misleading since the Rome II Regulations claims universal application such that distortions of competition in non-Member States are equally covered.

103 According to Recitals 22 and 23, the concept of acts restricting free competition in Art. 6 (3) Rome II encompasses acts prohibited solely under a national competition law and not by Arts. 101, 102 TFEU.[178] Due to the central role of Arts. 101, 102 TFEU within the EU, acts prohibited only by national competition laws occur particularly in relation to non-Member States. Particularly relevant examples are instances of unilateral acts by non-dominant yet strong market players that are caught not by Art. 102 TFEU but by prohibitions embodied in national competition laws.[179]

104 Beyond cartels, concerted practices and the abuse of a dominant position, non-contractual damages claims in the context of mergers, joint ventures and other concentrations are also covered by Art. 6 (3) Rome II,[180] since they also have the potential of interfering with free competition. Within the EU, cross-border concentrations are governed by Merger Regulation No. 139/2004,[181] which determines its scope of application itself and which has to be regarded as regulatory public law. The relationship between the Merger Regulation and Art. 6 (3) Rome II is the same as between Arts. 101, 102 TFEU and Art. 6 (3) Rome II: The conflict rule in Art. 6 (3) Rome II fills the gap and determines the national law applicable to damages claims and injunctive relief.[182]

105 Finally, Art. 6 (3) also covers actions for damages by aggrieved competitors against recipients of unlawful state aid.[183] First, both the treaty provisions on antitrust and state aid are part of the same chapter in the TFEU entitled "rules on competition" (Title VII, Chapter 1). Secondly, unlawful state aid may, just as a cartel or an unlawful merger, restrict free competition. In contrast to damages claims based on a violation of Arts. 101, 102 TFEU, damages claims based on unlawful mergers, joint ventures and other concentrations as well as unlawful state aid depend entirely on a corresponding action under the applicable national law. The CJEU did not require that such damages claims lie as a matter of EU law as it did in relation to private enforcement claims based on a violation of Arts. 101, 102 TFEU. Furthermore, one should

178 *Wiegandt*, in: jurisPK, Bürgerliches Gesetzbuch (2017), Art. 6 Rom II-VO note 20.

179 *Roth*, in: FS Kropholler (2008) 623, 644.

180 *Plender/Wilderspin*, The European Private International Law of Obligations (4th ed. 2014), note 20–039; *Wiegandt*, in: jurisPK, Bürgerliches Gesetzbuch (2017), Art. 6 Rom II-VO note 20.

181 Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ 2004 L 24/1.

182 It may even fill the gap of the Merger Regulation in relation to its territorial scope of application if one is either prepared to read Art. 6 (3) as not solely referring to the law of a country or is willing to accept the EC Merger Regulation as constituting the law of the country of each Member State for the purposes of Art. 6 (3); see *Mankowski*, RIW 2008, 177 (180).

183 *Plender/Wilderspin*, The European Private International Law of Obligations (4th ed. 2014), note 20–039; *Hellner*, 9 YbPIL (2007) 49, 69.

note in relation to unlawful state aid that Art. 6 (3) governs only the (private law) relationship between competitors whereas the relationship between state and recipient as well as state and aggrieved competitor is, pursuant to Art. 1 (1) Rome II, outside the material scope of Art. 6 (3).

bb) Coverage of the law determined by Art. 6 (3)

(1) Civil and commercial matters

106 Since the Rome II Regulation's substantive scope is under Art. 1 (1) generally limited to non-contractual obligations *in civil and commercial matters*, the substantive scope of Art. 6 (3) is linked to the dichotomy of public versus private enforcement. National as well as EU law provisions concerning public enforcement, particularly by use of sovereign powers (including sanctions), are outside the scope of Art. 6 (3),[184] while provisions concerning private enforcement lie inside Art. 6 (3)'s substantive scope. Consequently, national conflict rules still apply in relation to the public enforcement regime.[185] This accords with the rationale of Art. 6 (3) in fostering private enforcement of antitrust law.

(2) Competition law provisions of the TFEU

107 Whether the TFEU's competition law is applicable is not determined by the Rome II Regulation. Rather, the TFEU's competition law provisions, in particular Arts. 101 and 102, determine their substantive and territorial scope themselves under the effects doctrine as laid down by the CJEU in the *Wood Pulp* case,[186] which amounts to a unilateral conflict rule. This follows from the supremacy of the EC/EU treaty provisions over secondary EU legislation such as the Rome II Regulation.[187] *Mankowski* rightly adds a rather pragmatic argument, namely that Art. 6 (3) Rome II refers to a national law as being applicable, which by definition does not include the EC/EU treaty provisions as being of a supranational nature.[188] The national law determined by Art. 6 (3) Rome II is therefore limited to those aspects of private enforcement (cf. note 106 "civil and commercial matters") that are (rightly so) missing in the TFEU, namely the civil liability aspects arising from an infringement of the TFEU's competition law provisions. These include aspects of causation, the amount and calculation of damages, the availability of passing-on defences and all other matters listed (non-exhaustively) in Art. 15 (b) to (h)

184 *Pineau*, 5 J. Priv. Int. L. (2009) 311, 319; *Wiegandt*, in: jurisPK, Bürgerliches Gesetzbuch (2017), Art. 6 Rom II-VO note 22; *Thorn*, in: Palandt, Bürgerliches Gesetzbuch (76th ed. 2017), Art. 6 Rom II note 7; *Mankowski*, RIW 2008, 177 (180) *et seq*; *Garcimartín Alferéz*, EuLF 2007, I-77, 86; *Cheshire/North/Fawcett* (14th ed. 2008), p. 812.

185 *Thorn*, in: Palandt, Bürgerliches Gesetzbuch (76th ed. 2017), Art. 6 Rom II note 7; *Mankowski*, RIW 2008, 177 (181) *seq.*

186 ECJ, Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85 – *Ahlström* [1988] ECR 5193.

187 *Ackermann*, in: Liber amicorum Piet J. Slot (2009), 109, 113 *et seq.*; *Roth*, in: FS Kropholler (2008) 623, 634 ; *Wolf*, Die internationale Durchsetzung von Schadensersatzansprüchen wegen Verletzung des EU-Wettbewerbsrechts (2017), 589 *et seq.*; *Mankowski*, RIW 2008, 177 (179) *et seq.*; *Francq/Wurmnest*, in: Basedow/Francq/Idot (eds.), International Antitrust Litigation, 2012, 91, 110 *et seq.*; *Wurmnest*, EuZW 2012, 933 (936) *et seq.*; *Thorn*, in: Palandt, Bürgerliches Gesetzbuch, Anh zu EGBGB 38–42, Art. 6 ROM II note 6 reaches the same conclusion but based on an understanding of EU competition law as EU overriding mandatory provisions that apply irrespective of the national law governing the liability issues.

188 *Mankowski*, RIW 2008, 177 (179).

Rome II[189] – all, of course, subject to the EU law principles of equivalence and effectiveness in accordance with the CJEU's judgments in *Courage*[190] and *Manfredi*.[191] Hence, the TFEU competition law provisions and the national law provisions determined by Art. 6 (3) Rome II do not overlap but rather supplement each other in order to enable efficient private enforcement of EU competition law.

(3) National competition law provisions

Matters are more complicated with regard to national competition law provisions. In particular, the arguments of supremacy and the reference in Art. 6 (3) Rome II to a national law are limited to the TFEU's competition law provisions so that they are not applicable to national competition laws. Furthermore, and again unlike the TFEU's competition law, national competition laws contain prohibitions of acts restricting free competition as well as provisions addressing civil liability in cases of an infringement of the competition law prohibitions. Considering Art. 6 (3) Rome II's primary objective of fostering private enforcement of competition law and considering the subject matter of the Rome II Regulation as such, it appears obvious that the national law determined by Art. 6 (3) Rome II governs all civil liability aspects of the respective claim, in particular those listed in Art. 15 (b) to (h) Rome II. In contrast, it is less clear whether Art. 6 (3) Rome II also applies with regard to the national competition law prohibitions of acts restricting free competition, i.e. whether it determines the national law whose competition law prohibitions apply to the act in question. The matter is disputed nationally as well as with regard to Art. 6 (3) Rome II. **108**

Mainly two arguments may be put forward in favour of Art. 6 (3) Rome II covering the question of which national competition law prohibitions apply to the act in question. **109**

First, one could argue that under Art. 15 lit. a Rome II, the law applicable to non-contractual obligations governs, inter alia, the basis and extent of liability and that an infringement of the TFEU's or the national competition law's prohibitions constitutes the basis for liability.[192] One may, however, counter-argue that the basis of liability referred to in Art. 15 lit. a is still linked to civil liability issues and does not encompass the underlying violation of competition law prohibitions. Hence, the law determined by Art. 6 (3) Rome II would in this context only govern the requirement of the respective cause of action in the national competition law that the respondent infringed TFEU or national competition law prohibitions in order to be held liable. The question whether the respondent did in fact infringe national (or TFEU) competition law prohibitions is, however, a preliminary matter governed not by the law **110**

189 For a detailed and thorough analysis of these matters see *Wolf*, Die internationale Durchsetzung von Schadensersatzansprüchen wegen Verletzung des EU-Wettbewerbsrechts (2017), 603 *et seq*.

190 ECJ, Case C-453/99 – *Courage* [2002] ECR I-6297.

191 ECJ, Joined Cases C-295/04 and C-298/04 – *Manfredi* [2006] ECR I-6619.

192 See *Ackermann*, in: Liber amicorum Piet J. Slot (2009), 109, 115; *Wolf*, Die internationale Durchsetzung von Schadensersatzansprüchen wegen Verletzung des EU-Wettbewerbsrechts (2017), 592 *et seq*. (referring to the effet utile of Art. 6 (3) Rome II that would otherwise be at risk); *Massing*, Europäisches Internationales Kartelldeliktsrecht (2011), 145 *et seq*. (without any further discussion of the matter); the potential argument is also stressed by *Francq/Wurmnest*, in: Basedow/Francq/Idot (eds.), International Antitrust Litigation (2012), 91, 112 f.; Hüßtege/Mansel/*Weller*, BGB (2014), Vol. 6, Art. 6 note 33 (although both finally take a different position).

determined by Art. 6 (3) Rome II but by the relevant national law prohibitions, which determine their applicability themselves (by way of a unilateral conflict rule often contained in the prohibition itself). In this context, one has to take into account that Art. 15 lit. a covers all conflict rules of the Rome II Regulation, many of which are founded solely on civil liability grounds rather than public law prohibitions determining their scope of application on their own. The counter-argument is more convincing. The "basis and extent of liability" in Art. 15 lit. a Rome II refers only to the civil liability aspects of the private enforcement claim and does not extend to foreign mandatory laws, which are often of a public law nature. One should therefore not apply Art. 15 lit. a Rome II without having this in mind and without the corresponding modifications. Against this background, the argument based on Art. 15 lit. a Rome II loses much of its initial attraction.

111 Second, one could argue that the preclusion of a choice of law in Art. 6 (4) Rome II would not make much sense if the law determined by Art. 6 (3) Rome II was limited to civil liability aspects since such a preclusion appears necessary and justified only with regard to competition law prohibitions.[193] This second argument is, however, equally unconvincing. Private enforcement fulfils a dual function: It provides a remedy to the aggrieved market participants, but it also fulfils a market regulatory function. Private parties are used as the protectors of market Regulation in the public interest. And this public interest and the link to the respective national markets affected by the act in question must not be at the disposition of the parties.

112 There are further arguments against the determination of the applicable national competition law prohibitions by way of Art. 6 (3) Rome II. First, according to their nature as mandatory provisions under most national competition laws, these prohibitions determine their applicability by way of national unilateral conflict rules. Determining their applicability by way of the multilateral conflict rule of Art. 6 (3) Rome II would run the risk of applying national competition law prohibitions in disregard of their express will not to be applied.[194] This would not only be conceptually bizarre but might also lead to unnecessary frictions between the countries involved. Second, the wording of Art. 6 (3) (b) Rome II as well as the systematic context of Art. 6 (3) and Art. 6 (1) Rome II are further arguments against an application of Art. 6 (3) Rome II to national competition law prohibitions. It is clear that the choice awarded to the claimant in Art. 6 (3) (b) is limited to civil liability aspects. He cannot choose the national prohibition he deems most favourable to him.[195] The choice of law in Art. 6 (3) (b) Rome II relates to "compensation

193 See *Wiegandt*, in: jurisPK, Bürgerliches Gesetzbuch (2017), Art. 6 Rom II note 24 (who finally takes the opposite view though).

194 *Rosenkranz*/*Rohde*, NIPR, 2008, 435; for an overview of the national approaches to the applicability of national competition law prohibitions see *Basedow*, in: Académie de Droit International de la Haye (ed.), Recueil des Cours No. 264 (1997), 9, 64 *et seq*.; *Francq*/*Wurmnest* in: Basedow/Francq/Idot (ed.), International Antitrust Litigation (2012), 91, 114 *et seq*. consider the argument based on Art. 16 Rome II but see problems since this would require a very broad interpretation of Art. 16 (which addresses overriding mandatory provisions) since Art. 16 is limited to an application of the mandatory provisions of the *lex fori*).

195 *Roth*, in: FS Kropholler (2008) 623, 647 *et seq*.; *Francq*/*Wurmnest*, in: Basedow/Francq/Idot (eds.), International Antitrust Litigation (2012), 91, 127; *Wiegandt*, in: jurisPK, Bürgerliches Gesetzbuch (2017), Art. 6 Rome II note 25.

for damage" and more importantly requires that "the market in that Member State [i.e. the chosen one] is amongst those directly and substantially affected by the restriction of competition out of which the non-contractual obligation on which the claim is based arises". This makes clear that the restriction of competition is a prerequisite of the claim to which the choice refers but is not subject to the choice.[196] Similarly, in Recital 23 Rome II the concept of restrictions of competition is linked to "agreements, decisions, concerted practices or abuses […] prohibited by Articles 81 and 82 of the Treaty or by the law of a Member State." This indicates as well that the infringement of EU or national competition law prohibitions is a prerequisite of the civil liability claim such that it cannot be subject to the conflict rule of Art. 6 (3) (b) Rome II determining the law applicable to that civil liability claim. Hence, the civil liability claim is the main issue governed by the law determined according to Art. 6 (3) Rome II whereas the underlying violation of EU or national competition law prohibitions is a preliminary issue determined independently by the unilateral conflict rules.

In addition to those two counter-positions there is also a middle-position.[197] It tries to pay due attention to the arguments put forward for the two counter-positions by combining them. As a starting point, Art. 6 (3) Rome II should cover competition law prohibitions found in national laws, but this determination of the applicable law is subject to the respective law's own will to be applied. Hence, if the respective national competition law prohibition indicates that it does not apply to the act in question, this rejection prevails over the determination of the applicable law by Art. 6 (3) Rome II. Although this middle-position has its merits in combining the potential reach of Art. 6 (3) Rome II with the unilateral reach of the national competition laws, it results in an unnecessarily complex determination of the applicable law. In the end, it is the national competition law prohibitions that are decisive. Hence, it appears more pragmatic and efficient to skip Art. 6 (3) Rome II as a starting point and directly consider the national competition law prohibitions' will to be applied. **113**

In the end, the issue whether Art. 6 (3) Rome II determines the question of which national competition law prohibitions apply to the act in question is more a theoretical one than of practical importance. The majority of national competition laws follow the effects doctrine with regard to public and private law enforcement of competition law, which nearly always results in the applicability of the same national law as the one determined by Art. 6 (3) Rome II.[198] For the same reason it raises no major problems that the law applicable to the violation of competition law prohibitions and the law applicable to civil liability aspects are determined by different conflict rules. The risk that they result in different laws being applicable to different aspects of the claim can be disregarded. **114**

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196 *Mankowski*, RIW 2008, 177 (181) also refers to the wording of Art. 6 (3)(b) Rome II, stressing in particular the terms "claim", "person seeking compensation" and "jurisdiction", which he regards as being limited to civil liability.

197 See *Francq/Wurmnest*, in: Basedow/Francq/Idot (eds.), International Antitrust Litigation, 2012, 91, 111 *et seq*.

198 For the potential differences in a limited number of cases see *Francq/Wurmnest*, in: Basedow/Francq/Idot (eds.), International Antitrust Litigation (2012), 91, 109 *et seq*.

115 Finally, one should also note that the recent Directive on Antitrust Damages Actions[199] harmonizes the civil liability aspects of Member State national laws. As a result, the determination of the law applicable to those civil liability aspects will become less relevant for the outcome of the claim if it is a case involving exclusively EU Member States. Considering that in intra-EU cases the relevant competition law prohibitions will regularly be the ones contained in the TFEU (Arts. 101, 102) and that the civil liability aspects governed by the law determined by Art. 6 (3) Rome II are harmonized, it becomes apparent that conflict-of-law issues are generally becoming less relevant with regard to private enforcement of competition law in intra-EU cases. The stage of conflict of laws is increasingly skipped in favour of harmonized national laws or even uniform EU-wide competition law provisions.

(4) Contractual versus non-contractual obligations

116 Since the Rome II Regulation's substantive scope is pursuant to Art. 1 (1) generally limited to *non-contractual obligations*, questions regarding the unenforceability of a contractual claim for breach of competition law are outside Art. 6 (3)'s substantive scope. Rather, the law governing the contractual claim is determined by the various conflict rules found in the Rome I Regulation, particularly Arts. 3, 4 and 6. Foreign competition law is given effect according to Art. 9 (3) Rome I, which concerns foreign mandatory provisions. Far more relevant, EU competition law (i.e. the prohibitions of the TFEU, Arts. 101, 102 in particular) rendering the contract void (under Art. 101(2) TFEU in particular) applies due to its mandatory nature whenever the act in question falls within its substantive and territorial scope.[200]

117 In contrast, damages claims by non-parties to the prohibited agreement, e.g. a damages claim of a downstream purchaser of goods in the amount of the overcharged price due to a cartel or concerted practice upstream, are governed by Art. 6 (3) Rome II.[201] Such damages claims are not of a contractual nature since they are not based on the contract between the downstream purchaser and the upstream seller. In fact, no breach of that contract occurred. The contract was performed by both parties and the purchaser only found out later that he paid an overcharged price.

(5) Damages claims and injunctive relief

118 The law determined by Art. 6 (3) applies to (non-contractual) claims for damages in so far as the market has already been affected, but it also applies to injunctive relief (*ex parte* and interim as well as final injunctions) in relation to imminently pending acts restricting free competition.[202] In the latter case, the markets that are likely to be affected determine the applicable law.

(6) Rules on procedure and proof

119 Pursuant to Art. 1 (3) matters of evidence and procedure are governed not by the *lex causae* determined by the Rome II Regulation but by the *lex fori*. This is subject to Art. 22, which states that presumptions of law and rules on the burden of proof contained in the *lex causae*

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199 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance, OJ 2014 L 349/1.

200 *Mankowski*, RIW 2008, 177 (182).

201 *Plender/Wilderspin*, The European Private International Law of Obligations (4th ed. 2014), note 20–040.

202 See generally Art. 2 note 9 *et seq.* and specifically in relation to Art. 6 (3) *Mankowski*, RIW 2008, 177 (182) *et seq.*

apply. With regard to cartel damages claims or injunctive relief, this results in the following classification of procedural and evidential aspects of such claims: Provisions on the effect of decisions by cartel authorities or courts on the claim and provisions on disclosure such as Arts. 5 to 9 of the Cartel Damages Directive are of a procedural nature such that the respective provisions of the *lex fori* apply. The means of evidence are covered by Art. 22 Rome II such that they are governed by the *lex causae*, whereas the need for evidence and the way in which evidence is heard are governed by the *lex fori*. Furthermore, time limitations, the conduct of the proceedings, the type of claim, appeals, court fees and estimations of damages are governed by the *lex fori*.[203]

b) Personal scope

Considering that Art. 6 (3) Rome II aims at fostering private enforcement of competition law, in particular by way of damages claims, it applies to non-contractual claims by anyone in the distribution chain suffering damage as a result of anti-competitive behaviour. This may be final, individual consumers as well as commercial downstream purchasers. **120**

c) Territorial scope

At first sight Recital 23 casts doubt on Art. 6 (3)'s territorial scope when it refers to agreements etc. which have as their object or effect the prevention, restriction or distortion of competition *within a Member State or within the internal market* and likewise to an abuse of a dominant position *within a Member State or within the internal market*. At second sight, however, it becomes clear that the Recital does not restrict Art. 6 (3)'s territorial scope. Such a restriction would be incompatible with the overall design of the Rome II Regulation as a *loi uniforme*,[204] claiming universal application pursuant to its Art. 3, which is not qualified in any regard by Art. 6 (3) itself.[205] Against this background, Recital 23 simply appears to be an example of bad drafting which results in an editorial mistake: As the drafters adopted the concepts of Arts. 101 and 102 TFEU, they also mistakenly imported their territorial focus on the Member States and the internal market. **121**

4. Operation

The operation of the conflict rule in Art. 6 (3) depends on several criteria: follow-on versus stand-alone actions and violations of EU versus national competition law prohibitions. **122**

a) Follow-on actions

At least in relation to EU competition law prohibitions, the majority of damages actions will be follow-on actions. The violation of the respective competition law prohibition[206] will have **123**

[203] For further details see *Wolf*, Die internationale Durchsetzung von Schadensersatzansprüchen wegen Verletzung des EU-Wettbewerbsrechts (2017), 364 *et seq*.

[204] See Art. 3 note 1 *et seq*.

[205] Concurring *Francq/Wurmnest*, in: Basedow/Francq/Idot (eds.), International Antitrust Litigation (2012), p. 91, 100 *et seq*.; *Wurmnest*, EuZW 2012, 933 (936); *Tzakas*, Die Haftung für Kartellrechtsverstöße im internationalen Rechtsverkehr (2011), p. 352 f.; *Mankowski*, IPRax 2010, 389 (396) *et seq*; *Fitchen*, Journal of Private International Law 5 (2009) 337, 353 fn. 49; *Wautelet*, Revue de Droit Commercial Belge 2008, 502, 505 *et seq*.

[206] For the sake of simplicity, I will refer only to antitrust prohibitions in the following sections; all statements likewise apply to illegal mergers and state aid.

already been determined either by the Commission or by a national cartel authority (in particular under Regulation 1/2003).[207]

124 A decision by the Commission on the violation of EU competition law prohibitions is under Art. 16 Regulation 1/2003 binding upon a Member State court seized with a damages claim with the result that the question of which conflict rule determines the law applicable to the violation of competition law[208] is irrelevant. The remaining civil liability aspects of the private enforcement claim, such as standing, limitation periods, assessment of damages, award of punitive damages[209] and the other issues listed (non-exhaustively) in Art. 15 Rome II, are governed by the law determined by Art. 6 (3) Rome II. Pursuant to Art. 1 (3) Rome II, however, matters of evidence and procedure are governed by the *lex fori*.[210]

125 A decision on the violation of national competition law prohibitions by a national cartel authority[211] is not automatically binding upon the court seized with the damages claim. Instead, recognition or any other form of taking the decision into account in the damages claim will depend on the *lex fori*.[212]

b) Stand-alone actions

126 In cases involving a stand-alone action the court seized has to pursue a two-step approach. As a first step, it has to determine whether the act in question violates EU or national competition law prohibitions. In doing so, the court will first consider a violation of EU and then of national competition law prohibitions. The law applicable to this issue is – according to the view taken above –determined not by Art. 6 (3) Rome II[213] but by Arts. 101, 102 TFEU or by national conflict-of-law principles in the event national competition law prohibitions have relevance. If the court finds that the act in question does violate EU or national competition law prohibitions, it will in a second step determine the law governing the other aspects of the damages claim pursuant to Art. 6 (3) Rome II.

5. Determination of the applicable law

127 The applicable law is generally determined by Art. 6 (3)(a) whereas Art. 6 (3)(b) constitutes an option for the claimant only in cases featuring multi-state and multi-party constellations involving other EU Member States.

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207 Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1/1.

208 See *supra* note 107 *et seq*.

209 Concurring *Pineau*, 5 J. Priv. Int. L. (2009) 311, 315.

210 For more details see *supra* note 119; for a general analysis of the dichotomy of substance and procedure see *Illmer*, 28 CJQ (2009) 237.

211 Within the EU, such cases (involving a cross-border element) will be rather rare; they may only arise in relation to national cartel law going beyond the prohibition of an abuse of a dominant position in Art. 102 TFEU. They might, however, arise more frequently in relation to decisions by non-Member State cartel authorities.

212 Cf. in that regard § 33(4) of the German Act Against Restrictions of Competition (*Gesetz gegen Wettbewerbsbeschränkungen* – GWB), providing for a binding effect of a decision by the German competition authority on the violation of antitrust law.

213 See *supra* note 107 *et seq*.

a) General rule

The general rule in Art. 6 (3)(a) adopts the market effects principle previously employed by most national laws. Like Art. 6 (1), it is an entirely inflexible conflict rule. Both the common habitual residence connection of Art. 4 (2) and the escape clause of Art. 4 (3) are inapplicable, and Art. 6 (4) excludes a choice of law. **128**

aa) Market effects principle

The market effects principle of Art. 6 (3) (a) is conceptually and practically very close, although not identical, to the connecting factor of Art. 6 (1). The slight conceptual difference reflects the different emphasis in unfair competition law versus antitrust law with regard to the protected interests.[214] Corresponding with the primary objective of competition law to protect competition on and access to the market as such, the market effects principle of Art. 6 (3) (a) refers to any country in which an anti-competitive act has affected or is likely to affect free competition. The seat of the companies involved in the anti-competitive activities and the country where the person(s) claimed to be liable acted (or even took only preparatory action), e.g. the place where the cartel or other anti-competitive behaviour was agreed upon, are irrelevant.[215] **129**

bb) Market

Considering Art. 6 (3)'s purpose of determining one or several national laws to apply to the anti-competitive act in question, its market effects principle refers to national markets. Its notion of market is primarily a geographical one. **130**

The main conceptual difference between the notion of market in Art. 6 (3) Rome II and the notion of market for the purposes of Arts. 101, 102 TFEU lies in the fact that the determination of the relevant market for the purposes of Art. 6 (3) Rome II is less based on economic considerations. It is the conflict of the potentially applicable laws that has to be solved, which is primarily a geographical conflict, and not the question of under which law(s) and in which country the defendant can be held liable for the alleged violation of competition law prohibitions. As a result, the determination of the relevant market(s) for the purposes of Art. 6 (3) Rome II is – compared to the determination for the purposes of Arts. 101, 102 TFEU or national competition law prohibitions – more of a geographical than of an economic nature. The very purpose of Art. 6 (3) Rome II requires the identification of the affected national markets in order to determine the national laws applicable to the civil liability aspects of the claim. In contrast, under Arts. 101, 102 TFEU the relevant market regularly spreads over several Member States without its needing to be split into national markets. Otherwise, there is regularly no cross-border effect required for the application of Arts. 101, 102 TFEU versus national competition laws. Hence, the different purposes of Art. 6 (3) Rome II and Arts. 101, 102 TFEU result in a different focus as regards the market determination: The focus is geographical down to the level of national markets under Art. 6 (3) Rome II; under Arts. 101, 102 TFEU it is economic and involves aspects of product substitutability. Against this background, the market concept of Arts. 101, 102 TFEU and that of Art. 6 (3) Rome II have to be interpreted differently.[216] One cannot simply transfer the **131**

214 See the detailed discussion *supra* note 69 *et seq*.

215 *Roth*, in: FS Kropholler (2008) 623, 640.

216 *Francq/Wurmnest*, in: Basedow/Francq/Idot (eds.), International Antitrust Litigation (2012), 91, 120 *et seq*.; *Wolf*, Die internationale Durchsetzung von Schadensersatzansprüchen wegen Verletzung des EU-

market concept employed by the Commission and the CJEU for the purposes of Arts. 101, 102 TFEU to Art. 6 (3) Rome II in order to determine the applicable law(s). Still, the geographic aspect in the market concept of Arts. 101, 102 TFEU may serve as a helpful basis for determining the national markets for the purposes of Art. 6 (3) Rome II.

132 Considering the elements relevant for determining the respective market under Arts. 101, 102 TFEU in light of Art. 6 (3) Rome II, the market(s) for the purposes of Art. 6 (3) Rome II are those national territories where the parties to the claim compete for customers with regard to certain goods or specific services such that the allegedly anti-competitive act in question affects free, unrestricted competition. The focus is on territorial considerations whereas the economic details regarding the anti-competitive effect in respect of the relevant product or services markets, the exact territorial boundaries and effects, and a variety of other parameters are a matter for the substantive law. This accords with the different levels of Art. 6 (3) Rome II as a conflict rule and with Arts. 101, 102 TFEU as rules of substantive law determining civil liability in an individual case.

133 When considering to what extent and in which ways the market concept found in TFEU competition law can be useful when determining the relevant market(s) under Art. 6 (3) Rome II, it appears helpful to distinguish between follow-on and stand-alone actions.

(1) Follow-on actions

134 As regards follow-on actions, the relevant product (economic) and geographic markets, together constituting the market for the purposes of Arts. 101, 102 TFEU, have already been determined by the competent competition authority, often the Commission. Although the concepts differ, as laid down above, this determination should serve as the starting point for determining the relevant market for the purposes of Art. 6 (3) Rome II.[217] More specifically, the parties and the court concerned with the private enforcement action can make use of the factual elements established by the competition authority in order to determine the relevant market for the purposes of Art. 6 (3) Rome II.[218] This holds true especially with regard to the geographical market, which, for the purposes of Art. 6 (3) Rome II, has to be split up into national markets, regularly resulting in a multi-state mosaic of applicable laws.[219]

Wettbewerbsrechts (2017), 444 *et seq*.; *Fitchen*, 5 J. Priv. Int. L. (2009) 337, 358 *et seq*; *Wiegandt*, in: jurisPK, Bürgerliches Gesetzbuch (2017), Art. 6 Rom II note 39; *Roth*, in: FS Kropholler (2008) 623, 642; a different view is taken by *Hellner*, 9 YbPIL (2007) 49, 60; *Plender/Wilderspin*, The European Private International Law of Obligations (4th ed. 2014), note 20–056; the in part distinct view taken by the author in *Huber/Illmer*, Rome II Regulation (2011), Art. 6 note 92 *et seq*. is abandoned.

217 Concurring *Francq/Wurmnest*, in: Basedow/Francq/Idot (eds.), International Antitrust Litigation (2012) 91, 121 ("the judge can (or in some jurisdictions must) rely to a large extent on the market delineation carried out by the European Commission or a national competition authority"); *Wiegandt*, in: jurisPK, Bürgerliches Gesetzbuch (2017), Art. 6 Rome II note 39; *Hellner*, 9 YbPIL (2007) 49, 60; sceptical even in this scenario *Wolf*, Die internationale Durchsetzung von Schadensersatzansprüchen wegen Verletzung des EU-Wettbewerbsrechts (2017), 449, but in effect he also accepts the decision by the cartel authority as a starting point.

218 *Wolf*, Die internationale Durchsetzung von Schadensersatzansprüchen wegen Verletzung des EU-Wettbewerbsrechts (2017), 449.

219 For multi-state scenarios see in more detail *infra* note 150 *et seq*.

(2) Stand-alone actions

In the case of stand-alone actions there is no basis to build upon when determining the relevant market(s) for the purposes of Art. 6 (3) Rome II. Hence, the market has to be determined afresh following the criteria set out above.[220] The scenario of stand-alone actions exemplifies why it is important to detach the market concept of Art. 6 (3) from that of Arts. 101, 102 TFEU. Otherwise, the parties to a private enforcement claim would have to establish all the facts relevant under Arts. 101, 102 TFEU, including complex economic considerations, which are usually investigated by the cartel authorities at great personal and financial effort. This would be too much of a burden for the parties and would create a substantial hurdle to private enforcement which would, in turn, be contrary to the very aim of Art. 6 (3) Rome II, namely to foster private enforcement actions to the extent achievable by a conflict rule. **135**

cc) Effects

Effects, as the second element of the market effects principle of Art. 6 (3) Rome II, are *any* changes in the competitive conditions on the respective national market.[221] The requirement is neutral, objective and potentially wider than the requirement of implementation[222] established by the CJEU in the *Wood Pulp* case with regard to Arts. 81, 82 EC Treaty (now Arts. 101, 102 TFEU).[223] It is not tantamount to interference, impairment or any other criterion that carries a value judgment as to the alteration of the competitive conditions.[224] **136**

There are various indications for such effects on a market. For instance, any market on which the defendant is generating turnover is potentially affected; even business operations by the defendant may suffice. Likewise, a market on which both claimant and defendant compete for customers is potentially affected. **137**

Under the effects-based approach pursued by Art. 6 (3), the country where the parties to the cartel, concerted practice or other agreement acted is irrelevant. This view accords with Recital 21, stating that Art. 6 in its entirety is merely a clarification of the general conflict rule in Art. 4 (1), which also only refers to the *lex locus damni*.[225] This is a narrower approach than is taken by the CJEU in relation to jurisdiction under Art. 7 (2) Brussels I, which lies at the place where the damage occurred but also at the place where the event giving rise to the damage took place.[226] **138**

dd) Application in common scenarios

Applying the market effects principle to the most common scenarios yields the following guidelines: **139**

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220 See *supra* note 129 *et seq*.

221 *Mankowski*, RIW 2008, 177 (185).

222 *Roth*, in: FS Kropholler (2008) 623, 640; *Mankowski*, RIW 2008, 177 (185); *Wiegandt*, in: jurisPK, Bürgerliches Gesetzbuch (2017), Art. 6 Rom II-VO note 29 regards both criteria as being nearly identical in substance.

223 ECJ, Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85 – *Ahlström* [1988] ECR 5193 note 16 (the Wood Pulp case).

224 Concurring *Roth*, in: FS Kropholler (2008) 623, 640.

225 See Art. 4 note 69 *et seq*.

226 See CJEU case law starting with Case 21/76 (*Mines de Potasse d'Alsace*, ECR I-1735 note 25).

140 In cases of horizontal agreements or concerted practices the affected markets are regularly those where the purchasers of the goods or services provided by the cartel members are located, i.e. where the goods or services are distributed (irrespective of a deviating seat of the purchasers in another country). As an example, in the case of export cartels the affected markets are those to where the respective goods or services are exported.[227]

141 In the case of a cartel on the demand side the affected markets are also those where the purchasers are located and to where the purchased goods are intended to be delivered since access to and conditions on those markets are distorted.

142 In the case of vertical agreements or concerted practices the affected markets are regularly the markets where third parties affected by the cartel or concerted practice operate.[228]

ee) Restrictive filters

143 In contrast to the option extended by Art. 6 (3) (b), neither the general rule of Art. 6 (3) (a) nor a recital explicitly requires a direct and substantial effect on the market as a threshold for applying the respective country's national law. A recital to that extent[229] was considered but finally deleted during the conciliation process between the Parliament and the Council. Reasons for the deletion were not given.

144 Considering the nature of Art. 6 (3) as a mere clarification of the general rule in Art. 4 as well as the purpose and effect of such restrictive filters, it appears most convincing to require a direct effect as being inherent in Art. 6 (3) (a), but not a substantial effect.[230] Substantiality of the effects is therefore irrelevant for the determination of the applicable law(s). It is rather a matter of the applicable substantive competition law(s) to determine the extent to which spillover effects constitute a violation of competition law prohibitions and give rise to damages claims or injunctive relief.

145 The matter is, however, contested and several authors find that further restrictive filters – setting threshold requirements on the level of conflict of laws – are inherent in the potentially wide market effects principle.[231] There is, however, no unanimity amongst those authors: Some do not require a direct effect, but a substantial one;[232] others even add a requirement of foreseeability.[233]

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227 *Wurmnest*, EuZW 2012, 933 (937).

228 *Wurmnest*, EuZW 2012, 933 (937).

229 See recital 20 of the Common Position (EC) No. 22/2006 of 25 September 2006, OJ 2006 C 289E/68.

230 Concurring *Pineau*, 5 J. Priv. Int. L. (2009) 311, 322 *seq*.; *Dickinson*, The Rome II Regulation (2008), note 6.65; presumably also *Fitchen*, 5 J. Priv. Int. L. (2009) 337, 366 *et seq*.

231 See in particular *Mankowski*, RIW 2008, 177 (186); *Rosenkranz/Rohde*, NIPR 2008, 435, 437; Staudinger/*Fezer/Koos* [2015] IntWirtschR note 354 *et seq*; *Hellner*, 9 YbPIL(2007) 49, 61 *et seq*.

232 *Leible/Lehmann*, RIW 2007, 721 (730); *Plender/Wilderspin*, The European Private International Law of Obligations (4th ed. 2014), note 20–067 argue in that direction; *Roth*, in: FS Kropholler (2008) 623, 641 rejects a substantiality threshold but considers a *de minimis* threshold (while others do not even see such fine differentiations but consider any appreciability/substantiability threshold as one category of a potential restrictive filter).

233 *Mankowski*, RIW 2008, 177 (185); disagreeing: *Hellner*, 9 YbPIL(2007) 49, 62.

(1) Direct effect

The requirement of a direct effect is closely linked to the general conflict rule in Art. 4, on the one hand, and to the passing-on defence in substantive competition law, on the other hand. **146**

According to Recital 21, Art. 6 does not stand as an exception but as a clarification of the general conflict rule in Art. 4 (1). Since it is commonly agreed with regard to Art. 4 that indirect consequences of the act in question are irrelevant when determining the country where the damage occurs,[234] the matter appears to be settled also in relation to Art. 6 (3): indirect effects, in particular financial loss, are not market effects for the purposes of determining the applicable law.[235] **147**

The merits of disregarding indirect effects may be illustrated by considering the passing on-defence, i.e. the question whether the defendant succeeds with the argument vis-à-vis direct purchasers claiming damages that the overcharges paid by them due to a price fixing cartel were passed on to the final purchasers, so that, on balance, the direct purchasers did not suffer any loss. If substantive competition law grants the passing on-defence, it is regularly combined with granting final purchasers, usually consumers, the right to file a damages claim based on their indirect loss. The defendant should not be able to get away without paying any damages for his anti-competitive behaviour given that the final purchaser did actually suffer a loss resulting from the anti-competitive act in question. If different laws apply to the claim of the direct, first purchaser (country of the direct effect) and to the claim of the final purchaser (country of the indirect effect), and if the law applicable to the claim of the direct purchaser does not allow the passing on-defence while the law applicable to the claim of the final purchaser permits the passing on-defence and therefore also allows a claim based on the final purchaser's indirect loss, the defendant may face two damages claims. In the reverse case, he may face no damages claim at all. In both scenarios one would have to undertake the difficult task of (artificially) adapting the applicable laws on the level of conflict of laws and/or the substantive law – a highly undesirable result. All these problems are avoided if indirect consequences are regarded as irrelevant for the determination of the applicable law, such that the law of the country whose market is directly affected by the anti-competitive act governs claims by direct and indirect purchasers, including the passing on-defence.[236] **148**

(2) Substantial effect

Calls for a substantiality threshold on the level of conflict of laws in order to reduce the number of applicable laws are regularly based on the argument that substantiality or at least an appreciability/*de minimis*-threshold forms a part of substantive EU competition law as **149**

234 See Art. 4 note 85 *et seq*.

235 Concurring *Francq*/*Wurmnest*, in: Basedow/Francq/Idot (eds.), International Antitrust Litigation (2012), 91, 123; *Wurmnest*, EuZW 2012, 933 (938); *Dickinson*, note 6.66; *Stone*, EuLF 2004, 213, 227; *Wolf*, Die internationale Durchsetzung von Schadensersatzansprüchen wegen Verletzung des EU-Wettbewerbsrechts (2017), 487; for the contrary view (i.e. no restriction in that regard) see e.g. *Roth*, in: FS Kropholler (2008) 623, 640 *et seq*. (e contrario Art. 6 (3)(b) Rome II).

236 Similarly *Plender*/*Wilderspin*, The European Private International Law of Obligations (4th ed. 2014), note 20–066; it is important to note that the requirement of a direct effect is only relevant for determining the applicable law. It does not determine the existence of a damage claim by indirect purchasers, which is a matter for the substantive law (of the country of direct effects).

well as most national substantive competition laws.[237] Sometimes it is added that one would otherwise have to apply a substantive competition law which, according to its own standards, does not call for application given the lack of an appreciable or substantial effect on the respective country's market.[238] Those calls are not convincing and the arguments put forward are misleading and misguided. Filters based on substantiality-, appreciability- or *de minimis*-considerations refer to the violation of substantive competition law prohibitions but not to their applicability on the level of conflict of laws.[239] Hence, unsubstantial, non-appreciable or minimal effects on a market do not result in the inapplicability of the respective national or EU competition law provisions. Rather, those provisions are applicable, but there may have been no violation due to the limited effects of the act in question. Even apart from the different levels of operation of the filters (substantive law) and Art. 6 (3)(a) Rome II (conflict of laws), it is not convincing to replace or at least contradict the diverse national thresholds with one uniform European threshold under Art. 6 (3)(a) Rome II. Finally, it should be recalled that the applicability of EU and national competition law prohibitions is not governed by Art. 6 (3) Rome II,[240] so that any substantiality-, appreciability- or *de minimis*-threshold even on the level of conflict of laws would be outside the Rome II Regulation's substantive scope.

b) Multi-state scenarios

150 In multi-state scenarios, i.e. where one single act restricts (or is likely to restrict) free competition on several markets, the applicable law is generally also determined by Art. 6 (3)(a). However, Art. 6 (3)(b) offers a limited choice of a single law applicable to the entire claim. It is closely intertwined with the jurisdiction regime of the Brussels I*bis* Regulation.

aa) Mosaic of applicable laws under Art. 6 (3)(a)

151 Applying Art. 6 (3)(a) to an anti-competitive act affecting several markets results in the mosaic principle: the law of each country whose market is affected applies in relation to the damage that occurs in that country.[241] This will regularly make an action for damages or injunctive relief so burdensome that it may discourage private enforcement.

bb) Lex fori under Art. 6 (3)(b)

152 Taking account of the burden created by Art. 6 (3) (a) in the event of a multi-state scenario, which increases with the number of countries involved, Art. 6 (3) (b) allows the claimant to choose one single law to govern the entire claim, irrespective of the country where the damage occurred. The option is, however, limited in several respects. First, the claimant has to file the claim with the courts at the defendant's domicile in a Member State. Second, the choice is limited to the *lex fori*. Third, the claimant can only make use of the option if the

237 *Mankowski*, RIW 2008, 177 (186); *Hellner*, 9 YbPIL (2007) 49, 61 *et seq*; Staudinger/*Fezer*/*Koos* (2015) IntWirtschR note 354; *Massing*, Europäisches Internationales Kartelldeliktsrecht (2011), 187 *et seq*.

238 *Hellner*, 9 YbPIL (2007) 49, 62.

239 *Wurmnest*, EuZW 2012, 933 (938); *Wolf*, Die internationale Durchsetzung von Schadensersatzansprüchen wegen Verletzung des EU-Wettbewerbsrechts (2017), 503; *Augenhofer*, in: Callies (ed.), Rome Regulations (2nd ed. 2015), Art. 6 Rome II note 92.

240 See the discussion *supra* note 107 *et seq*.

241 *Dicey*/*Morris*/*Collins*, The Conflict of Laws (15th ed. 2012), note 35–061; *Mankowski*, RIW 2008, 177 (188); *Dickinson*, The European Private International Law of Obligations (4th ed. 2014), note 6.68; *Pineau*, 5 J. Priv. Int. L. (2009) 311; *Roth*, in: FS Kropholler (2008) 623, 644 *et seq*.

market of the forum state is amongst those directly and substantially affected by the anti-competitive act. Still, the option granted by Art. 6 (3) (b) has the potential of reducing costs and the duration of litigation as well as minimizing the risk of an incorrect decision by enabling the court to apply the *lex fori* to the entire claim.[242]

153 The notion of domicile for the purposes of Art. 6 (3) (b) is identical with that under Art. 4, 62 Brussels I*bis*.[243] It is an overarching concept of EU private international law and international civil procedure, and Art. 6 (3)(b) is related to actions regularly brought under the Brussels I Regime.

154 While it is required that the defendant's domicile be located in a Member State and that this Member State's market is amongst those directly and substantially affected, the other affected markets may be those of non-Member States.[244] The option granted by Art. 6 (3) (b) is not limited to intra-EU cases. Nevertheless, the violation of EU competition law is the reference constellation that it was tailored to. EU competition law applies whenever the anti-competitive act may affect trade between Member States. This regularly implies a multi-state scenario. Since the territorial application of EU competition law is, unlike that of national competition laws, not tied to national borders and markets, there regularly arises the difficulty of allocating the actual or pending damage to the respective national markets where the mosaic parts are located. Even in follow-on actions, the plaintiff would have to establish the law applicable to the mosaic portions amongst the plurality of affected markets.

155 The indirect choice of the plaintiff does not extend to the question of violation of competition law prohibitions, EU or national ones alike. Rather, it is limited to the private law aspects of the claim.[245] This holds true even if one takes the view that the violation of competition law prohibitions is governed by the law determined under Art. 6 (3): The applicable competition law prohibitions will then be determined by Art. 6 (3) (a) instead of the law chosen under Art. 6 (3) (b) even if that results in a mosaic of applicable laws. Otherwise, the forum's competition law prohibitions or even EU competition law prohibitions might have to be applied to effects in non-Member State markets for which they do not claim application under the effects doctrine.[246] According to the correct view on the scope of Art. 6 (3) as explained above,[247] the law determined by Art. 6 (3) does in any event not govern the issue of violation of EU or national competition law prohibitions, so that the issue of an application of Art. 6 (3)(b) does not arise. Such a limitation of the option granted by Art. 6 (3) (b) does not contradict its purpose of overcoming the practical difficulties of the mosaic approach. In the follow-on actions constituting the majority of cases, the main

242 *Pineau*, 5 J. Priv. Int. L. (2009) 311, 323; *Mankowski*, RIW 2008, 177 (188); *Plender/Wilderspin*, The European Private International Law of Obligations (4th ed. 2014), note 20–073; *Wiegandt*, in: jurisPK, Bürgerliches Gesetzbuch (2017), Art. 6 Rom II-VO note 43.

243 *Mankowski*, RIW 2008, 177 (189).

244 *Pineau*, 5 J. Priv. Int. L. (2009) 311, 324; *Roth*, in: FS Kropholler (2008) 623, 647.

245 See generally *supra* note 107 *et seq*; see in particular with regard to Art. 6 (3)(b) *Roth*, in: FS Kropholler (2008) 623, 647 *seq*.; *Plender/Wilderspin*, The European Private International Law of Obligations (4th ed. 2014), note 20–074 (suggesting the application of Art. 17 Rome II in that regard); *Scholz/Rixen*, EuZW 2008, 327 (331).

246 *Roth*, in: FS Kropholler (2008) 623, 647.

247 See *supra* note 107 *et seq*.

difficulty of multi-state scenarios does not lie in establishing the violation of competition law but rather in the application of different laws to the civil liability aspects of the claim under the mosaic approach.

156 The optional rule in Art. 6 (3) (b) requires that the domicile Member State is amongst those directly and substantially affected by the anti-competitive act. This implies that there may be several (national) markets that are directly and substantially affected.[248] The requirement of a direct effect does not go beyond the general rule stated in Art. 6 (3) (a),[249] whereas the requirement of a substantial effect does. The latter's main aim is to ensure a significant link between the chosen law and at least one of the affected markets. Furthermore, with the limitation of the number of laws that can be chosen it indirectly reduces the number of available fora in order to avoid excessive forum shopping. The concept of a substantial effect is not further specified or even defined in Art. 6 (3) (b). As a bottom line, it appears to be more than appreciable.[250] In order to determine whether the respective country's market is substantially affected, turnover and market shares on the respective markets are important criteria.[251] Comparisons and relative numbers may be taken into account in several ways. First, the absolute number of goods or services sold on the respective markets may be compared. Second, one may look at the market share of the cartel on the respective market and compare that with the market share on other national markets. In any event, the decisive criteria will have to be determined on a case-by-case basis since they largely depend on the circumstances of each individual case.

157 Art. 6 (3)(b) does not set the terms for making use of the option (timing, form etc.). Since these issues are matters of procedure, they are pursuant to Art. 1 (3) Rome II governed by the national procedural law of the *lex fori*, so in effect by the same law as the one chosen by the claimant to govern the substantive law aspects.

c) Several co-defendants in multi-party scenarios

158 If in a multi-state scenario the action lies against several co-defendants (provided that they may be sued jointly under the respective rules of jurisdiction, e.g. Art. 8 Brussels I*bis*), the option of the *lex fori* is restricted to those cases where the claim against each of them is based on a restriction of competition directly and substantially affecting the market of the forum Member State. While multi-state scenarios involving only one defendant may often occur in the case of an abuse of a dominant position under Art. 102 TFEU, the combined multi-state-multi-party scenario will usually arise in a case of a cartel or concerted practice under Art. 101 TFEU.

d) Relationship with jurisdiction under the Brussels I regime

159 The option granted to the claimant in Art. 6 (3)(b) Rome II is closely intertwined with the jurisdiction regime in multi-state and multi-party scenarios under the Brussels I*bis* Regulation as developed by the CJEU.

160 In a multi-state scenario, the claimant has several options under the Brussels I*bis* Regime as to where to file his claim. The options differ considerably with regard to the damage that is

248 *Wurmnest*, EuZW 2012, 933 (939); *Mankowski*, RIW 2008, 177 (189); *Roth*, in: FS Kropholler at 646.

249 See *supra* note 146 *et seq*.

250 *Roth*, in: FS Kropholler (2008) 623, 646; *Dickinson*, The Rome II Regulation (2008), note 6.71.

251 *Roth*, in: FS Kropholler (2008) 623, 646.

recoverable. First, he may sue the defendant pursuant to Art. 7 (2) Brussels I*bis* either at the place where the damage occurred or at the place where the event giving rise to the damage took place.[252] An action at the place where the damage occurred implies distinct claims in each country whose market is affected. The jurisdiction of the court seized is limited to the damage that occurred on the respective market (one mosaic piece of the damage per claim).[253] An action at the place where the event giving rise to the damage took place may cover the entire damage even though different laws may apply to the different mosaic pieces (all mosaic pieces in one claim).[254] Second, the plaintiff may sue the defendant pursuant to Art. 4 Brussels I*bis* at the latter's domicile, where he may also recover the entire damage even though different laws may apply to the different mosaic pieces (again all mosaic pieces in one claim). Since the place where the event giving rise to the damage took place will regularly coincide with the defendant's domicile,[255] jurisdiction in multi-state scenarios will regularly lie with the courts at the defendant's domicile. The option granted to the plaintiff by Art. 6 (3)(b) Rome II complements the jurisdictional options that allow claiming all mosaic pieces in one single claim: Not only is one claim before one court sufficient to recover the entire damage, the claim is also governed by one single law. It is only this combined effect of one court and one law under Art. 4/7(2) Brussels I*bis* and Art. 6 (3)(b) Rome II that entirely overcomes the mosaic dilemma.

161 However, in its *CDC* judgment[256] the CJEU added a new jurisdiction to the general doctrine developed by the CJEU in the *Shevill* case and in subsequent case law not concerning competition law claims. In the *CDC* judgment, the court held that the place where the damage occurred within the meaning of Art. 7 (2) Brussels I*bis* is the place where the damage actually manifests itself, which is, for each cartel victim taken individually, the place where the victim has its registered office.[257] It added that those courts at the place where the damage occurred may award damages for the whole of the loss inflicted upon them.[258] In effect, this creates jurisdiction beyond the Brussels I*bis* regime at the plaintiff's domicile in respect of the entire loss suffered (all mosaic pieces in one claim). For the purposes of jurisdiction, there is no mosaic anymore,[259] and Art. 6 (3)(b) Rome II overcomes the mosaic with regard to the applicable law. This further fosters private enforcement of competition law, which may have been the driving force behind this modification of the well-established *Shevill-*

252 See in particular ECJ, Case 21/76 – *Mines de Potasse d'Alsace* [1976] ECR 1735 note 19 *et seq*.; Case C-68/93 – *Shevill* [1995] ECR I-415 note 20; Case C-167/00 – *Verein für Konsumenteninformation* [2002] ECR I-8111 note 42 *et seq*.; Case C-168/02 – *Kronhofer* [2004] ECR I-6009 note16.

253 ECJ, Case C-68/93 – *Shevill* [1995] ECR I-415 note 30.

254 ECJ, Case C-68/93 – *Shevill* [1995] ECR I-415 note 32; for further details see *G. Wagner*, 62 RabelsZ (1998) 243, 277 *et seq*.; *Mäsch*, IPRax 2005, 509; see also OGH RdW 2002, 603; OLG München, MMR 2000, 277; OLG Hamburg, GRUR-RR 2008, 31; Cour de Cassation (France) 125 (1998) Clunet 136.

255 *G. Wagner*, IPRax 2008, 1 (8).

256 ECLI:EU:C:2015:335 (C-352/13, *Cartel Damage Claims (CDC) Hydrogen Peroxide SA vs. Akzo Nobel NV et al.*).

257 ECLI:EU:C:2015:335 (C-352/13, *Cartel Damage Claims (CDC) Hydrogen Peroxide SA vs. Akzo Nobel NV et al.*) note 53.

258 ECLI:EU:C:2015:335 (C-352/13, *Cartel Damage Claims (CDC) Hydrogen Peroxide SA vs. Akzo Nobel NV et al.*) note 54.

259 *Wolf*, Die internationale Durchsetzung von Schadensersatzansprüchen wegen Verletzung des EU-Wettbewerbsrechts (2017), 266 *et seq*.

doctrine particularly for competition law claims. In particular, it remedies the downsides of the mosaic approach under *Shevill* with regard to jurisdiction by concentrating the place where the damage occurred at one place, the plaintiff's domicile. In effect, the CJEU may have felt pressure or at least a need to adapt jurisdiction in multi-state cases to the level that Art. 6 (3)(b) Rome II has achieved with regard to the applicable law in order to overcome the mosaic scenarios.

162 The special rule of Art. 6 (3)(b) relating to the case of several co-defendants in a multi-state scenario is linked to the plaintiff's jurisdictional option under Art. 8 (1) Brussels I*bis* to sue such co-defendants in one single court. The requirement of a close connection between the claims against the co-defendants under Art. 8 (1) Brussels I*bis* is regularly met in cases of a cartel or concerted practice within the meaning of Art. 101 TFEU,[260] which is the standard case of application for Art. 8 (1) Brussels I*bis* in competition law claims.[261]

e) Tactical considerations

163 Within the regime of Art. 6 (3) (b) there is little room for tactical considerations due to the requirement of a direct and substantial effect of the anti-competitive act at the domicile of the defendant. This renders forum shopping at least under the first alternative of lit. b hardly possible. In fact, the avoidance of forum shopping was the very purpose of introducing the two restrictive requirements in lit. b as opposed to lit. a. Under the second alternative of lit. b, however, there may be room for forum shopping as between the domiciles of at least some of the co-defendants, considering that the home markets of cartel members are usually amongst those markets directly and substantially affected.[262]

164 When deciding whether to make use of the options of Art. 6 (3) (b), the plaintiff has to weigh advantages and disadvantages of these options versus application of the general conflict rule in Art. 6 (3) (a) in each individual case. Amongst the relevant aspects are those listed (non-exhaustively) in Art. 15 concerning the scope of application of the applicable law(s) as well as matters of evidence and procedure, which are pursuant to Art. 1 (3) governed by the *lex fori*. While costs and time efficiency will usually militate in favour of Art. 6 (3) (b), an advantageous assessment of damages under a specific national law which is not amongst those applicable under the options of Art. 6 (3) (b) may outweigh its general advantages. The plaintiff may then rather stick with the mosaic of applicable laws under Art. 6 (3) (a).

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260 *Mäsch*, IPRax 2005, 509 (512) *et seq.*; *Leible/Lehmann*, RIW 2007, 721 (730); *Mankowski*, RIW 2008, 177 (191); see also *Roche Products Ltd. v Provimi Ltd* [2003] EWHC 961 note 41 *et seq.* (an action in the aftermath of the vitamins cartel); for a detailed analysis of the decision see *Bulst*, 4 EBOR (2003) 623, in relation to Art. 6 Brussels I at 631 *seq.* and 643; for a recent illustration see Case C-352/13, *Cartel Damage Claims* ECLI:EU:C:2015:335 (even though the judgment was in fact concerned with a potential abuse of Art. 8 (1) Brussels I [Art. 6 (1) of the old Brussels I Regulation 44/2001] in instances where the claim against one of the co-defendants is subsequently withdrawn; see notes 15 *et seq.*).

261 For further details on private enforcement under the Brussels I Regime see *Weller*, ZVglRWiss 110 (2013) 89 *et seq.*

262 *Mankowski*, RIW 2008, 177 (191); *Heiss/Loacker*, JBL 2007, 613, 630; *Roth*, in: FS Kropholler (2008) 623, 646.

Article 7: Environmental damage

The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.

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I. Purpose of the provision

1 Art. 7 contains one of the specific conflict rules that are intended, pursuant to Recital 19, to deal with special torts/delicts where the general rule of *lex loci damni* in Art. 4 (1) does not allow a reasonable balance to be struck between the interests at stake.[1] Even though there are some international instruments harmonizing substantive national rules on environmental liability,[2] the important differences that exist between national Regulations, together with the fact that environmental damage does not respect national borders, make the issue of applicable law particularly important. Recital 25 refers to Art. 174 of the EC Treaty (now Art. 191 TFEU), which provides that there should be a high level of protection of the environment based on the precautionary principle, the principle that preventive action should be taken, the principle of priority for corrective action at source and the principle that the polluter pays. Pursuant to Recital 25, this fully justifies the use of the principle of discriminating in favour of the person sustaining the damage by giving that person the right to choose between the law

[1] For the preparatory versions of Art. 7, see Art. 7 of the original proposal of the Commission in COM (2003) 427 final, and Art. 8 in the subsequent, amended proposal COM (2006) 83 final.

[2] See the overview and references in *von Bar*, RdC 268 (1997), 291, 318–324; *Munari/Schiano di Pepe*, in: Malatesta (ed.), The Unification of Choice of Law Rules on Torts and Other Non-Contractual Obligations in Europe (Padova 2006), p. 173, 175–179. It must also be recalled that in accordance with Art. 28, the Regulation does not prejudice the application of international conventions to which one or more Member States were parties at the time when the Regulation was adopted (unless the convention applied exclusively between two or more of the Member States). Art. 3 (2) Convention on the Protection of the Environment between Denmark, Finland, Norway and Sweden of 19 February 1974 provides, for example, that the question of compensation for damage caused by environmentally harmful activities in another Contracting State must not be judged by rules which are less favourable to the injured party than the rules of compensation of the state in which those activities were carried out, see 13 ILM 592 (1974). Regarding the interpretation of this provision, see *Hellner*, Rom II-förordningen (Stockholm 2014), pp. 170–172.

determined by Art. 4 (1) and the law of the country in which the event giving rise to the damage occurred (normally the country where the person claimed to be liable committed the harmful act or omission causing the damage). The main purpose of this solution, even though based on the unilateral choice of law by the claimant, is not to improve the claimant's position; the fairness of giving the claimant in environmental damage cases better compensation than is given to victims of other cross-border torts is, in fact, far from obvious.

A well-informed and rational claimant will often benefit from his freedom of choice, but the purpose of this freedom appears rather to be to influence the behaviour of the juridical or natural person claimed to be liable by making it difficult for him to avoid or limit his liability either by directing the harmful effects of his activities to, or by carrying out such activities in, a country with non-existing or polluter-friendly civil liability rules on environmental damage. This alternative (or rather elective) conflict rule, sometimes called "the principle of ubiquity",[3] forces the operators of ecologically dangerous activities, established in countries with a low level of civil-law protection of the environment, to abide by the higher levels prevailing in neighbouring countries, while discouraging operators established in high-protection countries from placing their facilities at the border, for example in order to discharge toxic substances into a river carrying the toxic waste into a neighbouring country with laxer civil liability rules.[4] **2**

Since environmental damage may be scattered in several countries, the possibility to choose the law of the event giving rise to the damage allows the plaintiff, or plaintiffs, to facilitate proceedings by applying one and the same law to all damage. This is particularly advantageous if the persons seeking compensation do so in the form of a collective action, in which the application of several laws in parallel might prove particularly difficult. The same reasoning underlies Art. 6 (3)(b), which in antitrust actions allows the plaintiff to base his claim on the law of the forum if damage to the market is sustained in more than one country.[5] It is submitted that this purpose, although never officially given, is practically more important than that of affecting the localization of polluting activities. It is less likely that rules of private international law have an influential role to play in such decisions. **3**

II. Substantive scope of the provision

1. Ecological damage and damage to a person or to property

The wording of Art. 7 differentiates between environmental damage as such (ecological damage) and damage sustained by a person or property as a result of environmental damage. Environmental damage is damage to the ecology itself rather than to a particular person or property.[6] The conflict rule in Art. 7 is the same for both these types of damage, and from the point of view of private international law it may therefore seem unnecessary to draw a line between them. However, it appears that damage sustained by persons or property as a result **4**

3 See, for example, *von Bar*, RdC 268 (1997), 291, 371; *Fach Gómez*, YbPIL 6 (2004), 291, 297; *Kadner Graziano*, YbPIL 9 (2007), 71, 74–76; *Fuchs*, in: Peter Huber, Art. 7 note 5.

4 See COM (2003) 247 final pp. 19–20; *Bernasconi*, Civil Liability Resulting from Transfrontier Environmental Damage: a Case for the Hague Conference?, www.hcch.net/upload/wop/gen_pd8e.pdf pp. 33–34; *Symeonides*, in: FS Erik Jayme (2004), p. 951.

5 See *Hellner*, Essays in Honour of Michael Bogdan (2013), p. 109, 113 *et seq*.

6 See COM (2003) 427 final p. 19.

of environmental damage is by definition merely an indirect consequence of the event giving rise to the environmental damage itself. This seems to entail that, when the applicable law is to be determined pursuant to the general rule in Art. 4 (1), not only the environmental damage itself but also the ensuing damage to persons or property is governed by the law of the country where the environmental damage occurred. In other words, the localization of the ensuing damage to persons or property is not relevant.

5 Art. 7 does not contain any definition of environmental damage as such, but a definition can be found in Recital (24), stating that "environmental damage" should be understood as meaning adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms. It should be recalled in this context that non-contractual obligations arising out of nuclear damage, which, needless to say, may cause serious harm to the environment, are excluded from the scope of the Rome II Regulation by its Art. 1 (2) (f). However, not all international instruments dealing with liability for nuclear damage include environmental damage in their scope and it can therefore not beexcluded that the exemption from scope is interpreted narrowly so as to only include those types of damage regulated in international instruments, hence leaving some room for the application of the Rome II Regulation.[7]

6 The definition of environmental damage in Recital 24 seems to be roughly in line with the definition in Art. 2 Directive 2004/35/EC,[8] even though that Directive focuses on administrative and other public-law measures and does not address issues of private international law.[9] It would follow from this that noise emissions do not fall within the scope of Art. 7 and that only Art. 4 is applicable to actions based on cross-border noise pollution (they will probably be very rare).[10]

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7 See *Bach*, in: Peter Huber, Art. 1 note 52; *Hellner*, Rom II-förordningen, p. 169.

8 Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on Environmental Liability with regard to the Prevention and Remedying of Environmental Damage, OJ 2004 L 143/56. According to the definition in Art. 2 (1) Directive 2004/35/EC, "environmental damage" means: (a) damage to protected species and natural habitats, which is any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species; (b) water damage, which is any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, as defined in Directive No. 2000/60/EC, of the waters concerned, with the exception of adverse effects where Art. 4 (7) of that Directive applies; (c) land damage, which is any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms. In the same Art. 2, Directive 2004/35/EC defines "damage" as a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly. A natural resource service means in this context the function performed by a natural resource for the benefit of "another natural resource or the public"; see Art. 2 (13) Directive 2004/35/EC.

9 With regard to private international law, Recital (10) Directive 2004/35/EC states explicitly that it does not provide for additional rules of conflict of laws and is without prejudice to the rules on international jurisdiction in the Brussels I Regulation.

10 *Fuchs*, in: Peter Huber, Art. 7 note 20; *Hellner*, Rom II-förordningen, p. 167.

In contrast to the Directive, the definition of environmental damage in Recital (24) does not explicitly require that the adverse impact be significant or measurable, but it seems to be implied in the concept of environmental damage that it has to be of a certain significance, either in terms of quantity (such as the number of square kilometres or persons affected) or intensity (such as the seriousness of the problems caused or potentially caused).[11] What is more, according to its Art. 3 (1) the Directive is only applicable to environmental damage caused by certain occupational activities (this limitation does not apply if the damage is caused to a protected species or natural habitat). It is submitted that no such limitation can be read into Art. 7 of the Rome II Regulation.[12] This would also be in line with Art. 3 (2) of the Directive, which indicates its minimum character. **7**

2. Civil and commercial matters

a) Actions by public authorities

It follows from the aforesaid that typical environmental (ecological) damage is not inflicted on individuals but rather on the society at large. Proceedings concerning such damage will therefore normally be initiated by the State or another public instrumentality (for example a province or a municipality). If the claim is brought by a public authority in the exercise of its powers rather than in its capacity of a private person (for example as the owner of the affected land),[13] the claim is pursuant to Art. 1 (1) excluded from the scope of the Regulation as not being a "civil and commercial matter".[14] The situation may be different if the State has authorized a private person, such as a non-governmental environmentalist organization, to take legal action, in its own name, against the person responsible for the ecological damage.[15] **8**

Art. 15 (3) Directive 2004/35/EC empowers Member States to seek to recover costs that they have incurred in relation to the adoption of preventive or remedial (cleaning up) measures. However, the Directive contains no rules for the enforcement of such claims and it is clear that they fall outside the scope also of the Brussels I/I*bis* Regulations due to their public law nature. For this reason and in the spirit of Art. 191 TFEU and the polluter pays principle it has been submitted that for such cases the scope of application of both the Brussels I*bis* Regulation and the Rome II Regulation should be given a wider interpretation than usual.[16] **9**

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11 See Annex I to Directive No. 2004/35/EC.

12 For an opinion *contra Plender/Wilderspin*, para. 21–012. However, it should be noted that this opinion is given "with no great confidence".

13 See *Gemeente Steenbergen* v. *Baten* (Case C-271/00), [2002] ECR I-10489, concerning the corresponding provision in the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. In the case of *Land Oberösterreich* v. *ČEZ a.s.* (Case C-343/04), [2006] ECR I-4557, where an Austrian Province brought an action in its capacity as owner of the land allegedly threatened by radiation from a Czech nuclear power station operated by the defendant, the applicability of the Brussels Convention (and thus the civil and commercial nature of the dispute) was not even called in question.

14 Cf. *von Bar*, RdC 268 (1997), 291, 394, 410. Cf. also the ECJ judgments *LTU* v. *Eurocontrol*, case 29/76, [1976] ECR 1541 and *Netherlands v. Rüffer*, case 814/79, [1980] ECR 3807, concerning the corresponding provision in the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

15 *Verein für Konsumenteninformation v. Henkel* (Case C-167/00), [2002] ECR I-8111, concerning the corresponding provision in the Brussels Convention.

16 See *Betlem/Bernasconi*, (2006) 122 LQR 124, 130 *et seq.*; *Kadner Graziano*, YbPIL 9 (2007), 71, 83 *et seq.*

However, the concept "civil and commercial matters" is used in a long line of EU Regulations that are to be given a uniform interpretation and cannot be allowed to vary depending on the subject matter, Recital (7). It is therefore submitted that costs incurred by a State in its public capacity, and not as landowner, for preventive or remedial measures fall outside scope of the Rome II Regulation.[17]

b) Fines and penalties

10 As will be shown (*infra* note 15), the Regulation applies not only to compensation for damage that has already occurred but also to non-contractual obligations that are likely to arise due to damage that is likely to occur (see Art. 2). The measures to be taken to prevent or terminate damage are, pursuant to Art. 15 (d), governed by the law designated by Art. 7 (or 14), but can be taken only within the limits of powers conferred on the court by its procedural law. This *i.a.* applies to whether and how an injunction prohibiting behaviour harmful to the environment can be combined with (the threat of) a financial sanction such as a periodic penalty to be paid for non-compliance with the injunction. However, as the Regulation deals merely with non-contractual obligations in civil and commercial matters, it does not in any way affect any penal or administrative measures taken by national authorities in order to prevent or terminate ecological injury or damage. In particular, fines payable to the state rather than to the claimant may be classified as not being "civil and commercial".[18] Penalties of civil and commercial nature will be enforced in the other Member States provided they fulfil the requirements imposed by the Brussels I Regulation, especially its Art. 49.[19]

c) Punitive or exemplary damages

11 Punitive or exemplary damages, claimed by a private person in a civil dispute, in principle fall within the scope of the Regulation, but Recital (32) contains a reminder that depending on the circumstances of the case and the legal order of the Member State of the court seized, such non-compensatory damages, if of an excessive nature, "may" be regarded as being contrary to the public policy (*ordre public*) of the forum.[20]

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17 See *Dickinson*, The Rome II Regulation (Oxford 2008), para. 7.06; *Bogdan*, in: Ahern/Binchy p. 219, 224; *Fuchs*, in: Peter Huber, Art. 7 note 18.

18 However, financial penalties imposed by a Member State due to offences committed by violating obligations arising from an instrument adopted under the EC Treaty, including penalties for violations of national laws implementing EC directives, are normally recognized and enforced in the other Member States pursuant to Council Framework Decision No. 2005/214/JHA of 24 February 2005 on the Application of the Principle of Mutual Recognition to Financial Penalties, OJ 2005 L 76/16.

19 *Realchemie Nederland BV v. Bayer CropScience AG* (Case C-406/09), [2011] ECR I-9773, I-9800. It is conceivable that the injunction itself does not provide for penalties and that their imposition and amount are to be decided in subsequent proceedings following a violation of the injunction. Such proceedings may take place in the country of the injunction, but it may also be possible to initiate them in another country recognizing the injunction, provided the courts of that country have jurisdiction. As the injunction should not be given more far-reaching effects abroad than at home, it is submitted that even in the last-mentioned situations the courts should give effect to the substantive law that was applied when the injunction was issued, *i.e.* normally the law applicable to the tort as such.

20 This formulation is much softer than Art. 24 of the Commission's original proposal COM (2003) 427 final, according to which the awarding of non-compensatory damages, such as exemplary or punitive damages, "shall be contrary to Community public policy". The "soft" reminder in Recital (32) is, however,

3. Liability of a parent company

Environmental damage is sometimes caused by the operations of a local company belonging to a multinational enterprise, which may give rise to questions regarding the liability of the foreign parent company. Pursuant to Art. 15 (g), "liability for the acts of another person" is governed by the law applicable to the non-contractual obligation in question, *i.e.*, the law designated by Art. 7. Nevertheless, it appears that if the parent company is claimed to be liable solely in its capacity of shareholder, the question of its liability is excluded from the scope of the Regulation by Art. 1 (2)(d) as being of company-law nature (liability of "of members as such for the obligations of the company").[21] The law designated by Art. 7 may, however, apply to the extent it contains special rules on the liability of parent companies for environmental damage and damage sustained by persons or property as a result of environmental damage.[22] **12**

4. Relationship with other articles

Art. 7 may overlap with some of the other provisions in the Regulation. It is clear that according to the maxim *lex specialis derogat legi generali* it enjoys priority in relation to the main conflict rules in Art. 4. It is equally clear that it gives way to party autonomy in accordance with Art. 14. The relationship with the other special conflict rules is less evident, in particular Art. 5 dealing with product liability. There is no doubt that a faulty product, for example a chemical substance, may cause ecological damage within the scope of Art. 7. A similar overlapping may occur between Art. 7 and Art. 9 on industrial actions, for example if an unlawful strike causes a poisonous emission from a chemical plant due to the absence of the employees in charge of preventing such events. The Regulation does not provide a solution for such conflicts between conflict rules and it remains to be seen how they will be solved by the CJEU. It is possible that the claimant will be given the right to choose between the overlapping Articles.[23] **13**

III. Applicable law

1. The principle of ubiquity – claimant's choice

The two alternatives offered to the claimant by Art. 7 do not have the same standing. It is Art. 4 (1) that constitutes the main rule and the *lex loci damni* applies unless the claimant opts for the law of the country of the event giving rise to the damage. Recital 25 states that the question of at which point in time the person seeking compensation can make the choice of the applicable law will be determined in accordance with the (procedural) law of the Member State of the forum. The *lex fori* may provide, for example, that the choice must be made at the latest when the claimant lodges the document instituting the action, but it may instead **14**

not quite without legal effects, as it makes it difficult to argue that the use in these cases of the public policy reservation is abusive; *Régie nationale des usines Renault SA v. Maxicar SpA and Orazio Formento* (Case C-38/98), [2000] ECR I-2973.

21 *Ebbesson*, JT 2006–07, 279, 308.

22 Cf. the difference made by Arts. 1(3) and 22 (1) between general rules on evidence and special rules on burden of proof in matters of non-contractual obligations.

23 See for the opinion that Art. 7 prevails over Art. 5 *Dickinson*, para. 5.17.

allow him to defer his choice until some later stage of the proceedings. The procedural law of the country of the forum must reasonably also determine whether and to what extent the court is permitted or required to provide guidance to the claimant, for example by informing him of his options under Art. 7.

15 A literal reading of Art. 7 may create the impression that the right to opt for the law of the country in which the event giving rise to the damage occurred can merely be exercised by a "person seeking compensation for damage",[24] and not persons applying for an injunction intended to prevent the damage, but such a restrictive reading would be incompatible with the purpose and background of the rule, in particular with the reference in Recital 25 to the principles that preventive action should be taken and that corrective action at source should be given priority. It would also be contrary to Art. 2, which makes it clear that the Regulation applies even to non-contractual obligations and damage that are "likely to occur". This provision was added in order to avoid burdening the text of the Regulation with constant repetitions of "or is likely to occur". What is more, Art. 15 (d) on the scope of the applicable law includes "measures which a court may take to prevent or terminate injury or damage".[25] It is submitted, therefore, that the word "compensation" in Art. 7 should be understood as referring both to reparation for damage occurred and injunctions intended to prevent potential damage.[26]

16 Without explicitly saying so, Art. 7 can in practice be expected to result in the application of the law which is more favourable to the claimant (*favor laesi* or *Günstigkeitsprinzip*), at least if the claimant has the resources necessary for finding out which of the two legal systems is more favourable (this is not always simple, as one law may be more advantageous on one point but less on another).[27] It is submitted that the claimant cannot pick the cherries out of the cake by combining selected rules of the law applicable pursuant to Art. 4 (1) with selected rules of the law of the country in which the event giving rise to the damage occurred, *i.e.* he can merely rely on one of the two legal systems and must take it in its entirety[28] (but see *infra* about Art. 17).

17 According to some commentators, including one of the authors of this contribution, *Michael Bogdan*, the claimant can, however, choose different laws for different parts of the

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[24] *Le demandeur en réparation, la persona que reclama el resarcimiento de los daños, den person som begär skadestånd, de persoon die schadevergoeding vordert, osoba která uplatňuje nárok na náhradu škody, etc.* The German text appears to differ from the other versions, as it speaks of the person sustaining damage (*der Geschädigte*) without mentioning the remedy sought.

[25] See *Hellner*, Rom II-förordningen, p. 175.

[26] See also *Kadner Graziano*, YbPIL 9 (2007), 71, 76–77, who suggests that Art. 7 does not make a distinction between claims for damages and claims for other remedies, such as prohibitory or mandatory injunctions.

[27] See *Bernasconi*, Civil Liability Resulting from Transfrontier Environmental Damage: a Case for the Hague Conference? www.hcch.net/upload/wop/gen_pd8e.pdf p. 34; *Betlem/Bernasconi*, (2006) 122 L. Q.Rev. 124, 137–144; *Mahmoudi*, Nordic J. Int. L. 1990, 128, 134.

[28] The same restriction on *dépeçage* seems to apply with regard to the freedom of choice given to the parties in Art. 14, for example when a foreign investor buying land from farmers for the purpose of building a chemical factory inserts into the purchase agreements a clause designating the law to govern his liability for potential future harm caused to their surrounding lands as a result of environmental damage. Art. 14, in contrast to Art. 3 (1) Rome I Regulation, does not mention the possibility of *dépeçage*.

damage, for example the law designated by Art. 4 (1) for personal damage and the law of the country of the harmful event for the damage to property.[29] This would then constitute two different "claims" within the meaning of Art. 7. According to another opinion, advocated i.a. by the other author of this contribution, *Michael Hellner*, such a possibility is not foreseen by the Regulation. Art. 7 is *lex specialis* in relation to Art. 4 and the former explicitly includes "damage sustained by persons […] as a result of such [environmental] damage".[30]

18 The claimant has the right to choose the more favourable of the two laws irrespective of whether the person claimed to be liable knew or should have known that the damage might occur in a country other than that of the event giving rise to it. All this means that well-informed claimants in cross-border cases will generally be in a better position and obtain better protection than claimants in purely domestic cases, who have no similar right to choose between legal systems.[31] It should further be recalled that Art. 7 (2) Brussels I*bis* Regulation, as interpreted by the CJEU,[32] also affords the claimant in matters relating to tort the option of suing the defendant either in the courts of the Member State where the direct[33] damage occurred (or may occur) or in the courts of the Member State of the event giving rise to the damage.

19 The reference in Art. 7 to Art. 4 is limited to the first paragraph of the latter and does not include the provisions in Art. 4 (2) and 4(3), so that the habitual residence of both parties in the same country or a manifestly closer connection of the tort with a country other than that indicated in Art. 4 (1) will not influence the determination of the applicable law. This means that if a Swedish enterprise is sued by one of its Swedish subcontractors because of a poisoning sustained by the subcontractor while working for the defendant in Saudi Arabia as a result of environmental damage for which the defendant is claimed to be liable, the governing law will be the law of Saudi Arabia, in spite of the Swedish habitual residence of both parties and their pre-existing contractual relations. All this can, depending on the substantive contents of the legal systems involved, rather surprisingly, sometimes make Art. 7 less favourable to the claimant than the general conflict rules in Art. 4.

2. Multiple events giving rise to the same damage

20 A complication regarding the localization of the "event giving rise to the damage" may arise if the damage is the result of a combination of several mutually independent events, for example air pollution originating from two chemical factories located in different

29 See *Bogdan*, in: Ahern/Binchy p. 219, 222; *Bogdan*, Liber Fausto Pocar, tomo II (2009), p. 95, 98; *Unberath/Cziupka*, in: Rauscher, Art. 7 Rom II-VO note 41.

30 Of the same opinion *Fuchs*, in: Peter Huber, Art. 7 note 29.

31 Those rules of the applicable law that are not mandatory can naturally even in purely domestic cases be contracted out and be replaced by rules "borrowed" from another legal system, but this is not a matter of private international law but merely a consequence of the freedom of contract as afforded by the substantive rules of the *lex causae*.

32 See *Bier v. Mines de potasse d'Alsace* (Case 21/76), [1976] ECR 1735, concerning Art. 5 (3) Brussels Convention.

33 See *Dumez* v. *Helaba* (Case C-220/88), [1990] ECR I-49; *Marinari* v. *Lloyd's Bank* (Case C-364/93), [1995] ECR I-2719; *Kronhofer v. Maier* (Case C-168/02), [2004] ECR I-6009 (all concerning Art. 5 (3) Brussels Convention).

countries. If the person claimed to be responsible for one of the events is different from the person claimed to be responsible for the other, and the person seeking compensation chooses to base his claim on the law of the country in which the event giving rise to the damage occurred, the liability of the two defendants will be governed by different legal systems (the same may, of course, happen also if the claimant bases his claim against one of the defendants on the place of the damage and against the other on the place of the harmful event, or if there has been a choice of different legal systems in accordance with Art. 14). However, if the same person is claimed to be responsible for both events, such as when both polluting factories are operated by the same company, and one of the two events is manifestly the principal cause of the damage, it might be reasonable to apply to the whole damage the law of the country of that event in accordance with the principle of *accessorium sequitur principale*,[34] but it is doubtful whether the wording of the Regulation permits such a solution.

3. Damage occurring outside state territory

21 The wording of Art. 7 seems to assume that the damage and/or the event giving rise to the damage can be localized to a country or countries. However, the damage and/or the event giving rise to it may occur on, for example, the high seas, in the Antarctic or even in outer space. Since this is a "horizontal" problem that can arise also in the context of other non-contractual obligations, we would refer the reader to the general commentary on Art. 4 **cross-reference to the place were this matter is dealt with**

4. Rules of safety and conduct

22 The application of the *lex loci damni* pursuant to Arts. 7 and 4 (1) does not prevent the person claimed to be liable from relying on Art. 17, which provides that in assessing the conduct of that person account must be taken, "as a matter of fact" and "in so far as is appropriate", of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability. Art. 17 has in mind the conduct-regulating rules, and not the rules dealing with the assessment or allocation of the damage or loss. The rules of safety and conduct, comparable to traffic rules such as speed limits,[35] are normally of a public-law nature and they are territorial in the sense that they are usually not intended to govern human behaviour in other countries.[36]

23 Art. 17 gives the court a substantial amount of discretion. Taking into account "as a matter of fact" of the rules of safety and conduct is not the same thing as applying them. A violation of the local rules of this type should be taken into consideration even when the liability is in other respects governed by another legal system (for instance the *lex loci damni* or the law chosen by the parties in accordance with Art. 14). The fact that the person claimed to be liable has complied with all rules of safety and conduct in force in the country of the harmful

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34 See *Shenavai v. Kreischer* (Case 266/85), [1987] ECR 239 para. 19, concerning Art. 5 (1) Brussels Convention.

35 See Recital (34) and *von Bar*, RdC 268 (1997), 291, 381; *Boskovic*, in: Bernard Audit/Muir Watt/Pataut (eds.), Conflits de lois et régulation économique (2008), p. 195, 205.

36 This applies in principle also to the environmental provisions of EU law, which for the purposes of Art. 7 should be treated as part of the law of each and every Member State.

event – including those cases where he had obtained a special permission from the authorities of that country to act in the manner that led to the environmental damage[37] – will not necessarily protect him from all compensation claims in accordance with the applicable law.[38] A big enterprise may possess greater knowledge about the environmental risks and dangers caused by its activities than the authorities of the countries concerned, especially in the case of developing countries, and it would be inappropriate to exonerate the enterprise from liability for the consequences of its activities on the ground that it did abide by the local rules of safety and conduct which it knew (or should have known) were inadequate.

24 It is for the applicable law to decide what importance is to be given to the existence of a permit.[39] For instance, under the laws of some countries it is not possible to bring an action for an injunction to stop a certain activity if it has a permit. An action can only be brought for compensation for damage that has actually occurred.[40] It is of course therefore unlikely that the claimant will base his action on the law of the place of the harmful event, if pursuant to that law the existence of a permit frees the polluter of all liability and/or excludes the application for an order to stop polluting activities. On the contrary, if the *lex loci damni* contains such a rule, the well-informed claimant will most likely base his claim on the law of the place of the harmful event. In this context it should be noted that, if the applicable law contains a rule giving certain effects to a permit, the CJEU has established that it would be a violation of the principle of non-discrimination on grounds of nationality to treat a permit from another Member State differently than one from the forum State.[41]

25 In the less probable scenario, where the requirements imposed by the rules of safety or conduct in the country of the event giving rise to the damage were actually harmful to the environment but could not be avoided by the defendant due to their mandatory nature, it is possible in some cases that the defendant abiding by these rules cannot be considered to have been negligent even though his negligence and liability is to be assessed pursuant to a different legal system. Due to the respect owed to the sovereignty of other countries, it is normally inappropriate for the courts of one country to order the defendant to behave in a manner incompatible with the mandatory rules of conduct and safety which are in force in another country where that behaviour is to take place, quite irrespective of which law applies pursuant to Art. 7.

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37 The liability of the State for granting the permission, as well as the liability of the State for failing to prohibit, supervise and prosecute activities harmful to the environment, falls beyond the scope of the Regulation due to Art. 1 (1) ("liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*)").

38 See COM (2003) 427 final p. 25.

39 In the words of *Bernasconi*, Civil Liability Resulting from Transfrontier Environmental Damage: a Case for the Hague Conference?, www.hcch.net/upload/wop/gen_pd8e.pdf p. 43), "it is for the *lex causae* to establish the framework, into which the effects of the foreign permit are to be inserted". Cf. also *Fach Gómez*, YbPIL 6 (2004), 291, 307; *Kadner Graziano*, YbPIL 9 (2007), 71, 79; *Hager*, RabelsZ 53 (1989), 293.

40 Such was the case under Austrian law in *Land Oberösterreich v. ČEZ a.s.* (Case C-115/08), [2009] ECR I-10265.

41 *Land Oberösterreich v. ČEZ a.s.* (Case C-115/08), [2009] ECR I-10265 para. 139.

Article 8: Infringement of intellectual property rights

1. The law applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the country for which protection is claimed.
2. In the case of a non-contractual obligation arising from an infringement of a unitary Community intellectual property right, the law applicable shall, for any question that is not governed by the relevant Community instrument, be the law of the country in which the act of infringement was committed.
3. The law applicable under this Article may not be derogated from by an agreement pursuant to Article 14.

I. Introduction

1. Structure of Art. 8

1 Art. 8 provides a special conflict rule for the infringement of intellectual property rights. According to Art. 8 (1), the law applicable shall be the "law of the country for which protection is claimed". The criterion of Art. 8 (1) deviates from the general principle of Art. 4 (1) which refers to the "country in which the damage occurs". Art. 8 (1) codifies the *lex loci protectionis* principle which has been the prevalent principle in the private international laws of many EU Member States before Rome II.[1] According to Art. 8 (1), the *lex loci*

protectionis is applicable to non-contractual obligations arising from an infringement of an intellectual property right, not to other aspects that may be relevant in a concrete infringement case, e.g. the requirements for protection or the ownership of the intellectual property right in question. Art. 8 (2) stipulates a special conflict rule for unitary community intellectual property rights for those questions which are not regulated in the respective community instrument, e.g. in the Community Design Regulation 6/2002.[2] The law applicable under Art. 8 (1) and 8 (2) may not be derogated from by a choice of law agreement. Unlike other special connection rules of the Rome II Regulation, Art. 8 does not refer to Art. 4 (2) and 4 (3). Therefore, the common habitual residence rule of Art. 4 (2) and the rebuttal clause of Art. 4 (3) are not applicable to infringement cases.

2. Underlying principles: territoriality and *lex loci protectionis*

Today's private international law principles in the field have their roots in the traditional system of territorially restricted intellectual property rights. Since the 14th century, intellectual property rights have been granted by the Emperor, Kings or Seigneurs as "privileges" for the respective country's territory.[3] This was also the traditional approach for copyright before the natural law idea became prevalent on the continent that copyright should not be subject to any act of state or formality. Industrial property rights like patents and trademarks are typically still subject to an administrative act of a granting state.[4] Against this background, it is the traditional approach in private international law to apply the law of the state of registration for registered rights or – more generally – the law of the state for which protection is sought to all questions concerning the existence and scope of protection as well as to the remedies for infringement. This conflict of law principle is called the *lex loci protectionis* principle. **2**

According to the predominant theory, the concept of territorially restricted intellectual property rights and the *lex loci protectionis* principle are also to be found in the main international conventions for the protection of intellectual property.[5] The Paris Convention for the Protection of Industrial Property of 1883, lastly revised in 1967, the Berne Conven- **3**

1 See also Recital 26 Rome II: "Regarding infringements of intellectual property rights, the universally acknowledged principle of the lex loci protectionis should be preserved."

2 Council Regulation (EC) No. 6/2002 of December, 12 2001 on Community designs, OJ L 3, 5.1.2002, 1–24.

3 See for copyright *Gieseke*, Vom Privileg zum Urheberrecht (1998), 13 *et seq*.; for patents see *Dölemeyer*, Erfinderprivilegien und frühe Patentgesetze, in: Otto/Klippel (eds.), Geschichte des deutschen Patentrechts (2015), 13–36; *Kurz*, Weltgeschichte des Erfindungsschutzes, passim; for the English development see *Bently*/*Shermann*, Intellectual Property Law, 33 *et seq*. and 376 *et seq*.; *Cornish*/*Llewelyn*/*Aplin*, Intellectual Property, notes 3–04 *et seq*. and 10–01 *et seq*.

4 Trademarks may also be protected without registration, see Article 6bis Paris Convention ("Well-known marks"). The Community designs Regulation (note 2) also recognizes protection of unregistered Community designs, see Articles 1(2) lit. a, 11.

5 See BGH, GRUR 1992, 697 (698) – ALF; Cour Cass. Propriétés Intellectuelles 2013, 306 – Fabrice X/ABC News Intercontinental; *Buchner*, in: Calliess, Rome Regulations: Commentary, Art. 8 Rome II, note 1; *Drexl*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, notes 70–74; *Fawcett*/*Torremans*, Intellectual Property and Private International Law, notes 12.01 *et seq*.; *Kono*/*Jurčys*, in: Kono (ed.), Intellectual Property and Private International Law, 15–19; *Metzger*, JZ 2010, 929 (932); *Moura Vicente*,

tion for the Protection of Literary and Artistic Works of 1886, lastly revised in 1971, and the following treaties were not aiming at a unification of conflict rules, but at the national treatment of authors and right holders coming from other Member States and for minimum standards of protection.[6] However, the conventions refer on several occasions to the "law of the country where protection is claimed"[7] which is interpreted as a reference to the law of the country for which protection is sought by many courts and commentators.[8]

4 Regarding the indirect and ambiguous drafting of the provisions, it is not surprising that the interpretation of these provisions remained controversial. According to some authors the reference to the law of the country "where" protection is claimed is to be understood as a reference to the *lex fori* including the private international law rules of the forum.[9] Such an interpretation would open the possibility to deviate from the *lex loci protections* and to apply other conflict principles to copyright cases. Regarding the fact that the author's right may not be construed as a mere functional instrument of economic policy, but as a natural right protecting both the economic and personal interests or moral rights, it is an often raised claim that the private international law for copyright should abandon the territorial approach and recognize an universalist concept (at least for certain aspects, e.g. first ownership).[10] Further arguments for such an approach may be drawn from the decline of registration requirements in copyright law – which is one of the major achievements of the Berne Convention, see Art. 5 (2) – and the increasing practical problems of a territorial conception regarding the emergence of ubiquitous media and communication services on the Internet. The interests of right holders and Internet services are hardly compatible with a strict territorial approach to copyright law.[11]

5 Notwithstanding the mentioned conceptional and practical challenges, the territoriality principle has prevailed so far as the main principle of the private international law of intellectual property in the Member States of the European Union. The reason for the persistence of the principle seems to be, besides its long tradition and its observance in

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Receuil des cours 335 (2008), note 119; *Schaafsma*, Intellectuele eigendom in het conflictenrecht, note 1144 *et seq*.

6 *Goldstein*/*Hugenholtz*, Internationale Copyright, 34 *et seq*.; *von Lewinski*, International Copyright Law and Policy, notes 2.39 *et seq*; *Ricketson*/*Ginsburg*, International Copyright and Neighbouring Rights, Vol. 1, notes 2.01–2.50.

7 Articles 5 (2), 6^{bis} (2), 6^{bis} (3), 7 (8), 10^{bis} (1), 14^{bis} (2) (a), 18 (2) Berne Convention. See also Article 2(1) Paris Convention ("The advantages that *their respective laws* now grant, or may hereafter grant, to nationals").

8 See *supra* note 5.

9 See e.g. from the literature *Boschiero*, Yearbook of Private International Law (2007), 87, 98–99; *van Eechoud*, Choice of Law in Copyright, 67–70; *Schack*, Urheber- und Urhebervertragsrecht, note 1015; see also *Dickinson*, The Rome II Regulation: The Law Applicable to Non-Contractual Obligations, note 8.05 and *Pearce v. Ove Arup* [2000] Ch. 403, 441–442.

10 See e.g. *Drobnig*, RabelsZ 1976, 195 *et seq*.; *van Eechoud*, Choice of Law in Copyright, passim; *Klass*, GRUR Int. 2007, 373, 385 *et seq*. and GRUR Int. 2008, 546, 548 *et seq*.; *Moura Vicente*, Receuil des cours 335 (2008), note 123; *Schack*, Urheber- und Urhebervertragsrecht, notes 1026–1043; *Siehr*, UFITA 108 [1988] 9, 24; see also *American Law Institute*, Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes, § 313.

11 *Klass*, GRUR Int. 2007, 373, 383; *Schack*, MMR 2000, 59 (65).

the framework of the international conventions, that territoriality still serves as an effective means against any extraterritorial application of policy choices in the field of intellectual property law.[12] Intellectual property rights are granted and limited by states as part of their economic, social and cultural policy. This is not only true for patents and trademarks which primarily serve economic goals, but also for copyright despite its double nature as an economic and a moral right. Under the *lex loci protectionis* principle, economies with a dominant position in certain sectors, e.g. in the movie or pharmaceutical industry, may not export their intellectual property principles with the intellectual goods they are exporting to other states.[13] Universalist theories so far have not developed comparable safeguards for the national social and cultural policies, but avoid the consequences of their own theories by referencing public order or internationally mandatory provisions.[14]

The territoriality of intellectual property and the application *lex loci protectionis principles* have been recognized by the CJEU already before the coming into force of the Rome II Regulation. The CJEU applied both principles in a cross-border broadcasting case in 2006 and based its judgement on the "principle of the territoriality of those rights, which is recognised in international law and also in the EC Treaty".[15] Later, the Court has repeatedly invoked the territoriality of intellectual property rights and the applicability of the law of the granting state in cases concerning jurisdiction of courts according to Art. 5 (3) Brussels I Regulation.[16] **6**

3. Legislative history

The European Commission's Preliminary Draft Proposal of a Regulation on the law applicable to non-contractual obligations of May 2002[17] did not contain a special conflict rule for intellectual property rights. In the reactions to its consultation, the Commission received several comments on intellectual property of which most suggested to exclude intellectual property rights altogether from Rome II.[18] The Commission nevertheless followed the proposal of the "Hamburg Group on Private International Law", a group of scholars from the Hamburg Max-Planck Institute for Foreign and Private International Law and the University of Hamburg, which proposed to include a special conflict rule codifying the *lex loci* **7**

12 *Basedow*, in: European Max Planck Group on Conflict of Laws in Intellectual Property (eds.), Conflict of Laws in Intellectual Property: The CLIP Principles and Commentary, comment C02 on Article 3:102; *Dickinson*, The Rome II Regulation: The Law Applicable to Non-Contractual Obligations, notes 8.24–8.25; *Drexl*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, notes 15–26; *Grünberger*, ZVglRWiss 108 (2009) 134, 147; *Metzger*, JZ 2010, 930 (933).

13 For a detailed analysis of extraterritorial application of intellectual property rights see *Peukert*, in: Handl/Zekoll/Zumbansen (eds.), Beyond Territoriality: Transnational Legal Authority in an Age of Globalization, 189–228. See also *Drexl*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, notes 282 *et seq*.

14 See the paradigmatic case Cour de Cassation, 28.5.1991, D. 1993, jur. 197 (English translation IIC 1992, 702) – *John Huston* in which the court disregarded the law of the country of origin based and applied French provisions on moral rights as internationally mandatory provisions.

15 CJEU C-192/04 – *Lagardère/SPRE*, para. 46. But see CJEU, C-28/04 – *Tod's/Heyraud*, ECR 2005 I-5781, para. 32 on Article 5(1) Berne Convention.

16 CJEU C-170/12 – *Pinckney*, para. 39; C-441/13 – *Hejduk/Energieagentur*, para. 22.

17 See ec.europa.eu/justice/news/consulting_public/rome_ii/news_hearing_rome2_en.htm.

18 *Hahn/Tell*, in: Basedow/Drexl/Kur/Metzger (eds.), Intellectual Property in the Conflict of Laws, 7, 11–12.

protectionis as a general principle and a more specific rule on unitary community rights.[19] The Commission adopted this approach in its 2003 proposal[20] but modified the wording of the provision on unitary intellectual property rights in Art. 8 (2). According to the Hamburg Group, the "law of the state where the infringement affects the right" would have been applicable. Instead, the Commission referred to "law of the country in which the act of infringement was committed".[21] The provision remained largely unchanged in the further legislative procedure and was no longer controversial.[22] The European Parliament's Committee on Legal Affairs suggested to allow the party to choose the applicable in infringement cases in its Draft Report on the proposal.[23] But the final resolution of the Parliament did not contain the amendment.[24]

4. Current international debate, soft law instruments

8 The World Intellectual Property Organisation (WIPO) has tabled the issue of conflict of laws since the 1990ies at several conferences and meetings.[25] These efforts have not resulted in more concrete drafts for an international instrument yet. Of main interest for international trade mark conflicts is the Joint Recommendation of WIPO and the Paris Union Concerning the Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet of 2001.[26] The Recommendation's rules are applicable at the substantive law level. Their main purpose is to solve disputes on the use of protected signs on the Internet by way of a uniform interpretation of the national or regional trade mark laws. The future development may possibly be guided by several collections of soft law principles which have been published recently on the issue or are expected to be published soon. This is already apparent for the American Law Institute's (ALI) "Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes" published in 2007.[27] According to ALI Principles, as a general rule, the law of the country for which protection

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19 Hamburg Group for Private International Law, in: RabelsZ 2003 (65), 1, 21–24.

20 See Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("Rome II"), COM (2003) 427 final. See also *Hahn/Tell*, in: Basedow/Drexl/Kur/Metzger (eds.), Intellectual Property in the Conflict of Laws, 7, 13: [The proposal of the Hamburg Group] "directly inspired the Commission's proposal".

21 *Illmer*, in: Huber (ed.), Rome II Regulation: Pocket Commentary, Art. 8, note 1.

22 For the discussion during the legislative procedure see *Grünberger*, in: Nomos-Kommentar zum BGB, Art. 8 Rom II, note 8; *Heinze*, in: juris-Praxiskommentar BGB, Art. 8 Rom II, notes 2–3.

23 See Draft Report on the proposal for a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ("Rome II") of the Committee on Legal Affairs (Rapporteur: *Diana Wallis*) of 27 June 2005, A6–0211/2005, Amendment 25.

24 European Parliament legislative resolution on the Council common position with a view to the adoption of a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ("Rome II"), P6_TA(2007)0006.

25 WIPO held a first conference on the subject on January 30, 2001, see http://www.wipo.int/edocs/mdocs/mdocs/en/wipo_pil_01/wipo_pil_01_9.pdf. A second seminar was held on January 16, 2015, see http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=290636.

26 Joint Recommendation Concerning the Protection of Marks, and Other Industrial. Property Rights in Signs, on the Internet (2001), see www.wipo.int/edocs/pubdocs/en/marks/845/pub845.pdf.

27 *American Law Institute*, Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes.

is sought is governing the infringement of intellectual property rights. However, for cases of "ubiquitous" infringement on the Internet, the ALI Principles allow for the concentration of worldwide claims under one law. If plaintiff and defendant are resident in different states and the right holder has made the main investments in his state of residence, he may plead the whole case under the law of this state. Taking the dominant position of US media and technology industries in many fields into account, the ALI Principles will allow US companies to plead worldwide cases under US copyright or patent law on a regular basis. The "Principles for Conflict of Laws in Intellectual Property" prepared by the European Max-Planck Group for Conflict of Laws in Intellectual Property (CLIP) and published in 2013[28], are also providing for special rules on ubiquitous infringement but are primarily referring to the law of the defendant's habitual residence. The purpose of the CLIP Principles is to serve as a model for legislators and for courts when deciding cases.[29] The Advocates General of the CJEU and national courts of EU Member States have repeatedly referred to the CLIP Principles.[30] The International Law Association is currently working on a set of guidelines which should serve as a common worldwide soft law instrument on the matter.[31]

II. Intellectual property rights

1. General definitions

The term "intellectual property" in the sense of Art. 8 must be defined autonomously as a term of European law. At the same time, the term must be defined broadly enough to cover all different kinds of national, regional or international exclusive rights possibly characterized as intellectual property. Recital 26 Rome II provides the starting point for the definition: "For the purposes of this Regulation, the term 'intellectual property rights' should be interpreted as meaning, for instance, copyright, related rights, the sui generis right for the protection of databases and industrial property rights." This definition clarifies that both copyright (plus related rights and database rights) and industrial property rights are covered, but does not resolve the question of how to specify the terms "related rights" and "industrial property" and how to characterize the borderline cases like e.g. unfair competition, geographical indication etc. Another autonomous European definition of intellectual property may be found in the Statement by the Commission concerning Art. 2 of the Enforcement Directive 2004/48/EC,[32] which provides a non-exhaustive list of the most important intellectual property rights: "The Commission considers that at least the following intellectual property rights are covered by the scope of the Directive: copyright, rights related to copyright, sui generis right of a database maker, rights of the creator of the topographies of a semiconductor product, trademark rights, design rights, patent rights, including rights derived from supplementary protection certificates, geographical indications, utility model rights, plant variety rights, trade names, in so far as these are protected as exclusive property rights in the national law concerned." The defi- **9**

28 *European Max Planck Group on Conflict of Laws in Intellectual Property*, Conflict of Laws in Intellectual Property: The CLIP Principles and Commentary.

29 See the preamble of the CLIP Principles, op. cit.

30 See Opinion of AG Cruz Villalón, 11.9.2014, C-441/13 – *Hejduk*, note 26; Opinion of AG Jääskinen, 13.6. 2013, C-170/12 – *Pinckney*, note 53; Opinion of AG Cruz Villalón, 29.3.2012, C-616/10 – *Solvay*, note 24; see also *Lucasfilm v. Ainsworth* [2011] UKSC 39, N° 95 and 109.

31 See www.ila-hq.org/en/committees/index.cfm/cid/1037.

32 OJ L 94, 13.4.2005, 37.

nition in Art. 2 of Regulation 608/2013 concerning customs enforcement of intellectual property rights[33] follows the same structure but entails more detailed references, e.g. for the different types of geographical indications. Ultimately, each type of intellectual property right must be analysed individually.

2. Copyright and related rights

10 Copyright as an intellectual property right covers both the economic exclusive rights of authors and subsequent right holders and the moral or personality rights of authors, irrespective of whether those rights are recognised as an integral part of the author's right in the work or whether other legal means are used to protect the author's non pecuniary interest.[34] Copyright may also grant claims for compensation for a use deemed to be lawful under the applicable copyright law, e.g. in case of private copy levies.[35]

11 Several international conventions, European directives and national copyright systems supplement the author-centric copyright with other rights which are granted to other natural persons or companies active in the performance of production of literary and artistic works. The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 1961 provides protection for the most commonly accepted related (or neighbouring) rights. The Rome Convention has been ratified by 95 states, but not by the U.S. The WIPO Performances and Phonograms Treaty of 1996 has also been accepted by the U.S. but leaves out broadcasting organizations. In the European Union, the Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property[36] has harmonized the rights of performers, phonogram producers and movie producers. In addition, the Directive 96/9/EC on the legal protection of databases[37] has introduced an exclusive right for the database maker, i.e. the person who takes the initiative and the risk of investing in the database. Some jurisdictions, e.g., Germany or Switzerland provide additional related rights on top of the international or European standards, e.g. for scientific editions, posthumous works, photographs or press publishers. All these international, regional, or national related rights are covered by Art. 8.

12 Of main interest for the audiovisual sector, but based on different subject matters are exclusive rights in sports events as they are protected under the French *Code du sport*[38] or under the Brazilian law.[39] If the organiser of the sports event has the exclusive right to exploit the sports event, those rights should be characterized as intellectual property rights in the sense of Art. 8.[40]

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33 OJ L 181, 29.6.2013, 15–34.

34 Compare Article 6bis Berne Convention which is also agnostic to the "means of redress for safeguarding the rights granted by this Article".

35 See e.g. Article 5(2) lit. a of the Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, 10–19.

36 OJ L 376, 27.12.2006, 28–35.

37 OJ L 77, 27.3.1996, 20–28.

38 Art. L. 333–1 till L. 331–5.

39 See *Hilty/Henning-Bodewig*, Rechtsgutachten: Leistungsschutzrecht für Sportveranstalter?, https://www.dosb.de/fileadmin/fm-dosb/downloads/recht/Hilty_Gutachten_Leistungsschutzrechte.pdf, 53 *et seq.*

3. Industrial property rights

Art. 8 covers a variety of different industrial property rights. The term industrial property is defined in Art. 1 (2) of the Paris Convention, which is incorporated into the WTO-Agreement on trade-related aspects of intellectual property rights (TRIPS)[41] and as such part of the EU law.[42] According to Art. 1 (2), "the protection of industrial property has as its object patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellations of origin, and the repression of unfair competition." The definition is not binding for the interpretation of Art. 8 Rome II because of its different context. Still, it expresses an international consensus about typical categories of industrial property. **13**

Art. 8 covers all kinds of industrial property rights for technological inventions. This comprises first and foremost patents, especially utility patents which protect technological inventions,[43] but also plant or design patents as they are recognized in some jurisdictions, e.g. the U.S.[44] National patent law may be superseded by regional or international agreements which facilitate the registration and examination of patents, the most important examples being the European Patent Convention of 1973, lastly revised in 2000, and the Patent Cooperation Treaty of 1970. But these international systems of patent registration and examination have not established regional or worldwide patents rights with unitary effects, especially with regard to the non-contractual obligations arising out of an infringement.[45] In this respect, the *lex loci protectionis* prevails. Art. 8 is also applicable to supplementary protection certificates granted on the basis of Regulation 469/2009 concerning the supplementary protection certificate for medicinal products[46] and Regulation (EC) No. 1610/96 concerning the creation of a supplementary protection certificate for plant protection products.[47] Those certificates confer the same rights as conferred by the basic patent and have the same territorial scope. It is therefore the respective *lex loci protectionis* which governs the scope of protection and the obligations arising out of an infringement.[48] Finally, some jurisdictions grant utility models for technological inventions, e.g. France, Germany, and the Netherlands.[49] Unlike patents, utility models may be registered without substantive examination. The European Commission's initiative to harmonize the law of the Member States with regard to utility models was not successful so far. A proposal for a Directive was withdrawn in 2006.[50] Utility models are clearly covered by Art. 8 Rome II. **14**

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40 *Drexl*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, note 162; *Grünberger*, ZVglRWiss 108 (2009) 134, 140; *Illmer*, in: Huber (ed.), Rome II Regulation: Pocket Commentary, Art. 8, note 8.

41 See Art. 1 (2) TRIPS-Agreement.

42 The EU is member of the WTO. TRIPS is applicable in the EU legal order, see CJEU, C-135/10 – *SCF/Del Corso*.

43 See Art. 27 of the WTO-Agreement on trade-related aspects of intellectual property rights (TRIPS).

44 See § 161 and § 171 US Patent Act. However, "design patents" do not protect technological inventions but new and original designs and should rather be characterized as registered design rights.

45 See Art. 64 European Patent Convention.

46 OJ L 152, 16.6.2009, 1–10.

47 OJ L 198, 8.8.1996, 30–35.

48 See *Grabinski*, in: Benkard (found.), Patentgesetz, § 16a, note 33.

49 See the comparative overview in the European Commission's Green Paper "The Protection of Utility Models in the Single Market", COM (95) 370 final, 7.

50 See ec.europa.eu/growth/industry/intellectual-property/patents/utility-models_de.

15 An equally important group of industrial property rights consists of trade marks, comprising both registered and unregistered signs, exclusive rights for company or trade names or symbols that provide protection similar to trade marks without being limited to specific goods or services[51], and titles of artistic or literary works that are protected similar to trade marks.[52] With regard to the protection of trade marks, the relevant international conventions go beyond a mere international registration system.[53] The Paris Convention recognizes an international protection of well-known marks in Art. 6.[54] Another exception to the territoriality principle is provided for so-called "Telle-quelle" trade marks in Art. 6.[55] However, these exceptions concern the requirements for the protection and validity of trade marks but not the scope of protection and the remedies in case of infringement. They do therefore not interfere with Art. 8 Rome II. Trade marks granted by the European Union Intellectual Property Office in accordance with the EU Union trade mark Regulation 2015/2424[56] are covered by Art. 8 (2) as unitary Community intellectual property rights.

16 Art. 8 covers both registered and unregistered design rights.[57] The Hague Agreement Concerning the International Deposit of Industrial Designs of 1925 and the Hague Act of 1960 established an international registration system that does not affect the scope of protection of design rights. Community design rights granted by European Union Intellectual Property Office on the basis of the Community designs Regulation 6/2002 are Community unitary intellectual property rights in the sense of Art. 8 (2).

17 Plant variety rights (or plant breeder's rights) provide a specific exclusive right for new varieties that are distinct, stable, and uniform. The EU Regulation 2100/94 on Community plant variety rights[58] and many other jurisdictions follow the model of the UPOV International Convention for the Protection of New Varieties of Plants of 1991. National plant variety rights are covered by Art. 8 (1) Rome II. Community plant variety rights granted by the Community Plant Variety Office are governed by Art. 8 (2) Rome II.

18 Exclusive rights on the topographies of semiconductor products, as provides by the EU Directive 87/54/EEC[59] or by the US Semiconductor Chip Protection Act of 1984, are intellectual property rights in the sense of Art. 8 Rome II.

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51 This applies insofar as these trade names or symbols are protected as exclusive rights, see the Statement by the Commission concerning Art. 2 of the Enforcement Directive 2004/48/EC, OJ L 94, 13.4.2005, 37. Other legal issues raised by the use of trade names, e.g. the authority to act under a trade name or liability issues, are not covered by Art. 8.

52 See § 5 para. 3 German Trade Mark Act.

53 These are, besides the Paris Convention, the Madrid Agreement of 1891 and the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks of 1989.

54 For the special relationship of the protection of well-known trademarks under Art. 6bis Paris Convention and the territoriality principle see *Dinwoodie*, 41 Houston Law Review (2004), 885, 919 *et seq*.

55 "Every trademark duly registered in the country of origin shall be accepted for filing and protected as is in the other countries of the Union, subject to the reservations indicated in this Article."

56 OJ L 341, 24.12.2015, 21–94.

57 Registered designs are harmonized in the EU by Directive 98/71/EC on the legal protection of designs, OJ L 289, 28.10.1998, 28–35.

58 OJ L 227, 1.9.1994, 1–30.

A less obvious case is the designation of origin or geographical indication, registered e.g. on the basis of the EU Regulation 1151/2012 on quality schemes for agricultural products and foodstuffs.[60] Geographical indications are listed in the definitions of intellectual property in other EU instruments[61] and are also included into the TRIPS Agreement (Art. 22–24). Unlike typical intellectual property, those rights are not owned by individual holders. Still, geographical indications are designed as exclusive rights with an intellectual property like scope of protection.[62] Also, any misuse of the indication may be prohibited by individual competitors.[63] These similarities suggest the application of Art. 8 Rome II. Additional arguments may be drawn from the rationale behind the *lex loci protectionis* principle: It would seem doubtful to extend the policy choices behind geographical indications granted in one state or region to activities arising in another state or region which has chosen not to implement comparable protection instruments or where the geographical indication has not been registered. These arguments plead for application of Art. 8 Rome II.[64] As Union-wide registered rights, geographical indications are covered by Art. 8 (2) Rome II. **19**

4. Unfair competition, trade secrets, personality rights

Claims based on unfair competition are not covered by Art. 8 but by Art. 6 Rome II. Unfair competition in the sense of Art. 6 does not only comprise the "core cases" of misleading and aggressive commercial practices which are harmonized in the EU Directive 2005/29/EC unfair business-to-consumer commercial practices,[65] but also business-to-business practices including "acts to exploit a competitor's value (passing off and the like)", as the Commission's Explanatory Memorandum on Rome II puts it.[66] In view of this clear statement, it is undisputed that claims against unfair imitation of products or services of competitors are governed by Art. 6.[67] Nonetheless, claims against an imitation of products or services will frequently find their ground both in intellectual property, e.g. copyright, design or trade **20**

59 OJ L 24, 27.1.1987, 36–40.

60 For a list of the different types of geographical indications, see Article 2 N°4 Regulation 608/2013 concerning customs enforcement of intellectual property rights.

61 See Regulation 608/2013 and Statement by the Commission concerning Article 2 of the Enforcement Directive 2004/48/EC, note 51.

62 See Article 13 of EU Regulation 1151/2012 on quality schemes for agricultural products and foodstuffs.

63 See e.g. § 128 German Trade Mark Act.

64 This approach has been applied by the German Bundesgerichtshof under the national conflict principles before Rome II, see BGH, GRUR 2007, 884 – Cambridge Institute. For the application of Art. 8 Rome II see *Drexl*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, notes 124–128; *Heinze*, in: juris-Praxiskommentar BGB, Art. 8 Rom II, note 26; *Illmer*, in: Huber (ed.), Rome II Regulation: Pocket Commentary, Art. 8, note 9; *Sack*, WRP 2008, 1405 (1406) *et seq*.

65 OJ L 149, 11.6.2005, 22–39.

66 Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("Rome II"), COM (2003) 427 final, 16.

67 *De Miguel Asensio*, in: Leible/Ohly, Intellectual Property and Private International Law, 137; *Bariatti*, Litigating Intellectual Property Rights Disputes Cross-border: EU Regulations, ALI Principles, CLIP Project, 63, 68; *Dickinson*, The Rome II Regulation: The Law Applicable to Non-Contractual Obligations, note 8.12; *Drexl*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, note 163; *Fawcett/Torremans*, Intellectual Property and Private International Law, notes 15.21; *Leistner*, in: Basedow/Drexl/Kur/Metzger (eds.), Intellectual Property in the Conflict of Laws, 129.

marks, and in unfair competition. One may wonder whether in these cases a *dépeçage* for those different claims is the most expedient solution. The CLIP Principles suggest to apply the *lex loci protectionis* at least *mutatis mutandis* to "disputes involving allegations of unfair competition arising from the same set of facts as relating allegations involving intellectual property rights".[68] An argument for such an approach could be taken from the – admittedly unspecified – reference to unfair competition in Art. 1 (2) of the Paris Convention. Still, the question is mainly of academic interest. The *lex loci protectionis* and the market effects rule will lead to similar results in most cases.[69] Differences between the two approaches involve issues of substantive law, e.g. in case of merely preparatory act which may not effect the market in the sense of Art. 6 but still possibly infringe an intellectual property right in the sense of Art. 8.[70]

21 The protection of trade secrets, although mentioned in Art. 39 of the TRIPS Agreement, is not governed by Art. 8 but by Art. 6.[71] Trade secrets are typically not protected by an exclusive right but through other legal mechanisms, especially by remedies against an unlawful disclosure.[72] As such, trade secrets provide an alternative to intellectual property rights, especially patents, which require disclosure. The Commission's Explanatory Memorandum on the Proposal of the Rome II Regulation of 2003 characterizes industrial espionage and disclosure of business secrets as cases of unfair competition.[73] This is also in line with the definitions of intellectual property in other EU instruments[74] which do not contain trade secrets.

22 Personality and privacy rights are excluded from Rome II, Art. 1 (2) lit. g), and may therefore not be characterized as intellectual property in the sense of Art. 8,[75] irrespective of the more general discussion whether personality rights, the right to a person's voice or image, or personal data may be characterized as intellectual property in a broader sense.[76] The exclusion in Art. 1 (2) lit. g) does not affect the application of Art. 8 on the non-pecuniary interests

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68 Article 1:101(3)(b) CLIP Principles. See notes 12, 29.

69 *De Miguel Asensio*, in: Leible/Ohly, Intellectual Property and Private International Law, 137, 166.

70 *De Miguel Asensio*, in: Leible/Ohly, Intellectual Property and Private International Law, 137, 166; *Leistner*, Comments: The Rome II Regulation Proposal and its Relation to the European Country-of-Origin-Principle, in: Drexl/Kur (eds.), Intellectual Property and Private International Law (2005), 176, 183.

71 See also *Grünberger*, in: Nomos-Kommentar BGB, Art. 8 Rom II, note 17; *Heinze*, in: juris-Praxiskommentar BGB, Art. 8 Rom II, note 27; *Illmer*, in: Huber (ed.), Rome II Regulation: Pocket Commentary, Art. 8, note 10. But see *McGuire*, in: Beck Online-Großkommentar, Art. 8 Rom II, notes 118–120 (application of Art. 8 depends on national structure of protection of trade secrets).

72 See Article 39 TRIPS. See also Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, OJ L 157, 15.6. 2016, 1–18.

73 Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (Rome II"), COM (2003) 427 final, 16.

74 See Art. 2 Regulation 608/2013 concerning customs enforcement of intellectual property rights and the Statement by the Commission concerning Art. 2 of the Enforcement Directive 2004/48/EC, notes 51, 60 *et seq*.

75 *Heinze*, in: juris-Praxiskommentar BGB, Art. 8 Rom II, note 27; *Illmer*, in: Huber (ed.), Rome II Regulation: Pocket Commentary, Art. 8, note 12.

76 See most recently *Zech*, 6 (2015) JIPITEC 192, para. 1.

in intellectual property, especially moral rights in copyright law, moral rights of performing artists or the right of the inventor to be mentioned as such in the patent.[77]

III. Infringement of intellectual property rights, Art. 8 (1)

1. Infringement

23 Art. 8 (1) determines the applicable law for non-contractual obligations arising from an infringement. This raises the question what is meant by "infringement". Different from property in tangible goods and land, intellectual property rights do not assign full exclusivity to their holders in the sense that any interference of the work, invention, trademark etc. can be prohibited. Rather, intellectual property protection is limited in scope. Only certain legally defined actions are exclusively assigned to the right holder, e.g. the making, offering, placing on the market or using of a product which is the subject-matter of the patent or the reproduction, distribution or communication to the public of a copyright-protected work.[78] A court may only hold for infringement if the defendant has carried out those defined actions. These principles of substantive law may also be used as a starting point to define the term "infringement" on the conflicts of law level. All claims are covered by Art. 8 as long as they are based upon an alleged action of the defendant that falls under the typical catalogues of actions reserved for the right holder of an intellectual property right. Not only the prevalent acts of infringement, but also all less typical claims based upon actions with regard to intellectual property are covered by Art. 8, e.g. if the plaintiff maintains that the mere use of reproductions of copyright-protected design furniture amounts to copyright violation[79] or if the plaintiff argues that mere transfer of goods may infringe a trademark.[80] These claims may be unsubstantiated according to substantive law. Still, they must be characterized as alleged infringement cases under Art. 8. It is not required that the defendant's action fulfils all the legal requirements for an infringement for Art. 8 to apply.[81] The plaintiff must not bring evidence at this stage proofing that the defendant is responsible for the alleged infringement.[82] Instead, it is sufficient for the application of Art. 8 that the plaintiff purports an infringing action carried out by the defendant.

24 Art. 8 covers all non-contractual claims arising from an infringement. This comprises tort- or delict-type claims for damages or injunctions as they are provided for in typical intellectual property acts. Art. 8 is also applicable to unjustified enrichment or restitution claims and to claims of negotiorum gestio arising from infringement as clearly stated by Art. 13. Art. 8 is also applicable to declarations of non-infringement.[83] A claim seeking to obtain payment of fair compensation based upon a copyright limitation must also be characterized

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77 See *Drexl*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, note 164; *Grünberger*, in: Nomos-Kommentar BGB, Art. 8 Rome II, note 29.

78 Articles 16 (trademarks) and 28 (patents) TRIPS Agreement define a universal minimum standards of the rights conferred. For copyright see Art. 6bis to 14ter Berne Convention and the WIPO Copyright Treaty of 1996.

79 See e.g. CJEU, C-456/06 – *Cassina*.

80 See e.g. CJEU, C-281/05 – *Montex/Diesel*; CJEU, C-446/09 and C-495/09 – *Philips/Nokia*.

81 See *Grünberger*, ZVglRWiss 108 (2009) 134, 152–155.

82 See *Heinze*, in: juris-Praxiskommentar BGB, Art. 8 Rom II, note 29.

as a non-contractual obligation arising out of an infringement.[84] In the case of copyright limitations, the defendant executes a use of work which is covered by the exclusive right of the author. The limitation provision, e.g. the private copy limitations, justifies such use but requires payment of a compensation. Those compensation claims are non-contractual and they arise out of an – legally justified – infringement.[85]

25 A claim of particular nature is the resale right or "droit de suite" which is provided for in Art. 14[ter] Berne Convention, in the European Directive 2001/84/EC on the resale right[86] and in many national copyright acts. Those claims are tied to a professional resale of an original work of art and recognise a right of the author to receive a royalty based on the sales price obtained for the resale. Such a resale does not interfere with the exclusive right of the author, i.e. the author cannot prevent the resale. Therefore, the claim is not based upon an infringement in the sense of substantive copyright law. Nonetheless, "infringement" in Art. 8 must be understood as an autonomous notion of private international law. It applies to all claims arising from the use of an intellectual property right as long as those claims are not based upon a contract. Claims out of the resale right are not arising from a contract between the reseller and the author. They are of a non-contractual nature and as a consequence covered by Art. 8.[87] Such an interpretation is in line with the CJEU case law on Art. 5 Brussels I Regulation (now Art. 7 Brussels Ia Regulation) according to which all claims are of a non-contractual nature that are not related to a contract.[88]

2. Country for which protection is claimed

26 Art. 8 (1) determines the law of the country "for which protection is claimed" as the applicable law. It is the plaintiff's claim which determines according to the law of which state the court should find for infringement. This connecting factor has rightly been described as a subjective connecting factor.[89] At the level of private international law, it is up to the plaintiff to decide for which country he seeks protection. This will typically be the country in which the defendant allegedly acted as described in the local intellectual property legislation. But it

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83 *Bariatti*, Litigating Intellectual Property Rights Disputes Cross-border: EU Regulations, ALI Principles, CLIP Project, 63, 71.

84 Cf. CJEU, C-572/14 – *Austro-Mechana/Amazon* on Art. 5(3) Brussels I (Council Regulation (EC) 44/2001).

85 *Grünberger*, in: Nomos-Kommentar BGB, Art. 8 Rom II, note 47; *Heinze*, in: juris-Praxiskommentar BGB, Art. 8 Rom II, note 43; *Illmer*, in: Huber (ed.), Rome II Regulation: Pocket Commentary, Art. 8, note 55. But: *Drexl*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, note 161; *Fezer/Koos*, in: Staudinger, Kommentar zum Bürgerlichen Gesetzbuch, Internationales Wirtschaftsrecht, note 909; *Sack*, WRP 2008, 1405 (1410).

86 See European Directive 2001/84/EC on the resale right for the benefit of the author of an original work of art.

87 *Illmer*, in: Huber (ed.), Rome II Regulation: Pocket Commentary, Art. 8, note 55; see from the older case law before Rome II German Bundesgerichtshof BGHZ 126, 252 = BGH GRUR 1994, 798 – *Folgerecht mit Auslandsbezug*. But see *Dickinson*, The Rome II Regulation: The Law Applicable to Non-Contractual Obligations, note 8.18.

88 See CJEU, 189/87 – *Kalfelis*, para. 18; CJEU, C-334/00 – *Tacconi*, para. 21.

89 See e.g. *Buchner*, in: Calliess, Rome Regulations: Commentary, Art. 8 Rome II, notes 9–12; *Grünberger*, ZVglRWiss 108 (2009) 134, 153.

may also occur that the plaintiff seeks for protection in a country against activities of the defendant that have been carried out in another country, e.g. if the defendant communicates from one state to another via Internet or exports infringing goods to other states. Whether the court may decide on infringement in these cases, is a question of substantive law. For the application of the law of the respective state, according to Art. 8 (1), it suffices that the plaintiff claims protection for those state.

This subjective connecting factor provides a fair balance of interest in single-state scenarios in which the plaintiff claims protection for only state. This is beyond doubt in standard cases, especially if the defendant commits one of the typical infringement actions, e.g. the making, offering or placing on the market of a product which embodies an intellectual property right. However, for borderline cases, one may discuss whether the approach should be nuanced, especially if the law of the state for which protection is claimed has extraterritorial effects, e.g. if the plaintiff seeks protection under the law of state A with its stronger sanctions for activities that have been carried out in state B.[90] Under the subjective test of Art. 8 (1), the court will have to apply the law of state A exclusively in such a case. The provision does not foresee a rebuttal clause like Art. 4 (3). However, the extraterritorial effects of the application of the law of state A in a given case may still be mitigated on the basis of the public policy of the forum in accordance with Art. 26.[91] Such an approach is only consequent if one accepts that territoriality of intellectual property rights is not just an historical principle incorporated in the Berne convention, but still has its function as a means against extraterritorial application of policy choices of other states in the field of intellectual property law. **27**

In multi-state scenarios, a mechanical application of the law or the laws designated by the plaintiff may have its flaws. Under Art. 8 (1), the court will have to apply the respective laws of all states for which the plaintiff claims for protection. In principle, such a "mosaic approach" should be acceptable for both parties, e.g. in case of multistate terrestrial broadcasting.[92] A reasonable plaintiff will consider carefully for which particular states he will claim for protection.[93] If a case concerns multiple countries, e.g. an alleged infringement of patents by the defendant's products in twenty or thirty European and non-European markets, the plaintiff will usually choose to claim for injunctive relief or damages for single "battleground" states before entering into settlement negotiations for the other states. But the plaintiff may also claim for protection in all states. The court will then have to apply the law of all states for which protection is claimed. This may burden the defendant with high litigation costs if experts for multiple national law must be heard. It has therefore been suggested by the CLIP Principles (Art. 3:602) to apply a *de minimis* rule in international intellectual property law.[94] If the alleged infringement has taken place in a multitude of states, the court should be free to focus on those countries in which the alleged infringement **28**

90 See e.g. the *Card reader case* of the Japanese Supreme Court, 26.9.2002, Minshû Vol. 56, No. 7, 1551, English translation is available at http://www.courts.go.jp/english/judgments/text/202.9.1926–2000.-Ju-.No.580.html.

91 *Heinze*, in: juris-Praxiskommentar BGB, Art. 8 Rom II, notes 31 and 55.

92 CJEU, C-192/04 – *Lagardère/SPRE*, para. 46, 54.

93 See also *McGuire*, in: Beck Online-Großkommentar, Art. 8 Rom II, note 158.

94 On the *de minimis* rule, see *Kur*, 30 Brook. J Int'l L (2005) 953, 966 *et seq*. See also *Buchner*, in: Calliess, Rome Regulations: Commentary, Art. 8 Rome II, notes 11–17; *Fezer/Koos*, in: Staudinger, Kommentar

has either caused a substantial effect or in which the alleged infringer has substantially acted. However, it should be noted that this provision is not a rule of private international law but a rule of interpretation which should be applied on the substantive law level ("A court applying the law or laws determined by ..."). One advantage of such an approach is that it may be applied in accordance with Art. 8 (1). The model for the rule has been Art. 2 of the Paris Union and WIPO "Joint Recommendation Concerning the Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet," which recommends a cautious application of national (or regional) trademark law in Internet cases.[95] The Recommendation has already been applied by national courts, e.g. the German Federal Court of Justice in the *Hotel Maritime* case.[96]

29 Additional issues arise in cases of ubiquitous infringement over the Internet, where a communication initiated by the defendant is available in practically all states and may potentially infringe intellectual property in all states.[97] A truly ubiquitous infringement may only arise with regard to unregistered intellectual property, namely copyright and well-known trademarks. Works of authorship are protected without registration in all Member States of the Berne Union, see Art. 5 (2) Berne Convention. The same holds true for well-known trademarks according to Art. 6 Paris Convention.

30 For registered rights, the existence of the right cannot be assumed. Even a worldwide service on the Internet may infringe patents in a few states. The critical question for an alleged worldwide infringement of copyright or trademarks is if and under which circumstances it should be allowed for right holders to claim for damages under one single law (or at least a manageable number of laws) for the entire damage suffered worldwide and, even more critically, to claim for worldwide injunctions without having to plead for 200 or even more jurisdictions. At first glance, the case for the right holder's position in this debate seems to be clear. The literal application of the "mosaic approach" is burdensome and may produce high litigation costs in Internet cases. However, there are also arguments against a deviation from territoriality. First, the arguments behind the territoriality principle are also valid in cases of ubiquitous infringement. Applying national intellectual property legislation to infringement cases occurring abroad means applying that legislation extraterritorially. Europeans would not like to have U.S. copyright case law applied to activities conducted in Europe. Vice versa, U.S. or Japanese industries would not like to be sued under the EU *sui generis* database protection legislation.[98] Intellectual property legislation is part of national (or European) trade and cultural policy and

zum Bürgerlichen Gesetzbuch, Internationales Wirtschaftsrecht, notes 929 *et seq*; *McGuire*, in: Beck Online-Großkommentar, Art. 8 Rom II, notes 147–150 and 160–161.

95 Joint Recommendation Concerning the Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet of October 2001, Adopted by the Paris Union for the Protection of Industrial Property and WIPO, WIPO Publication No. 845.

96 German Bundesgerichtshof, BGH GRUR 2005, 431 – *Hotel Maritime*.

97 For the different approaches to come to the application of one single law to copyright infringements on the Internet, see *Dinwoodie*, in: Basedow/Drexl/Kur/Metzger (eds.), Intellectual Property in the Conflict of Laws, 195, 201–202; *Drexl*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, notes 273–281; *van Eechoud*, Choice of Law in Copyright, 169–232; *Ginsburg*, Private International Law Aspects of the Protection of Works and Objects of Related Rights Transmitted Through Digital Networks, 30 November 1998, available at www.wipo.int/meetings/en/doc_details.jsp?doc_id=926:36–44; *Spindler*, IPRax 2003, 412; *Thum*, GRUR 2001, 9.

should not cause any repercussions outside the state borders. Applying one law to worldwide infringement cases would lead inevitably to such extraterritorial effects.[99] Second, applying the mosaic approach to infringement cases on the Internet may in theory burden the right holder with the duty to plead for all jurisdictions concerned. In practice, it should suffice in most cases to ask for damages or injunctions for the most important markets to force the infringer to shut down its service.[100] The famous decision of the Paris Court of First Instance in the *Yahoo/LICRA* case illustrates that territorially restricted injunctions can be granted in Internet cases, and that Internet service providers may choose to ban critical services on a global scale even if the injunction was limited to a certain country.[101]

Still it may raise problems if courts grant injunctions based upon the application of only one law but do not restrict those injunctions territorially. Such (unwanted) extraterritorial effects of injunctions may only be cured by a careful interpretation in the enforcement stage.[102] Third, one should not forget the interests of the alleged infringer at stake. The defendant cannot limit the conflict to certain important markets as it is the case for the plaintiff. Also, if one would accept that the plaintiff may choose to handle the case under one single law, he could choose a law with a higher protection standard to the entire infringement case and as such deprive the defendant from the exceptions and limitations of the jurisdictions with a lower level of protection. Therefore, the challenges raised by the Internet have not undermined the policy considerations underlying the territoriality principle entirely. **31**

The question must rather be how the principle can be reshaped to provide pragmatic solutions to ubiquitous cases. The CLIP Project suggests specific rules on ubiquitous infringement. Art. 3:603 CLIP Principles allows the court to apply one single law to the issues of infringement and remedies in cases in which the infringement is carried out through ubiquitous media such as the Internet. If a ubiquitous infringement in the sense of Art. 3:603 CLIP Principles has taken place, the right holder may claim for damages or injunctions under the law with the closest connection. Under the factors listed in Art. 3:603(2) CLIP Principles, it will often be the law of the state where the infringer has his habitual residence or principle place of business that is most closely connected. If the court applies one single law to the infringement and remedies, it is still admitted for the parties according to para. 3 to plead that the law of a state covered by the dispute differs from the law applied by the court.[103] In this case, the court shall apply the different laws pleaded unless this would lead to an inconsistent judgment, e.g. if one jurisdiction would grant an injunction whereas the other jurisdiction would not. Here the court may apply one law and take into account the differences when fashioning the remedies.[104] For cases of secondary liability of neutral Internet service providers, Art. 3:604 **32**

98 See Art. 7 of Directive 96/9/EC of 11 March 1996 on the legal protection of databases; OJ L 77, 27.3.1996, 20–28.

99 See *Drexl*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, note 281.

100 Cf. *Goldsmith*, 5 Ind. J. Global Legal Stud. (1998), 475, 487–490 (spillover effects do not undermine the legitimacy of territorial regulation).

101 See Paris Court of First Instance, 22 May 2000, www.juriscom.net/2000/11/tgi-paris-refere-20-novembre-2000-uejf-et-licra-c-yahoo-inc – UEFJ et LICRA/Yahoo!

102 See Art. 4:102(3) CLIP Principles.

103 This was already suggested by *Ginsburg* in 1998; see *Ginsburg*, 45 (note 97).

(2) CLIP Principles adds a special conflict rule which leads to the application of one single law which should be predictable before a legal conflict arises.[105] Art. 3:603, 3:604 CLIP Principles provide modern solutions for the determination of the applicable law in ubiquitous infringement cases. Their application in the EU would either require a legislative reform of Art. 8 (1) or a recognition *praeter legem* by courts.

IV. Infringement of unitary intellectual property rights, Art. 8 (2)

1. Unitary intellectual property rights

33 Since the 1990ies, the EU has created a system of Union-wide intellectual property rights which are registered by the EU administration and which have unitary effects throughout the Union. The first and most important right of this kind is the Community trade mark, which was created by the Regulation 40/94.[106] The Regulation was later replaced by the Regulation 207/2009,[107] which was again substantially amended in 2015.[108] In its latest version, the trademark system is now called 'European Union trade mark'. The Regulation provides uniform rules for most substantive issues, including the effects of the Union trade mark and the sanctions in case of infringement. However, in its Art. 101(2), it also provides for "all matters not covered by this Regulation" a reference to "the applicable national law". In older versions, the reference was to the national law of the forum state, "including its private international law".

34 The second unitary intellectual property right was created 1994 with the implementation of the Community plant variety right Regulation 2100/94[109] which followed the same approach. It referred for restitution claims, which were not dealt with in the Regulation, to the law of the forum state including its private international law, Art. 97 (1). The Community design Regulation 6/2002 created a third unitary intellectual property right.[110] Art. 88 (2) again referred for "all matters not covered by this Regulation" to the national law of the forum state, "including its private international law". The later created protection for geographical indications recognized a Union-wide scheme of protection with unitary effects,

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104 Art. 3:603 CLIP Principles has used § 321 ALI Principles as a blueprint. § 321 ALI Principles does not only allow concentration under one applicable law for infringement and remedies but also for the existence, validity, duration, and attributes. Also, the criteria listed in § 321 put a stronger emphasis on the plaintiff's habitual residence which has provoked the criticism that the ALI would plead for a worldwide application of the "lex Hollywood", see *Drexl*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, note 334; *Metzger*, JZ 2010, 930 (934).

105 See *Neumann*, Die Haftung der Intermediäre im Internationalen Immaterialgüterrecht, 394–396.

106 Council Regulation (EC) No. 40/94 of 20 December 1993 on the Community trade mark, OJ L 11, 14.1. 1994, 1–3.

107 Council Regulation (EC) No. 207/2009 of 26 February 2009 on the Community trade mark (codified version): OJ L 78, 24.3.2009, 1–42.

108 Regulation (EU) 2015/2424 of the European Parliament and of the Council of 16 December 2015 amending Council Regulation (EC) No. 207/2009 on the Community trade mark: OJ L 341, 24.12. 2015, 21–94.

109 Council Regulation (EC) No. 2100/94 of 27 July 1994 on Community plant variety rights; OJ L 227, 1.9. 1994, 1–30.

110 Council Regulation (EC) No. 6/2002 of 12 December 2001 on Community designs: OJ L 3, 5.1.2002, 1–24.

but did not regulate any sanctions.[111] Insofar, national law remained applicable which raises the question of which law shall be applicable.[112] Patents registered by the European Patent Office on the basis of the European Patent Convention of 2000 (EPC) are not covered by Art. 8 (2) since they are not based on Community law and do not have a unitary effect in the Union. After registration, the effect of European patents differs from one designation state to another, see Art. 64 (1) EPC. By contrast, the future EU Unitary Patent will establish a system of unitary patent protection in the participating Member States. It is expected that the Regulations 1257/2012[113] and 1260/2012[114] and the Agreement on a Unified Patent Court will enter into force at the end of 2017.[115]

2. General concept

Art. 8 (2) does not replace Art. 8 (1). It provides a supplementary conflict rule. EU law and its instruments on unitary intellectual property rights are applicable if the plaintiff claims protection for the EU. In respect to Art. 8 (1), the EU is the "country" for which protection is claimed.[116] However, the *lex loci protectionis* principle, as it is codified in Art. 8 (1), does not suffice for those issues that, according to the respective EU instrument, are left to national law. Here, the law of country for which protection is claimed does not foresee a solution. Therefore, courts need a supplementary conflict rule which provides a different connecting factor.[117] This supplementary conflict rule is only applicable to questions which are not governed by the respective instrument of Union law. Courts should therefore start their analysis with Art. 8 (1), then examine if the issues at stake are regulated in the respective instrument, and only if this is not the case turn to Art. 8 (2) in case of an unregulated issue. **35**

According to Art. 8 (2), the law of the country in which the act of infringement was committed shall govern the non-contractual obligation. Since Art. 8 (2) in practical terms refers to the application of a specific Union law instrument, e.g. the Union trade mark Regulation or the Community plant variety Regulation, it should be admissible to use the definition of the infringing acts from the substantive law provisions of that instrument and to start from here with the localisation of the act of infringement.[118] In a trade mark case, the place where the alleged act of infringement was committed is the place where the alleged infringer offers **36**

111 Council Regulation (EC) No. 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, OJ L 93, 31.3.2006, 12–25 replaced by Regulation (EU) No. 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs, OJ L 343, 14.12.2012, 1–29.

112 *Drexl*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, note 132.

113 Regulation (EU) No. 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection, OJ L 361, 31.12.2012, 1–8.

114 Council Regulation (EU) No. 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements, OJ L 361, 31.12.2012, 89–92.

115 Agreement on a Unified Patent Court, OJ C 175, 20.6.2013, 1–40.

116 *Drexl*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, notes 135–138; *McGuire*, in: Beck Online-Großkommentar, Art. 8 Rom II, notes 174–178.

117 This was already the original concept of the Hamburg Group for Private International Law, RabelsZ (2003) 67, 1, 21–24.

goods or services under a trade mark, imports or exports the goods or uses the sign on business papers and in advertising etc. From this perspective, the place of the act giving rise to the infringement and the place of the damage accrued to the right holder, i.e. the infringement, will typically coincide.[119]

3. Cross-border and multistate infringement cases

37 However, there are also atypical and thus more complex scenarios of cross-border infringements. In a first group of atypical cases, the alleged infringer does not carry out any of the acts described in the relevant instrument as infringements. Here, courts should still apply the respective instrument, e.g. the Union trademark Regulation, in accordance with the subjective test of Art. 8 (1) and dismiss the action on the basis of substantive law without even entering into the analysis of Art. 8 (2).[120] Without an infringement, the issues covered by Art. 8 (2) do not arise. In a second group of atypical cases, the allegedly infringing activity matches with acts described in the respective instrument, but it was carried out in a third state. In this case, the action may still infringe a unitary right, e.g. if the alleged infringer operated a website from a third country but targets one or more European markets. A literal application of Art. 8 (2) in this case would lead to the application of the law of a third state, a result which is hardly compatible with the overall concept of the provision to refer to the (harmonized) law of an EU Member State.[121] It would also be unacceptable to deny the requested claim with the argument that the legislator did not intend any application of a non-harmonized law.[122] It should rather be accepted that the legislator overlooked this case and created a lacuna which should be filled *praeter legem* by a conflict rule which leads to the application of the law of the targeted state or states.[123]

38 The remaining question is then how to deal with multiterritorial infringements in which the alleged infringer has acted in several EU Member States. Here it is questionable whether Art. 8 (2) leads to the application of the laws of multiple EU Member States. The application of such a mosaic approach would be in line with Art. 8 (1)[124] and also with Art. 4 (1) for tort claims.[125] Nevertheless, it has been suggested by legal scholars to apply only one national law in case of multistate infringements of unitary rights.[126]

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118 *Grünberger*, in: Nomos-Kommentar BGB, Art. 8 Rom II, note 51; *Heinze*, in: juris-Praxiskommentar BGB, Art. 8 Rom II, note 40.

119 *Fezer/Koos*, in: Staudinger, Kommentar zum Bürgerlichen Gesetzbuch, Internationales Wirtschaftsrecht, note 912; But see *Fayaz*, GRUR Int 2009, 566, 572; *Hohloch*, in: Erman (found.), BGB, Art. 8 Rom II, note 10.

120 The rights conferred to the right holder are regulated in all above mentioned EU instruments. If the alleged infringer has not acted accordingly, the issues covered by Art. 8 (2), i.e. the sanction, will not arise.

121 *Schaper*, Durchsetzung der Gemeinschaftsmarke, 197. But see *Zwanzger*, Das Gemeinschaftsgeschmacksmusterrecht zwischen Gemeinschaftsrecht und nationalem Recht, 128–129.

122 This is suggested by *Grünberger*, in: Nomos-Kommentar BGB, Art. 8 Rom II, note 54.

123 *Drexl*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, note 140. See also the original proposal of the Hamburg Group: "member state where the infringement affects the right" (note 19).

124 Supra III.

125 *Illmer*, in: Huber (ed.), Rome II Regulation: Pocket Commentary, Art. 8, note 39.

126 Sceptical *McGuire*, in: Beck Online-Großkommentar, Art. 8 Rom II, notes 194–197.

Giving the fact, that remedies for infringement are harmonized in the EU by the Enforcement Directive 2004/48, there are indeed arguments against a strict territorial approach.[127] One solution that has been suggested is the application of the law of the habitual residence of the defendant.[128] Such a solution would streamline the applicable law with the jurisdiction rules but would hardly be compatible with the current wording of Art. 8 (2). However, the solution may be applied even under the current wording, if the defendant acted mainly at his habitual residence.[129] If the defendant acted mainly at another place, one could also plead for the application of that law.[130] Another suggestion goes to the application of the law of the country where the last action relevant for the occurrence of the infringement has been carried out.[131] Such an approach is compatible with the wording of Art. 8 (2) more easily. It is of special appeal in cases in which the defendant's activities cannot be localized at one main centre. The downside is that such an approach requires to set aside earlier infringing actions in other states for the determination of the applicable law which may also lead to undesirable results for the right holder, e.g. if the trademark holder prefers to seek protection under the law of the state where the goods have been produced rather than under the law of the state where the goods where shipped.[132] Therefore, such an approach should only be applied under the condition that the plaintiff may still choose to apply the local laws for specific jurisdictions. The CJEU so far had no opportunity to decide on the dispute. **39**

4. Unitary patents

For the future EU Unitary Patent system, as it will be established by the Regulations 1257/2012[133] and 1260/2012[134] and the Agreement on a Unified Patent Court,[135] two scenarios have to be distinguished: First, the scenario of European patents with unitary effect under the Regulations 1257/2012 and 1260/2012 and, second, the scenario of European patents which are not covered by the two Regulations but are still within the scope of the Agreement on a Unified Patent Court.[136] **40**

The first scenario concerns European patents in the sense of Art. 3 (1) Regulation 1257/2012 granted with the same set of claims in respect of all the participating Member States whose unitary effect has been registered in the register for unitary patent protection. For those patents, uniform protection in the participating Member States is achieved by a reference to the law of one participating Member State which is applicable to the patent in its entirety and in all participating Member States, Arts. 5 and 7 Regulation 1257/2012. **41**

127 *Kur*, GRUR Int. 2014, 758–760. See also *Fayaz*, GRUR Int. 2009, 566, 572 *et seq*.; *Knaak*, in: FS Tilmann, 373, 380–382; *Schaper*, Durchsetzung der Gemeinschaftsmarke, 194–206.

128 *Metzger*, in: Drexl/Kur (eds.), Intellectual Property and Private International Law, 215–225 (de lege ferenda); *Illmer*, in: Huber (ed.), Rome II Regulation: Pocket Commentary, Art. 8, note 39 (de lege ferenda).

129 *Drexl*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, note 143.

130 *Kur*, GRUR Int. 2014, 758–760; *Schaper*, Durchsetzung der Gemeinschaftsmarke, 196–197.

131 *Heinze*, in: juris-Praxiskommentar BGB, Art. 8 Rom II, note 42.

132 See also *Drexl*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, note 143.

133 *Supra* note 113.

134 *Supra* note 114.

135 *Supra* note 115.

136 On the following see *Heinze*, in: juris-Praxiskommentar BGB, Art. 8 Rom II, notes 11 *et seq*.

42 Under these provisions, the law the Member State of residence or (principal) place of business of the patent applicant at the date of the filing of the application or, as a subsidiary rule for applicants from third countries, the law of the place of the European Patent Organisation, i.e. German law, applies.[137] Since all participating Member States are Member States of the Agreement on a Unified Patent Court at the same time, the substantive provisions will be – at least for all questions dealt with in the Agreement – the same, irrespective of which Member States' law will be applicable under Arts. 5 and 7 Regulation 1257/2012.[138]

43 Nevertheless, European patents with unitary effect are also unitary Community intellectual property rights in the sense of Art. 8 (2) Rome II.[139] This raises the question of the relationship between Art. 8 (2) Rome II and Arts. 5 and 7 of Regulation 1257/2012.[140] The answer may be found in Art. 27 Rome II which gives priority to "the application of provisions of Community law which, in relation to particular matters, lay down conflict-of-law rules relating to non-contractual obligations". This priority rule leads to the follow-up-question of which issues are covered by Arts. 5 and 7 of Regulation 1257/2012 and fall under the priority rule. Art. 5 Regulation 1257/2012 only refers to the law of the respective participating state for the "scope of that right and its limitations". Art. 7 Regulation 1257/2012 provides a conflict rule for the unitary patent as an object of property. The scope of the two provisions is therefore more limited than the scope of Arts 8, 15 Rome II. It has therefore rightly been suggested to apply Art. 8 (2) to issues like sanctions, prescription etc. which are in the realm of Art. 15 Rome II, but which do not concern the scope of the right, its limitations and questions related to the transfer of the patent.[141] The issue will not be of main importance for all questions dealt with in the Agreement on a Unified Patent Court, especially sanctions, as both conflict rules will finally lead to the application of the law of Member States which are equally bound by the Agreement. If an issue is not covered by the Agreement, e.g. prescription, Art. 8 (2) Rome II will lead to the application of the national law of the Member State in which the act of infringement was committed. The same solution may be achieved by direct application of the Agreement and its Art. 24 (2)(a) which refers to Union law including its private international law principles for issues not covered by the Agreement.[142] Both ways will lead to the application of Art. 8 (2) Rome II.

44 The second scenario concerns the application of the Agreement on a Unified Patent Court to regular European patents which are not registered as unitary patents in accordance with Regulation 1257/2012. According to its Art. 3 lit. c) and d), the Agreement is also applicable to those European "bundle" patents and respective applications from the date of its entry

137 See *McGuire*, Mitt 2015, 537, 540–542; *Müller-Stoy*/*Paschold*, GRUR Int. 104, 646–657; *Tilmann*, GRUR Int. 2016, 409, 410 *et seq*.

138 *Tilmann*, GRUR Int. 2016, 409, 410 *et seq*.

139 *Drexl*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, note 147; *Grünberger*, in: Nomos-Kommentar BGB, Art. 8 Rom II, note 49a; *Heinze*, in: juris-Praxiskommentar BGB, Art. 8 Rom II, note 12. See also *Augenstein*/*Haertel*/*Kiefer*, in: Bodewig/Fitzner/Lutz, Beck'scher Online-Kommentar Patentrecht, EPGÜ Art. 24, note 4.

140 See the detailed discussion at *Heinze*, in: juris-Praxiskommentar BGB, Art. 8 Rom II, notes 11 *et seq*.

141 *Drexl*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, note 147, *Heinze*, in: juris-Praxiskommentar BGB, Art. 8 Rom II, note 15.

142 Such an approach would presuppose the applicability of the Agreement as suggested by some commentators, see e.g. *McGuire*, Mitt 2015, 537, 539.

into force (if the patent holder has not made use of the "opt out"-clause in Art. 83 (3) of the Agreement). These patents remain, with regard to the rights conferred to the patent holder and to revocation proceedings, "bundles" of national patents in accordance with Arts. 64 and 138 EPC. National patent systems, which are contracting parties to the Agreement on a Unified Patent Court, will of course apply the Agreement instead of their national patent law, as far as the issues at stake are covered by the Agreement. Nevertheless, as those patents remain "bundles" of national patents, the law applicable must be determined according to Art. 8 (1) Rome II whereas Art. 8 (2) is not applicable. If the Agreement on a Unified Patent Court is applicable as part of the *lex loci protectionis* under Art. 8 (1), the provision on the sources of law in Art. 24 of the Agreement must be applied.[143] But this requires that the plaintiff claims for protection in one or more Member States of the Agreement. By contrast, the suggestion to apply the Agreement directly with priority over the Rome II Regulation must be rejected.[144] Such a priority is excluded by Art. 28 Rome II. The Agreement on a Unified Patent Court is a convention between EU Member States which has been concluded after Rome II.[145] Rome II takes precedence over those conventions.

V. Scope of the applicable law

1. "Secondary characterisation" under Art. 15 Rome II

When the law applicable to the infringement of an intellectual property right has been determined in accordance with Art. 8, the court will have to decide which aspects of the case shall be governed by the so determined *lex causae*. In this regard, Art. 15 may serve as a starting point for this process of "secondary characterisation".[146] The provision comprises a list of typical legal issues in tort and other cases of non-contractual obligations covered by the *lex causae*, e.g. the basis and extent of liability, grounds for exemption etc. For general issues of non-contractual obligations, it may provide guidance, e.g. for prescription and limitation of claims under Art. 15 lit. h). However, courts should refrain from a too literal application of Art. 15 to infringement cases. The provision itself is drafted as an *eiusdem generis* rule ("shall govern in particular") which allows an inclusion of other issues not explicitly listed. Moreover, the issues listed in Art. 15 do not quite match with the issues that arise in typical infringement cases. The characterisation of some of those issues is controversial. **45**

2. Scope and limitations of the exclusive right

According to the predominant interpretation, Art. 8 covers the scope of protection of intellectual property rights, as defined by the different intellectual property acts.[147] With the **46**

143 *Heinze*, in: juris-Praxiskommentar BGB, Art. 8 Rom II, note 19.

144 See *McGuire*, Mitt 2015, 537, 539; *McGuire*, in: Beck Online-Großkommentar, Art. 8 Rom II, note 81; (uniform law instrument with priority of the conflict of law principles of the forum); see also *Augenstein/Haertel/Kiefer*, in: Bodewig/Fitzner/Lutz, Beck'scher Online-Kommentar Patentrecht, EPGÜ Art. 24, note 7.

145 *Heinze*, in: juris-Praxiskommentar BGB, Art. 8 Rom II, note 17.

146 See the comments on Article 15.

147 *Drexl*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, note 165–174; *Grünberger*, ZVglRWiss 108 (2009) 134, 171–172; *Heinze*, in: juris-Praxiskommentar BGB, Art. 8 Rom II, note 20. But see *Fawcett/Torremans*, Intellectual Property and Private International Law, note 15.33.

term "scope", intellectual property lawyers usually refer to the actions which are exclusive assigned to the right holder, e.g. the making, offering, placing on the market or using of a product comprising a patented invention, a copyright protected work, a trademark etc. Whether the alleged infringer violates the intellectual property right by carrying out such an action, has to be decided on the basis of the law of the country for which protection is sought. Such a characterisation is in line with Art. 15 lit. a) according to which the "basis and extent" of liability is covered by the *lex causae*.

47 It is likewise uncontroversial that limitations and exceptions to intellectual property rights are covered by Art. 8.[148] Limitations and exceptions serve important functions in copyright, patent and other intellectual property rights. In copyright law, limitations and exceptions, like the quotation right or the private copy exceptions, protect important social, cultural, educational and political interests. In patent law, limitations like the experimental use exceptions ensure that technical progress is not excessively hampered by patent rights. Those limitations and exceptions may be characterised as "grounds for exemption from liability" according to Art. 15 lit. b).

3. Remedies

48 More intricate questions may arise in the characterisation of remedies claimed for the infringement. According to Art. 15 lit. c), the *lex causae* covers "the existence, the nature and the assessment of damage or the remedy claimed". This comprises also the requirements for the claimed remedies, e.g. requirements of intention or negligence. Art. 15 lit. d) adds that "within the limits of powers conferred on the court by its procedural law, the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation" shall also be governed by the *lex causae*. However, the reservation at the beginning of lit. d) clarifies that the procedural aspects of remedies are determined by the *lex fori*. In this regard, the Commission's Explanatory Memorandum on Rome II explains that the measures against an infringement should, in principle, be covered by the *lex causae* "without actually obliging the court to order measures that are unknown in the procedural law of the forum".[149] This opens the possibility for the court to deny remedies which are not available under its local law. Also, the *lex fori* must decide on the procedural preconditions for the granting of such remedies, e.g. the necessity of a prior hearing before an order of preliminary measures, rules of evidence or measures of enforcement.[150]

4. Determination of persons liable for the infringement

49 According to Art. 15 lit. a), the law applicable to the infringement is also governing "the determination of persons who may be held liable for acts performed by them". Art. 15 lit. g) adds that the applicable law is also called to decide upon "liability for the acts of another person". Issues of secondary or contributory liability are of special importance for infringement cases. Right holders often bring suit against parties whose actions or conduct enable

148 *Grünberger*, ZVglRWiss 108 (2009) 134, 171; *Leistner*, in: Leible/Ohly (eds.), Intellectual Property and Private International Law (2009), 97, 104.

149 Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("Rome II"), COM (2003) 427 final, 24.

150 *Heinze*, in: juris-Praxiskommentar BGB, Art. 8 Rom II, note 50.

other parties to carry out directly infringing activities, e.g. claims against Internet intermediaries whose services are used for infringing activities or claims against producers of component parts which are later assembled to infringing goods. According to Arts. 8 and 15 lit. g), the liability of those allegedly secondary infringers is governed by the law of the country for which protection is claimed.[151] This may lead to a situation of legal uncertainty, especially for Internet intermediaries. If their services are available on the worldwide Internet, they will be faced with the situation that right holders may bring suit based upon any of the applicable laws under the mosaic approach and plead for secondary liability of the service provider for infringements committed by the users of the service. The CLIP-Principles have therefore suggested to attenuate the *lex loci protectionis* principle at least for neutral services that may be used by infringing or non-infringing purposes.[152] An application of this proposal in the EU would either require a legislative reform of Art. 8 (1) or a recognition *praeter legem* by courts.[153]

5. Existence and validity of intellectual property rights

Whether Art. 8 covers the existence and validity of intellectual property rights has been much discussed in the early years before and after the entering into force of the Regulation.[154] Today, most commentators agree that issues of existence and validity are not covered by Art. 8, but are still in the realm of the autonomous national conflict principles.[155] For a non-contractual obligation arising out of the infringement, the existence and validity of the allegedly infringed intellectual property right is a preliminary question. The "basis and extent" of liability under Art. 15 lit. a) refers to the question what constitutes a violation of intellectual property and not to the question whether a subject matter is protected by an intellectual property right. The existence and validity may depend on several formal requirements especially in case of registered intellectual property rights, e.g. requirements of application, examination, registration or the payment of annual fees. For unregistered rights, originality of a work or the question whether a trademark is well-known may raise difficult questions. Those questions have to be separated from the claims the right holder may assert in case of infringement of those rights.[156] For registered rights, such a separation will nonetheless lead to the application of the same law in most instances, as existence and validity of registered intellectual property rights are usually also covered by the *lex loci protectionis*.[157] But for copyright, the situation may be **50**

151 *Drexl*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, note 225; *Fawcett/Torremans*, Intellectual Property and Private International Law, note 15.28; *Grünberger*, in: Nomos Kommentar BGB, Art. 8 Rom II, note 39; *Heinze*, in: juris-Praxiskommentar BGB, Art. 8 Rom II, note 44; *Illmer*, in: Huber (ed.), Rome II Regulation: Pocket Commentary, Art. 8, note 47.

152 See Article 3:604 CLIP-Principles. See also *Drexl*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, note 225; *Neumann*, Die Haftung der Intermediäre im Internationalen Immaterialgüterrecht, 394–396.

153 See *Grünberger*, in: Nomos-Kommentar BGB, Art. 8 Rom II, note 35c.

154 On the draft see *Basedow/Metzger*, in: FS Boguslavskij, 153–172; *Obergfell*, IPRax 2005, 9 (12)-13.

155 *Drexl*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, note 169; *Fawcett/Torremans*, Intellectual Property and Private International Law, note 15.33; *Leistner*, in: Leible/Ohly (eds.), Intellectual Property and Private International Law (2009), 97, 102; *Metzger*, JZ 2010, 930 (933); *Schack*, Urheber- und Urhebervertragsrecht, note 1051. But see *Buchner*, in: Calliess, Rome Regulations: Commentary, Art. 8 Rome II, notes 18–19; *Grünberger*, in: Nomos-Kommentar BGB, Art. 8 Rom II, note 43.

156 Against *Grünberger*, in: Nomos-Kommentar BGB, Art. 8 Rom II, note 43.

157 *McGuire*, in: Beck Online-Großkommentar, Art. 8 Rom II, notes 31–41.

different if the forum state applies a country of origin-approach to the existence and validity of those rights.[158] Whether this is the case or not, is subject to the national conflict of laws principles.

6. Ownership, transferability, contracts

51 Issues of ownership of intellectual property typically arise as preliminary questions in infringement cases when the defendant contests the plaintiff's assertion of ownership. Ownership has to be distinguished from the infringement and the obligations arising out of it. No other conclusion may be drawn from Art. 15 lit. f), according to which the determination of the "persons entitled to compensation for damage sustained personally" is covered by the applicable law under the Regulation. Art. 15 lit. f) refers to the question whether a person other than the "direct victim" can obtain compensation for damage sustained.[159] It does not address the ownership of a tangible or intangible good whose violation gives rise to a non-contractual obligation.[160] It is also not necessary under the *effet utile doctrine* to extend the scope of application of the Rome II Regulation to the issue of ownership to give full effect to its unification purpose.[161] This purpose is limited to non-contractual obligations and may not be extended to preliminary questions related to the infringed rights. Ownership issues are therefore excluded from Art. 8.[162] Disputes about ownership issues may arise both for registered and unregistered intellectual property rights and cover different aspects, e.g. the authorship of a copyright protected work, the entitlement to registered rights, the allocation of rights in employment or other contractual relationships (so called "work for hire"). Such ownership issues are dealt with differently under national conflict rules.[163] Some EU Member States apply the *lex loci protectionis*, e.g. Germany,[164] Austria[165] and now also France[166], whereas other jurisdic-

158 *Basedow*, in: European Max Planck Group on Conflict of Laws in Intellectual Property (eds.), Conflict of Laws in Intellectual Property: The CLIP Principles and Commentary, notes N01–02 on Article 3:102 CLIP-Principles.

159 Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (Rome II"), COM (2003) 427 final, 23.

160 See *Schack*, MMR 2000, 59 (60).

161 *Grünberger*, ZVglRWiss 108 (2009), 134 (160–163).

162 *Basedow*, in: Basedow/Kono/Metzger (eds.), Intellectual Property in the Global Arena, 3, 18; *Boschiero*, Yearbook of Private International Law (2007), 87, 102; *Drexl*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, note 169; *Leistner*, in: Leible/Ohly (eds.), Intellectual Property and Private International Law, 97, 102; *Metzger*, JZ 2010, 930 (933); *Schack*, Urheber- und Urhebervertragsrecht, note 1051. But see *Grünberger*, in: Nomos-Kommentar BGB, Art. 8 Rom II, note 43; *Obergfell*, IPRax 2005, 9 (12)-13.

163 See *Drexl*, in: European Max Planck Group on Conflict of Laws in Intellectual Property (eds.), Conflict of Laws in Intellectual Property: The CLIP Principles and Commentary, notes N03–08 on Article 3:201 CLIP-Principles; *Kono/Jurčys*, in: Kono (ed.), Intellectual Property and Private International Law, 135–145.

164 German Bundesgerichtshof BGH GRUR 1999, 152 – *Spielbankaffaire*; *Fezer/Koos*, in: Staudinger, Kommentar zum Bürgerlichen Gesetzbuch, Internationales Wirtschaftsrecht, note 904.

165 Article 34(1) Austrian Private International Law Act. Austrian Oberster Gerichtshof, 17.6.1986, 4 Ob 309/86 – *Hotel Video*. However, Article 34(2) provides an exception for works created in the framework of employment relationships, for which the law applicable to the employment contracts is applicable.

166 French Cour de Cassation, IIC 2013, 856 – *ABC News*. For the older law see *Ancel*, in: Kono (ed.), Intellectual Property and Private International Law, 525, 546.

tions apply the *lex originis*, e.g. Portugal[167] or Greece[168]. These different approaches are still applicable after the entry into force of the Rome II Regulation.

A question closely related to ownership concerns the transferability of intellectual property rights. Transferability is of particular importance in copyright law. Some jurisdictions deny the transferability of the entire copyright or of certain aspects, e.g. moral rights, or of specific claims based upon copyright, e.g. claims for remuneration. Whether those rights or claims may be transferred, is a preliminary question in an infringement case and as such not covered by Art. 8.[169] By contrast, the question whether a right to claim damages or a remedy may be transferred, including by inheritance, is a question which is covered by the Rome II Regulation, see Art. 15 lit. e). **52**

Contracts relating to intellectual property rights are not covered by Art. 8 Rome II but by the Rome I Regulation.[170] **53**

VI. Relationship to other provisions

1. Exclusion of freedom of choice, Arts. 8 (3), 14 Rome II

Art. 8 (3) excludes the parties' freedom to choose the applicable law. Art. 14 is not applicable. This exclusion was already included in the Comments of the Hamburg Group for Private International Law[171] and in the Commission's proposal of 2003.[172] The Commission's Explanatory Memorandum explained the rule with the brief sentence that freedom of choice "would not be appropriate" for the infringement of intellectual property rights.[173] This was criticized by the European Parliament, but the point was not taken up by the Commission and the Council.[174] In view of the policy choices behind the territoriality principle, there are indeed compelling arguments for the restrictive position taken by Art. 8 (3). The scope of protection and also the remedies, e.g. the availability of double damages, are crucial elements of the level of protection of intellectual property and therefore part of the national trade and cultural policy that cannot be derogated from contract.[175] However, there are also critical **54**

167 Article 48(1) Portuguese Civil Code. See also *Moura Vicente*, Receuil des cours 335 (2008), note 123.

168 Article 67 Greek Copyright Act.

169 On the issue of transferability see *Drexl*, in: European Max Planck Group on Conflict of Laws in Intellectual Property (eds.), Conflict of Laws in Intellectual Property: The CLIP Principles and Commentary, notes N01–08 on Article 3:301 CLIP-Principles; *Grünberger*, ZVglRWiss 108 (2009) 134, 164; *Metzger*, in: Basedow/Drexl/Kur/Metzger (eds.), Intellectual Property in the Conflict of Laws, 61–77.

170 On the relationship between the two instruments see *infra* VI.4.

171 Hamburg Group of Private International Law, RabelsZ 2003 (65), 1, 34.

172 Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (Rome II"), COM (2003) 427 final, 36.

173 Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (Rome II"), COM (2003) 427 final, 22.

174 European Parliament legislative resolution on the Council common position with a view to the adoption of a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ("Rome II"), P6_TA(2007)0006, Amendment 25.

175 See *Bariatti*, Litigating Intellectual Property Rights Disputes Cross-border: EU Regulations, ALI Principles, CLIP Project, 63, 72; *Basedow*/*Metzger*, in: FS Boguslavskij, 153, 160; *Buchner*, GRUR Int. 2005,

voices who plead for the acceptance of party autonomy at least for the remedies.[176] This solution has also been suggested by the CLIP Principles in Art. 3:606(1). But given the clear wording of Art. 8 (3) Rome II, such an approach could only be introduced by the legislator.[177] What remains is the freedom of the parties to conclude a license agreement with retroactive effect or to reach a settlement and to choose the law applicable insofar.[178]

2. Relationship to Art. 4 Rome II

55 Art. 8 is *lex specialis* to the more general rules in Art. 4. Therefore, the general rule for the applicable law for torts or delicts in Art. 4 (1) is not applicable to infringements of intellectual property rights. Also, the common habitual residence rule in Art. 4 (2) and the rebuttal clause in Art. 4 (3) may not be applied.[179]

3. Ordre public, internationally mandatory provisions

56 The application of the *lex loci protectionis* may be refused if such application is manifestly incompatible with the public policy (ordre public) of the forum, Art. 26, or if it would go against internationally mandatory provisions, Art. 16. Considerations of public policy are restricted to exceptional circumstances.[180] A violation of public policy may be argued in case of excessive non-compensatory or punitive damages, see Recital 32 Rome II. However, one should keep in mind that EU intellectual property law accepts under certain circumstances double[181] or even quadruple[182] license fees as damages. Courts should therefore be prudent when characterising higher damages as violation of public policy. Another field of application of the public policy exception is the extraterritorial application of intellectual property legislation. Whenever states provide intellectual property protection against actions carried out on the territory of another state, courts should consider to refuse such an overshooting application of the law.[183]

1004, 1008; *Fezer/Koos*, in: Staudinger, Kommentar zum Bürgerlichen Gesetzbuch, note 923; *Heiss/Loacker*, JBl. 2007, 613, 633 *et seq.*; *McGuire*, in: Beck Online-Großkommentar, Art. 8 Rom II, notes 31–41.

176 *Boschiero*, Yearbook of Private International Law (2007), 87, 107–110; *Dickinson*, The Rome II Regulation: The Law Applicable to Non-Contractual Obligations, note 8.54; *Drexl*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, note 250; *Fawcett/Torremans*, Intellectual Property and Private International Law, note 15.43; *Grünberger*, in: Nomos-Kommentar BGB, Art. 8 Rom II, note 7; *Moura Vicente*, Receuil des cours 335 (2008), note 162. But see *Neumann*, J. Priv. Int'l. L. 583, 591.

177 *Grünberger*, in: Nomos-Kommentar BGB, Art. 8 Rom II, note 7.

178 *Heinze*, in: juris-Praxiskommentar BGB, Art. 8 Rom II, note 54.

179 *Illmer*, in: Huber (ed.), Rome II Regulation: Pocket Commentary, Art. 8, note 15.

180 Recital 32 Rome II.

181 CJEU, C-367/15 – *OTK*.

182 See Article 18(2) Commission Regulation (EC) No. 1768/95 of 24 July 1995 implementing rules on the agricultural exemption provided for in Article 14 (3) of Council Regulation (EC) No. 2100/94 on Community plant variety rights, OJ L 173, 25.7.1995, 14–21.

183 *Fezer/Koos*, in: Staudinger, Kommentar zum Bürgerlichen Gesetzbuch, Internationales Wirtschaftsrecht, note 916; *Heinze*, in: juris-Praxiskommentar BGB, Art. 8 Rom II, note 56. But see CJEU, C-38/98 – *Renault/Maxicar*.

4. Relationship to Rome I

Contracts relating to intellectual property rights, e.g. transfer, license, publishing, research and development contracts, are covered by the Rome I Regulation.[184] They are outside the scope of application of Rome II. The issue of transferability of intellectual property rights or particular claims is subject to the national private international law principles and as such also outside the scope of application of Rome II.[185] **57**

Problems of delimitation may arise with regard to contracts transferring the right to claim for damages arising out of an infringement. According to Arts. 15 lit. e), 8 Rome II, the *lex loci protectionis* applies to the question whether those rights may be transferred or not. However, this does not imply that other contractual arrangements between the parties, e.g. the price to be paid for the transferred rights, warranties and liability etc., should also be governed by Rome II. For the mere contractual arrangements, the Rome I Regulation applies, in particular the freedom to choose the applicable law in Art. 3 Rome I.[186] **58**

Pre-existing contracts between the parties, especially when comprising choice of law clauses, are without effect for the law applicable to the non-contractual obligations arising out of infringement, e.g. in case of excessive production of branded goods going beyond the terms of a trademark license contract. Art. 4 (3), which provides for an accessory connection rule for pre-existing relationships with regard to claims of tort or delict, is not applicable to Art. 8.[187] Therefore, all contractual claims and remedies are covered by Rome I, whereas all remedies based upon infringement are covered by Rome II. **59**

5. Relation with other European Union law

The EU legislator has mitigated the effects of the territoriality principle for satellite broadcasting. According to Art. 1 (2) lit. b) of the Directive on satellite broadcasting and cable retransmission of 1993[188], the act of communication to the public by satellite occurs solely in the Member State where the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth. The rule determines which acts should be characterized as communication to the public. As such, it addresses questions of substantive law.[189] It does not determine the applicable law in the state where the signals are introduced or in other **60**

184 *De Miguel Asensio*, Yearbook of Private International Law (2007), 199, 203; *Torremans*, Journal of Private International Law (2008), 397, 400.

185 *Supra* V.6.

186 *Metzger*, European Max Planck Group on Conflict of Laws in Intellectual Property (eds.), Conflict of Laws in Intellectual Property: The CLIP Principles and Commentary, note N01 on Article 3:501 CLIP-Principles.

187 *Basedow*/*Metzger*, in: FS Boguslavskij, 153, 161; *Illmer*, in: Huber (ed.), Rome II Regulation: Pocket Commentary, Art. 8, note 15.

188 Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248, 6.10.1993, 15–21.

189 *Drexl*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, note 127; *Grünberger*, ZVglRWiss 108

states. In this respect, Art. 8 (1) Rome II is decisive. The rules of the Directive are only applicable to satellite broadcasting. The CJEU has rejected to apply them to terrestrial broadcasting.[190]

61 In 2017, the EU has enacted the Regulation on cross-border portability of online content services in the internal market.[191] According to Art. 4 of the Regulation, the provision of an online content service to a subscriber who is temporarily present in a Member State, as well as the access to and the use of that service by the subscriber, shall be deemed to occur solely in the subscriber's Member State of residence.The rule has be construed as a substantive law provision and does not preempt Art. 8 (1) Rome II.[192]

6. Relation with international conventions

62 According to Art. 28 (1) Rome II, the 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. For conventions concluded exclusively between EU Member States, Rome II takes priority, Art. 28 (2).

63 Art. 28 (1) is decisive for the relationship between Rome II and the older international conventions in the field of intellectual property, especially the Paris Convention of 1883 and the Berne Convention of 1886.[193] If one interprets the Conventions as containing a reference to the *lex loci protectionis*, which is controversial, the Conventions would be covered by Art. 28 (1) and would prejudice the application of Art. 8 Rome II.[194] The same conclusion could be drawn from the membership of the EU to the WTO and to the TRIPS Agreement which comprises in Art. 2 (1) and 9(1) incorporation clauses with regard to Arts. 1 to 12 of the Paris Convention and Arts. 1 to 20 of the Berne Convention.[195] In this regard, it is not relevant that Commission's list of conventions[196] that have been notified by the Member States in accordance with Art. 29 Rome II does not mention the Paris and the Berne Convention since the published list is not meant to be exhaustive.[197] However, the priority of the Paris and the Berne Convention under Art. 28 (1) can only go as far as it contains a conflict of law rule. There are indeed

(2009) 134, 142; *Heinze*, in: juris-Praxiskommentar BGB, Art. 8 Rom II note 6; *Illmer*, in: Huber (ed.), Rome II Regulation: Pocket Commentary, Art. 8, note 19.

190 CJEU C-192/04 – *Lagardère/SPRE*, para. 22 *et seq*.

191 Regulation (EU) 2017/1128 of 14 June 2017 on cross-border portability of online content services in the internal market, OJ L 168, 30.6.2017, 1-11.

192 See Recital 23 of the Regulation.

193 *Supra* I.2., notes 5 and 7.

194 But see *Bariatti*, Litigating Intellectual Property Rights Disputes Cross-border: EU Regulations, ALI Principles, CLIP Project, 63, 66.

195 *Drexl*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, note 180.

196 Notifications under Article 29(1) of Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations (Rome II), OJ C 343, 17.12.2010, 7–11.

197 The Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (Rome II"), COM (2003) 427 final, referred in Article 26(2) which is now Article 29(2) to "the full list" of conventions. The word "full" was later deleted.

strong arguments to read the references in the Convention to "law of the country where protection is claimed" as expressing the *lex loci protectionis* principle.[198] However, the Conventions only comprise the general principle. They leave room for more precise rules on its application as long as these national or European rules do not interfere with the principle. Therefore, Art. 8 and 13 and the other provisions applicable to intellectual property rights, especially Arts. 15, 26 and 28, which are either expressions of the principle[199] or rules on its application, may be applied as more concrete implementing provisions of the general principles enshrined in the Paris and the Berne Convention.[200]

Several bilateral agreements have been concluded between EU Member States and/or third countries with to regard geographical indications.[201] If those agreements have been concluded with third countries before the adoption of Rome II, they remain untouched by the Regulation according to Art. 28 (1) Rome II. By contrast, according to Art. 28 (2), the Regulation takes precedence over agreements concluded exclusively between EU Member States. **64**

Article 9: Industrial action

Without prejudice to Article 4(2), the law applicable to a non-contractual obligation in respect of the liability of a person in the capacity of a worker or an employer or the organisations representing their professional interests for damages caused by an industrial action, pending or carried out, shall be the law of the country where the action is to be, or has been, taken.

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198 *Supra* I.2.

199 This was also the position of the Commission, see Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (Rome II"), COM (2003) 427 final, 20.

200 *Illmer*, in: Huber (ed.), Rome II Regulation: Pocket Commentary, Art. 8, note 21. But see *Boschiero*, Yearbook of Private International Law (2007), 87, 94.

201 See e.g. the list cited by *Drexl*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, note 110. A comprehensive overview of 160 states is provided by the EU Commission's handbook on GI protection, Part 2, see http://trade.ec.europa.eu/doclib/docs/2007/june/tradoc_135089.pdf.

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I. Scope and legislative purpose

Art. 9 is less comprehensive than it might appear to be at first sight. Art. 9 solely and exclusively deals with the PIL of non contractual obligations arising from collective action. But it does not ascertain the law applicable to the collective action *per se* and in its entirety. Hence, Art. 9 carries only a rather limited ambition. It regulates solely the 'Arbeitskampfdeliktsstatut', but not the 'Arbeitskampfstatut'.[1] But insofar as tortious liability and the 'Arbeitskampfdeliktsstatut' are at stake, it *does* relate also to the lawfulness or legality of an **1**

industrial action and to the conditions for undertaking industrial action.[2] Insofar Art. 15 (a) must not be read restrictively,[3] not even in the light of Recital (28).[4] This might gather particular relevance for strikes within a country's civil service since the approach towards a right to strike for civil servants diverges between different states fundamentally, from a complete denial to constitutional guarantees.

2 Moreover, Art. 9 looks only at the tortious aspects of collective action, but not at the wider context or at possible consequences in the contractual realm of employment agreements. In the latter realm the Rome I Regulation, in particular its Art. 8, reigns.[5] This concerns e.g. payment, reduction or suspension of wages during the industrial action; liberating from, or suspension of, duties to perform; terminating the employment agreement.[6] Insofar Art. 12 (1) (c), (d) Rome I Regulation casts the die since possible consequences of a possible breach of obligations or a way of extinguishing obligations (e.g. by cancellation) are at stake.[7]

3 Settlement agreements between the parties involved, which are terminating the industrial action, are to be characterised as contractual, too.[8] The same applies to damages for the breach of a preceding collective agreement, in particular generating an obligation to abstain from initiating any industrial action.[9] As far as collective agreements are involved these issues are governed by the law applicable to the respective collective agreement.[10]

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1 *Knöfel*, EuZA 2008, 228 (234); *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 1; *Christian Heinze*, RabelsZ 73 (2009), 770 (786); *Deinert* § 16 note 2; *Julie Jacobs* pp. 38–39. *Contra Christian Heinze*, in: jurisPK BGB Art. 9 Rome II-VO note 9.

2 *Palao Moreno*, YbPIL 9 (2007), 115, 120; *Crespo Hernández*, Rev. electr. met. e hist. der. V (2008), 1; *Joubert*, in: Corneloup/Joubert p. 55, 78; *Kadner Graziano*, RabelsZ 73 (2009), 1 (58); *Morse*, in: Liber Fausto Pocar, vol. II (2009), p. 723, 725; *Temming*, in: Nomos Kommentar BGB Art. 9 Rom II-VO notes 66, 79; *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 63; *Julie Jacobs* pp. 106–107. Insofar concurring *Christian Heinze*, in: jurisPK BGB Art. 9 Rome II-VO note 9. *Contra Fotinopoulou Basurko*, Trib. soc. 238 (2010), 46, 52–53; *Ludewig* pp. 187–190; *Carballo Piñeiro* p. 283.

3 *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 63; *Julie Jacobs* p. 107.

4 *Contra Junker*, in: Münchener Kommentar zum BGB Art. 9 Rom II-VO note 36; *Zelfel* pp. 118–121; *Carballo Piñeiro* p. 283; *Dörner*, in: Handkommentar zum BGB Art. 9 Rom II-VO notes 1–2.

5 *Knöfel*, EuZA 2008, 228 (240); *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 37; *Christian Heinze*, RabelsZ 73 (2009), 770 (790); *Christian Heinze*, in: jurisPK BGB Art. 9 Rome II-VO note 11; *Winkler von Mohrenfels*/*Block*, EAS B 3000 note 208 (2010); *Spickhoff*, in: Bamberger/Herbert Roth, Art. 9 Rom II-VO note 1; *Illmer*, in: Peter Huber, Art. 9 Rome II Regulation note 14; *Zelfel* p. 59; *Temming*, in: Nomos Kommentar BGB Art. 9 Rom II-VO note 70.

6 *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 37 with references to *Polak*, Arbeidsverhoudingen in het Nederlands internationaal privaatrecht (1988) pp. 150–151; *Coursier*, Le conflit de lois en matière de contrat de travail (1993) p. 142.

7 *Winkler von Mohrenfels*/*Block*, EAS B 3000 note 208 (2010); *Zelfel* p. 59; *Temming*, in: Nomos Kommentar BGB Art. 9 Rom II-VO notes 7, 69–70.

8 *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 37; *Gamillscheg*, in: FS Albert Gnade (1992), p. 755, 758–759 with regard to *Dimskal Shipping Co. S.A. v. International Transport Workers Federation (The "Evia Luck")* [1992] 2 A.C. 152 (H.L., per Lord *Goff of Chieveley*); see also *Jafferali*, RGAR 2008, 14399 No. 32.

9 *Schlachter*, in: Erfurter Kommentar zum Arbeitsrecht (18th ed. 2018) Art. 9 Rom II-VO note 2; *Zelfel* p. 59; *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 37.

Extending Art. 9 beyond its clear-cut context and submitting the overall phenomenon 'industrial action' to Art. 9 would raise the danger that industrial action *per se* would be made subject to a degree of unlawfulness, illegality and condemnation which would be hardly compatible and consistent with the protection and the privileges which it enjoys under certain Member States' constitutional laws.[11] This worried Sweden as the main propagent of Art. 9.[12] The law applicable to the 'Arbeitskampfstatut' in general still is a matter for national, not unified conflicts rules; hence it would be a mere (if welcome) coincidence if the same law governs both the 'Arbeitskampfstatut' and the 'Arbeitskampfdeliktsstatut'. It cannot be forcefully said that establishing such harmony lies behind the teleology of Art. 9[13] since if Art. 9 had been intended so, it should have been explicitly extended to the general 'Arbeitskampfstatut' (which would have implied leaving the general realm of the Rome II Regulation). **4**

Insofar as aspects of industrial actions which go beyond torts are to be judged, one has to resort to the respective domestic PIL rules of the forum state.[14] The restricted scope of Art. 9 is amply emphasized by Art. 9 forming part of Chapter II Torts/Delicts of the Rome II Regulation as by its wording which expressly refers only to "non contractual obligations". **5**

On second thought, all these restrictions are naturals and not surprises, but almost given for a rule forming part of a Regulation on the law applicable to non-contractual obligations that carefully avoids overstepping, particularly so at the frontier towards contracts. **6**

Art. 9 ought to have been drafted even more carefully since then (i.e. in 2007) Art. 137 (5) EC Treaty, now Art. 153 (5) TFEU, prohibits European legislature from adopting minimum provisions in the field of wages, collective associations and industrial conflict. Although Art. 9 was based on the competence established in then Art. 61 lit. c EC Treaty and not on Art. 137 (2) EC Treaty, Art. 137 (5) EC Treaty clearly and inevitably formed part of the overall picture.[15] Restricting Art. 9 to dealing solely with non contractual obligations arising from industrial action kept the fine red line[16] regardless how wide or narrow one is prepared to construe Art. 137 (5) EC Treaty, now Art. 153 (5) TFEU.[17] **7**

Art. 9 is a pretender and even an impostor. It conveys the impression of a promise which it **8**

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10 *Christian Heinze*, RabelsZ 73 (2009), 770 (791); *Temming*, in: Nomos Kommentar BGB Art. 9 Rom II-VO note 71.

11 *Rolf Birk*, IPRax 1987, 14 (16); *Franzen*, IPRax 2006, 127 (129); *Knöfel*, EuZA 2008, 228 (234); *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 1; *Paukner*, Streikrecht entsandter ausländischer Arbeitnehmer im inländischen Betrieb (2009) p. 35; *Julie Jacobs* p. 37.

12 *Carballo Piñeiro* p. 288.

13 To this avail *Carballo Piñeiro* p. 282 (with some degree of self-contradiction on pp. 282–283).

14 *Knöfel*, EuZA 2008, 228 (234)-235; *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 5; *Junker*, in: Münchener Kommentar zum BGB Art. 9 Rom II-VO note 20.

15 *Rödl*, in: Calliess, Art. 9 Rome II Regulation note 6.

16 *Rödl*, in: Calliess, Art. 9 Rome II Regulation note 6.

17 See on this construction issue *Yolanda Del Cerro Alonso v. Osakidetza-Servicio Vasco de Salud* (Case C-307/05), [2007] ECR I-7122 para. 39; *Pataut*, RCDIP 93 (2004), 800, 804–805; *Schmidt-Kessel*, in: FS Manfred Löwisch (2007), p. 325, 333; *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 2.

would not keep – and which it not even gives when closer scrutinised. Art. 9 is one piece in a jigsaw, yet perhaps the major and most important piece.

9 Measured only by the number of published court decisions, the practical relevance of Art. 9 appears to be negligible. A single decision is recorded[18] (not surprisingly from Sweden, the very State who initiated Art. 9), and a passing mention occurred in a Danish court,[19] i.e. in the court of a non-Member State. But the very small number of published court decisions is only one indicator. It does not rule out that Art. 9 might play some role as ramification for interested parties planning or designing industrial actions.

II. Legislative history

10 Art. 9 was first and nominally introduced by, and is often credited to,[20] the JURI Committee[21] and the European Parliament[22] (where some circles might have had some political interest of conquering a first slice of collective labour law[23]) But the driving force and mastermind behind Art. 9 was Sweden who made the initial proposal[24] and who was more and more successfully in gathering supportive allies over the duration of the legislative process. The European Parliament followed Sweden's suggestion.[25] Behind the scenes severe lobbying by several power groups erupted.

11 Sweden was concerned that any rule dissociating the law applicable to industrial action from the place where the industrial action took place and leading to the *lex loci damni* would conflict with the Swedish liberal approach[26] towards activities of trade unions. The Swedish delegation went at pains to expressly put emphasis on the particular importance of this point for Sweden.[27]

12 Surprisingly, the European Social and Economic Committee[28] did not seize upon the Swedish idea expressly. But already the initial Draft Report of the European Parliament's Committee on Legal Affairs endorsed the Swedish Proposal, yet only restricted to strikes[29]

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18 Arbetsdomstolen 22 December 2011 - beslut nr 95/11 http://www.arbetsdomstolen.se/upload/pdf/2011/95-11.pdf.

19 Arbejdretten 1 July 2015 – Case AR2015.0083, AuR 2016, 37 with note *Buschmann*.

20 See e.g. *Kadner Graziano*, RabelsZ 73 (2009), 1 (58); *Marongiu Bonaiuti* p. 140.

21 Report (Reporter: *Wallis*) of 27 May 2005, A6–0211/2005, pp. 12–13 Amendment 15, pp. 24–25 Amendment 31.

22 Legislative Resolution European Parliament, 1st Reading, Doc. 10812/05 – CODEC 590 JUSTCIV 132, pp. 9 (Amendment 15 – Recital 18a [new]), 17 (Amendment 31 – Article 6a [new]).

23 *Junker*, NJW 2007, 3675 (3680).

24 Doc. 9009/04 ADD 8 JUSTCIV 71 CODEC 645 p. 12: "Art. 8a Industrial action. The law applicable to a non-contractual obligation arising out of a noticed or executed industrial action shall be the law of the country where the action has been taken."

25 *Vrellis*, in: Essays in honour of Michael Bogdan (2013), p. 659, 661; *Carballo Piñeiro* p. 281.

26 Outline e.g. by *Buurn*, in: Dorssemont/Jaspers/van Hoek, (eds.), Cross-Border Collective Actions in Europe – A Legal Challenge (2007), p. 203.

27 Doc. 9009/04 ADD 8 JUSTCIV 71 CODEC 645 p. 12.

28 Opinion of the European Economic and Social Committee, OJ EC 2004 C 241/1.

29 Draft Report of the Committee on Legal Affairs (Reporter: *Wallis*) of 11 November 2004, 2003/0168 (COD).

whereas the final Report extended to all kinds of industrial action.[30] The motivation underlying the introduction of a special rule was to retain full effectivity to individual rights to take industrial action under national laws.[31]

13 In its Amended Proposal the Commission remained sceptical, though, and did not embrace the Parliament's Amendment. The proposed rule was rejected as too rigid, but the Commission declared to be sensitive to the underlying political arguments.[32] Residual openness was thus signaled.

14 In the course of negotiations, opposition mounted. France set out (successfully[33]) to limit the substantive scope of the proposed special rule to non contractual obligations leaving out the matter of general legality or illegality of the industrial action.[34] Latvia and Estonia wanted to protect the ingression of their seafarers into the European, in particular the Baltic seafarer's labour market.[35] They were not restricted by any concerns of national law about protecting trade unions.[36] Perhaps the proceedings in *Laval*[37] backed the Baltic resurgence since they concerned a struggle between a Swedish trade union and a Latvian employer.[38]

15 Greece who was acting in the interest of her vast and influential shipping sector joined them.[39] Cyprus did later on accompany Greek, not surprisingly, since the bulk of Cypriote shipping is effectively owned by Greeks and run through Peiraios based maritime agencies.[40] Denmark who permittedly participated in the negotiations in spite of abstaining from membership in any future Regulation, was the fifth official opponent and jumped on the bandwagon supporting Greece.[41] This trinity advanced another line of argument namely that ships might be subjected to the differing laws of the harbour states irrespective of whether they complied with the provisions of the law of their flag state. The United Kingdom, home of the London based International Transport Workers' Federation (ITF) but under Governments with a strong tendency to liberalise labour markets, was sympathetic with the opposition yet only unofficially.[42]

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30 Report of the Committee on Legal Affairs (Reporter: *Wallis*) of 27 May 2005, A6–0211/2005, p. 25 (Amendment 31).

31 Report of the Committee on Legal Affairs (Reporter: *Wallis*) of 27 May 2005, A6–0211/2005, pp. 12–13 Amendment 15, pp. 24–25 Amendment 31.

32 Amended Commission Proposal, COM (2006) 83 final p. 7.

33 *Michael Hellner* p. 192.

34 Doc. 9009/04 ADD 8 pp. 12–13.

35 See Doc. 12219/06 ADD 1.

36 See *Davulis*, in: FS Manfred Löwisch (2007), p. 73.

37 *Laval un Partneri Ltd. v. Svenska Byggnadsarbetareforbundet* (Case C-341/05), [2007] ECR I-11767.

38 *Michael Hellner* p. 189. The ECJ decided *Laval* only on 18 December 2007, i.e. after the die in the Rome II negotiations had been finally cast.

39 Doc. 9143/06 ADD 2 LIMITE JUSTCIV 118 CODEC 455 and Doc. 12219/06 ADD 1, CODEC 838 JUSTCIV 181 p. 1.

40 Doc. 12219/06 ADD 1, CODEC 838 JUSTCIV 181 p. 1.

41 Doc. 12219/06 CODEC 838 JUSTCIV 181 p. 2 fn. 1.

42 See *Mankowski* p. 74.

16 The Council's Common Position[43] was the decisive stage.[44] It shaped the eventual face of what has become Art. 9. It introduced the reservation in favour of Art. 4 (2), on a Dutch initiative referring to the example of a strike on an oil rig in international waters carried out by employees resident in the same country as the employer hiring them.[45] Moreover, the Common Position added valuable clarifications as to the object regulated and the addressees of liability.[46] The changes appear to have served a dual political purpose: first to signalise some kind of compromise towards the position of the opposing Member States, Latvia and Estonia, second to offer some consolation to the Parliament by giving away something in the comparatively minor area of Art. 9 while rejecting almost all other Amendment Proposals made by the Parliament with regard to other issues.[47]

17 Another compromise was the insertion of the actual Recital (28) which expressly asserts what Art. 9 does *not* set out to do: to ingress into the substantive law of the Member States regulating industrial action. Recital (28) makes it explicit and unmistakable that Art. 9 is without prejudice to the conditions relating to the exercise of industrial action in accordance with national law and without prejudice to the legal status of trade unions or of the representative organisations of workers as provided for in the law of the Member States. However, Recital (28) is incomplete insofar as employers and organisation representing employers' interests need to be added mentally.[48]

18 In the Second Reading in the European Parliament on 28 January 2007, Art. 9 as shaped in the Common Position was passed. A motion to delete it completely by *Toomas Savi* (Liberal from Estonia) failed.[49] In the Plenary Debate *Piia-Noora Kauppi* (Christian Democrat from Finland) argued that trade unions would use the opportunities offered to them by Art. 9 in order to blackmail seafarers and to undermine the competitiveness of the European shipping industry.[50] *Kauppi*'s motion to limit the scope of Art. 9 to shipping and to employ solely the ship's flag as connecting factor did not succeed, either.[51]

19 Today (when it has become pretty clear that Art. 9 is not a nuclear device) it is hardly understandable or even imaginable that two otherwise inconspicuous Member States, namely Latvia and Estonia, carried such a grudge and fury against Art. 9 that they finally voted against the entire project of the Rome II Regulation for the single reason that it included Art. 9.[52] But this was only the final footnote in a vivid legislative history full of challenges and changes. At least, the opposition appears to have exacted some influence on the shape which Art. 9 got in the Council's Common Position.

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43 Common Position (EC) No. 22/2006 of the Council of 25 September 2006, OJ 2006 C 289E/68.

44 *Carballo Piñeiro* p. 281.

45 *Michael Hellner* p. 194.

46 *Knöfel*, EuZA 2008, 228 (234); *Vrellis*, in: Essays in honour of Michael Bogdan (2013), p. 659, 661.

47 *Junker*, in: Liber amicorum Klaus Schurig (2012), p. 81, 93; *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 12; *Julie Jacobs* p. 15.

48 *Carballo Piñeiro* p. 285.

49 Doc. 5516/07 p. 4.

50 P6_CRE(2007)01–18(4).

51 Doc. 5516/07 p. 4.

52 Doc. 11313/07.

III. Political background and policy issues

Imminent interests are affected, and the political dimensions are evident. The law of industrial action is embedded in the national legal and regulatory cultures of labour law relations which differ significantly between the Member States[53].[54] Art. 9 touches upon the options which trade unions have and thus in many Member States even on issues of constitutional law.[55] Societal pre-conditions play a role not to be underestimated, as do policies to liberalise or to protect labour markets. The area is extremely sensitive and abounds of strong public interests, protectionism of local labour force, climates for investments and the Regulation of economic, industrial and social relations.[56] In the national arena influential power-groups and public choice are very relevant factors. At the EU level the possible tension with the fundamental freedom to provide services is an undercurrent.[57] **20**

If Art. 9 did not exist and Art. 4 led to the application of the *lex loc damni* dissociated from the place where the industrial action is or has been taken Member States who are strongly interested in promoting local policies towards unions or industries, would feel equally strongly inclined to operationalise Arts. 16; 26 on a regular basis in order to pursue such policies.[58] This would be inconsistent with the character of these rules as exceptions and with the need for a bilateral solution.[59] To judge the admissibility of strikes etc. should be reserved for the local law of the place where such industrial action is taken.[60] It touches on very sensitive policy issues possibly vital for many States, and thus must in deed be seen in a context with Arts. 16; 26[61] although it is formulated as an omnilateral, not a unilateral conflicts rule. **21**

Art. 9 puts the emphasis on behavioural regulation rather than restitutionary interests.[62] It promotes prevention over compensation and damages which latter remedies are only rarely asked for in the context of industrial action.[63] In effect, the special conflicts rule implemented by Art. 9 operates like a special mandatory rule in relation to industrial action, yet favouring not the *lex fori* as such but the local law of the industrial activities.[64] Consequentially, Art. 9 might prevent courts from having to resort to exceptional mechanisms like overriding mandatory rules or public policy.[65] **22**

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53 Comparative overview e.g. by *Junker*, in: Rieble/Junker/Giesen, Neues Arbeitskampfrecht? (2010), p. 155.

54 *Illmer*, in: Peter Huber, Art. 9 Rome II Regulation note 4.

55 See only *Christian Heinze*, in: jurisPK BGB Art. 9 Rome II-VO note 2.

56 *van Hoek*, in: Dorssemont/Jaspers/van Hoek, (eds.), Cross-Border Collective Actions in Europe – A Legal Challenge (2007), p. 425, 448; *Morse*, in: Liber Fausto Pocar, tomo II (2009), p. 723, 724; *Christian Heinze*, RabelsZ 73 (2009), 770 (781).

57 See Doc. 9143/06 ADD 1 LIMITE JUSTCIV 118 CODEC 455 and Doc. 12219/06 ADD 1 CODEC 838 JUSTCIV 181 p. 2.

58 *Christian Heinze*, RabelsZ 73 (2009), 770 (781); *Illmer*, in: Peter Huber, Art. 9 Rome II Regulation note 4.

59 *Illmer*, in: Peter Huber, Art. 9 Rome II Regulation note 4.

60 *Christian Heinze*, RabelsZ 73 (2009), 770 (781).

61 *Christian Heinze*, RabelsZ 73 (2009), 770 (781).

62 *Knöfel*, EuZA 2008, 228 (236); *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 52; *Illmer*, in: Peter Huber, Art. 9 Rome II Regulation note 5; *Junker*, in: Münchener Kommentar zum BGB Art. 9 Rom II-VO note 2.

63 *Junker*, in: Münchener Kommentar zum BGB Art. 9 Rom II-VO note 2; *Carballo Piñeiro* p. 282.

64 *Illmer*, in: Peter Huber, Art. 9 Rome II Regulation note 5.

23 The aim of Art. 9 is expressly stated by Recital (27) 2nd sentence: to protect the rights and obligations of workers and employers (trade unions, employers' associations and their respective representatives to be added). The activities constituting industrial action get a certain territorialistic touch.[66] The law comes from where the action is.[67]

IV. General features

1. Innovative and novel character of Art. 9

24 Art. 9 is a novelty and innovation.[68] It is not trivial and trite,[69] but rather intriguing.[70] Looked at it under a comparative aspect, it appears worldwide to be the first expressly codified conflicts rule tailor-made for the tortious aspects of industrial action. At least none of the Member Status could present such a conflicts rule in its autonomous conflicts law prior to the Rome II Regulation. The trigger for the Swedish motion came from the quarters of European international procedural law, namely the ECJ's decision in *DFDS Torline*[71] on then Art. 5 (3) Brussels Convention.[72] The Swedish initiative started in the same year 2004 only three months after *DFDS Torline* had been decided. In hindsight, one might question whether Sweden would have dared putting such a request on the table if *Viking* and *Laval* with their severe curtailing of union power had been decided back then; perhaps she would still have made her initiative bearing in mind that industrial action is hardly an area where the freedom of establishment is affected.[73]

2. Systematic place within the Rome II Regulation

25 Within the overall system of the Rome II Regulation, Art. 9 clearly is an exception to, and a deviation from, Art. 4 (1).[74] Whereas Art. 4 (1) establishes the *lex loci damni* as the basic principle for torts, Art. 9 joins the opposite camp and champions the *lex loc actus*. Its only companion in this regard is the optional right of choice given to the claimant with regard to environmental damages by Art. 7 *in fine*. This structural deviation from Art. 4 (1) justifies the need for an express special rule[75] if one – like Sweden and her allies – was discontent with

65 *Christian Heinze*, RabelsZ 73 (2009), 770 (781); *Carballo Piñeiro* p. 282.

66 *Marongiu Bonaiuti* p. 141.

67 Admittedly, 'action' here has a meaning analogous to that which it has in so called 'action movies'.

68 See only *Christian Heinze*, RabelsZ 73 (2009), 770 (777).

69 As *Junker*, NJW 2007, 3675 (3680) surmises.

70 See *Unberath/Cziupka/Pabst*, in: Rauscher, Art. 9 Rom II-VO note 3.

71 *Danmarks Rederiforeniging, acting on behalf of DFDS Torline AS v. LO Landsorganisationen i Sverige, acting on behalf of SEKO Sjöfolk Facket for Service och Kommunikation* (Case C-18/02), [2004] ECR I-1417.

72 *Joubert*, in: Corneloup/Joubert , p. 55, 78–79; *Christian Heinze*, RabelsZ 73 (2009), 770 (779); *Mankowski*, Interessenpolitik und europäisches Kollisionsrecht, (2011) p. 74; *Deinert* § 16 note 2; *Michael Hellner* pp. 188–189; *Carballo Piñeiro* p. 281; *Unberath/Cziupka/Pabst*, in: Rauscher, Art. 9 Rom II-VO note 4; *Temming*, in: NK BGB Art. 9 Rom II-VO notes 3, 8; *van Calster*, European Private International Law (2nd ed. 2016) p. 175; *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 13.

73 See *Knöfel*, EuZA 2008, 228 (248)-249.

74 See only *Basedow*, RabelsZ 74 (2010), 118 (132).

75 Such need is doubted by *Fallon*, in: Basedow/Baum/Nishitani (eds.), Japanese and European Private

applying the *lex loci damni* also to industrial actions. The precedence expressly given to Art. 4 (2) and the *lex communis habitationis* is a political compromise[76] and comes with some price.[77]

26 Like almost all other special rules for torts in the Rome II Regulation (with the exception of Art. 5), Art. 9 does not contain an escape clause, neither by direct implementation nor by incorporation of, or reference to, Art. 4 (3).[78] Insofar it aligns with Arts. 6, 7 and 8. The underlying *rationale* is another time a political one: Special rules are specifically designed for expressing and implementing specific evaluations; these would be toppled if a special rule was made subject to an escape clause. The guiding value of a special rule would be heavily impaired. This bars every attempt to apply Art. 4 (3) *per analogiam*, too.[79] Furthermore, reference to the law of the flag of a ship cannot call on the services of an escape clause anymore.[80] But the case is different insofar as the reservation in Art. 9 in favour of Art. 4 (2) becomes effective and Art. 4 (2) applies in a concrete case.[81]

27 Art. 4 (3) 2nd sentence joins the general escape clause of Art. 4 (3) 1st sentence in the list of rules *not* referred to it in Art. 9. Technically, this inhibits any accessory connection[82] (which even if admitted would have to answer the intricate question what could possibly constitute a leading relationship, perhaps with the exception of an appropriate collective agreement between the correct parties[83]). Yet again, the case is different if Art. 4 (2) applies in a concrete case, trumping Art. 9 by virtue of the reservation made in Art. 9 *principio*.

28 Whether party autonomy can be really permitted in the field of industrial actions addressed by Art. 9 might also be subject to further consideration because of the possibly overriding social interests at stake[84] and the multiplicity of interested parties concerned. The *argumentum e contrario* that Art. 9 does not feature a parallel to Arts. 6 (4); 8 (3) carries quite some weight and is rather forceful.[85] If the special conflicts rule in Art. 9 was

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International Law in Comparative Perspective (208), p. 261, 274 who instead favoured an extensive recourse to the general escape clause.

76 *Supra* Art. 9 note 16 (*Mankowski*).

77 *Infra* Art. 9 notes 65–71 (*Mankowski*).

78 See only *Gerhard Wagner*, IPRax 2008, 1 (10); *Illmer*, in: Peter Huber, Art. 9 Rome II Regulation note 7; *Vrellis*, in: Essays in honour of Michael Bogdan (2013), p. 659, 672; *Unberath*/*Cziupka*/*Pabst*, in: Rauscher, Art. 9 Rom II-VO note 11.

79 Concurring in the result *Junker*, Liber Amicorum Klaus Schurig (2012), p. 81, 94; *Junker*, in: Münchener Kommentar zum BGB Art. 9 Rom II-VO note 10; *Spickhoff*, in: Bamberger/Herbert Roth, Art. 9 Rom II-VO note 3; *Däubler*, in: Däubler, § 32 note 16; *Deinert* § 16 note 18; *Aubart*, Die Behandlung der dépeçage im europäischen Internationalen Privatrecht (2013) p. 183; *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 61.

80 *Knöfel*, EuZA 2008, 228 (245); *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 61.

81 *Infra* Art. 9 note 71 (*Mankowski*).

82 *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 62.

83 See for the latter *Junker*, in: Liber Amicorum Klaus Schurig (2012), p. 81, 94.

84 *de Boer*, YbPIL 9 (2007), 19, 25; *Ofner*, ZfRV 2008, 13, 20; *Zelfel* p. 110; *infra* Art. 14 note 10 (*Mankowski*).

85 *Dickinson*, in: *Dicey*/*Morris*/*Collins*, para. 34–044; *Vrellis*, in: Essays in honour of Michael Bogdan (2013), p. 659, 673; *Unberath*/*Cziupka*/*Pabst*, in: Rauscher, Art. 9 Rom II-VO note 12; *Picht*, in: Rauscher, Art. 14 Rom II-VO note 8; *von Hein*, in: Calliess, Art. 14 Rome II Regulation note 7; see also *Knöfel*, EuZA 2008, 228 (246).

not intended to be mandatory and thus the law of the place of the industrial action was the only viable option,[86] the European legislator should have fortified this expressly. But this argument would be even more convincing if Art. 9 was based on a fully considered approach reflecting any position towards party autonomy. The issue did simply not arise. To deduct a legislative intent from the lack of an express exclusion[87] is a rather speculative exercise.

29 To relegate public interests to the admissibility of industrial actions and to believe this not to be covered by a rather limited scope of Art. 9 (restricted to issues of civil liability) might provide additional if only tentative support.[88] Public interests play an important role in the background[89] and should not be neglected.[90]

30 In practice, the differences might be scant since most substantive laws will not permit derogating non contractual obligations of the types covered by Art. 9.[91]

31 Depending on the permissability of parties' choice of law there is a three-step or a two-step ladder for determining the law applicable to non contractual obligations arising out of industrial actions:
- If one is prepared to admit party autonomy there are three steps: Art. 14; if not, Art. 4 (2); if not, Art. 9.[92]
- If one is not prepared to admit party autonomy there are only two steps: Art. 4 (2); if not, Art. 9.

V. Concept of 'industrial action'

1. No autonomous concept

32 There is no definition or circumscription of 'industrial action' in Art. 9 or in any of the Recital. On the contrary, the European legislators expressly refrains from implementing an autonomous European concept of 'industrial action'. Recital (27) 1st sentence is very clear in this regard: It recognises that the exact concept of industrial action, such as strike action or lock-out, varies from one Member State to another; consequentially it states that such concept is governed by each Member State's internal rules.[93] In other words, this amounts to a classificatory reference to substantive law.[94] It does make a decisive difference here whether this is

86 To this avail *Gerhard Wagner*, IPRax 2006, 372 (386); *Gerhard Wagner*, IPRax 2008, 1 (10).

87 *Carballo Piñeiro* p. 293.

88 *Vogeler*, Die freie Rechtswahl im Kollisionsrecht der außervertraglichen Schuldverhältnisse (2013) pp. 133–134.

89 *Supra* Art. 9 note 4 (*Mankowski*).

90 Tentatively to the opposite avail *Zelfel* p. 111.

91 *Palao Moreno*, YbPIL 9 (2007), 115, 118; *Gerhard Wagner*, IPRax 2008, 1 (10); *Unberath*/*Cziupka*/*Pabst*, in: Rauscher, Art. 9 Rom II-VO note 13.

92 See only *Palao Moreno*, YbPIL 9 (2007), 115, 118; *Illmer*, in: Peter Huber, Art. 9 Rome II Regulation note 6; *Deinert*, ZESAR 2012, 311, 312; *Unberath*/*Cziupka*/*Pabst*, in: Rauscher, Art. 9 Rom II-VO note 11; *Temming*, in: Nomos Kommentar BGB Art. 9 Rom II-VO note 52; *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 43; *Christian Heinze*, in: jurisPK BGB Art. 9 Rome II-VO note 4.

93 *Julie Jacobs* pp. 71–73.

established in a Recital or in Art. 9 itself.[95] Recital (27) 1st sentence charts the course and vetoes an autonomous interpretation of the concept of industrial action.[96] For practical purposes it is more than a trifle unfortunate that the core term of Art. 9 is treated this way.[97]

Recital (27) 1st sentence rules out the possibility of each and every autonomous interpretation.[98] Attempts to the contrary[99] cannot succeed. Insofar as they are based on Recital (27) 2nd sentence[100] they intertwine two aspects that should be separated, and overlook that the two sentences of Recital (27) deal with two separate matters.[101] A functional approach[102] would be fine in principle, but cannot be reconciled with Recital (27) 1st sentence, either. Art. 28 Charter of Fundamental Rights, Art. 11 ECHR and Art. 6 pt. 4 European Social Charter[103] define minimum standards which are to be protected by the constitutional laws of the Member States, but do not develop a full concept.[104] Art. 6 pt. 4 European Social Charter is subject to Artts. 38; 31 European Social Charter. Moreover, any autonomous concept of industrial action would possibly contravene now Art. 153 (5) TFEU, formerly Art. 137 (5) EC Treaty.[105] **33**

In some linguistical versions of Art. 9, certain measures are explicity named. In particular, the French version names "une grève ou un lock-out". At first glance this looks like an autonomous ramification. But such glance would be superficial and misleading.[106] One should take Recital (28) very seriously. Art. 9 does not set out to invade into the territory of the Member States' substantive laws – which it would possible do if it could be read as introducing lock-outs where this instrument is unknown (as e.g. in Greece[107] or in **34**

94 See only *Junker*, NJW 2007, 3675 (3680); *Knöfel*, EuZA 2008, 228 (241); *von Hein*, ZEuP 2009, 6 (31); *Deinert*, ZESAR 2012, 311, 314; *Deinert*, § 16 note 4; *Temming*, in: Nomos Kommentar BGB Art. 9 Rom II-VO note 34 with further references.

95 *Temming*, in: Nomos Kommentar BGB Art. 9 Rom II-VO note 34.

96 *Carballo Piñeiro* p. 283.

97 *Palao Moreno*, YbPIL 9 (2007), 115, 119; *Unberath/Cziupka/Pabst*, in: Rauscher, Art. 9 Rom II-VO note 7.

98 *von Hein*, VersR 2007, 440 (450); *Leible/Matthias Lehmann*, RIW 2007, 721 (731); *Guerchon/Piedelièvre*, Gaz. Pal. 2007, 3106, 3120; *Knöfel*, EuZA 2008, 228 (241); *Dickinson* para. 9.19; *Christian Heinze*, RabelsZ 73 (2009), 770 (782)-783; *Illmer*, in: Peter Huber, Art. 9 Rome II Regulation note 8; *Junker*, in: Münchener Kommentar zum BGB Art. 9 Rom II-VO note 14; *Unberath/Cziupka/Pabst*, in: Rauscher, Art. 9 Rom II-VO note 7; *Temming*, in: Nomos Kommentar BGB Art. 9 Rom II-VO note 34.

99 *van Hoek*, NIPR 2008, 448, 451; *Franzina*, in: Calvo Caravaca/Castellanos Ruiz (dir.), La Unión Europea ante el Derecho de la Globalización (2008), p. 299, 345; *Morse*, in: Liber Fausto Pocar, vol. II (2009), p. 723, 727; *Calvo Caravaca/Carrascosa González* pp. 169–170; *Dorssemont/van Hoek*, in: Ales/Novits (eds.), Collective Action and Fundamental freedoms in Europe (2010), p. 225, 229–231; *Plender/Wilderspin* para. 23–008; *Rödl*, in: Calliess, Art. 9 Rome II Regulation note 20.

100 As in particular *Plender/Wilderspin* para. 23–008 does.

101 *Illmer*, in: Peter Huber, Art. 9 Rome II Regulation note 8.

102 As advocated for by *Rödl*, in: Calliess, Art. 9 Rome II Regulation note 20.

103 On this rule e.g. *Julie Jacobs* pp. 51–54.

104 *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 40. Tentatively favouring these rules as the fundament of an autonomous interpretation *Rödl*, in: Calliess, Art. 9 Rome II Regulation note 19; see also (yet rather *in futurum) Temming*, in: Nomos Kommentar BGB Art. 9 Rom II-VO note 35.

105 *Julie Jacobs* p. 72.

106 *Knöfel*, EuZA 2008, 228 (241); *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 39.

Spain[108]). Art. 9 abstains from such invasion else it would overstep the EU's competence.[109] On the other hand, it must cover legal institutions which are known in the law of at least some Member States. To exclude lock-outs from its scope would overdo respect to Greece and Spain. In principle, Art. 9 should be interpreted broadly in order to cover all forms of trade-union, workers' or employees' actions which are known in various legal systems despite conceptual differences in the details.[110]

2. Classificatory reference to the *lex causae* or to the *lex fori*?

35 But Recital (27) 1st sentence[111] leaves some ambiguity as to whether its classificatory reference leads to the substantive law of the *lex fori*[112] or to the substantive law of the *lex causae*[113].[114] Yet the determination which law is the *lex causae* might depend on whether the obligation at stake can be characterised as one arising out of industrial action or not. A seemingly complicated intermediate step would involve a bootstrap principle to be applied.[115] But executing the bootstrap principle with regard to Art. 9 would lead to the law of the state where the possibly relevant activity took place, and would thus be rather easily to operate.

36 Grammatical arguments point either side: On the one hand Recital (27) 1st sentence does not explicitly revert to the *lex fori*, in contrast to Recital (10).[116] On the other hand, Recital (27) refers only to the laws of Member States whereas determining the *lex causae* by virtue of Art. 9 is not limited to Member State laws.[117]

37 That reverting to the *lex fori* would undermine the uniformity of Art. 9 for one of its central

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107 *Iliopoulos-Strangas*, in: Soziale Grundrechte in der Europäischen Union (2000/2001), p. 149, 151.

108 *Liebertz*, ZIAS 2001, 274.

109 *Knöfel*, EuZA 2008, 228 (241); *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 39.

110 *Vrellis*, in: Essays in honour of Michael Bogdan (2013), p. 659, 663.

111 Critical on the drafting of Recital (27) in general and detail *Vrellis*, in: Essays in honour of Michael Bogdan (2013), p. 659, 664.

112 Favouring this *Knöfel*, EuZA 2008, 228 (241); *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 37; *Jafferali*, RGAR 2008, 14399 No. 32; *Spickhoff*, in: Bamberger/Roth, Art. 9 Rom II-VO note 1; *Winkler von Mohrenfels*/*Block*, EAS B 3000 para. 206 (2010); *Maeßen*, Auswirkungen der EuGH-Rechtsprechung auf das deutsche Arbeitskampfrecht unter besonderer Berücksichtigung der Entscheidungen in den Rechtssachen Viking und Laval (2010) p. 16; *Pfeiffer*/*Matthias Weller*/*Nordmeier*, in: Spindler/Fabian Schuster, Recht der elektronischen Medien (3rd ed. 2015) Art. 9 Rom II-VO note 1; *Julie Jacobs* pp. 76–79; *Hohloch*, in: Erman, Art. 9 Rom II-VO note 3; *Thorn*, in: Palandt, Art. 9 Rom II-VO note 2.

113 Favouring this *Christian Heinze*, RabelsZ 73 (2009), 770 (782); *Christian Heinze*, in: jurisPK BGB Art. 9 Rome II-VO note 5; *Illmer*, in: Peter Huber, Art. 9 Rome II Regulation note 9; *Zelfel* pp. 41–46; *Tscherner*, Arbeitsbeziehungen und Europäische Grundfreiheiten (2012) p. 131; *Deinert*, ZESAR 2012, 311, 314; *Deinert*, § 16 note 4; *Junker*, in: Münchener Kommentar zum BGB Art. 9 Rom II-VO note 15; *Carballo Piñeiro* p. 284; *Unberath*/*Cziupka*/*Pabst*, in: Rauscher, Art. 9 Rom II-VO note 8; *Temming*, in: Nomos Kommentar BGB Art. 9 Rom II-VO note 36; *Neumayr*, in: Koziol/Peter Bydlinski/Bollenberger, Art. 9 Rom II-VO note 2.

114 *Michael Hellner* p. 190.

115 See *Rödl*, in: Calliess, Art. 9 Rome II Regulation note 16.

116 *Junker*, in: Münchener Kommentar zum BGB Art. 9 Rom II-VO note 5; *Temming*, in: Nomos Kommentar BGB Art. 9 Rom II-VO note 36.

117 *Julie Jacobs* p. 77.

aspects would be interpreted differently[118] (and consequentially give rise to unwanted forum shopping[119]) could be explained as a natural consequence from Art. 9 not employing an autonomous definition. More force can be seen in the argument that the policy considerations underlying Art. 9 militate in favour of seeing the same law applied in all Member State courts which can only be safeguarded by the same law being applied to the classificatory issues.[120] Applying the *lex fori* may lead to Art. 9 being construed more narrowly or more broadly than is necessary to protect workers, trade unions or employers carrying out industrial action in another country than the forum state.[121] Local law shall rule immunities. And this is to be the local rule of where the action is.

3. Measures covered

The term 'industrial action' draws at least some outer borders and establishes some outer frame:[122] The action at stake must carry some relation with employment. General strikes, political strikes and strikes ignited by State budget cuttings are sometimes said not to qualify[123] since it should not suffice that the immediate target is some industry activity.[124] But this would collide with the right to such general or political strikes being constitutionally guaranteed in a number of Southern European Member States at least.[125] 'Trade dispute' under s. 244 Trade Union and Labour Relations (Consolidation) Act 1992 in the UK[126] is narrower than the concepts of industrial actions under other Member State laws. Thatcherism has not been quite that fruitful and at home in Greece. **38**

Functionally, the framework must be wide enough to cover the four basic scenarios of cross-border industrial action which have emerged in practice. These scenarios are:[127] Firstly, the parties concerned are resident in different countries from the start. Secondly, measures taken in one state trigger extensions or consequences in one or more other countries. Thirdly, parties from other countries join in. Fourthly, measures involve an inter- or transnational organisation (like the International Transport Workers' Federation ITF) or pursue goals in different countries. **39**

The range of 'industrial action' should in principle be open for:[128] strike; lock-out; boycott; **40**

118 So *Christian Heinze*, RabelsZ 73 (2009), 770 (782); *Illmer*, in: Peter Huber, Art. 9 Rome II Regulation note 9; *Carballo Piñeiro* p. 284; see also *Temming*, in: Nomos Kommentar BGB Art. 9 Rom II-VO note 37.

119 *Carballo Piñeiro* p. 284.

120 *Dickinson* para. 9.19; *Unberath/Cziupka/Pabst*, in: Rauscher, Art. 9 Rom II-VO note 8.

121 *Dickinson* para. 9.19; *Unberath/Cziupka/Pabst*, in: Rauscher, Art. 9 Rom II-VO note 8.

122 *Michael Hellner* p. 190.

123 *Dickinson* para. 9.20; *Michael Hellner* p. 190.

124 *Contra Vrellis*, in: Essays in honour of Michael Bogdan (2013), p. 659, 665.

125 *Christian Heinze*, RabelsZ 73 (2009), 770 (783); see also *Temming*, in: Nomos Kommentar BGB Art. 9 Rom II-VO note 35.

126 On which *Dickinson* para. 9.20 relies.

127 *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 23 amalgamating *Hansjörg Otto* § 13 note 2 p. 267 and *Däubler*, in: Däubler, § 32 notes 2 *et seq*.; see also *Dorssemont/van Hoek*, ELLJ 2011, 48, 58 *et seq*. *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 24 also gives examples from the recent past for each of the scenarios.

128 *Dickinson* para. 9.22; *Junker*, in: Münchener Kommentar zum BGB Art. 9 Rom II-VO note 19; *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 41; *Julie Jacobs* pp. 84–87.

operational occupation of the workplace;[129] 'going slow' (in particular 'work to rule', 'Dienst nach Vorschrift'[130]); 'going sick'; refusal to work justified overtime; calls for strike; calls for occupation. Industrial actions includes also solidarity strikes and sympathy strikes.[131] Virtual or cyber-industrial action is a modern-day phenomenon that could unearth e.g. as mail bombing or mail flooding.[132]

41 Excessive misconduct by single employees bordering at general criminal conduct, e.g. arson, bodily violence, fighting, theft or destruction of working materials or work equipment are not covered by Art. 9; the same applies to 'boss-napping' (kidnapping or detaining of superiors, in particular directors). All this might happen on the occasion of a strike, but in the respective individual's personal responsibility, not as an integral part of a strike and is thus subjected to Art. 4.[133]

42 Insofar as media campaigns trying to influence public opinion[134] or to incise sympathy from political decision-makers, violate personality rights Art. 1 (2) (g) renders the entire Rome II Regulation including Art. 9 inapplicable.[135]

VI. Personal scope

1. In general

43 Art. 9 regulates the PIL for the liability of a person in the capacity of a worker or an employer or the organization representing their professional interests. Hence, its personal scope is limited in a number of respects, but wide enough to cover trade unions and employers' associations.[136] What constitutes a trade union or an employers' association is an incidental question left to the rules of international company law.[137] The concept of 'worker' raises quite some questions and opens some twilight zones, though: Insofar as one required a worker to be actually employed it would exclude dismissed workers even if these workers fight against the very restructuration measure which led to their dismissal – and that would be a hardly acceptable result.[138] 'Workers' should not be confined to 'typical' workers, either, but should also include atypical employment relations, part-time employees, apprentices, interns, working students and retired persons.[139]

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129 *Carballo Piñeiro* p. 288.

130 *Christian Heinze*, RabelsZ 73 (2009), 770 (782).

131 *Knöfel*, EuZA 2008, 228 (241); *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 42.

132 See e.g. *Zachert*, NZA-Beilage 2006, 61, 66.

133 *Christian Heinze*, RabelsZ 73 (2009), 770 (785); *Spickhoff*, in: Bamberger/Herbert Roth, Art. 9 Rom II-VO note 2; *Däubler*, in: Däubler, Arbeitskampfrecht § 32 note 34; *Michael Hellner* p. 191; *Temming*, in: Nomos Kommentar BGB Art. 9 Rom II-VO note 51; *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 41; *Julie Jacobs* pp. 40–41.

134 See *Zachert*, NZA-Beilage 2006, 61, 66.

135 *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 36.

136 See *Michael Hellner* p. 192.

137 *Vrellis*, in: Essays in honour of Michael Bogdan (2013), p. 659, 664–665.

138 *Christian Heinze*, RabelsZ 73 (2009), 770 (784); *Temming*, in: Nomos Kommentar BGB Art. 9 Rom II-VO note 44.

139 *Temming*, in: Nomos Kommentar BGB Art. 9 Rom II-VO note 44.

Not expressly mentioned are:[140] the functionaries of trade unions or employers' associations; local representatives of trade unions or employers' associations; directors or superiors within an employer's organisation; strikebreakers, blacklegs, scabs; pickets; an employer's senior or junior management.[141] **44**

Technically, one could feel inclined to subject the liability of all persons not mentioned to Art. 4, not to Art. 9.[142] This would negate their specific capacity as a functionary[143] and would lead i.a. to the result that a trade union would be liable according to the law where it staged a strike whereas its local or overall executive could be personally held liable pursuant to the law where damage was suffered. Conflicting principles of PIL would govern closely related aspects. Consequences of a split would be particularly awkward and unwelcome if one takes a possible redress by the executive held personally liable against the trade union into account. But most importantly, suing a representative personally could possible become a viable option for circumventing legal privileges and immunities which organisations enjoy.[144] **45**

Strikebreakers and scabs run a high likelihood to be drawn into physical confrontations with pickets. It would be not easy to explain why the liability of the picket struggling with the strikebreaker should be subject to Art. 9 whereas the strikebreaker's possible liability would be subject to Art. 4. The better alternative is to apply Art. 9 uniformly.[145] **46**

The better arguments thus militate in favour of applying Art. 9.[146] Any corrective device *via* Art. 4 (3), namely to apply the 'Arbeitskampfdeliktsstatut' by way of an accessory connection,[147] would be rendered unnecessary. **47**

Internal disputes within leading or umbrella organisations of trade unions or employers' associations (e.g. the European Trade Union Confederation or BusinessEurope) do not fall under Art. 9.[148] These are intercorporate matters which might be excluded from the Rome II Regulation by virtue of Art. 1 (2) (d); insofar the municipal conflicts rules of the forum might lead to the law applicable to the respective leading or umbrella organisation.[149] **48**

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140 *Knöfel*, EuZA 2008, 228 (239); *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 28; *Julie Jacobs* p. 39.

141 *Dickinson* para. 9.25.

142 *Junker*, in: Münchener Kommentar BGB Art. 9 Rom II-VO note 25; *Knöfel*, EuZA 2008, 228 (239); *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 28.

143 *Julie Jacobs* p. 40.

144 *Dickinson* para. 9.25; *Rödl*, in: Calliess, Art. 9 Rome II Regulation note 9.

145 To the same avail *Spickhoff*, in: Bamberger/Herbert Roth Art. 9 Rom II-VO note. 2; *Temming*, in: Nomos Kommentar BGB Art. 9 Rom II-VO note 44. *Contra Dickinson* para. 9.28; *Vrellis*, in: Essays in honour of Michael Bogdan (2013), p. 659, 667.

146 *Christian Heinze*, RabelsZ 73 (2009), 770 (784); *Christian Heinze*, in: jurisPK BGB Art. 9 Rome II-VO note 7; *Däubler*, in: Däubler § 32 note 28; *Temming*, in: Nomos Kommentar BGB Art. 9 Rom II-VO note 46.

147 As proposed by *Junker*, in: Münchener Kommentar BGB Art. 9 Rom II-VO note 25; *Rödl*, in: Calliess, Art. 9 Rome II Regulation note 9.

148 *Ludewig* p. 201; *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 28.1.

149 *Ludewig* p. 201; *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 28.1.

49 Friends and relatives of workers or employers act on their own personal risk without enjoying immunities or the privilege of being covered by the special conflicts rule of Art. 9.[150] But this changes if the respective measures (e.g. a flash-mob or mail bombing) are organised by, or can be attributed to, a trade union.[151]

2. Third parties as creditors

50 The wording of Art. 9 relates only to the liability side, i.e. to the debtor of claim. It does not spell out the creditor perspective (as the Commission rightly criticised[152]). In particular it does not explicitly address whether damage suffered by third parties is covered.[153]

51 The Commission criticised that third party relations had not been explicitly excluded from Art. 9 by the Council's Common Position.[154] However, this does not condense to a conclusive argument in favour of an exclusion.[155] The Commission's criticism did not prompt any alteration, not even an intervention by the European Parliament. If the Common Position was transferred unchanged in the final Regulation this indicates that the Council's criticised Position survived. The Commission was not in a position to alter the course of events.[156]

52 The phrase 'in capacity' does not carry any conclusion in this regard since it unambiguously relates exclusively to the liability side.[157] An example could be that goods are delivered lately or not all from a French based seller to a German based buyer due to a transport strike in France. Another example could be a flight controllers' strike inflicting damage on air carriers. Or a trade union launches a strike against a port authority or a terminal operator which causes the loss of cargo aboard a ship that cannot reach its berth[158] or cannot leave the port in time.[159]

53 A wide and broad reading would include both in Art. 9.[160] Certainly that would improve the trade unions' cause[161] or generally the cause and the liberty to fight of the parties involved in

150 *Dickinson* para. 9.24.

151 *Temming*, in: Nomos Kommentar BGB Art. 9 Rom II-VO note 47.

152 COM (2006) 566 final p. 4.

153 *Michael Hellner* p. 193.

154 COM (2006) 566 final p. 4.

155 But tentatively so *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 32.

156 *Julie Jacobs* p. 43.

157 *Julie Jacobs* p. 42. *Contra Christian Heinze*, RabelsZ 73 (2009), 770 (784); *Christian Heinze*, in: jurisPK BGB Art. 9 Rome II-VO note.

158 *Carballo Piñeiro* p. 285.

159 *Zelfel* p. 72.

160 *Leible*/*Matthias Lehmann*, RIW 2007, 721 (731); *Dutoit*, in: Liber Fausto Pocar, vol. II (2009), p. 309, 321; *Morse*, in: Liber Fausto Pocar, vol. II (2009), p. 723, 730–731; *Illmer*, in: Peter Huber, Art. 9 Rom II-VO note 21; *Junker*, in: Münchener Kommentar zum BGB Art. 9 Rom II-VO note 24; *Dorssemont*/*van Hoek*, ELLJ 2011, 48, 70; *Zelfel* pp. 74–78; *Deinert*, ZESAR 2012, 311, 317; *Deinert*, § 16 note 35; *Unberath*/*Cziupka*/*Pabst*, in: Rauscher, Art. 9 Rom II-VO note 10; *Temming*, in: Nomos Kommentar BGB Art. 9 Rom II-VO note 48; *Julie Jacobs* pp. 43–44; *Rauscher*, Internationales Privatrecht (4th ed. 2017) para. 1333.

161 *Carballo Piñeiro* p. 285.

the industrial action.[162] They would not have to fear to be subjected to the whiles of the *lex loci damni* and would have to comply only and exclusively with the law of the place where they fight it out in their industrial action.[163]

54 But respectable arguments and reasons are mounted to point the other way.[164] The first one recurs to (German) substantive law where liability towards third parties generally is not made subject to the law specific to industrial actions but to general private law.[165] This draws rather heavily on substantive law[166] (and a particular substantive law at that). The second one relies that damage to third parties will only rarely been inflicted intentionally, but rather accidentally and as collateral damage.[167] Intention yet again is not an aspect for PIL but rather for substantive law. Collateral damage remains damage inflicted by the industrial action.

55 The possible consequences if one did not submit third party claims also to Art. 9, need to be taken into consideration. Insofar it has been proposed to resort to Art. 4 (3) 2nd sentence and to establish an accessory connection to the law applicable to the contract between the third party and the employer if such contract exists.[168] But there is a major obstacle, even disregarding the high hurdle that Art. 9 is not subject to Art. 4 (3) in general[169]: The debtor in tort is not party to that contract.[170] To overcome this is rather difficult.[171] Previsibility for the debtor of the claim would still be a major problem.[172]

56 If one accepts that the rationale underlying Art. 9 is legal concentration in favour of a single law a recourse to possibly different *leges loci damni* for different aspects of the damage caused by the same industrial action could hardly be reconciled with that rationale.[173] Any active party would run an almost incalculable risk; this would create a severe burden in particular for trade unions and employees.[174] That third parties will regularly sue independently[175] appears to be a correct assumption, but relates only to the procedural side which generally happens not to be fully harmonised with Art. 9. Moreover, they might even be

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162 See *Zelfel* pp. 75–76.

163 *Zelfel* p. 75.

164 *Knöfel*, EuZA 2008, 228 (243); *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 30; *Jafferali*, RGAR 2008, 14399 no 32; *Dickinson* para. 9.26.

165 *Knöfel*, EuZA 2008, 228 (243); *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 30 with reference to BGH NZA 2016, 47; *Hansjörg Otto*, Arbeitskampf- und SchlichtungsR (2006) § 16 notes 120 *et seq*.

166 *Zelfel* p. 74.

167 *Knöfel*, EuZA 2008, 228 (243); *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 30.

168 *Knöfel*, EuZA 2008, 228 (243); *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 32.

169 *Supra* Art. 9 note 26 (*Mankowski*).

170 *Zelfel* p. 76; *Julie Jacobs* pp. 43–44.

171 *Illmer*, in: Peter Huber, Art. 9 Rom II Regulation note 21; *Zelfel* p. 76. See in different contexts *Mankowski*, TranspR 1996, 10 (12); *Mankowski*, CR 1999, 512 (521). *Contra Knöfel*, EuZA 2008, 228 (243); *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 32.

172 *Zelfel* p. 76.

173 *Rödl*, in: Calliess, Art. 9 Rome II Regulation note 10.

174 *Dorssemont/van Hoek*, ELLJ 2011, 48, 70; *Rödl*, in: Calliess, Art. 9 Rome II Regulation note 10.

175 *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 31.

instances where damage done to third parties (suppliers or customers of the direct victim) is instrumentalised for generating pressure from this third parties' side on the direct victim.[176]

VII. Liability

1. Liability in tort

57 Art. 9 regulates the PIL for the *liability* of a person in the capacity of a worker or an employer or the organization representing their professional interests. 'Liability' is only liability in tort; Art. 9 does not embrace unjust enrichment, *negotiorum gestio* or *culpa in contrahendo*.[177] That these other kinds of non contractual obligations are subject to the Rome II Regulation, but not to its Art. 9, yet to its Arts. 10–12 can be deducted in two respects: Firstly, Art. 9 clearly forms part of Chapter II on torts and delicts.[178] Secondly, what was intended was a reversal of Art. 4 (1). Thirdly, for industrial action there is no counterpart to Art. 13 which would extend Art. 9 to all kinds of non contractual obligation regardless of their nature.[179] Furthermore, Art. 9 does not apply to effects of any industrial action on an individual employment agreement; such effects ought to be governed by the law applicable to that contract under Art. 8 Rome I Regulation.[180]

2. Preventive relief

58 Art. 9 puts damages 'caused by a pending industrial action' and 'damages caused by an industrial action carried out' on equal footing. This justifies to assume that Art. 9 embraces preventive relief, too.[181] With regard to industrial actions this gains particular importance since in practice the law of industrial action is rather law to prevent damage than law to compensate damage.[182] It would not be all too convincing if Art. 9 covered only the less practical, but not the really important part.

59 If one is not prepared to deduct this already from Art. 9, but rather classifies Art. 9 with

176 See *Ben-Israel*, IntEncyclCompL XV/15 (1997) pp. 39–40.

177 *Junker*, in: Münchener Kommentar BGB Art. 9 Rom II-VO note 11; *Siehr*, RabelsZ 74 (2010), 139 (151–152); *Illmer*, in: Peter Huber, Art. 9 Rome II Regulation note 14; *Carballo Piñeiro* p. 286; *Temming*, in: Nomos Kommentar BGB Art. 9 Rom II-VO note 68; *Christian Heinze*, in: jurisPK BGB Art. 9 Rome II-VO note 10; *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 29. *Contra Morse*, in: Liber amicorum Fausto Pocar, vol. II (2009), p. 723, 731–733.

178 *Carballo Piñeiro* p. 286.

179 *Junker*, in: Münchener Kommentar BGB Art. 9 Rom II-VO note 11; *Siehr*, RabelsZ 74 (2010), 139 (151–152); *Illmer*, in *Peter Huber*, Art. 9 Rome II Regulation note 14; *Carballo Piñeiro* p. 287; *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 29.

180 *Knöfel*, EuZA 2008, 228 (240); *Vrellis*, in: Essays in honour of Michael Bogdan (2013), p. 659, 668; see already *Pataut*, Dr. soc. 2005, 303, 307.

181 *von Hein*, VersR 2007, 440 (442); *Knöfel*, EuZA 2008, 228 (242); *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 33; *Knöfel*, in: Nomos Kommentar BGB Art. 2 Rom II-VO note 3; *Christian Heinze*, RabelsZ 73 (2009), 770 (785); *Junker*, in: Münchener Kommentar BGB Art. 2 Rom II-VO note 8; *Bach*, in: Peter Huber, Art. 2 Art. 9 Rom II-VO notes 2, 5; *Zelfel* p. 65; *Unberath/Cziupka/Pabst*, in: Rauscher, Art. 2 Rom II-VO note 5.

182 *Knöfel*, EuZA 2008, 228 (236); *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 33.

regard to preventive claims only as a kind of to do agenda,[183] the very same result would still follow yet from Art. 2 (2).[184] The plural ('damages', Schäden, dommages, danni, daños, danos, skador etc.) used in all linguistic versions of Art. 9 is not indicating a restriction to monetary damages[185] for it would run counter to that inevitable result.[186]

3. Damages 'caused' by the industrial action

The wording of Art. 9 seemingly qualifies the damages envisaged by adding 'caused'. The word 'caused' appears to be the present perfect participle relating to the past. This could give rise to a misconception that only damages already caused should be covered to the exclusion of only future or threatened damages. Such future or threatened damages include: damage to an enterprise's commercial goodwill, reliability or reputation; cost for adapting organisational measures as a consequence of someone else threatening a strike; loss of orders.[187] Other linguistic versions could at first glance seduce to the same conclusion.[188] **60**

Yet to stop here would be one step less than required. It would disregard Art. 2 (2), (3) which form part of the overall feature. Art. 2 (2), (3) convincingly call for a comprehensive understanding of 'damages' including future or threatened damages.[189] Furthermore, applying Art. 9 to preventive claims[190] should by necessity be accompanied by compensation for future damages and measures taken to prevent them. **61**

VIII. Party autonomy (Art. 14)

If one is prepared to admit party autonomy in general,[191] an *ex ante* choice of law for industrial action is hardly conceivable on a number of counts. First, who should be the relevant parties? Second, for practical reasons neither trade unions nor employers or their associations will feel all too inclined to conclude a choice of law *ex ante*. The case might be theoretically different with regard to settlement agreements[192] and with collective labour agreements,[193] though. Third, Art. 14 (1) (b) requires *all* the parties concerned to pursue a *commercial* activity. This cannot be said of trade unions,[194] and it is at least dubitable with regard to employers' associations if not downrightly to employers in that specific role as employer.[195] Employees are certainly not **62**

183 *Junker*, in: Münchener Kommentar BGB Art. 9 Rom II-VO note 21.

184 *Zelfel* pp. 65–67.

185 As *Dickinson* para. 9.27 and *Morse*, in: Liber Fausto Pocar, vol. II (2009), p. 723, 729 surmise.

186 *Zelfel* p. 67.

187 *Knöfel*, EuZA 2008, 228 (242); *Zelfel* p. 64.

188 See *Knöfel*, EuZA 2008, 228 (242); *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 34.

189 *Knöfel*, EuZA 2008, 228 (242); *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 34; *Zelfel* p. 67; *Temming*, in: Nomos Kommentar BGB Art. 9 Rom II-VO note 50.

190 *Supra* Art. 9 notes 58–59 (*Mankowski*).

191 To the negative *supra* Art. 9 notes 28–29 (*Mankowski*).

192 *Däubler*, in: Däubler, ArbeitskampfR § 32 note 43; *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 45.

193 See *Michael Hellner* p. 194.

194 *Gerhard Wagner*, IPRax 2008, 1 (10); *Magnus*, in: FS Willibald Posch zum 65. Geb. (2011), p. 443, 459; *Junker*, in: Liber amicorum Klaus Schurig (2012), p. 81, 95; *Junker*, in: Münchener Kommentar zum BGB Art. 9 Rom II-VO note 35; *Christian Heinze*, RabelsZ 73 (2009), 770 (787); *Deinert*, ZESAR 2012, 311,

amongst qualifiers.[196] On the other hand, trade unions should in principle enjoy a bargaining power which puts them on roughly equal footing with employers' associations and – *a maoire ad minus* – with single employers.[197] However, its appears highly questionable to characterise any kind of industrial action as a *commercial* activity.[198]

63 *Ex post* choice of law under Art. 14 (1) (a) is a different matter.[199] Yet it still poses the question who shall be entitled to choose, i.e. who are the relevant parties to such an agreement? In the past at least some courts under national PIL have displayed a certain tendency towards implying a tacit choice of law from concurring conduct in court proceedings.[200] To imply a tacit choice of the law of the forum where all parties concerned argue the case on the ground of that *lex fori* (*stillschweigende Rechtswahl durch Prozessverhalten* or *processuele rechtskeuze* respectively) raises some general questions under Art. 14 (1) (a).[201] They are not diminished in the context of Art. 9.[202]

64 Any choice of law if admitted exacts effect only *inter partes* and not *erga omnes*, i.e. only as between the parties which conclude it, or between either of them and those who are represented by the other party. Representation might require power of agency, a topic for separately determining the law applicable to it under municipal conflicts rules which apply in analogy to Art. 1 (2) (g) Rome II Regulation.[203]

IX. Common habitual residence, Art. 4 (2)

65 Art. 9 is only applicable where the parties do not share a common habitual residence in the same state. If they have a common habitual residence in the same state, Art. 9 gives way to Art. 4 (2). Art. 9 cedes to the *lex communis habitatio* since it expressly declares to be without prejudice to Art. 4 (2). The parties need only have their respective habitual residences in the same state, not at the same place if only the places concerned are in the same state. Whenever Art. 4 (2) is triggered Art. 9 is not applicable.[204] Where the industrial action takes place could then only become a factor under the escape clause of Art. 4 (3) if one is prepared to let invade Art. 4 (3) in the wake of Art. 4 (2)[205].

66 Ascertaining either party's habitual residence has to follow Art. 23 (as far as it goes).[206] For

312; *Deinert*, § 16 note 14; *Carballo Piñeiro* p. 293; *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 45; *Julie Jacobs* p. 100.

195 *Zelfel* pp. 113–114; *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 45.

196 *Michael Hellner* p. 194; *Carballo Piñeiro* p. 293.

197 *Temming*, in: Nomos Kommentar BGB Art. 9 Rom II-VO note 65.

198 *Palao Moreno*, YbPIL 9 (2007), 115, 121; *Magnus*, in: FS Willibald Posch zum 60. Geb. (2010), p. 443, 459.

199 *Michael Hellner* p. 194.

200 Pres. Rb. Amsterdam NJ 1981 Nr. 65 p. 162 with note *Jan C. Schultsz.*

201 Art. 14 notes 57–71 (*Mankowski*).

202 *Zelfel* p. 112; *Temming*, in: NK BGB Art. 9 Rom II-VO note 64; *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 47.

203 Art. 14 note 16 (*Mankowski*).

204 *Knöfel*, EuZA 2008, 228 (237); *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 48; *Jafferali*, RGAR 2008, 14399 no. 33.

205 On this systematic issue *infra* Art. 9 note 71 (*Mankowski*).

the purposes of Art. 23 (1) 2nd sentence in the present context, the employer's relevant place of business should be the one through which the employee gets his directives.[207] Art. 23 (2) does not apply to employees. A supplemental rule concerning the habitual residence of a natural person not acting in the course of its business should be added mentally. An employee's habitual residence must not be automatically equated to the place where he habitually carries out his work. Its stands only such chance if the employee is also living there at least part-time.[208]

67 The rationale underlying Art. 4 (2) is that compensatory mechanisms might be eased if a law common to both parties can be applied *post eventum*. Moreover, paying compensation and administrating the case will regularly involve insurer on either side of the claim. The parties will in all likelihood be insured by insurers resident in the same country as the parties are. Thus Art. 4 (2) will lead to the insurers dealing with each other within the same legal framework. The paradigm case for Art. 4 (2) is the traffic accident between two inhabitants of the same state abroad. Many of these characteristic elements are absent in the event of an industrial action.[209] Trade unions will only rarely, if ever, enjoy insurance cover, nor will employees. In industrial actions the preventive element is far more important if not dominant for practical purposes[210] than in the ordinary case of Art. 4 (2). At this level insurers do not feature prominently. Legitimate expections of the parties will rarely if ever lead to the common habitual residence in the rather collectively organised field of industrial action.[211]

68 Art. 4 (2) is an alien element in the field of industrial action. Industrial actions regularly involve a number of concerned persons, possibly on both sides. A collective element is germane to industrial action whereas Art. 4 (2) relates to an individual element. Elements of the personal sphere of single combatants need to be neglected for the purposes of industrial action which evidences a specific clash of collective interests and operates in its own sphere.[212] Resorting to the common habitual residence appears somewhat fortuitous.[213] It is – insofar differing from Art. 4 – not even mitigated by an escape clause[214] even one is not prepared to introduce Art. 4 (3) on the back of Art. 4 (2).

69 So far this might be regarded as a matter of legal policy and thus to be authoritatively decided by the introduction of the first phrase in Art. 9. But practical problems abound consequentially, if not even inevitably. Art. 4 (2) applies if *all* parties have their respective habitual residences in the same state (or one must be prepared to split a unitary complex into fragments, bilateralising obligations[215]). The more parties are concerned, the more complicated this becomes. At the first tier, it is a necessary prerequisite to identify the parties

206 See only *Siehr*, RabelsZ 74 (2010), 139 (149).

207 *Julie Jacobs* p. 97.

208 *Deinert* § 16 note 13; *Knöfel*, in: OK BGB Art. 9 Rom II-VO note 48.

209 To the same avail *Temming*, in: Nomos Kommentar BGB Art. 9 Rom II-VO note 60.

210 *Supra* Art. 9 notes 58–59 (*Mankowski*).

211 To a similar avail *Dickinson* para. 9.32.

212 *Knöfel*, EuZA 2008, 228 (238); *Knöfel*, in: OK BGB Art. 9 Rom II-VO note 50.

213 *Morse*, in: Liber Fausto Pocar, vol. II (2009), p. 723, 726; *Julie Jacobs* p. 99.

214 *Julie Jacobs* p. 98.

215 Possibly to this avail *Julie Jacobs* p. 98.

concerned and thus relevant. Does every single employee or employer involved matter in this regard?[216] If so, Art. 4 (2) will barely ever become operative (and perhaps, the ensuing application of Art. 9 is not all that unwarranted for). Bearing in mind the number of parties concerned, possibly only in auxiliary or subsidiary roles, it will not be all too convincing to subject the liability of some combatants to a law which by some chance is the law of the state where the main combatants are habitually resident.[217] At least the restricting requirement that all parties concerned have to reside in the same state, avoids splitting parts of a case from each other into bilateral relationships.

70 However, Art. 4 (2) will only lead to results differing from Art. 9 where all relevant parties are habitually resident in the same state other than the state where industrial action is taken.[218] A strike onboard ship involving crew members from the Philippines on the one side and a ship operating company from Liberia or Panama as employer on the other side will not trigger Art. 4 (2).[219]

71 To apply Art. 4 (2) might make sense in the rare cases that the very same parties from the same country fight it out in a number of jurisdictions or that one party willfully attacks the other in a certain state although both are resident in another state (here Art. 4 (2) might serve to avoid strike law shopping[220]). Under these exceptional circumstances, a unitary applicable law could be reached *via* Art. 4 (2) regardless where the concrete activities were staged. *Verbatim* the reservation in Art. 9 is only in favour of Art. 4 (2). *Verbatim* it does not extend to Art. 4 (3) even insofar as Art. 4 (2) is subject to Art. 4 (3).[221] However, taking into account that the reservation in favour of Art. 4 (2) was introduced only lately in the Council's Common Position, such deeper systematic connotations might not have been properly considered. Hence, it appears appropriate to import Art. 4 (3) insofar as Art. 4 (2) and not Art. 9 as such is applicable. Insofar Art. 4 (2) might automatically carry its limitation by Art. 4 (3) with it, even without express reference in the reservation. This would also cure criticism that a corrective device for possible accidentalities and fortuities caused by an application of Art. 4 (2) is lacking.[222]

X. Place where the industrial action is, or has been, taken

1. Rationale

72 Art. 9 is a deliberate exception to Art. 4 (1). Art. 4 (1) establishes the *locus damni* as the dominant connecting factor. Quite to the contrary, Art. 9 sheds any relevance to the *locus damni* but instead crowns the place where the industrial action is, or has been, taken. In substance this place is a specific kind of *locus actus* or *Handlungsort*.[223] This

216 Tentatively so *Rödl*, in: Calliess, Art. 9 Rome II Regulation note 24; *Julie Jacobs* p. 98.

217 *Knöfel*, EuZA 2008, 228 (238).

218 *Deinert* § 16 note 22; *Marongiu Bonaiuti* pp. 142–143; *Julie Jacobs* p. 97.

219 *Siehr*, RabelsZ 74 (2010), 139 (149); *Zelfel* p. 106.

220 *Zelfel* p. 106.

221 *Michael Hellner* p. 194.

222 For such criticism see *Dickinson* para. 9.32; *Palao Moreno*, YbPIL 9 (2017), 115, 122; *Morse*, in: Liber Fausto Pocar, vol. II (2009), p. 723, 726; *Zelfel* p. 107; *Spickhoff*, in: Bamberger/Herbert Roth, Art. 9 Rom II-VO note 3; *Palandt*, in: Thorn, Art. 9 Rom II-VO note 3.

excludes any recourse to be held to the *locus damni*. The entire *raison d'être* and purpose of Art. 9 can be boiled down to exactly this exclusion. The rule is to deny any effect to *DFDS Torline*[224] in the arena of PIL.[225] This calls for justification and explanation if one is not content with the political decision petrified simply by the existence of Art. 9, particularly so in the light of its legislative history.[226]

a) Harmony within the overall system of PIL?

To refer to conflictual harmony with the not unified national conflicts rules for the 'Arbeitskampfstatut'[227]is hardly convincing. Firstly, national conflicts rules governing the 'Arbeitskampfstatut' might decide for another connecting factor than the place where the industrial action is, or has been, staged. Secondly, Art. 9 is a European, unified conflicts rule. It is a novelty and innovation.[228] It should not draw its inner justification from not unified national rules.[229] **73**

b) Rights and interests of the parties

Art. 9 contributes to the protection of the fundamental rights created by insofar as Art. 9 in principle implies a guarantee that liability can arise only under the law of the place where the industrial is, or has been, taken and thus limits the conflictual risks of industrial actions.[230] It exerts a concentrating effect. Parties involved in the labour conflict can act more freely and have not to pay regard to possible consequences abroad under another law and in worst case scenarios under a number of differing *leges locorum damnorum*.[231] At least insofar Art. 9 is believed not only to correspond to the collective interests of workers, employers and their respective organisations, but also to government interests resulting from state policies on social and labour matters.[232] **74**

The *locus actus* guarantees previsibility for the prospective debtor to a greater degree than the *locus damni*.[233] The legal environment in which a certain activity is embedded becomes foreseeable and a more calculable factor.[234] **75**

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223 *Knöfel*, EuZA 2008, 228 (235); *Jafferali*, RGAR 2008, 14399 No. 33; *Basedow*, RabelsZ 74 (2010), 118 (132); *Zelfel* p. 84; *Tscherner*, Arbeitsbeziehungen und Europäische Grundfreiheiten (2012) p. 125; *Junker*, in: Liber Amicorum Klaus Schurig (2012), p. 81, 93; *Junker*, in: Münchener Kommentar zum BGB Art. 9 Rom II-VO note 2; *Julie Jacobs* p. 95.

224 *Danmarks Rederiforeniging, acting on behalf of DFDS Torline AS v. LO Landsorganisationen i Sverige, acting on behalf of SEKO Sjöfolk Facket for Service och Kommunikation* (Case C-18/02), [2004] ECR I-1417.

225 *Calvo Caravaca/Carrascosa González* p. 170; *Carballo Piñeiro* p. 288.

226 For the legislative history see *supra* Art. 9 notes 10–19 (*Mankowski*).

227 To this avail *Junker*, in: Liber Amicorum Klaus Schurig (2012), p. 81, 94; see also *Julie Jacobs* pp. 93–94.

228 *Supra* Art. 9 note 24 (*Mankowski*).

229 Compare in a similar vein *Julie Jacobs* pp. 75–76.

230 *Dorssemont/van Hoek*, ELLJ 2011, 48, 52.

231 *Joubert*, in: Corneloup/Joubert p. 55, 78–79; *von Hein*, RabelsZ 73 (2009), 461 (497); *Dorssemont/van Hoek*, ELLJ 2011, 48, 51; *Spickhoff*, in: Bamberger/Herbert Roth, Art. 9 Rom II-VO note 3; *Däubler*, in: Däubler, § 32 note 21.

232 *Carballo Piñeiro* p. 289.

c) Regulating behaviour not compensating

76 But the most important reason backing Art. 9 simply is: Regulating industrial action primarily is regulating behaviour not compensating.[235] Preventive and injunctory relief are dominant in practice[236] with damages serving only a secondary role. In PIL, regulating behaviour and putting emphasis on regulating behaviour by necessity results in a switch towards applying the *lex loci actus*.[237] To prevent certain local measures of industrial action effectively, this ought to be done locally.[238]

d) Market related approach?

77 To view Art. 9 – in some parallel to Art. 6 (1)[239] – as based on a market related approach[240] is at least an interesting approach. At first glance, Art. 9 relates to the single activities and is thus rather 'naturalistic'[241] or 'physical'.[242] But the wording is not as clear and unambiguous as it might appear: The object to be subjected to a certain law is the industrial action taken or to be taken. This does not necessarily relate to the single activities in isolation but can be read as putting them in their purposive context. On the other hand, the single activities must not be completely disregarded but must be regarded as the starting point. Any assumed market relation must be discernible in the single activities. Target market and actual place where activities are staged might not be identical with pressure on the other side being exerted by measures in a different country than that of the target market.[243]

78 Every market related approach stands and falls with its ability to develop a convincing functional circumscription of the market to which the activities shall relate. A possible approach could be to resort to the most basic definition of a market as the place where supply meets demand. Transposed into the realm of labour relations, supply and demand would relate to labour and labour conditions.[244] A truly inter- or transnational labour market for labour conditions does not exist,[245] not even in the maritime industry. Hence,

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233 *Gerhard Wagner*, IPRax 2006, 372 (386); *von Hein*, VersR 2007, 440 (450); *Zelfel* pp. 85, 89; *Tscherner*, Arbeitsbeziehungen und Europäische Grundfreiheiten (2012) p. 126.

234 *Zelfel* p. 85; *Deinert*, ZESAR 2012, 311, 312; *Deinert*, § 16 note 2; see also *Christian Heinze*, RabelsZ 73 (2009), 770 (781).

235 *Knöfel*, EuZA 2008, 228 (236); *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 10; *Junker*, in: Münchener Kommentar zum BGB Art. 9 Rom II-VO note 3; *Illmer*, in: Peter Huber, Art. 9 Rome II Regulation note 5; *Zelfel* p. 87; *Neumayr*, in: Koziol/Bydlinski/Bollenberger, ABGB Art. 9 Rom II-VO note 1; *Däubler*, in: Däubler, § 32 note 21; *Temming*, in: Nomos Kommentar BGB Art. 9 Rom II-VO note 24.

236 *Knöfel*, EuZA 2008, 228 (236); *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 10; *Zelfel* p. 88.

237 *Knöfel*, EuZA 2008, 228 (236); *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 10; *Zelfel* p. 87, both with reference to *Mankowski*, in: FS Andreas Heldrich (2005), p. 867, 883.

238 *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 10.

239 *Temming*, in: Nomos Kommentar BGB Art. 9 Rom II-VO note 27.

240 *Leible/Matthias Lehmann*, RIW 2007, 721 (731); *Temming*, in: Nomos Kommentar BGB Art. 9 Rom II-VO notes 20, 27; see also *Palao Moreno*, YbPIL 9 (2007), 115, 123. *Contra Knöfel*, EuZA 2008, 228 (235)-236; *Christian Heinze*, RabelsZ 73 (2009), 770 (781).

241 *Knöfel*, EuZA 2008, 228 (236); *Julie Jacobs* p. 94.

242 *Temming*, in: Nomos Kommentar BGB Art. 9 Rom II-VO note 53.

243 See *Julie Jacobs* p. 94.

244 *Temming*, in: Nomos Kommentar BGB Art. 9 Rom II-VO note 20; see also, albeit in a different context, *Mankowski*, IPRax 1999, 332 (336).

national labour markets come to the fore.[246] Globalisation and internationalisation have not made national labour markets vanish. On the contrary, competition between these markets and their regulating lawmakers is fierce. The existence of local or national markets for recruiting labour force is even a prerequisite for location competition.

Within a system of collective agreements, the relevant *locus* of the market could be said to be where the opponent's willingness is impacted.[247] In the event of prospective run-away industries strikes shall force them to stay where they are and not move abroad. Insofar the target 'market' would be the old location.[248] **79**

2. Favouring the attacker: strike law shopping, boycott law shopping, lock-out law shopping

Art. 9 favours the attacker. The party initiating the industrial action can choose where to attack and to hit. This opens potential for strike law shopping,[249] boycott law shopping[250] or lock-out shopping, as the case may be. But favouring the attacker is not by chance such. It is at the hard of Art. 9. It is the very reason why Art. 9 exists at all. The legislative history is telling and adamant in this regard. Hence it must be accepted as part of the deal.[251] **80**

Ordinarily, a trade union will be the party initiating an industrial action. It may well choose where to stage its activities. Some countries are more sympathetic to the trade unions' cause whereas others are strictly opposed. Yet countries which can afford giving some leeway to trade unions, regularly also feature effective judicial systems guaranteeing effective and fast judicial protection for the targets and victims of trade unions' activities. This keeps the balance and reduces the inherent risk of opportunistic behaviour on the trade unions' side, at least to a certain degree.[252] **81**

Art. 9 covers not only activities by trade unions like strikes, but also activities by employers or their associations, e.g. lock-outs; insofar the approach is neutral and not unilaterally favouring trade unions and employees.[253] It does not bear relevance whether such activities are reactive or proactive. Counter-attacks and preventive attacks (if one is permitted to use such allusions to military terminology and warfare) are equally covered. Insofar the deviation from the *locus damni* protects either side of the conflict against liability which would be excessive in their eyes.[254] Hence, Art. 9 is also a (small) triumph of successful lobbying – by both sides of the 'market' concerned.[255] **82**

245 *Knöfel*, EuZA 2008, 228 (236); see also *Rolf Birk*, in: FS Koresuke Yamauchi zum 60. Geb. (2006), p. 31, 34; *Rolf Birk*, in: FS Tuğrul Ansay (2006), p. 15.

246 *Temming*, in: Nomos Kommentar BGB Art. 9 Rom II-VO note 20.

247 *Knöfel*, EuZA 2008, 228 (236); *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 11.1; *Julie Jacobs* p. 94.

248 Compare *Knöfel*, EuZA 2008, 228 (236); *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 11.1.

249 See only *Knöfel*, EuZA 2008, 228 (246); *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 59; *Zelfel* p. 89; *Unberath*/*Cziupka*/*Pabst*, in: Rauscher, Art. 9 Rom II-VO note 18.

250 Term borrowed from *Magnus*, in: Willibald FS Posch zum 65. Geb. (2011), p. 443, 459.

251 *Deinert* § 16 note 16; *Deinert*, ZESAR 2012, 311, 313; see also *Zelfel* p. 89.

252 *Knöfel*, EuZA 2008, 228 (246); *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 59; *Däubler*, in: Däubler, § 32 note 32.

253 *Marongiu Bonaiuti* p. 142.

3. Construction in general

83 The place where the industrial action is to be, or has been, taken refers to the place where such action is, or has been, implemented, i.e. where the interests of the parties to the industrial dispute collide.[256] This is not automatically to be equated with the places where the persons involved in the industrial action displayed activities, but is believed to exclude activities of a merely preparatory nature.[257] In particular, the places where the industrial action was planned, coordinated or approved are believed to be irrelevant.[258] Insofar Art. 9 deviates from the general concept of resorting to a *lex loci actus* which – if judged correctly – should include so called preparatory acts and in particular the planning.[259] For the purposes of Art. 9, solely the execution matters, neither the planning nor even the coordination. Otherwise it would be threatened to apply a multiplicity of laws.[260]

84 In the outset, the place where the industrial action is, or has been, taken is 'naturalistic'. In principle this place describes the place where activities are physically executed and emanate into the external world.[261] Examples abound:[262] where cargo is not uploaded; where cargo is not discharged and unloaded; where a vessel is blocked; where machinery or plants are made disfunctional; where services are not rendered; where access is denied; where pickets are posted.

85 Where (in the truly 'local' sense) a call for strike or for boycott is issued should gain relevance insofar as one characterises such calls as measures covered by the notion of 'industrial action'.[263]Differences between the wording of Art. 9 and the wording of Recital (27) 2nd sentence which can be detected in some linguistic versions[264] do not justify any diverging result.[265] If one is prepared to follow a market related approach a call for strike or boycott could possibly be judged according to the law of the eventual target market,[266] insofar breaking through the principle of separability.

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254 *Evju*, RIW 2007, 898; *von Hein*, 82 Tulane L. Rev. 1663, 1701 (2008); *Mankowski* p. 74.

255 *von Hein*, 82 Tulane L. Rev. 1663, 1701 (2008); *Mankowski* p. 74.

256 *Dickinson* para. 9.31; *Illmer*, in: Peter Huber Art. 9 Rome II Regulation note 29.

257 *Illmer*, in: Peter Huber Art. 9 Rome II Regulation note 29.

258 *Knöfel*, EuZA 2008, 228 (244); *Knöfel*, in: OGK BGB Art. 9 Rome II-VO note 52; *Dickinson* para. 9.31; *Illmer*, in: Peter Huber Art. 9 Rome II Regulation note 29; *Zelfel* p. 81; *Spickhoff*, in: Bamberger/Herbert Roth, Art. 9 Rom II-VO note 3; *Däubler*, in: Däubler, § 32 note 30; *Deinert* § 16 note 15; *Michael Hellner* p. 195; *Temming*, in: Nomos Kommentar BGB Art. 9 Rom II-VO note 53; *Julie Jacobs* p. 96; *Christian Heinze*, in: jurisPK BGB Art. 9 Rom II-VO note 8.

259 *Mankowski*, in: Magnus/Mankowski, Art. 7 Brussels I*bis* Regulation notes 268–270; *Mankowski*, in: FS Reinhold Geimer zum 80. Geb. (2017), p. 419, 439–441.

260 *Zelfel* p. 81.

261 *Knöfel*, EuZA 2008, 228 (244); *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 52; *Winkler von Mohrenfels/Block*, EAS B 3000 note 206 (2010); *Zelfel* p. 80.

262 *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 52; see also *Zelfel* pp. 80–81.

263 Compare *Hergenröder*, GPR 2005, 33 (35); *Tscherner*, Arbeitsbeziehungen und Europäische Grundfreiheiten (2012) p. 127; *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 52.

264 As listed by *Julie Jacobs* p. 95.

265 *Knöfel*, EuZA 2008, 228 (244); *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 52.

266 *Temming*, in: Nomos Kommentar BGB Art. 9 Rom II-VO note 40.

The *locus laboris* does not become a relevant concept in this context.[267] Firstly, it is intrinsically tied to an individual employee carrying out his individual work. Secondly, evidently relevant activities (for instance boycotts) can unfold everywhere else than at a certain and fixed workplace.[268] **86**

Where the *locus laboris* fails any *locus non laboris* (i.e. any place where work should have been carried out but actually was not)[269] cannot succeed. Another time this would be a connecting factor related to an individual employee's obligations. **87**

The same objection inhabilitates any recourse to the *lex causae* of a single employment agreement.[270] Moreover, any accessory connection is ruled out by Art. 9 not featuring an escape clause.[271] **88**

4. 'Virtual industrial action'

In the event of 'virtual industrial action' it does not appear justified to deviate from Art. 9 in favour of applying the law of the place where the attacked server is located.[272] The place where the mail bombing etc. was initiated might not be the easiest place to identify and might suffer from a certain degree of manipulability.[273] But this problem is inherent in Art. 9 unless one declares mere preparatory measures and even the making of the decision which gets carried out afterwards, irrelevant.[274] Plus Art. 9 does not feature an escape clause and is thus willingly accepting a certain degree of inflexibility. Furthermore, the said approach is free-wheeling and lacks an anchor in the system surrounding Art. 9.[275] **89**

5. Principle of separability?

a) General discussion

The predominant view has it that each separable part of the industrial action has to be judged separately.[276] It establishes a principle of separability. It negates an open grouping **90**

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267 Imprecise *Ludewig* p. 195.

268 *Junker*, in: Münchener Kommentar zum BGB Art. 9 Rom II-VO note 27; *Zelfel* pp. 82–83; *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 51.

269 As advocated for by *van Schellen*, Aspecten van internationaal stakingsrecht (1983) pp. 13 *et seq.*

270 *Evju*, RIW 2007, 898 (903); *Hergenröder*, in: Dorssemont/Jaspers/van Hoek p. 307, 317–318; *Zelfel* p. 83.

271 *Zelfel* p. 83.

272 *Pfeiffer/Matthias Weller/Nordmeier*, in: Spindler/Fabian Schuster, Recht der elektronischen Medien (3rd ed. 2015) Art. 9 Rom II-VO note 2; see also *Christian Heinze*, in: jurisPK BGB Art. 9 Rome II-VO note 5.

273 *Pfeiffer/Matthias Weller/Nordmeier*, in: Spindler/Fabian Schuster, Recht der elektronischen Medien (3rd ed. 2015) Art. 9 Rom II-VO note 2.

274 As to the general approach see *supra* Art. 9 note 83 (*Mankowski*).

275 *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 55.

276 *Knöfel*, EuZA 2008, 228 (237); *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 53; *Palao Moreno*, YbPIL 9 (2007), 115, 125; *Junker*, in: Münchener Kommentar zum BGB Art. 9 Rom II-VO note 29; *von Hein*, RabelsZ 73 (2009), 461 (499); *Christian Heinze*, RabelsZ 73 (2009), 770 (786); *Zelfel* pp. 98–99; *Spickhoff*, in: Bamberger/Herbert Roth, Art. 9 Rom II-VO note 3; *Däubler*, in: Däubler, § 32 note 31; *Tscherner*, Arbeitsbeziehungen und Europäische Grundfreiheiten (2012) pp. 126–127; *Maeßen*, Auswirkungen der

and weighing of contacts which could possibly result in a certain place of industrial action outweighing all others.[277]

91 The alternative approach to the contrary endorses a search for a (relative) center of gravity and thus for applying a single law in the event that activities are staged in different countries.[278] The fundamental problem of this approach is its burning need to establish reliable yardsticks for measuring the relative weight of the single places where activities are staged. If this cannot be solved legal certainty is undermined.[279] Any quantitative analysis looking for instance at the numbers of workers involved, the amounts of damage caused or the durations of activities is said to be at odds with the structure of modern-day industrial actions which hit hard and fast.[280]

b) Solidarity strikes and sympathy strikes

92 Regardless whether one endorses a principle of separability, differentiating treatment should prevail with regard to solidarity strikes and sympathy strikes. These are separate objects and do thus not follow the law applicable to the main strike in any accessory manner.[281] They demand a separate and independent application of Art. 9.[282] This leads to the place where the solidarity or sympathy strike is, or has been, staged.[283]

93 The next step might involve answering the intricate question as to the legality and lawfulness of the main industrial action. The law applicable to the solidarity or sympathy strike might ask this question as an incidental question.[284] Following the so called *selbständige Vorfragenanknüpfung*[285] incidental questions have to be answered *via* the same conflicts rules to which they would be subjected if they were 'main' questions.[286] Systematic harmony within

EuGH-Rechtsprechung auf das deutsche Arbeitskampfrecht unter besonderer Berücksichtigung der Entscheidungen in den Rechtssachen Viking und Laval (2010) p. 16; *Vrellis*, in: Essays in honour of Michael Bogdan (2013), p. 659, 671–672; *Temming*, in: Nomos Kommentar BGB Art. 9 Rom II-VO note 58; *Hohloch*, in: Erman, Art. 9 Rom II-VO note 6; *Thorn*, in: Palandt, Art. 9 Rom II-VO note 3.

277 *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 53.

278 *Leible*/*Matthias Lehmann*, RIW 2007, 721 (731); *Dörner*, in: Handkommentar zum BGB Art. 9 Rom II-VO note 3.

279 *Knöfel*, EuZA 2008, 228 (237); *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 54; *Zelfel* p. 98; *Julie Jacobs* p. 96; see also *Temming*, in: Nomos Kommentar BGB Art. 9 Rom II-VO note 58.

280 *Knöfel*, EuZA 2008, 228 (237); *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 54; to the same avail already Geffken NJW 1979, 1739 (1744).

281 *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 42 (with reference to *Drobnig*/*Puttfarken*, Arbeitskampf auf Schiffen fremder Flagge [1989] pp. 27–28); *Däubler*, in: Däubler, § 32 note 52; *Julie Jacobs* p. 89.

282 *Temming*, in: Nomos Kommentar BGB Art. 9 Rom II-VO note 38; *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 42.

283 *Knöfel*, EuZA 2008, 228 (241); *Christian Heinze*, RabelsZ 73 (2009), 770 (787); *Junker*, in: Münchener Kommentar zum BGB Art. 9 Rom II-VO note 37; *Temming*, in: Nomos Kommentar BGB Art. 9 Rom II-VO note 38.

284 *Knöfel*, EuZA 2008, 228 (242); *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 42; *Temming*, in: Nomos Kommentar BGB Art. 9 Rom II-VO note 38.

285 On its admissibility and preferability under European PIL comprehensively *Bernitt*, Die Anknüpfung von Vorfragen im Europäischen Kollisionsrecht (2010) pp. 207 *et seq*.; *Solomon*, in: FS Ulrich Spellenberg (2010), p. 355, 366 *et seq*.

the PIL demands so.[287] At the next level, the alternative is whether one resorts to applying Art. 9 again, yet with a different object, namely the main action,[288] or reverts to the not unified municipal conflicts rules for determining the 'Arbeitskampfstatut' in general as opposed to the 'Arbeitskampfdeliktsstatut'.[289]Reading Art. 9 literally, the incidental question operates outside the realm of the liability of certain debtors, the limited issue with which Art. 9 is concerned.[290]

XI. Seamen's strike as the most important phenomenon

Seamen's strikes have always been the most prominent examples for cross-border industrial action. The majority of prominent cross-border conflicts of the past arose in the shipping and maritime industry.[291] In fact, seaman's strikes are the paradigm and the ground from which Art. 9 proceeded.[292] *DFDS Torline*[293], the trigger case for the Swedish initiative,[294] stemmed from the Scandinavian maritime industry, and the Latvian and Estonian opposition circled around the interests of their seafaring labour force.[295] **94**

Given that background it appears remarkable that Art. 9 does not contain a sub-rule, an own paragraph specifically addressing seamen's strikes. This is the more remarkable since until 2015[296] other European secondary legislation in the field of labour law and labour relations attributed a special role and special to seamen.[297] But traditionally PIL has shaped its rules in a more abstract and general manner, thus lagging a little behind the needs of international transport work and generating unnecessary difficulties of interpretation in this field. **95**

1. Industrial action onboard a ship on the High Seas

The law of the flag in principle governs industrial action onboard a ship whilst this ship is on the High Seas.[298] This is due to deference to international law and for the lack of a better alternative. Ships might have ceased to be regarded as floating territory, *territoire flottant*, of **96**

286 *Rolf Birk*, RabelsZ 46 (1982), 384 (406); *Rolf Birk*, RdA 1984, 129 (137); *Löwisch/Hergenröder*, AR-Blattei SD 170.8 note 65 (1997).

287 In the present context *Temming*, in: Nomos Kommentar BGB Art. 9 Rom II-VO note 39.

288 Favouring this *Temming*, in: Nomos Kommentar BGB Art. 9 Rom II-VO note 39.

289 Favouring this *Knöfel*, EuZA 2008, 228 (242); *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 42.

290 Similar, yet differentiating *Zelfel* p. 133–134.

291 *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 25.

292 See only *Siehr*, RabelsZ 74 (2010), 139 (148)-151; *Mankowski* p. 74.

293 *Danmarks Rederiforeniging, acting on behalf of DFDS Torline AS v. LO Landsorganisationen i Sverige, acting on behalf of SEKO Sjöfolk Facket for Service och Kommunikation* (Case C-18/02), [2004] ECR I-1417.

294 *Supra* Art. 9 note 24 (*Mankowski*).

295 *Supra* Art. 9 note 14 (*Mankowski*).

296 Directive (EU) 2015/1794 of the European Parliament and of the Council of 6 October 2015 und des Rates amending Directives 2008/94/EC, 2009/38/EC and 2002/14/EC of the European Parliament and of the Council, and Council Directives 98/59/EC and 2001/23/EC, as regards seafarers, OJ EU 2015 L 263/1 marks the landslide change.

297 *Dorssemont/van Hoek*, ELLJ 2011, 48, 57; *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 56.

298 *Brière*, Clunet 135 (2008), 31, 49; *van Hoek*, NIPR 2008, 449, 453; *Christian Heinze*, RabelsZ 73 (2009), 770 (786); *Zelfel* p. 96.

their respective flag states.[299] Certainly, Art. 18 (b) Proposal Rome II contained a rule regarding a ship as territory of its flag state and did not reappear in the Amended Proposal[300].

97 But this is not all-decisive and conclusive[301] since flag sovereignty still is one of the three recognised modes of sovereignty under international law besides territorial sovereignty and personal sovereignty.[302] Arts. 91; 92 (1) UNCLOS are unambiguous and unequivocal in this regard.

98 Flag sovereignty might not localise in the strict and technical sense, but it at least allocates and attributes the ship to a certain state. This should suffice for the purposes of international procedural law[303] and PIL.[304] In general principle, European PIL rightly follows international law insofar as this allocates places to certain states.[305] To decide otherwise for seamen's strikes would have to place much too much emphasis on the words "of the country where" in Art. 9, in particular the word "where".[306] These generic words do not carry that much emphasis. In fact, the ECJ in DFDS localised the *locus damni* necessarily in the flag state if the damage arose onboard the ship concerned.[307] This should cast the die in the event of a mere onboard strike on the High Seas.[308]

99 Furthermore, the flag enjoys the advantage of being clearly visible and recognisable. Flag sovereignty bundles the environment ship and ties it to the flag state. The environment ship

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299 See only *Mankowski*, Seerechtliche Vertragsverhältnisse im Internationalen Privatrecht (1995) pp. 472–473; *Chaumette*, RCDIP 95 (2006), 275, 283 *et seq*.; *Block* pp. 224–245.

300 COM (2006) 83 final.

301 *Zelfel* p. 94. *Contra Knöfel*, EuZA 2008, 228 (245); *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 57.1.

302 See only *Dieter Dörr*, Die deutsche Handelsflotte und das Grundgesetz (1988) p. 55; *Mankowski*, RabelsZ 53 (1989), 487 (500–501); *Mankowski*, Seerechtliche Vertragsverhältnisse im Internationalen Privatrecht (1995) p. 477; *Wolfrum*, BerDGesVR 31 (1990), 121, 126; *Núñez-Müller*, Die Staatszugehörigkeit von Handelsschiffen im Völkerrecht (1994) pp. 86–87; *von Gadow-Stephani*, Der Zugang zu Nothäfen und sonstigen Notliegeplätzen für Schiffe in Seenot (2006) p. 16; *Haijiang Yang*, Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea (2006) p. 26; *Block* p. 246.

303 BAGE 132, 182 (193); *Mankowski*, AP issue 1/2011 Art. 18 EuGVVO Nr. 1 Bl. 6R, 7; *Mankowski*, in: Rauscher, Art. 20 Brüssel Ia-VO note 26.

304 *Mankowski*, RabelsZ 53 (1989), 487 (502); *Mankowski*, Seerechtliche Vertragsverhältnisse im Internationalen Privatrecht (1995) p. 482; *Block* pp. 259–262.

305 *Herbert Weber v. Universal Ogden Services Ltd.* (Case C-37/00), [2002] ECR I-2013 paras. 31–36; *Roelvink*, in: Bundel opstellen aangeboden aan A.V.M. Struycken (1996), p. 273, 282; *Mankowski*, IPRax 2003, 21 (21–22); *Mankowski*, IPRax 2005, 58 (60); *Mankowski*, in: Rauscher, Art. 20 Brüssel Ia-VO note 26; *Mankowski*, in: Magnus/Mankowski, Art. 7 Brussels I*bis* Regulation note 271; *Huet*, Clunet 130 (2003), 661, 663; *Junker*, in: FS 50 Jahre BAG (2004), p. 1193, 1204; *Junker*, in: FS Andreas Heldrich (2005), p. 719, 730; *de Boer*, Ned. Jur. 2005 Nr. 337 p. 2611, 2612; *Requejo Isidro*, REDI 2005–1, 414, 417; *Egler*, Seerechtliche Streitigkeiten unter der EuGVVO (2010) pp. 165–168; *Block* p. 288.

306 As *Temming*, in: Nomos Kommentar BGB Art. 9 Rom II-VO note 54 does.

307 *Danmarks Rederiforeniging, acting on behalf of DFDS Torline AS v. LO Landsorganisationen i Sverige, acting on behalf of SEKO Sjöfolk Facket for Service och Kommunikation* (Case C-18/02), [2004] ECR I-1417 para. 44.

308 *Winkler von Mohrenfels*/*Block*, EAS B 3000 note 207 (2010).

defines a confined space within which an onboard industrial action takes place. There could not be more concentration and more demarcation to the outer world.

To regard the recourse to the flag as the localising factor only as a rebuttable presumption[309] would have to answer the intricate question under which circumstances a rebuttal should take place. Methodologically, this is particularly intricate in the light of Art. 9 lacking an escape clause. **100**

2. Industrial action onboard a ship in a port

If e.g. a strike or a lock-out are staged in a harbour or within territorial waters international law gives a differentiating answer. It depends on whether there are external effects outside the ship or not. The internal issues of the ship and its operation are in principle left to the flag state.[310] The internal issues comprise in particular labour struggles and industrial actions.[311] This applies even to ships in ports and harbours.[312] As far as the port side stays tranquil and the action is exclusively confined to the ship as such state practice leaves regulating such internal matters of the ship to the flag state.[313] **101**

Weighing the port state's territorial sovereignty against the flag state's flag sovereignty thus in practice results in the port state having primary jurisdiction but not exercising it until the internal issues of the ship do not remain internal but cause effects to the port environment. The flag state has principal jurisdiction, according to Art. 94 (1) UNCLOS[314] in particular for social matters.[315] A division of responsibilities between the flag state and the port states also emerges from Regulations 5.1 and 5.2 ILO Maritime Labour Convention 2006. Recital (9) Council Directive 2009/13/EC[316] refers to the underlying Agreement between the ECSA and the ETF applying to seafarers onboard ships registered in a Member State or flying the flag of a Member State. **102**

309 To this avail *Basedow*, RabelsZ 74 (2010), 118 (133).

310 See only *Colombos*, International Law of the Sea (6rd ed. 1967) p. 326 § 350; *Lagoni*, ArchVR 26 (1988), 261, 337; *Dahm*/*Delbrück*/*Wolfrum*, Völkerrecht I/1 (2rd ed. 1989) p. 411; *Mankowski*, Seerechtliche Vertragsverhältnisse im internationalen Privatrecht (1995) p. 477; *Churchill*/*Lowe*, Law of the Sea (3rd ed. 1999) pp. 65–68.

311 See only *von Gadow-Stephani*, Der Zugang zu Nothäfen und sonstigen Notliegeplätzen für Schiffe in Seenot (2006) p. 204; *Lagoni*, Anwendbarkeit von Arbeitsschutzvorschriften und Zuständigkeiten der Arbeitsschutzbehörden auf Seeschiffen unter fremder Flagge (2009) pp. 30–32.

312 See only *Churchill*/*Lowe*, Law of the Sea (3rd ed. 1999) pp. 65–66.

313 See only *Sohn*/*Gustafson*, The Law of the Sea in a Nutshell (1984) p. 86; *Churchill*/*Lowe*, Law of the Sea (3rd ed. 1999) pp. 65–66, 84. More critical *Marten*, Port State Jurisdiction and the Regulation of International Merchant Shipping (2014) pp. 28–31.

314 Disregarded by *Temming*, in: Nomos Kommentar BGB Art. 9 Rom II-VO note 55.

315 See only *Marten*, Port State Jurisdiction and the Regulation of International Merchant Shipping (2014) pp. 14–15.

316 Council Directive 2009/13/EC of 16 February 2009 implementing the Agreement concluded by the European Community Shipowners' Association and the European Transport Workers' Federation (ETF) on the Maritime Labour Law Convention, 2006, and amending Directive 1999/63/EC, OJ EU 2009 L 124/30.

3. Industrial action onboard a ship in territorial waters or in an Exclusive Economic Zone

103 *A maiore ad minus* the relevance of the flag is even augmented if an industrial action is taken while the ship is only travelling a coastal state's Exclusive Economic Zone (EEZ) since a coastal state's interests are lesser in the EEZ than they would be in a port or in territorial waters.[317] In the EEZ there are competing jurisdictional claims and not a potentially exclusive jurisdiction of the coastal state at the outset.[318] There might have been some degree of erosion of the flag over times;[319] but this has not resulted in any general permission to disregard flag sovereignty completely. This does not contradict the general attribution of the EEZ to the coastal state for the purposes of tort law[320] since this attribution relates only to 'external' torts.

3. Alternative approach: attempt at geographical localisation in the strict sense

104 The prevailing opinion does not care for such differentiation imposed by international law and denies relevance of the flag[321] (but for onboard strikes on the High Seas[322]). In principle, it pleads for applying the law of the place where the ship can be geographically localised at the time of the industrial action.[323]

105 This would make maritime industrial conflict generate a potential *conflit mobile*. Figuratively speaking, a ship would become a moving target (although the real aim is at the ship's owner or operator and those backing it). Trade unions might very well act opportunistically and await ships to enter ports in such countries whose law favours the trade unions' or the employees' cause, in order to hit exactly there. Applying the law of the flag in principle would destroy much potential for opportunistic behaviour although it could not completely relief of the burden to identify the precise position of a ship at a given time.[324] The law of the flag guarantees continuity as far as possible. It would in principle also solve the case that in-

317 Comprehensively *Haijiang Yang*, Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea (2006).

318 Arts. 217; 218; 220 UNCLOS; *Hasselmann*, Die Freiheit der Handelsschifffahrt (1987) p. 360; *Lagoni*, AVR 26 (1988), 261, 335; *Haijiang Yang*, Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea (2006) p. 84; *Marten*, Port State Jurisdiction and the Regulation of International Merchant Shipping (2014) p. 19.

319 *Carbone*, RdC 340 (2009), 63, 167.

320 See *Mankowski*, in: Magnus/Mankowski, Art. 7 Brussels I*bis* Regulation note 272.

321 *Knöfel*, EuZA 2008, 228 (245); *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 57; *Deinert* § 16 note 16; *Temming*, in: Nomos Kommentar BGB Art. 9 Rom II-VO notes 54 *et seq*. *Contra Ludewig* pp. 208–209.

322 *Knöfel*, EuZA 2008, 228 (245); *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 57; *Christian Heinze*, RabelsZ 73 (2009), 770 (786); *Spickhoff*, in: Bamberger/Herbert Roth, Art. 9 Rom II-VO note 3; *Winkler von Mohrenfels/Block*, EAS B 3000 note 207 (2010); *Magnus*, in: FS Willibald Posch zum 65. Geb. (2011), p. 443, 459. *Contra* insofar *Deinert* § 16 note 16 who negates any continuing relevance of the flag.

323 *Knöfel*, EuZA 2008, 228 (245); *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 58 – with reference to LAG Niedersachsen IPRspr. 2004 Nr. 47a p. 111; ArbG Hamburg IPRax 1987, 29; *Rolf Birk*, Die Rechtmäßigkeit des Streiks auf ausländischen Schiffen in deutschen Häfen (1983) pp. 35 *et seq*. – and *Winkler von Mohrenfels/Block*, EAS B 3000 note 207 (2010).

324 Which burden is admitted as a negative consequence of the alternative approach by *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 58.

dustrial action commenced above the EEZ, continued in territorial waters and culminated at a berth in a port.

5. Support activities or sympathy strikes in port states

The history of maritime industrial action has often seen supporting activities and sympathy strikes at land in port states, sometimes organised by local trade unions of local workers. Such industrial action might imply boycotts or blockades by lock personnel, stowaways, terminal personnel, personnel of the port authorities, pilots, truck drivers etc.[325] These are certainly not onboard the ship and are certainly not internal social matters of the ship. The ship is not an enclave in the foreign port anymore.[326] That turns the tide: The place where such industrial action at land is staged matters for the purposes of Art. 9 idf externals intervene.[327] Art. 28 Charter of Fundamental Freedoms supports this result.[328] **106**

To recognize this is very important for practical purposes since it reverses the result into its opposite. Trade unions gain the joker of strike law shopping and enjoy privileges granted by the local law of the respective port whereas the ship owner or ship operator cannot escape this by choosing a flag appropriate for his purposes. He might try to avoid certain laws by not calling at the respective States' ports.[329] But he must be prepared to lose lucrative trips in that range in turn. **107**

XII. Other special cases

1. Industrial action onboard oil rigs and drilling platforms

Industrial action onboard a stationary oil rig, drilling platform or other fixed installation above a certain state's EEZ or continental shelf should rather not be regulated by that state's law pursuant to Art. 9 based on Art. 92 (1) UNCLOS providing for the guideline,[330] but by the law of the state where that rig is registered or whose flag it is flying. Like with ships, Art. 94 (1) UNCLOS and the current practice of coastal states trump Art. 92 (1) UNCLOS. **108**

A maiore ad minus industrial action onboard an oil drilling rig on the High seas outside territorial waters or the EEZ of any state should be subjected to the law of the state where that rig is registered or whose flag it is flying.[331] **109**

2. Industrial action in Antarctica

In the unlikely event that industrial action is staged in Antarctica outside the territory of any state, Art. 9 should lead to applying the law of the state who under principles of international **110**

325 *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 60.

326 *Zelfel* p. 95.

327 *Zelfel* pp. 91, 95; *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 60; *Temming*, in: Nomos Kommentar BGB Art. 9 Rom II-VO note 54.

328 *Temming*, in: Nomos Kommentar BGB Art. 9 Rom II-VO note 54.

329 See *Zelfel* p. 89.

330 To the opposite avail *Block* p. 386.

331 *Block* p. 427.

exercises sovereignty (in another kind than territorial sovereignty) over the research or other facility in which the industrial action is locally taken.[332] Insofar Art. IX (2) Antarctica Convention provides the guideline from the quarters of international law.[333]

3. Civil servants' strike

111 The applicability of Art. 9 with regard to civil servants' strikes or other industrial action within a certain state's civil service depends upon the status and capacity of the employees involved. Insofar as they exercise *imperium* for their employing state, Art. 1 (1) 2nd sentence *in fine* applies and renders the entire Rome II Regulation, including its Art. 9, inapplicable. The yardsticks for drawing the line should be the same as under Art. 45 (4) TFEU and under Art. 1 (1) 2nd sentence Brussels I*bis* Regulation.[334] Insofar as Art. 1 (1) 2nd sentence invades domestic conflict rules apply. In the result, however, it is hardly conceivable that any other law than the state inside whose civil service the relevant industrial action takes place, would be applicable.

112 Another dimension, but again outside Art. 9, might be added by liability of the state towards third parties for the non functioning of its civil service due to industrial action.[335] This liability is governed by the law governing the relationship between the state and the third party,[336] in non contractual matters to be determined by national conflicts rules.[337] Even if one is prepared to include third parties as possible creditors under Art. 9 and the area concerned is one of *acta iure gestionis* (and not of *acta iure imperii* in the sense of Art. 1 (1) 2nd sentence), Art. 9 will not be applicable where the state is hit by a strike within its civil service. This would be different, though, if the third party raised claims against the striking civil servants or the organising union; but then this would not be a case of state liability.

113 A civil servant's personal liability towards a third party for striking against his employer, the state, is another issue.[338] Art. 9 is only applicable if one is prepared to disregard that the civil servant might be exercising *imperium* for the state against the third party if he pursued his duties (sub specie Art. 1 (1) 2nd sentence) and if one sets out to apply Art. 9 to the liability towards third party creditors at all.[339]

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332 *Block* p. 427.

333 In detail *Block* pp. 413–422.

334 See there *Mankowski*, in: Rauscher, Art. 20 Brüssel Ia-VO notes 34–35.

335 *Knöfel*, EuZA 2008, 228 (240); *Knöfel*, in: OGK BGB Art. 9 Rom II-VO note 35; *Däubler*, in: Däubler, § 32 note 20.

336 See in detail *Knöfel*, in: OGK BGB Art. 9 Rom II-VO notes 35–36.

337 *Temming*, in: Nomos Kommentar BGB Art. 9 Rom II-VO note 79.

338 *Vrellis*, in: Essays in honour of Michael Bogdan (2013), p. 659, 666.

339 See Art. 9 notes 50–56 (*Mankowski*).

Chapter III: **Unjust Enrichment, Negotiorum Gestio and Culpa in Contrahendo**

Article 10: Unjust enrichment

1. If a non-contractual obligation arising out of unjust enrichment, including payment of amounts wrongly received, concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict, that is closely connected with that unjust enrichment, it shall be governed by the law that governs that relationship.
2. Where the law applicable cannot be determined on the basis of paragraph 1 and the parties have their habitual residence in the same country when the event giving rise to unjust enrichment occurs, the law of that country shall apply.
3. Where the law applicable cannot be determined on the basis of paragraphs 1 or 2, it shall be the law of the country in which the unjust enrichment took place.
4. Where it is clear from all the circumstances of the case that the non-contractual obligation arising out of unjust enrichment is manifestly more closely connected with a country other than that indicated in paragraphs 1, 2 and 3, the law of that other country shall apply.

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Verhagen, Ongerechtvaardigde verrijking en sachwarneming in Rome II, WPNR 6780 (2008), 1003.

I. Legislative history

1 Art. 10 caters for the determination of the law applicable to unjust enrichment. The underlying legislative history shows some progress mowing forward from its very beginnings when Art. 9 Proposal Rome II provided for a single, rather undifferentiated rule aiming at dealing with the law applicable to non-contractual obligations arising out of an act other than tort or delict. This met with a mixed reception by different Member States, or rather criticism from various quarters,[1] mainly depending on the state of play in the respective Member State's own substantive law on unjust enrichment or *negotiorum gestio*, the United Kingdom in particular being rather sceptical in general,[2] insofar joined by Finland,[3] Ireland,[4] Belgium[5] and the Netherlands[6] whereas Cyprus pleaded for a differentiation between the different topics envisaged.[7] Germany criticised the condensed and barely understandable fashion of Art. 9 Rome II Proposal[8] (insofar joined by Italy[9]) and set out for a re-draft of her own.[10] France[11] and Estonia[12] were the most adamant supporters of including legislation on other non-contractual obligations. Sweden even submitted an own, full-fledge proposal detailing a separate conflicts rule for unjust enrichment.[13] In the background the German

1 *Michael Hellner* p. 200.
2 Council Doc. 9099/04 ADD 15 p. 7 para. 16 (United Kingdom); HL Paper 66 (2004), 41.
3 Council Doc. 9009/04 ADD 5 p. 3 (Finland).
4 Council Doc. 9009/04 ADD 13 p. 5 (Ireland).
5 Council Doc. 9009/04 ADD 4 p. 3 (Belgium).
6 Council Doc. 9009/04 ADD 16 p. 4 (Netherlands).
7 Council Doc. 9009/04 ADD 6 p. 3 (Cyprus).
8 Council Doc. 9009/04 ADD 11 p. 11 (Germany).
9 Council Doc. 9009/04 ADD 17 p. 4 (Italy).
10 Council Doc. 9009/04 ADD 11 p. 12 (Germany).
11 Council Doc. 9009/04 ADD 12 p. 5 (France).
12 Council Doc. 9009/04 ADD 7 p. 3 (Estonia).

Art. 38 EGBGB – introduced as recently as 1999 – might have served as some kind of inspiration (although its content was severely reversed in the following legislative process and does not reappear as such in Art. 10).

The negotiations led to the necessary differentiation.[14] The finally successful breakthrough in favour of devoting an own rule to unjust enrichment can be credited to the European Parliament.[15] The initial reluctance of some Member State was eventually overcome, but the differences between Member States' domestic law and the resultant problems of characterisation were recognised.[16] The proposed unitary rule, necessarily rather generic and imprecise,[17] was split up by way of compromise and reduced to cover the specifically highlighted, but most important sub-categories of non-contractual obligations beyond torts.[18] **2**

Unjust enrichment as a topic addressed and regulated also appears for example in Artts. 128 Swiss Private International Law Act; 1223 Russian Civil Code; 39 Turkish Private International Law Act; 14 New Japanese Private International Law Act; 31 Korean Private International Act 2001; 47 Chinese Private International Law Act 2010.[19] **3**

Art. 10 has not gained all too much prominence in case law yet. In Germany, there is a single published court case[20] addressing it more or less *en passant*.[21] The same appears to apply to England; there is a single case published, too.[22] The Netherlands add three more.[23] A recurring feature consists of referring to Art. 10 aligned with Art. 11 in a single sentence.[24] Once Art. 10 (1) is even used as expression of a general approach towards exceptions to the *Abstraktionsprinzip* of German substantive law.[25] **4**

II. Unjust enrichment

Art. 10 does not define 'unjust enrichment' positively[26] nor does Recital (28) (but neither **5**

13 Council Doc. 9009/04 ADD 8 p. 15 Art. 9b (Sweden).

14 See Council Doc. 16231/04 p. 12.

15 Legislative Resolution of the European Parliament, P6_TA(2005)0284 p. 13 (Art. 9).

16 *Boglione*, Assicurazione 2009 I 571, 592; *Plender/Wilderspin* para. 24–007.

17 *Marongiu Bonaiuti* p. 145.

18 *Honorati*, in: Preite/Gazzanti Pugliese di Cotrone (a cura di), Atti notarili – Diritto comunitario e internazionale, vol. I (2011), p. 483, 547.

19 *Mankowski*, Unjust Enrichment, in: European Encyclopedia of Private International Law (2017), p. 1809 (at 1809).

20 LG Saarbrücken NJW-RR 2012, 885 (887).

21 *Wurmnest*, ZvglRWiss 115 (2016), 624, 626.

22 *Banque Cantonale de Genève v. Polevent Ltd.*, *Victor Azria*, *Enoi SpA* [2015] EWHC 1968 (Comm), [2016] 2 WLR 550 (Q.B.D., *Teare* J.).

23 Vzngr. Rb. Zwolle-Lelystad NIPR 2013 Nr. 150 p. 268; Rb. Rotterdam, kantonrechter NIPR 2014 Nr. 259 pp. 449–450; Rb. Noord-Holland NIPR 2016 Nr. 410 p. 814.

24 BGH JZ 2015, 46 (49) with note *Mankowski*; Rb. Oost-Brabant, zittingsplaats 's-Hertogenbosch NIPR 2016 Nr. 61 p. 125.

25 LG Krefeld ZIP 2014, 1940 = IPRspr. 2014 Nr. 287 p. 767 (noted by *Jessica Schmidt*, EWiR 2014, 659).

26 *Briggs* para. 8.145.

does Art. 4 define 'tort'). The underlying concept of unjust enrichment *must* be an autonomous European concept, not dependent on the understanding of unjust enrichment in any particular national legal order.[27] Any recourse for instance to the *lex fori*[28] would undermine uniformity. The concept employed must be wide enough to cope with all conceptions and notions prevailing in national legal orders. It must not succumb to any particular construction and understanding of unjust enrichment and must not become partisan to any systematic sub-division, for instance in *Leistungskondiktionen* and *Nichtleistungskondiktionen*.[29] Art. 10 deliberately avoids any technical terms in order to reflect the wide divergence between national systems.[30] Even the substantive laws of the Member States represent fairly different concepts and standards, and the overall picture widens considerably if one adds non-European legal orders to the blend.[31] Thus an autonomous, non-technical concept broad enough to cover as much ground as possible is needed.[32]

6 The core characteristic is to reverse transfers of assets which transfers do not carry sufficient ground to be upheld.[33] Technical restrictions as to the nature of the enrichment or the ground for restitution would be unwelcome.[34] Even restitutionary trusts are included; they are not subject to the exclusion clause of Art. 1 (2) (e) since they are not based on any voluntary act.[35]

7 The Roman law of *condictiones* might not be assumed as common enough ground. *Condictio indebiti*, *condictio ob causam finitam*, *condictio causa data non secuta (vel ob rem)* and *condictio ob turpem vel iniustam causam* might serve an indicative purpose, though. (1) ventures to declare "payment of amounts wrongly received" to be included in the concept of unjust enrichment anyway. The English wording of the illustration has been castigated for its clumsiness, and in deed "paiement indu" or "Zahlungen auf eine nicht bestehende Schuld" is clearer; eventually all the same point towards *condictiones indebiti*.[36] This can be called the archetype of unjust enrichment.[37] This single express illustration must not be

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27 See only *Heiss*/*Loacker*, JBl 2007, 613, 641; *de Lima Pinheiro*, RDIPP 2008, 5, 28; *Rushworth*/*Andrew Scott*, [2008] LMCLQ 274, 285; *Chong*, (2008) 57 ICLQ 863, 864–872; *Pitel*, in: Ahren/Binchy p. 231, 238; *Sendmeyer*, IPRax 2010, 500 (502); *Tim Behrens* p. 60; *Matthias Lehmann*/*Duczek*, JuS 2012, 788 at 788; *Michael Hellner* p. 201; *Junker*, in: Münchener Kommentar zum BGB Art. 10 note 11; *Limbach*, in: Nomos Kommentar BGB Art. 10 Rom II-VO note 4; *Picht*, in: Rauscher, Art. 10 Rom II-VO note 1; *Moura Vicente*, Cuad. Der. Trans. 8 (2) (2016), 292, 300; *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 8; *Backmann*, in: jurisPK BGB Art. 10 Rom II-VO note 5.

28 As advocated for by *Brière*, Clunet 135 (2008), 31, 50.

29 *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 9.

30 Commission Proposal COM (2003) 427 final p. 21.

31 For comparative overviews see *Schlechtriem*, Restitution und Bereicherungsausgleich in Europa, Bd. I (2000), Bd. II (2001); *Reinhard Zimmermann* (Hrsg.), Grundstrukturen eines Europäischen Bereicherungsrechts (2005); *Visser*, in: Matthias Reimann/Reinhard Zimmermann (eds.), Oxford Handbook of Comparative Law (2006), p. 971; International Encyclopedia of Comparative Law, vol. X: Unjust enrichment and negotiorum gestio (2007); *von Bar*/*Swann*, Unjustified Enrichment (2010).

32 *Dickinson* para. 10.10.

33 *Martiny*, in: Reithmann/Martiny, Internationales Vertragsrecht (8th ed. 2015) para. 4.17; *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 3.

34 *Dickinson* para. 10.19.

35 *Verhagen*, WPNR 6780 (2008), 1003, 1004.

36 *Dickinson* para. 10.15; *Michael Hellner* p. 202.

mistaken as comprehensive and limitative.[38] Yet it should be taken as expression of the ambition to cover all kinds of unjust enrichment or restitution regardless of their denomination and construction under any domestic law.[39]

The mere use of the expression "unjust enrichment" in the wording of Art. 10 does not preclude "restitution" from being also covered. Given the verbal co-existence of "tort" and "delict" in Arts. 2; 4; (1), it might have been commendable to opt for a similar reduplication in terminology in (1), though, expressly adding "restitution". Yet the European legislator appears to have refrained from using 'restitution' for that more technical term might have prompted unwarranted allusions to a specific understanding under English law.[40] Howsoever, even proprietary restitution should be included.[41] **8**

To-date, the circumscription of unjust enrichment in Arts. VII–1:101; VII–3:101; VII–3:102 DCFR[42] might give a helping hand[43] although the DCFR has only persuasive authority. At first glance, a further hindrance might be believed to arise since the DCFR as such did not exist at the time when the Rome II Regulation was promulgated. But the preceding Principles of European Unified Enrichment Law had been published already at the beginning of 2006,[44] hence clearly available in the final stages of the drafting process leading to the Rome II Regulation. Their fundamental Article stated that an unjust enrichment is an enrichment which is not legally justified, with the result that, if it is obtained by one person and is attributable to another's disadvantage, the first person may, subject to legal rules and restrictions, be obliged to that other to reverse the enrichment. Art. VII–1:101 DCFR is simpler: "A person who obtains an unjustified enrichment which is attributable to another's disadvantage is obliged to that other to reverse the enrichment." Art. VII–3:101 DCFR supplements by defining enrichment as an increase in assets or a decrease in liabilities, receiving a service or having work done, or use of another's assets. Art. VII–3:102 DCFR supplements by defining disadvantage as a decrease in assets or an increase in liabilities, rendering a service or doing work, or using one's assets. **9**

Drawing a borderline to torts, torts might be said to focus on the claimant's loss whereas unjust enrichment centres on the defendant's gain.[45] Unjust enrichment aims at restituting, **10**

37 *Schinkels*, in: Calliess Art. 10 Rome II note 5.

38 *Rushworth/Andrew Scott*, [2008] LMCLQ 274, 285–286; *Briggs* para. 8.145.

39 *Honorati*, in: Preite/Gazzanti Pugliese di Cotrone (a cura di), Atti notarili – Diritto comunitario e internazionale, vol. I (2011), p. 483, 548.

40 *Mankowski*, Unjust Enrichment, in: European Encyclopedia of Private International Law (2017), p. 1809 (at 1809).

41 See *Chong*, (2008) 57 ICLQ 863, 865; *Michael Hellner* p. 205. Sceptical with regard to restitution in rem *Verhagen*, WPNR 6780 (2008), 1003, 1004.

42 On this part of the DCFR e.g. *Tobias Ott*, Das Bereicherungsrecht im Draft Common Frame of Reference (DCFR) aus deutscher Sicht (2013).

43 *Dickinson* para. 10.19; *Plender/Wilderspin* para. 24–027; see also *Schinkels*, in: Calliess Art. 10 Rome II Regulation note 5.

44 Principles of European Unified Enrichment Law of 27 February 2006, ERA-Forum 2006, 198; on these *von Bar/Swann/Wendehorst*, ERA-Forum 2006, 204, 220 and 244; see also *von Bar/Swann*, in: FS Egon Lorenz zum 70. Geb. (2004), p. 43; *Swann*, in: Reinhard Zimmermann (Hrsg.), Grundstrukturen eines Europäischen Bereicherungsrechts (2005), p. 265.

torts (and *culpa in contrahendo*) at compensating. Art. 10 does not require the claimant to suffer a disadvantage to any measure corresponding to the defendant's gain.[46] This helps for instance in characterising claims for compensation in the event that a non-owner has disposed over an asset in favour of a third party where such disposal is valid as against the real owner (see e.g. § 816 (1) 1st sentence BGB).[47]

11 Insofar as a criterion is utilised as to whose expense the defendant's gain has been made, this is to identify the person of the creditor but does not form a classificatory feature of the concept of unjust enrichment.[48] Wherever in a concrete case tort and unjust enrichment happen to concur, the tort might take the lead in determining the applicable law by virtue of (1).

12 To exclude restitution for wrongdoing and even *Eingriffskondiktion* from Art. 10[49] would go one step too far and would secretly introduce an element of the debtor being not responsible for his gain, in the concept of unjust enrichment; such an element cannot be found for instance in the modern understanding of *Eingriffskondiktionen* anymore which relates not to *Rechtswidrigkeit* but to *Zuweisungsgehalt*, i.e. that the legal order allocates the asset at stake to the creditor.[50]

13 However, Art. 10 and (1) in particular are deceptive insofar as they convey the impression that they would provide for a comprehensive treatment of all instances of unjust enrichment. For systematic reasons, this is not the case, though. Rather on the contrary, the perhaps most important case is *not* covered by Art. 10: Restitution following performance of an invalid contracts falls outside the scope of Art. 10 for it is governed by the Rome I Regulation. Art. 12 (1) (e) Rome I Regulations unambiguously and unequivocally claims these instances to be contractual and draws them into the contractual realm. Fortunately, this does not amount to a difference in substance since even he who mistakenly employs (1) to solve such cases, would eventually arrive at the same law which provides for the *lex causae* of the contract to regulate the ensuing restitutionary issues, too.

14 Other cut-outs from Art. 10 should be mentioned, too:[51] Firstly, Art. 13 calls for Art. 8 to be applied to all non-contractual obligations arising from infringement of intellectual property rights. Secondly, Art. 1 (2) (e), (g) might gain some relevance. Thirdly, restitution under tax or revenue law, administrative law or any other part of the law involving public bodies in exercise of their peculiar public powers and duties are excluded by virtue of Art. 1 (1). On the other hand, it is irrelevant for the purposes of Art. 10 whether the debtor is a minor.[52]

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45 See only *Tim Behrens* pp. 64 *et seq.*; *Schinkels*, in: Calliess Art. 10 Rome II Regulation note 2; *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 13; *Thorn*, in: Palandt Art. 10 Rom II-VO note 2.

46 *Rushworth/Andrew Scott*, [2008] LMCLQ 274, 286; *Dickinson* para. 10.19; *Finkelmeier* p. 266.

47 *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 15.

48 *Schinkels*, in: Calliess Art. 10 Rome II Regulation note 13; see also *Dickinson* para. 10.19 and possibly *de Lima Pinheiro*, RDIPP 2008, 5, 28. Imprecisely *Rushworth/Andrew Scott*, [2008] LMCLQ 274, 285.

49 As in particular *Dickinson* para. 4.13 does.

50 *Finkelmeier* p. 289; *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 12.

51 *Plender/Wilderspin* paras. 24–009, 24–011 to 24–021; *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 17.

52 *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 18.

III. Choice of law under Art. 14

The first and primary step - possibly also the last step in a concrete case - in determining the law applicable in case of unjust enrichment is to look for a choice of law by the parties which accords with Art. 14.[53] In practice, such choice of law would be conceivable for instance in a case where a party involuntarily paid more than is due under a contract which contains a choice of law clause with a wide and all-embracing wording like "all claims arising out of or in connection with this contract".[54] That a separate and isolated choice of law specifically for claims in unjust enrichment should be made[55] is not necessary if only the choice of the law clause in the contract is sufficiently wide.[56] **15**

Another possible instance could be a contracting party infringing the other party's intellectual property whilst the contract contains such a widely worded choice of law clause. But if one is prepared to extend Art. 8 as *lex specialis* to claims in unjust enrichment as Art. 13 does,[57] the parties' choice of law would not be compatible with Art. 8 (3). **16**

The borderline between an *ex* ante and an *ex post* choice of law, the latter being subjected to the more demanding requirements of Art. 14 (1) (b), is marked by the event giving rise to the unjust enrichment,[58] not by the unjust enrichment taking place.[59] Whether the debtor in unjust enrichment is himself disenriched later-on, is irrelevant by any means. **17**

IV. Accessory connection, (1)

1. General remarks

Pursuant to (1), if a non-contractual obligation arising out of unjust enrichment, including payment of amounts wrongly received, concerns a relationship existing between the parties, that is closely connected with that unjust enrichment, that unjust enrichment shall be governed by the law that governs that relationship. In short: If a governing relationship exists (1) establishes an accessory connection to the *lex causae* of that relationship. (1) can be viewed as a specific expression of the principle of proximity.[60] The underlying rationale is expediency, in that it is deemed preferable for the entire legal situation to be governed by the same law.[61] It avoids inenviable situations similar to a **18**

53 See only *Marongiu Bonaiuti* p. 146.

54 Practical example: Rb. Noord-Nederland, zittingsplaats Groningen NIPR 2015 Nr. 431 p. 769.

55 *Contra* Cassaz. Banca brosa tit. cred. 1990 II 1, 7–8 (commented upon by *von der Seipen*, IPRax 1991, 66).

56 *Briggs*, [2003] LMCLQ 389, 392; *Briggs*, Agreements on Jurisdiction and Choice of Law (2008) para. 10.63; *Kadner Graziano*, RabelsZ 73 (2009), 1 (8); *Kadner Graziano*, in: Ahern/Binchy p. 113, 121–122; *Tim Behrens* pp. 147–148.

57 *Moura Vicente*, Cuad. Der. Trans. 8 (2) (2016), 292, 302.

58 *Gerhard Wagner*, IPRax 2008, 1 (14); *Rugullis*, IPRax 2008, 319 (321); *Dickinson* para. 13.34; *Junker*, in: Münchener Kommentar zum BGB Art. 14 Rom II-VO note 19; *Vogeler*, Die freie Rechtswahl im Kollisionsrecht der außervertraglichen Schuldverhältnisse (2013) p. 243.

59 But cf. *Leible*, in: FS Erik Jayme (2004), p. 485, 494.

60 *Calvo Caravaca/Carrascosa Gonzalez* p. 147.

61 See only Commission Proposal COM (2003) 427 final p. 21; *Mankowski*, Unjust Enrichment, in: European Encyclopedia of Private International Law (2017), p. 1809, 1811.

dépeçage.[62] Art. 10 in principle aims at subjecting the reversal to the same law as the transfer to be reversed.[63] Which law is applicable to that governing relationship is an *Erstfrage* to be answered according to the conflicts rules which apply to that governing relationship.

19 According to its position within the system, its clear ambition and the equally clear wording of (2) and (3), (1) is the primary rule for determining the law objectively applicable to a claim in unjust enrichment.[64] Art. 10 establishes a cascade, and any lower tier can only be reached where a solution cannot be found on any higher tier.[65] This clear hierarchy is very welcome in the interest of legal certainty.[66] By establishing such a cascade with a flexible exception - in (4) - entails a clear legislative decision against any proper law approach which would refrain from nominating specific factors for building specific rules.[67]

20 Putting an accessory connection on the top tier is an elegant means of achieving harmony between the laws applicable to the governing relationship and to its reversal. This elegantly solves any classificatory difficulties how to separate one from the other[68] and avoids any possibly ensuing needs for material adjustment.[69] The corrective mode is subject to the same law as the process which led to the result to be corrected.[70] In particular to accept torts as possibly governing relationships might avoid quite some questions.[71]

21 Nature and source of the governing relationship are generally irrelevant for the purposes of (1) which is all-embracing in this regard.[72] It suffices that all parties assume and perceive the relationship to exist without it actually existing.[73] The governing relationship need not be

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62 *Marongiu Bonaiuti* p. 146.

63 *Leible/Matthias Lehmann*, RIW 2007, 721 (732); *Spickhoff*, in: Bamberger/Roth Art. 10 Rom II-VO note 1; *Schinkels*, in: Calliess, Art. 10 Rome II Regulation note 4; *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 3.

64 See only *Tubeuf*, TBH 2008, 535, 544; *Honorati*, in: Preite/Gazzanti Pugliese di Cotrone (a cura di), Atti notarili – Diritto comunitario e internazionale, vol. I (2011), p. 483, 551; *Plender/Wilderspin* para. 24–092; *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 5.

65 See only *Gerhard Wagner*, IPRax 2008, 1 (10); *Tubeuf*, TBH 2008, 535, 543; *Jessica Schmidt*, Jura 2011, 117, 126; *Michael Hellner* p. 207.

66 *Gerhard Wagner*, IPRax 2008, 1 (11).

67 *Pitel*, NIPR 2008, 456, 462.

68 *Heiss/Loacker*, JBl 2007, 613, 641; *Légier*, in: Corneloup/Joubert p. 145, 148; *Pontier*, MedNedVIR 136 (2008), 61, 108; *Honorati*, in: Preite/Gazzanti Pugliese di Cotrone (a cura di), Atti notarili – Diritto comunitario e internazionale, vol. I (2011), p. 483, 552; *Porcheron*, La règle d'accessoire et les conflits de lois en droit international privé (2012) p. 202 para. 349; *Michael Hellner* p. 207.

69 *Garcimartín Alférez*, EuLF 2007, I-77, I-88.

70 *Légier*, JCP G 2007 I.207 no. 81; *Légier*, in: Corneloup/Joubert p. 145, 154–155; *Tubeuf*, TBH 2008, 535, 545; *Porcheron*, La règle d'accessoire et les conflits de lois en droit international privé (2012) p. 203 para. 349.

71 See *Michael Hellner* pp. 203–204.

72 *Légier*, in: Corneloup/Joubert p. 145, 158.

73 *Leible/Matthias Lehmann*, RIW 2007, 721 (732); *Schacherreiter*, in: Beig/Graf-Schimek/Grubinger/Schacherreiter p. 69, 71; *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 23; *Backmann*, in: jurisPK BGB Art. 10 Rom II-VO note 14; *Fehrenbacher*, in: Prütting/Wegen/Weinreich Art. 10 Rom II-VO note 3.

valid, but can be invalid[74] since otherwise there could hardly be any *unjustified* enrichment but in the rare cases of overperformance (i.e. performance of more than what has been due). Plus it leads to *conditiones indebiti* and *condictiones ob causam finitam* getting the same treatment.[75]

Negotiorum gestio can be a leading relationship.[76] The same should apply to co-ownership[77] or constellations where a *rei vindicatio* persists.[78] Pre-contractual dealings might suffice;[79] the mere existence of Art. 12 does not denigrate that. Even social organisms might in principle qualify as governing relationships,[80] e.g. travel groups or companies (in an untechnical sense) akin to families.[81] Yet the basic requirement is that the relationship has an own law applicable to it; this disqualifies merely factual relationships which cannot be made subject to any conflicts rule.[82] Another criterion could be as to whether the relationship generates claims and obligations.[83] **22**

An important restriction appears to be that in principle the governing relationship must be between the parties, i.e. the parties of the claim in unjust enrichment.[84] Both governing and governed relation must be in principle between the same parties. Otherwise, a conflict with the adage *res inter alios acta aliis non nocet* would be threatened.[85] However, in multi-party relationships this could be overly formalistic and could in turn prompt the escape clause in (4) to become some kind of rule. The wording caters only for the ordinary case of identifiable and separable relationships between two parties, but does not address the specific needs of multi-party constellations. Hence, it should be handled with caution and not overly rigidly in such constellations.[86] **23**

Finally, a close connection must exist between the relationship potentially governing and the unjust enrichment. Under the auspices of PIL the case must be a unified one.[87] The governing relationship should be the starting point for the process eventually leading to the unjust enrichment.[88] This is for instance not satisfied where a claim has been assigned to either party after the unjust enrichment had occurred. **24**

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74 Commission Proposal COM (2003) 427 final p. 24; *Légier*, in: Corneloup/Joubert p. 145, 161–162; *Trüten*, Die Entwicklung des Internationalen Privatrechts in der Europäischen Union (2015) p. 557.

75 See *Trüten*, Die Entwicklung des Internationalen Privatrechts in der Europäischen Union (2015) p. 557.

76 *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 24.

77 See *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 11; *Thorn*, in: Palandt, Art. 11 Rom II-VO note 5.

78 *Backmann*, in: juris PK BGB Art. 10 Rom II-VO note 20.

79 Commission Proposal Com (2003) 427 final p. 24.

80 *Légier*, in: Corneloup/Joubert p. 145, 158.

81 *Picht*, in: Rauscher Art. 10 Rom II-VO note 23 fn. 77.

82 *Légier*, in: Corneloup/Joubert p. 145, 160.

83 *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 21; see also *Junker*, JZ 2008, 169 (175)-176; *Picht*, in: Rauscher, Art. 10 Rom II-VO note 23.

84 *Verhagen*, WPNR 6780 (2008), 1003, 1006; *Ansgar Staudinger*/*Czaplinski*, JA 2008, 401 (407); *Chong*, (2008) 57 ICLQ 863, 877–878; *Tim Behrens* p. 81; *Michael Hellner* p. 204; *Junker*, in: Münchener Kommentar zum BGB Art. 10 Rom II-VO note 15; *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 20.

85 *Tim Behrens* p. 81.

86 *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 42.

87 *Tim Behrens* p. 82.

88 *Petch*, (2006) 2 JIBLR 509, 513; *Rushworth*/*Andrew Scott*, [2008] LMCLQ 274, 304; *Chong*, (2008) 57

2. *Condictio indebiti* following an invalid contract: contractual characterisation by virtue of Art. 12 (1) (e) Rome I Regulation

25 A fundamental issue needs to be clarified at once: (1) does not apply to the seemingly most important case of a governing relationship, namely restitution following exchange of performances under a contract which turns out to be invalid. This case is governed not by (1), but by Art. 12 (1) (e) Rome I Regulation. Art. 12 (1) (e) Rome I Regulation draws this case into the contractual realm and subjects it to the PIL rules of the Rome I Regulation since it comprehensively embraces all consequences of nullity (read: invalidity) of a contract.[89] Whether the precedence of the Rome I to the Rome II Regulation in this regard can be described as an instance of *lex specialis derogat legi generali*[90] does not need to be decided.[91] In any event the scope of the Rome II Regulation in its entirety - which is, mind, restricted to *non* contractual obligations – not fulfilled for it requires a negative answer to the precedent question about a contractual characterisation. Differentiating what in a concrete case comes under Art. 12 (1) (e) Rome I Regulation and what under (1), might not be the easiest task,[92] yet it is clearly demanded by methodology and structure that Art. 12 (1) (e) Rome I Regulation must be the starting point.

26 Unfortunately, (1) is prone to give rise to misunderstandings and misgivings for the unwary and even the occasional non-expert since it does not cover the very case one would believe it to be designed for. The European legislator should have implemented a direct and express reference to the Rome I regime with regard to claims stemming from invalid contracts. Such a reference would not do (1) any harm. The only feasible explanation why it is missing is the sequence in time: The Rome II Regulation was promulgated before the Rome I Regulation came into existence. However, Art. 10 (1) (e) Rome Convention said the same what now Art. 12 (1) (e) Rome I Regulation is saying (but for the reservations made by the United Kingdom and others under Art. 22 Rome Convention). The only consolating feature is that the possible misgivings generally lead to the same result which would be reached on the correct way.[93]

27 That Rome I and not Rome II applies to the *condictio indebiti* generated by the invalidity of a contract has a noteworthy consequence: A choice of law is permitted to a wider extent than under Art. 14 since Art. 14 is equally inapplicable as is Art. 10. Instead Art. 3 Rome I Regulation is applicable, directly and without any detour via an accessory connection. If the contract at stake is a consumer contract or an employment agreement the parties' choice of law is subject to the more favourable law principle as enshrined in Art. 6 (2) 2nd sentence and Art. 8 (1) 2nd sentence Rome I Regulation respectively, though. Likewise, limitation to

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ICLQ 863, 878; *Schacherreiter*, in: Beig/Graf-Schimek/Grubinger/Schacherreiter p. 69, 73; *Tim Behrens* p. 83.

89 Siehe nur *Gerfried Fischer*, in: FS Ulrich Spellenberg (2010), p. 151, 155; MK BGB/*Spellenberg*, Art. 12 Rom I-VO note 169; *Staudinger*/*Magnus*, Art. 12 Rom I-VO note 76 mwN sowie OLG München 2 June 2016 – Case 23 U 2594/15 para. 42.

90 To this avail *Moura Vicente*, Cuad. Der. Trans. 8 (2) (2016), 292, 301.

91 *Gerfried Fischer*, in: FS Ulrich Spellenberg (2010), p. 151, 155.

92 *Crawford*/*Carruthers*, (2014) 63 ICLQ 1, 14.

93 See *Jessica Schmidt*, Jura 2011, 117, 126.

parties' choice of law implemented by Art. 5 (2) subpara. 2 and Art. 7 (3) Rome I Regulation respectively for passenger or insurance contracts must be respected, too.[94]

3. Accessory connection in the vicinity of contractual relationships

Art. 12 (1) (e) Rome I Regulation is limited to consequences of the nullity of a contract. This implies that it does not apply to claims for the return of overperformance of a really existing contract which is not null and void.[95] Insofar (1) steps in.[96] (1) is equally applicable to the reversal of invalid unilateral promises which do not constitute contracts in the sense of Art. 1 (1) Rome I Regulation,[97] of performances in advance of an expected future contract and of performances which pursue purposes beyond a given contract (i.e. cases of *condictiones causa data non secuta* or *condictiones ob rem*).[98] Restitution reversing overpayments of existing contractual claims also operates in the contractual realm.[99] **28**

4. Accessory connection in the vicinity of family relations

The accessory connection under (1) can have some relevance in the vicinity of family relationships (in the wider sense). Which law is applicable to a family relation at stake is to be answered according to the conflict rules for that family relationship. This is an incidental question excluded from the Rome II Regulation by virtue of Art. 1 II lit. b Rome II Regulation.[100] **29**

Restitution might be conceivable in particular where the creditor has payed a maintenance obligation which in reality did not exist, or paid more than was actually due on an existing maintenance obligation. The consequence is an accessory connection to the law applicable to the maintenance obligation[101] (if one is not prepared to subject such restitution directly to the Hague Maintenance Protocol and the law applicable to the maintenance obligation[102]). Overpaying after a divorce might be another example.[103] Insofar as breach of an engagement is honoured by giving the innocent fiancé a restitutionary claim this would be another example.[104] **30**

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94 *Mankowski*, Unjust Enrichment, in: European Encyclopedia of Private International Law (2017), p. 1809, 1810.

95 *Peter Huber*/*Bach*, in: Peter Huber, Art. 10 Rome II Regulation note 21 fn. 21.

96 Vzngr. Rb. Zwolle-Lelystad NIPR 2013 Nr. 150 p. 268; Rb. Rotterdam, kantonrechter NIPR 2014 Nr. 259 pp. 449–450.

97 *Gerfried Fischer*, in: FS Ulrich Spellenberg (2010), p. 151, 156.

98 *Gerfried Fischer*, in: FS Ulrich Spellenberg (2010), p. 151, 156; HK BGB/*Dörner*, Art. 10 Rom II-VO note 5.

99 OLG München 2 June 2016 – 23 U 2594/15 para. 42.

100 *Hohloch*, IPRax 2012, 110 (116); see also *Gerfried Fischer*, in: FS Ulrich Spellenberg (2010), p. 151, 156.

101 *Backmann*, in: jurisPK BGB Art. 10 Rom II-VO note 21.

102 *Mankowski*, in: Staudinger, BGB, HUP (2016) Art. 1 HUP note 24 (2016).

103 *Calvo Caravaca*/*Carrascosa Gonzalez* p. 148.

104 See *Michael Hellner* p. 206.

A possible candidate is also the restitution of a *mahr*.[105] Art. 1 (2) excludes such matters from the scope of the application of the Rome II Regulation even insofar as they pose solely incidental questions[106] and consequentially the law applicable to them is to be determined by virtue of the conflicts rules covering them.

5. Accessory connection and tort as governing relationship

31 (1) expressly mention tort or delict as possible governing relationships. Yet one could hardly imagine a tort in the context of a *condictio in debiti* but for restitution of damages paid in excess.[107] But the case is quite different in the event that bodily injuries or financial lasses are at stake.[108] In this regard tort and unjust enrichment can co-exist and concur. Unjust enrichment and tort look at the same factual setting form different angles: The tort looks at the victim's loss, unjust enrichment looks at the wrongdoer's gain.

32 Differing from Art. 4 (3) 2nd sentence, the wording of (1) does not require that the governing relationship must have necessarily predated, and pre-existed prior to, the claim in unjust enrichment. That is a strong argument.[109] But initially (and even in 2006[110]) the wording of both rules ran along parallel lines ("relationship previously exiting", "relation préexistante", "relación preexitente"),[111] and it is not discernible that (1) eventually dropped the requirement on purpose.[112] On the other hand it would be extremely sensible to submit all possibly concurring claims, in particular those of a non-contractual nature, to effectively the same law; this militates in favour of deeming simultaneity sufficient.[113] Moreover, to proceed down this avenue would conveniently deliberate of the difficult task to identify precisely which relationship was first in time.[114]

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105 See OLG Hamm IPRax 2012, 257; *Looschelders*, IPRax 2012, 238.

106 *Hohloch*, IPRax 2012, 110 (116); see also *Picht*, in: Rauscher, Art. 10 Rom II-VO notes 26–27. But cf. Commission Proposal COM (2003) 427 final p. 9; *Carella*, in: Malatesta p. 73, 78–79; *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 25.

107 *Backmann*, in: jurisPK BGB Art. 10 Rom II-VO note 19.

108 Examples: LG Saarbrücken, NJW-RR 2012, 885 (887) concerning a traffic accident and *Banque Cantonale de Genève v. Polevent Ltd.*, *Victor Azria*, *Enoi SpA* [2015] EWHC 1968 (Comm), [2016] 2 WLR 550 (Q.B.D., *Teare* J.) concerning a case of deceit.

109 *Banque Cantonale de Genève v. Polevent Ltd.*, *Victor Azria*, *Enoi SpA* [2015] EWHC 1968 (Comm) [17], [2016] 2 WLR 550 (Q.B.D., *Teare* J.); *Gerhard Wagner*, IPRax 2008, 1 (11); *Schacherreiter*, in: Beig/Graf-Schimek/Grubinger/Schacherreiter p. 69, 73; *Fawcett/Carruthers*, in: Cheshire/North/Fawcett, p. 827; *Junker*, in: Münchener Kommentar zum BGB Art. 10 Rom II-VO note 18; *Schinkels*, in: Calliess, Art. 10 Rome II Regulation note 38; *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 27; *Martiny*, in: Reithmann/Martiny, Internationales Vertragsrecht (8th ed. 2015) para. 4.21; *Picht*, in: Rauscher, Art. 10 Rom II-VO note 29; *Thorn*, in: Palandt, Art. 10 Rom II-VO notes 7–8.

110 Revised Commission Proposal COM (2006) 83 pp. 15, 17.

111 See Council Doc. 16231/04, p. 11.

112 *Tim Behrens* p. 79; *Peter Huber/Bach*, in: Peter Huber, Art. 10 Rome II Regulation note 20; *Picht*, in: Rauscher, Art. 10 Rom II-VO note 29 fn. 89; *Fehrenbacher*, in: Prütting/Wegen/Weinreich, Art. 10 Rom II-VO note 5.

113 *Moura Vicente*, Cuad. Der. Trans. 8 (2) (2016), 292, 303; *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 27; see also *Backmann*, in: jurisPK BGB Art. 10 Rom II-VO note 13.

114 *Michael Hellner* p. 209.

The consequential question as to whether a mere intended, thus future relationship could suffice, puts more strains on answering.[115] The Commission initially expected precontractual relations to be included.[116] Yet to rely on this,[117] would have to cope with Art. 12, the primary address for pre-contractual relationships, having being designed only in later stages after the Commission Proposal.[118] The answer might be that Art. 12 and *culpa in contrahendo* (like torts) cater only for damages whereas Art. 10 emphasises restitution of the debtor's gain to the creditor.[119] **33**

Yet another question is as to whether a relationship which has existed in the past but does not exist anymore actually, is sufficient. A pragmatic, not formalistic understanding calls for the positive result and for the affirmative answer.[120] **34**

6. Multiplicity of governing relationships

(1) does not expressly address the special case that a multiplicity of governing relationships exists.[121] Amongst them the relatively most important and relatively most determining one should get the upper-hand. This implies to search for the relative centre of gravity.[122] If a center of gravity cannot be identified, not even a relative one, it has been tentatively ventured to abstain from applying (1).[123] But this appears to make sense only if the competing relationships are subject to different laws.[124] In the event that a contact happens to concur with a tort the contract takes the lead by virtue of the accessory connection in tort under Art. 4 (3) 2nd sentence. **35**

V. Common habitual residence, (2)

Where the applicable law cannot be determined on the basis of (1) and the parties have their habitual residence in the same State (2) declares the law of that State applicable.[125] The basic idea is the same as in Art. 4 (2).[126] But the rank is different: Whereas Art. 4 (2) trumps the **36**

115 To the affirmative *Légier*, in: Corneloup/Joubert p. 145, 162; *Backmann*, in: jurisPK BGB Art. 10 Rom II-VO note 15.

116 Commission Proposal COM (2003) 427 final p. 24.

117 As e.g. *Leible/Matthias Lehmann*, RIW 2007, 721 (732) do.

118 See *Fawcett/Carruthers*, in: Cheshire/North/Fawcett pp. 826–827.

119 *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 22.

120 *Peter Huber/Bach*, in: Peter Huber, Art. 10 Rome II Regulation note 20; *Anton/Beaumont/McEleavy*, Private International Law (3rd ed. 2012) para. 14.196; *Plender/Wilderspin* para. 24–093; *Backmann*, in: jurisPK BGB Art. 10 Rom II-VO note 15.

121 *Petch*, (2006) 2 JIBLR 509, 513; *Plender/Wilderspin* paras. 24–091 *et seq*.

122 *Peter Huber/Bach*, in: Peter Huber Art. 10 Rome II Regulation note 21; *Plender/Wilderspin* para. 24–092.

123 *Peter Huber/Bach*, in: Peter Huber Art. 10 Rome II Regulation note 21.

124 *Plender/Wilderspin* para. 24–092.

125 Practical example: Rb. Noord-Holland NIPR 2016 Nr. 410 p. 814.

126 See only *Tubeuf*, TBH 2008, 535, 546; *van der Burg*, SEW 2009, 374, 386; *Michael Hellner* p. 210; *Mankowski*, Unjust Enrichment, in: European Encyclopedia of Private International Law (2017), p. 1809, 1811.

regular connection in Art. 4 (1), (2) is subsidiary to (1) in Art. 10.[127] The notion of habitual residence is explained in Art. 23 (as far as the latter rule goes).[128]

37 The relevant parties are not the parties in the litigation (claimant and defendant),[129] but the prospective creditor and the prospective debtor of the claim in unjust enrichment that is to be judged.[130] In multi-party situations this poses quite some difficulties for in these situations the most important and tricky aspect is to determine who is the correct creditor and who is the correct debtor. Yet the bootstrap principle as enshrined in Art. 10 (1) Rome I Regulation, might be generalised and can provide a key: A certain claim shall be subject to the law which would govern it if that claim in its concrete configuration (in particular between the concrete parties) was the relevant claim.

38 Pursuant to the clear wording of (2), the relevant point in time is the one when the event giving rise to unjust enrichment occurs (which should not be equated with the creditor's disadvantage occurring[131]). In turn, the time when the unjust enrichment takes place is irrelevant.[132] This deviates from Art. 4 (2), but happens to coincide with Art. 11 (2). The difference to Art. 4 (2) can be explained with Art. 4 (1) as the basic rule in tort emphasising the place where the damage occurs, i.e. the *Erfolgsort*. In practice, the difference in timing between (2) and Art. 4 (2) might not gain relevance since in the event of a tort coinciding with unjust enrichment, the tort will ordinarily take the lead thus rendering (1) applicable and excluding (2) which is subsidiary to (1), from becoming operative. Differences become effective, though, in the rare event that one of the parties switches its habitual residence cross-border exactly in the time between the event giving rise to the unjust enrichment on the one hand and the unjust enrichment as such on the other hand.[133]

39 That the parties share a common habitual residence in the same country can be fortuitous and accidental, though.[134] In instances where the parties are not intentionally interacting with each other, they might not know of their respective habitual residence until after the events spawning the claim.[135] In such instances, the escape clause in (4) might deserve a closer look and might provide for laudable flexibility.[136]

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127 *Gerhard Wagner*, IPRax 2008, 1 (11).

128 See only *Pitel*, NIPR 2008, 456, 457; *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 30.

129 *Dickinson* para. 10.28. Imprecisely *Rushworth/Andrew Scott*, [2008] LMCLQ 274, 285.

130 *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 30.

131 Overly thoughtful in this regard *Dickinson* para. 10.28; *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 31.

132 *Gerfried Fischer*, in: FS Ulrich Spellenberg (2010), p. 151, 154; *Plender/Wilderspin* para. 24–100; *Limbach*, in: Nomos Kommentar BGB Art. 10 Rom II-VO note 25; *Picht*, in: Rauscher, Art. 10 Rom II-VO note 33; *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 31.

133 *Gerfried Fischer*, in: FS Ulrich Spellenberg (2010), p. 151, 154; *Peter Huber/Bach*, in: Peter Huber Art. 10 Rome II note 23.

134 *Pitel*, NIPR 2008, 456, 457; *Pitel*, in: Ahern/Binchy p. 231, 246; *Evangelos Spinellis*, in: Mpolos/Tzakas Art. 10 Rome II note 35.

135 *Pitel*, NIPR 2008, 456, 457.

136 *Pitel*, NIPR 2008, 456, 457; *Pitel*, in: Ahern/Binchy p. 231, 246.

VI. Law of the country in which the unjust enrichment took place, (3)

40 If a dominant relationship cannot be determined for the purposes of (1) and the parties do not have their habitual residence in the same state, (3) calls for the law of the country in which the unjust enrichment took place, to be applicable. The place where the unjust enrichment took place thus advances to become the first connecting factor which is privy to the PIL of unjust enrichment. Austria unsuccessfully proposed to replace "took place" with "occurred".[137] Such alteration would not have made any substantial difference, though.[138] Likewise, the addition of "unjust" to "enrichment" does not imply that any moral or ethical judgment about the activity causing the enrichment is required.[139] See in a comparative perspective, provisions to the same effect as (3) are to be found in Arts. 128 (2) Swiss Private International Law Act; 39 (1) 2nd sentence Turkish Private International Law Act; 1223 (1) 1st sentence Russian Civil Code; 31 1st sentence Korean Private International Act 2001; 47 3rd sentence Chinese Private International Law Act 2010 whereas Art. 14 New Japanese Private International Law Act establishes the place where the events causing the non-contractual claims occurred as connecting factor.[140]

41 The debtor's gain is decisive, not the creditor's loss.[141] The resulting enrichment as such is to be located (and possibly reversed[142]), not the entire cause of action.[143] The event giving rise to unjust enrichment is irrelevant, either.[144] *Erfolgsort* is king, not *Handlungsort*.[145] A proposal by the European Parliament[146] to the contrary failed with the Council[147] resisting.[148] Objections that the place of enrichment might be entirely fortuitous e.g. dependent upon where a fraudster chooses to open the bank account to which monies are fraudulently overpaid[149] were eventually overruled.[150] Substantially, as far as concerns appear *prima facie* justified (e. g. in cases where evidence indicates that the account initially receiving monies or securities was merely a cipher or sham designed to make tracing more complicated) such concerns

137 Council Doc. 9009/04 ADD 1 p. 3 (Austria).

138 See *Michael Hellner* p. 211–212.

139 *Chong*, (2008) 57 ICLQ 863, 883; *Dickinson* para. 10.29; *Plender/Wilderspin* para. 24–106.

140 *Mankowski*, Unjust Enrichment, in: European Encyclopedia of Private International Law (2017), p. 1809, 1811-1812.

141 See only *McClean*, in: Dicey/Morris/McClean para. 36–037; *Michael Hellner* p. 211.

142 *Légier*, in: Corneloup/Joubert p. 145, 167.

143 *Rushworth/Andrew Scott*, [2008] LMCLQ 274, 287.

144 *Leible/Matthias Lehmann*, RIW 2007, 721 (732); *Kadner Graziano*, RabelsZ 73 (2009), 1 (66-67); *Späth*, Die gewerbliche Erbensuche im grenzüberschreitenden Rechtsverkehr (2008) p. 324; *Martiny*, in: Reithmann/Martiny, Internationales Vertragsrecht (8th ed. 2015) para. 4.23; *Junker*, in: Münchener Kommentar zum BGB Art. 10 Rom II-VO note 28.

145 *Leible/Matthias Lehmann*, RIW 2007, 721 (732); *van der Burg*, SEW 2009, 374, 386.

146 Legislative Resolution of the European Parliament, P6_TA(2005)0284 p. 13 (Art. 9); *Plender/Wilderspin* para. 24–109.

147 Docs. 16027/05 and 9143/06.

148 *Dickinson* para. 10.31; *Peter Huber/Bach*, in: Peter Huber Art. 10 Rome II note 24; *Marongiu Bonaiuti* p. 147; *Michael Hellner* p. 211.

149 Legislative Resolution of the European Parliament, P6_TA(2005)0284 p. 26; to the same avail *Carella* in: Malatesta p. 73, 83.

150 Common Position OJ 2006 C289E/79.

might be cured either by identifying the place of the final enrichment otherwise than with a mere intermediate device or by carefully using the escape clause in (4).[151] Moreover, the proposed alternative, namely the event giving rise to the unjust enrichment, would have to answer severe questions related to omissions and to multiple activities in a pleasing manner.[152] (3) does not follow the principle of ubiquity and does not put *Erfolgsort* and *Handlungsort* on equal footing, either.[153] The creditor does not have an optional right to chose between them, either.[154]

42 The place where the debtor's gain materialises, where the debtor obtained his enrichment by gaining power of disposal[155] in an (at least preliminarily[156]) permanent manner matters.[157] The result is important, not the chain of events leading to it. The (at least preliminarily) final destination counts, rather than any stepping stone or interim stage in the process.[158] Unjust enrichment is characterised by restitution and correcting misallocation, not by preventive purposes to deter. Its claims for restitution are not accompanied by duties to refrain from something which would by nature be proactive and *in futurum* with guiding behaviour as their primary purpose. Hence to look for the place where unjust enrichment took place perfectly matches the functionality of the law of unjust enrichment.[159] The augmentation of assets must be at the core and center.[160] The direct economic benefit is the decisive element.[161] Preceding activities, by whomsoever, are not a necessary requirement for assuming an unjust enrichment.[162] This can be easily illustrated by the example that enrichment is generated by a natural disaster (landslide, flood, storm, earthquake etc.).[163]

43 To employ the place where the enrichment took place purports at protecting the debtor.[164] Ordinarily it leads to applying a law with which the debtor is familiar and which is readily accessible for the debtor without additional costs being incurred.[165] Furthermore, as already indicated, in some (admittedly not in all[166]) instances the enrichment does not relate back to

151 For the latter *Rushworth/Andrew Scott*, [2008] LMCLQ 274, 287; *Dickinson* para. 10.33.

152 *Plender/Wilderspin* para. 24–104.

153 *van der Burg*, SEW 2009, 374, 386. Doubtful thus *Tubeuf*, TBH 2008, 535, 547.

154 *Gerhard Wagner*, IPRax 2008, 1 (11).

155 Council Doc. 9009/04 ADD 1 p. 4 (Austria).

156 Permanency in an unqualified manner would be a problematic criterion; *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 35.

157 *Brière*, Clunet 135 (2008), 31, 51; *Dickinson* paras. 10.29–10.30; *Gerfried Fischer*, in: FS Ulrich Spellenberg (2010), p. 151, 154; *Picht*, in: Rauscher, Art. 10 Rom II-VO note 39; *Limbach*, in: Nomos Kommentar BGB Art. 10 Rom II-VO note 25.

158 *Briggs* para. 8.151.

159 Convincing *Finkelmeier* p. 294.

160 *Finkelmeier* p. 294.

161 *Dickinson* para. 10.34; *Chong*, (2008) 57 ICLQ 863, 886; *Plender/Wilderspin* para. 24–110.

162 *Contra Pitel*, in: Ahern/Binchy p. 231, 248.

163 *Ellger*, Bereicherung durch Eingriff (2002) p. 126.

164 *Gerfried Fischer*, in: FS Ulrich Spellenberg (2010), p. 151, 154; *Finkelmeier* pp. 294–295 sowie *Bird*, in: Rose (ed.), Restitution and the Conflict of Laws, 1995, S. 64, 114.

165 *Picht*, in: Rauscher, Art. 10 Rom II-VO note 37.

166 *Pitel*, in: Ahern/Binchy p. 231, 250.

activities on the debtor's side.[167] Yet in all instances, the debtor incurs the liability involuntarily, and liability is imposed upon him *ex lege*.[168] This should be justification enough for leaning towards him when it boils down to (3).[169] One should bear in mind that cases in which the debtor commits a tort, are already covered by (1) with the tort being the governing relationship, and (3) is thus inoperable in principle.

44 The important question remains whether the place matters where the enrichment currently is or the place where it initially and originally occurred. The former could entice the debtor to move the respective assets cross-border and thus to influence, if not to manipulate the connecting factor in his own interest.[170] Moreover, (3) employs past tenses with its verb ("eingetreten ist", "took place"). The latter would be open for manipulation, too. Following the current place of enrichment could lead to changes in the applicable law whereas the initial place of enrichment is fixed once and forever. On the other hand, to actually enforce a claim on the return or to the delivery of a concrete asset would make more sense in the place where that asset is currently located. Yet this would not necessarily imply *lex fori* (*executionis*) and *lex causae* to run on parallel lines. If the asset to be returned passes through a number and variety of stages (e.g. monies pass through a number of bank accounts),[171] already the localization of the place of the initial enrichment will lead to the last of these stages[172] since mere interim stages do not bear relevance.[173] That benefits were indirectly received or enjoyed or that wealth is recorded somewhere does not suffice.[174] The first ingression might be easier to evidence and to document,[175] but is not necessarily the end even of the first part of the story. It might be quite as virtual and temporary as the following steps.

45 For localising the concrete enrichment that very concrete enrichment as such is relevant, not any general centre of the debtor's assets[176] or even less the debtor's habitual residence as such.[177] The focus is on the object of enrichment, not on the overall gain of wealth. Insofar as concrete gains in wealth are to be located as the relevant enrichment, one should mirror the same yardsticks that are in reverse used for localising losses in the PIL of torts[178] and under Arts. 7 pt. 2 Brussels I*bis* Regulation; 5 pt. 3 2007 Lugano Convention.[179] Gain and losses are of

167 *Bird*, in: Rose (ed.), Restitution and the Conflict of Laws (1995), p. 64, 114; *Finkelmeier* p. 295.

168 *Bird*, in: Rose (ed.), Restitution and the Conflict of Laws (1995), p. 64, 114.

169 Unconvinced *Pitel*, in: Ahern/Binchy p. 231, 250.

170 *Chong*, (2008) 57 ICLQ 863, 887.

171 See *Dickinson*, Eur. Bus. L. Rev. 13 (2002), 369, 378.

172 See *Picht*, in: Rauscher Art. 10 Rom II-VO note 39.

173 *Briggs* para. 8.151.

174 *Dickinson* para. 10.34.

175 *Chong*, (2008) 57 ICLQ 863, 886.

176 *Kadner Graziano*, RabelsZ 73 (2009), 1 (66); *Peter Huber/Bach*, in: Peter Huber Art. 10 Rome II note 27; *Junker*, in: Münchener Kommentar zum BGB Art. 10 Rom II-VO Rn. 44; *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 35.

177 *Verhagen*, WPNR 6780 (2008), 1003, 1009.

178 See Art. 4 note 94–100 (*Magnus*).

179 In particular *Rudolf Kronhofer v. Marianne Maier* (Case C-168/02), [2004] ECR I-6009 paras. 20–21; *Universal Music International Holding BV v. Michael Tétreault Schilling* (Case C-12/15), ECLI:EU:C:2016:449 paras. 30–40; *Mankowski*, in: Magnus/Mankowski Art. 7 Brussels I*bis* Regulation notes 328–340 with extensive references.

course different features, but the task of localising is the same in principle. A rebuttable presumption that in cases of doubt assets will be concentrated at the debtor's habitual residence[180] might appear pragmatic, but would be too far-reaching.[181] If the European legislator had intended to establish such a presumption it could have done so easily. Presumptions have been a well-known technique of European PIL ever since the Rome Convention. To employ this technique was never even remotely discussed in the drafting process that eventually led to Art. 10. Merely indirect gains are not relevant[182] mirroring another time that indirect negative consequences are expressly declared not relevant by Art. 4 (1) *in fine*.

46 It would be bold but promising to resort to Art. 2 pt. 9 European Insolvency Regulation 2015 in order to identify where certain assets are located. The possible advantage would be even greater in the case of bank accounts, given Art. 2 pt. 9 iii European Insolvency Regulation 2015.[183] If in exceptional cases stronger ties to another law exist (4) provides for the cure.[184] If transfer is directed at different accounts in different countries the solution should follow the same lines[185] as in any other case of a multiplicity of places where the unjust enrichment occurred.[186] Transfer to accounts in tax havens has to be in principle accepted.[187]

47 The more independent the place where the enrichment occurred is determined the more harmony with the PIL of torts appears to be disturbed.[188] If the debtor obtained his gain by tortious behaviour it cannot be argued that he deserves to be protected by PIL insofar as he acquired that gain accidentally,[189] since in such cases he is responsible for his own enrichment.[190] Yet the solution should be to apply (1) in such cases, tying the enrichment accessorily to the law applicable to the tort possibly committed *uno actu*.[191] (1) enjoys precedence over (3), the latter being double subsidiary. By the same token of accessory

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180 To this avail *Junker*, in: Münchener Kommentar zum BGB Art. 10 Rom II-VO notes 28–29; *Spickhoff*, in: Bamberger/Herbert Roth Art. 10 Rom II-VO note 9; *Picht*, in: Rauscher Art. 10 Rom II-VO note 39.

181 See (in the context of torts) A-G *Szpunar*, ECLI:EU:C:2016:161 note 43, 48; OGH ÖJZ 2005, 271 (272); *Mankowski*, in: Magnus/Mankowski Art. 7 Brussels I*bis* Regulation note 334.

182 *Chong*, (2008) 57 ICLQ 863, 888.

183 See on this rule *Mankowski*, in: FS Klaus Pannen (2017), p. 243, 249–251.

184 See *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 36.

185 Art. 10 note 49 (*Mankowski*).

186 Compare *Fawcett/Carruthers*, in: Cheshire/North/Fawcett p. 830; *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 36.

187 But cf. *Matthias Lehmann/Duczek*, JuS 2012, 788 (789).

188 *Peter Huber/Bach*, in: Peter Huber Art. 10 Rome II note 25; *Picht*, in: Rauscher Art. 10 Rom II-VO note 38.

189 See Begründung der Bundesregierung zum Entwurf eines Gesetzes zum internationalen Privatrechts für außervertragliche Schuldverhältnisse und Sachen, BT-Drs. 14/343, 9; *von Caemmerer*, in: Schlechtriem (Hrsg.), Vorschläge und Gutachten zur Reform des deutschen internationalen Privatrechts der außervertraglichen Schuldverhältnisse (1983), p. 57–58.

190 *Picht*, in: Rauscher Art. 10 Rom II-VO note 37.

191 Favouring this *Heiss/Loacker*, JBl 2007, 613, 641; *Gerhard Wagner*, IPRax 2008, 1 (11); *Gerfried Fischer*, in: FS Ulrich Spellenberg (2010), p. 151, 152; *Hohloch*, in: Erman Art. 10 Rom II-VO note 7; *Junker*, in: Münchener Kommentar zum BGB Art. 10 Rom II-VO note 19; *Limbach*, in: Nomos Kommentar BGB Art. 10 Rom II-VO note 21; *Thorn*, in: Palandt Art. 10 Rom II-VO note 8.

connection one avoids difficulties of characterization[192] in distinguishing tort and unjust enrichment.[193]

Where property is attached by processing etc., the enrichment takes place where the respective chattel is located at the time of such processing etc.[194] The same holds true where a non-owner disposes over chattels[195] and where someone invests in maintaining or enhancing a chattel.[196] Benefits generated by the use of a chattel should be located where that use takes place.[197] **48**

If the debtor obtains his gain in different places in different jurisdictions, (3) in principle follows this multiplication and does not pursue a unitary approach.[198] The situation mirrors the multiplicity of places where damage occurs under Art. 4 (1). What is acceptable under Art. 4 (1) should be accepted in the reverse scenario here. To recommend an application of (4) to provide one applicable law to deal with the entire claim and thus to synchronise the applicable law,[199] would be at odds with the general structure of Art. 10.[200] **49**

Problems are said to arise where the enrichment received by the debtor is negative, i.e. the debtor is saved from otherwise inevitable expenditure.[201] Yet taking into account the overall balance, the enrichment in these cases is economically positive in the debtor's favour. The balance is felt (and, playing with words, could be conceived as arriving) at the place where the assets are located which the debtor would have used otherwise for expenditure or for performing his own debts.[202] Furthermore, the enrichment will ordinarily be the result of a service (in a wide sense) rendered which to achieve would have cost the saved expenditure.[203] In these cases the benefit was received where the positive results of the said service were received.[204] Insofar as the benefit consisted in the use of chattel, again the place where that expenditure-saving use took place, is the relevant one.[205] **50**

192 See *Dickinson* para. 10.17; *Chong*, (2008) 57 ICLQ 863, 878–879.

193 *Limbach*, in: Nomos Kommentar BGB Art. 10 Rom II-VO note 21.

194 *Schacherreiter*, in: Beig/Graf-Schimek/Grubinger/Schacherreiter p. 69, 76; *Tim Behrens* p. 100; *Thorn*, in: Palandt, Art. 10 Rom II-VO note 10.

195 *Tim Behrens* p. 100 with reference to BGH IPRspr. 1960/61 Nr. 231 p. 700; BGH IPRspr. 1962/63 Nr. 172 p. 572; OLG Hamm IPRspr. 1989 Nr. 76 pp. 164–165; OLG Düsseldorf IPRspr. 1998 Nr. 54 p. 92; *Macmillan Inc. v. Bishopsgate Investment Trust plc* [1996] 1 All ER 585, 602 (C.A.).

196 *Tim Behrens* p. 101; prior to the Rome II Regulation to the same avail *Werner Lorenz*, IPRax 1985, 328 (328); *Einsele*, JZ 1993, 1025 (1032); *Schlechtriem*, IPRax 1995, 65 (69).

197 *Dickinson* para. 10.34; *Junker*, in: Münchener Kommentar zum BGB Art. 10 Rom II-VO note 28; *Schinkel*, in: Calliess Art. 10 Rome II Regulation note 44.

198 *Contra Légier*, in: Corneloup/Joubert p. 145, 168–169.

199 To this avail *Fawcett/Carruthers*, in: Cheshire/North p. 830; *Plender/Wilderspin* para. 24–112.

200 Concurring in the result *Schinkels*, in: Calliess Art. 10 Rome II Regulation note 45.

201 *Fawcett/Carruthers*, in: Cheshire/North p. 830; *Plender/Wilderspin* para. 24–113.

202 *Fawcett/Carruthers*, in: Cheshire/North p. 830; *Peter Huber/Bach*, in: Peter Huber Art. 10 Rome II Regulation note 28.

203 *Schinkels*, in: Calliess Art. 10 Rome II Regulation note 45.

204 *Schinkels*, in: Calliess Art. 10 Rome II Regulation note 45.

205 *Schinkels*, in: Calliess Art. 10 Rome II Regulation note 45.

VII. Escape clause, (4)

51 As a structurally necessary corrective device[206] and a loophole for the dynamics of developments,[207] (4) establishes an escape clause (or rule of displacement[208]): Where it is clear from all the circumstances of the case that the non-contractual obligation arising out of unjust enrichment is manifestly more closely connected with a country other than that indicated in (1), (2) and (3), the law of that other country shall apply. A manifestly closer connection shall prevail. This can be explained as an expression of the principle of proximity.[209]

52 "Closer" is a comparative. Hence, it requires a comparison. The first step is to identify and to execute the rule relevant in the concrete case. To proceed directly to (4) would collide with the function, nature, systematic position and wording of (4). To extract specific conflicts for specific kinds of claims in unjust enrichment would be methodologically incorrect, either. Escape clauses operate on a concrete, not on an abstract level. They are not a hub for sub-rules.

53 A weighing of contacts is called for. On the outset, one has to put the weight of the regular connecting factor which is operative in the concrete case, plus elements supporting it by pointing towards the law of the same state on the one pan of the scales, and others elements pointing towards the law of another stet on the other pan of the scales. If again other elements point towards a third, fourth etc. law, it is necessary to raise the number of pans accordingly.

54 (4) does not nominate explicitly any particular factors which could become relevant in the localising exercise. The range is open and wide. This is said to give rise to uncertainty.[210] But such uncertainty is reduced to a bearable extent by the yardstick being "manifestly closer" which indicates that a single factor alone must not permit to deviate from the rule.

55 "Manifestly" introduces a strict test not lightly met.[211] The parallel to Arts. 4 (2); 5 (3); 11 (4) is evident and should provide further guidance.[212] (4) is not supposed to leave the line of battle. Using the escape must remain a restricted and rare exception.[213] Otherwise legal certainty would be undermined.[214] A stalemate must necessarily be resolved by applying the rule at stake,[215] and even a small or medium overweight favouring a deviation from the rule would not suffice. The task to circumscribe the threshold of triggering (4) is not an easy

206 *Picht*, in: Rauscher Art. 10 Rom II-VO note 42; *Limbach*, in: Nomos Kommentar zum BGB Art. 10 Rom II-VO note 26.

207 *Tim Behrens* pp. 103–104.

208 As *Dickinson* para. 10.35 likens it to fashion.

209 *Tubeuf*, TBH 2008, 535, 543.

210 *Petch*, (2006) 2 JIBLR 509, 514; *Plender/Wilderspin* para. 24–115.

211 *Peter Huber/Bach*, in: Peter Huber, Art. 10 Rome II Regulation note 32; *Plender/Wilderspin* para. 24–117.

212 *Michael Hellner* p. 212; *Marongiu Bonaiuti* p. 146; *Plender/Wilderspin* para. 24–116; *Junker*, in: Münchener Kommentar zum BGB Art. 10 Rom II-VO note 31.

213 *Tim Behrens* pp. 104–105; *Picht*, in: Rauscher Art. 10 Rom II-VO note 44.

214 *van der Burg*, SEW 2009, 374, 386.

215 See *Banque Cantonale de Genève v. Polevent Ltd.*, *Victor Azria*, *Enoi SpA* [2015] EWHC 1968 (Comm) [19], [2016] 2 WLR 550 (Q.B.D., *Teare* J.).

one,[216] but in any event the threshold should be high. In principle, the trigger should be the same, regardless whether (1), (2) or (3) provides the rule in the concrete case.[217]

"Manifestly" should be understood as "*much* more closely connected"[218] (which obviously leaves the unenviable task to fill "much" with life in a given case).[219] A theoretically possible alternative understanding that "manifestly" goes to the degree of certainty in the conclusion, such that the court is sure,[220] should gain no favour.[221] **56**

The court should not limit itself to considering elements relied on by the creditor to support his claim.[222] (4) operates on an 'all or nothing' basis, bot on an issue by issue basis, hence it looks for overall assessments, not for assessment of particular issues that the parties have presented for determination.[223] **57**

Obvious candidates for factors to be taken into account are the place(s) where the event(s) giving rise to the unjust enrichment were staged and the habitual residence of either party to the claim. Possible candidates depending on the facts of the concrete case to be judged are places where accounts used for reception of monies transferred by other persons are located. Another possible candidate is the *situs* of chattels in order to reach harmony with the rules governing acquisition *ex lege*.[224] Yet it has been doubted whether property law could generate bilateral relationships.[225] **58**

If the rule to be applied in the concrete case is (1), the connecting factors nominated in (2) and (3) should weigh in. If the rule to be applied in the concrete case is (2), the place where the enrichment took place, the connecting factor nominated in (3), should weigh in[226] but will only if supported by other concurring elements, outweigh the parties' common habitual residence.[227] On aggregate, it is not all too likely that (1) will be displaced under (4).[228] (1) requires a relationship between the parties which is closely connected, and Art. 4 (3) 2nd sentence employs exactly such a relationship as the main example for a closer connection in the parallel realm of tort. Hence, what traditionally has been the main case for escape clauses has in Art. 10 been promoted to the top of the objective **59**

216 *Pitel*, in: Ahern/Binchy p. 231, 252.

217 *Pitel*, in: Ahern/Binchy p. 231, 252.

218 *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 40.

219 *Pitel*, NIPR 2008, 456, 458; *Pitel*, in: Ahern/Binchy p. 231, 252–253.

220 See *Pitel*, NIPR 2008, 456, 458; *Pitel*, in: Ahern/Binchy p. 231, 252–253.

221 See *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 40.

222 *Dickinson* para. 10.36.

223 *Dickinson* para. 10.36.

224 *Verhagen*, WPNR 6780 (2008), 1003, 1008; *Picht*, in: Rauscher Art. 10 Rom II-VO note 43.

225 *Schacherreiter*, in: Beig/Graf-Schimek/Grubinger/Schacherreiter p. 69, 75.

226 *Picht*, in: Rauscher Art. 10 Rom II-VO note 43; *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 41.

227 Rb. Noord-Holland NIPR 2016 Nr. 410 p. 814.

228 *Dickinson* para. 10.35; *Briggs* para. 8.152; *Plender/Wilderspin* para. 24–117; *Junker*, in: Münchener Kommentar zum BGB Art. 10 Rom II-VO note 31; *Backmann*, in: jurisPK BGB Art. 10 Rom II-VO note 27.

connection cascade.[229] Envisaging a different result to be reached via (4) is easier in the context of (3).[230]

60 (4) operates only in determining the law objectively to unjust enrichment absent a choice of law. Like the rest of Art. 10 it step backs and retreats once faced with a valid parties' choice of law made in accordance with Art. 14.[231]

VIII. Multi-party situations

61 Art. 10 does not contain any express rules specifically devoted to multi-party situations.[232] To address multi-party situations in all their varieties would have been too complicated and would have unhinged the inner balance of Art. 10, giving the exceptional cases too much attention compared to the rules. The possible situations are so diverse and manifold that any attempt to draft rules covering them at least in their majority, is doomed for failure.[233] Earlier attempts at drafting rules[234] have accordingly not been seized upon. However, (1) must not be understood as a conclusive answer as might be easily illustrated in the case typical for triangular situations that two possible claims in restitution leading to two different debtors are governed by two different laws.[235]

62 The rules in Art. 10 have been designed for two-party relationships and are fitted for two-party relationships. Amongst them, (3) is the relatively most neutral towards multi-party relationships. Yet in multi-party situations, starting with triangular situations, even (3) leads only to the decisive question which is the relevant enrichment, advancing a tier up.

63 The restitution of a performance rendered by the promisor to the benefiting third party under an ineffective or invalid contract for the benefit of a third party is subject to the *lex causae* of that contract pursuant to Art. 12 (1) (e) Rome I Regulation.[236] Likewise the restitution of overperformance follows the law applicable to the contract for the benefit of the third party.[237] Whether the promisor can reclaim from the third party or has to claim from the promisee is again an issue to be decided by the law applicable to the contract for the

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229 *Légier*, JCP G 2007 I.207 no. 82; *Légier*, in: Corneloup/Joubert p. 145, 149; *Verhagen*, WPNR 6780 (2008), 1003, 1005; *Honorati*, in: Preite/Gazzanti Pugliese di Cotrone (a cura di), Atti notarili – Diritto comunitario e internazionale, vol. I (2011), p. 483, 551; *Peter Huber/Bach*, in: Peter Huber, Art. 10 Rome II Regulation note 32; *Michael Hellner* p. 212; *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 41.

230 *Plender/Wilderspin* para. 24–117.

231 See only *Calvo Caravaca/Carrascosa Gonzalez* p. 149.

232 *Tim Behrens* pp. 161–163; *Schinkels*, in: Calliess, Art. 10 Rome II Regulation note 28; *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 20.

233 Hamburg Group for Private International Law, RabelsZ 67 (2003), 1 (33)-34.

234 In particular *Busse*, Internationales Bereicherungsrecht (1998) pp. 176–177; *Busse*, RIW 1999, 16 (20).

235 Hamburg Group for Private International Law, RabelsZ 67 (2003), 1 (33)-34; see also *Tubeuf*, TBH 2008, 535, 545; *Légier*, in: Corneloup/Joubert p. 145, 163–164.

236 *Tim Behrens* pp. 211–214; *Schinkels*, in: Calliess, Art. 10 Rome II Regulation note 36; *Picht*, in: Rauscher, Art. 10 Rom II-VO note 51; NK BGB/*Limbach* Art. 10 Rom II-VO note 23; *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 51.

237 *Tim Behrens* pp. 215–220 with comprehensive references.

benefit of the third party.[238] If promisee and third party set out to battle they do so on the ground of the law applicable to any legal relationship between the two of them pursuant to (1).[239] Restitution between promisor and promisee is subject to the *lex causae* of the contract for the benefit of the third party.[240]

64 If the putative *debitor cessus* has performed and the putative assignee has received that performance following an invalid assignment or the assignment of a non-existing claim, restitution is subject to the law applicable to that the putatively assigned claim under (1) plus the generalisable conclusion from Art. 14 (2) Rome I Regulation.[241] This law governs the way forth, hence it should govern the way back. Insofar as restitution as between the *debitor cessus* and the assignor is at stake the law applicable to any relationship between the two of them (e.g. the sales contract which generated the assigned payment claim for the price) governs under (1).[242] Restitution as between the assignor and the assignee is, following (1), governed by the law which is applicable to the obligatory relationship between these two parties, not by the law applicable to the assignment as such.[243]

65 If someone performs another's obligation in the erroneous assumption that he performed an own obligation towards the creditor, claims for unjust enrichment as between the performing party and the true debtor are governed by the law applicable to any existing relationship between the two of them under (1) if there is such.[244] If not, in a first step (3) leads to the law of the place where the creditor received the performance;[245] but (4) might point to the law applicable to the creditor's claim against the true debtor.[246]

66 Likewise, the law governing the claim concerned reigns if a third party voluntary performs another's assumed obligation which does not exist in reality; only where the putative debtor has asked the third party for such performance restitution between the third party and the putative debtor is subject to any relationship between the two of them.[247] This reasoning is not based on (1) since there is no governing relationship between the creditor and the third party,[248] but on (4).[249] Whether the performing third party enjoys the benefit of a *cessio legis*

238 *Bamberger/Herbert Roth/Spickhoff* Art. 10 Rom II-VO note 8; *Schinkels*, in: Calliess, Art. 10 Rome II Regulation note 36; *Palandt/Thorn* Art. 10 Rom II-VO note 9; *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 51.

239 *Schinkels*, in: Calliess, Art. 10 Rome II Regulation note 36.

240 *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 51.

241 *Picht*, in: Rauscher, Art. 10 Rom II-VO note 51; *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 47; see also *Tim Behrens* pp. 238–255, yet relying on (4) rather than (1).

242 *Tim Behrens* p. 236; *Fehrenbacher*, in: Prütting/Wegen/Weinreich, Art. 10 Rom II-VO note 3.

243 *Tim Behrens* pp. 228–236; *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 46.

244 *Picht*, in: Rauscher, Art. 10 Rom II-VO note 49.

245 *Tim Behrens* pp. 278–279.

246 *Schinkels*, in: Calliess, Art. 10 Rome II Regulation note 31; *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 45.

247 In detail *Tim Behrens* pp. 260–277.

248 *Ofner*, ZfRV 2008, 13, 20; *Chong*, (2008) 57 ICLQ 863, 877 f.

249 *Schacherreiter*, in: Beig/Graf-Schimek/Grubinger/Schacherreiter S. 69, 89–92; *Tim Behrens* pp. 272–273; *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 43.

ought to be judged according to Art. 15 Rome I Regulation or Art. 19 respectively depending on the nature of the claim performed.[250]

67 In other instances the performer renders a performance but to a wrong, not intended addressee.[251] Performer and addressee do not share a common bond, and thus (2) plus subsidiarily (3) are applicable.[252]

68 Restitution as between a paying guarantor and the guarantee following performance of a non-existing guarantee are subject to law applicable to the assumed guarantee by virtue of Art. 12 (1) (e) Rome I Regulation.[253] Restitution as between a main debtor asking for the guarantee and the guarantor are governed by the law applicable to any relationship between those two parties.[254]

69 Restitution in the context of letters of credits is subject to (1) and follows accessorily the law applicable to the relationship which is at stake.[255]

70 If a non-owner validly disposes over property neither that disposition nor any possibly underlying obligation are a governing relationship for the purposes of (1).[256] Hence, one has to resort to (3). Yet (3) may lead to different laws depending upon whether one judges restitution against the disposing non-owner or against the recipient of the disposition.[257]

71 If a non-owner cashes it a claim and if the debtor of that claim renders a performance to the non-owner which has liberating effect towards the resl owner the non-owner ingresses into the ownership of the claim. Claim and ownership being the central elements, it appears appropriate to submit restitution as between the real owner and the non-owner[258] to the law applicable to the claim.[259] This ought to be preferred in the interest of previsibility and predictability, too.[260] But technically (1) is in principle not operable, and (4) might be the last resort.[261] (1) can apply if an invalid assignment featuring the still true owner as assignor and the non-owner as assignee caused the present allocation of ownership.[262]

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250 *Schinkels*, in: Calliess, Art. 10 Rome II Regulation note 29; *Picht*, in: Rauscher, Art. 10 Rom II-VO note 48; *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 44.

251 See Begründung der Bundesregierung zum Entwurf eines Gesetzes zur Neuregelung des Internationalen Privatrechts der außervertraglichen Schuldverhältnisse und der Sachen, BT-Drs. 14 /343, 9.

252 *Schacherreiter*, in: Beig/Graf-Schimek/Grubinger/Schacherreiter S. 69, 77; *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 50.

253 *Tim Behrens* pp. 301–315; *Schinkels*, in: Calliess, Art. 10 Rome II Regulation note 32; *Picht*, in: Rauscher, Art. 10 Rom II-VO note 50; *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 53.

254 In detail *Tim Behrens* pp. 315–325; furthermore e.g. *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 53.

255 *Schacherreiter*, in: Beig/Graf-Schimek/Grubinger/Schacherreiter S. 69, 82–84; *Tim Behrens* pp. 285–287.

256 *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 55.

257 *Picht*, in: Rauscher, Art. 10 Rom II-VO notes 55–56.

258 E.g. § 816 II BGB in German substantive law.

259 *Picht*, in: Rauscher, Art. 10 Rom II-VO note 57.

260 *Tim Behrens* pp. 252–253.

261 *Tim Behrens* pp. 250–252.

262 *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 57.

Paying agents demand the most complex considerations.[263] The legal situation has become even more complicated after the Payment Services Directives[264] introduced the payment service contract as legal institution in its own right. At the level of substantive law, this could have revolutionised matters and could have drawn formerly restitutionary cases into the realm of contract.[265] This could have repercussions for conflicts law, too, insofar matters could also at this level be linked to the contractual bond between the payer and its paying agent (normally its bank).[266] Either a contractual characterisation could prevail directly or, if not so, an accessory connection to the *lex causae* of the payment services contract under (1) is the preferable option. **72**

Restitution as between payer and recipient is subject to the law governing any relationship between these two parties, by virtue of (1). Insofar the recipient's trust in the application of the very law which governs his relationship with the payer, deserves respect.[267] Yet such relationship does not exist in the event that the payment reached a wrong and unintended recipient.[268] In this event (2) and subsidiarily (3) step in.[269] **73**

It appears not justified to regularly deviate from this via (4),[270] be it in favour of the law governing the *Valutaverhältnis*,[271] be it in favour of the law governing the *Deckungsverhältnis*,[272] in particular if one had turned down an accessory connection in favour of the law governing the payment services contract previously. **74**

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263 In particular *Schacherreiter*, in: Beig/Graf-Schimek/Grubinger/Schacherreiter S. 69, 79 f.; *Tim Behrens* pp. 174–198.

264 Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing 97/5/EC, OJ EC 2007 L 43/25; Directive (EU) 2366/2015 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, OJ EU 2015 L 337/35.

265 As to the discussion in German substantive law see only BGH NJW 2015, 2575; BGHZ 203, 378 = JZ 2016, 950 with note *Jansen* = NJW 2015, 3093 with note *Kiehnle*; LG Hannover ZIP 2011, 1406; LG Berlin WM 2015, 376; AG Hamburg-Harburg WM 2014, 352; AG Schorndorf WM 2015, 1239; *Langenbucher*, in: FS Andreas Heldrich (2005), p. 285; *Langenbucher*, in: FS Johannes Köndgen (2016), p. 383; *Bartels*, WM 2010, 1828; *Detlev W. Belling/Johannes Belling*, JZ 2010, 708; *Winkelhaus*, BKR 2010, 441; *Winkelhaus*, Der Bereicherungsausgleich nach Umsetzung des neuen Zahlungsdiensterechts, 2012; *Fornasier*, AcP 212 (2012), 410; *Kiehnle*, Jura 2012, 895; *Danwerth*, ZjS 2013, 225; *Linardatos*, BKR 2013, 395; *Linardatos*, WuB 2015, 246; *Linardatos*, DB 2015, 2319; *Omlor*, jM 2014, 315; *Schnauder*, JZ 2016, 603.

266 Tentatively so *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 48.

267 *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 49; see also *Tim Behrens* p. 179.

268 *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 48.

269 *Tim Behrens* pp. 177–187.

270 *Tim Behrens* pp. 188–192.

271 Favouring this e.g. BGE 121 III 109, 111; OGH SZ 54/2 pp. 8–9; *Schlechtriem*, IPRax 1987, 356 (357); *Schlechtriem*, IPRax 1995, 65 (66).

272 Favouring this e.g. *Jayme*, IPRax 1987, 186 (187); *Jayme*, in: FS Werner Lorenz zum 80. Geb. (2001), p. 315, 318; *Heiko Plaßmeier*, Internationales Bereicherungsrecht (1998) p. 346; *Busse*, Internationales Bereicherungsrecht (1998) pp. 183, 189; *Busse*, RIW 1999, 16 (20); *Eilinghoff*, Das Kollisionsrecht der ungerechtfertigten Bereicherung nach dem IPR-Reformgesetz von 1999 (2004) pp. 212–214.

IX. Scope of the applicable law (characterisation)

75 Art. 15 is the central rule with regard to characterising matters in the field of non-contractual obligations. It offers a (non-comprehensive) list of issues which are positively subjected to the law applicable to the non-contractual obligation at stake. Unfortunately, Art. 15 is exclusively fixated and focused on torts. It does not properly reflect unjust enrichment with its different ideas, concepts and terminology. Its wording relates to liability, damage, remedy (responsabilité, dommages, réparation; Haftung, Haftbarmachen, Schaden, Wiedergutmachung, Schadensersatz; responsabilidad, daños, imdenicazión; responsabilità, danno, indennizzo; aansprakelijkheid, schade; ansvar, skad, göttgorelse etc.). In particular the reference to "damage" as the core notion is disturbing since damage relates to the creditor's loss whereas unjust enrichment places emphasis on the debtor's gain. Hence, Art. 15 needs a swift transfer and translation when applied to unjust enrichment.[273]

76 It would be preferable if each kind of non-contractual obligation benefited from its specific characterisation rule. This would avoid any need to adapt, or rather to translate and transfer, Art. 15 to unjust enrichment or *negotiorum gestio*.[274] Deplorably, the European legislator did not make use of, and did not seize upon, reasoned proposals[275] offered for such specific characterisation rules. Yet this should not carry any conclusion that these proposals were dismissed and could not form the basis for the said "translation" of Art. 15, the more so, since they deliberately copied the fundamental structure of Art. 15.

77 With regard to unjust enrichment the following was proposed:[276]

78 Art. 10a – Scope of the law applicable to non-contractual obligations arising out of unjust enrichment

79 The law applicable to non-contractual obligations arising out of unjust enrichment shall govern:

1. the basis and conditions of any such obligation, including the determination of creditor and debtor;
2. the objections to, and exemptions from, any such obligation;
3. the extent of liability under such obligation including any privilege, exclusion, division or restriction and the question whether restitution in kind or money is due;
4. the question whether the liability might be extended upon third parties;
5. the question whether such obligation may be assigned or inherited;
6. performance and the various ways of extinguishing the obligation;
7. the rules of prescription and limitation, including rules relating to the commencement of a period of prescription or limitation and the interruption and suspension of the period;
8. accompanying tracing claims.

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273 See *Tubeuf*, TBH 2008, 535, 548.

274 *Dickinson*, Eur. Bus. L. Rev. 13 (2002), 369, 378; Hamburg Group for Private International Law, RabelsZ 67 (2003), 1 (29); *Picht*, in: Rauscher, Art. 10 Rom II-VO note 8.

275 Hamburg Group for Private International Law, RabelsZ 67 (2003), 1 (29).

276 Hamburg Group for Private International Law, RabelsZ 67 (2003), 1 (29).

Art. 10a pt. 4 which reflects rules like § 822 BGB[277] would pay due regard to a particularity of the law of unjust enrichment. Likewise, the *Entreicherungseinwand*, the defense of change of circumstances or any other defense of disenrichment[278] as speciality of the law of unjust enrichment would find its place under Art. 10a pt. 3. **80**

In any event the law applicable to the claim arising out of unjust enrichment governs the extent of what has to be restituted; as to whether incorporeal advantages or uses have to be compensated; as to whether surrogates have to be handed over; as to which extent interest accrues; how to treat claims in unjust enrichment by both parties.[279] Art. 22 Rome II Regulation concerning matters of burden of proof and evidence equally applies.[280] **81**

Incidental questions, in particular concerning existence and ownership of rights, are to be answered according to the law applicable to the object of such incidental question,[281] the latter correctly determined via the PIL of the forum (so called *selbstständige Vorfragenanknüpfung*).[282] **82**

Article 11: Negotiorum gestio

1. **If a non-contractual obligation arising out of an act performed without due authority in connection with the affairs of another person concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict, that is closely connected with that non-contractual obligation, it shall be governed by the law that governs that relationship.**
2. **Where the law applicable cannot be determined on the basis of paragraph 1, and the parties have their habitual residence in the same country when the event giving rise to the damage occurs, the law of that country shall apply.**
3. **Where the law applicable cannot be determined on the basis of paragraphs 1 or 2, it shall be the law of the country in which the act was performed.**
4. **Where it is clear from all the circumstances of the case that the non-contractual obligation arising out of an act performed without due authority in connection with the affairs of another person is manifestly more closely connected with a country other than that indicated in paragraphs 1, 2 and 3, the law of that other country shall apply.**

277 Hamburg Group for Private International Law, RabelsZ 67 (2003), 1 (33).

278 See the terminology employed in Art. 6:101 Principles of European Unified Enrichment Law and Arts. VII–5:101 (2); VII–6:101 DCFR.

279 MK BGB/*Junker*, Art. 10 Rom II-VO note 32; *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 58; *Thorn*, in: Palandt, Art. 10 Rom II-VO note 12.

280 *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 58.

281 Insofar concurring *Junker*, in: Münchner Kommentar zum BGB Art. 10 Rom II-VO note 25; *Unberath*/*Cziupka*/*Pabst*, in: Rauscher, Einl. Rom II-VO note 46; *Schinkels*, in: OGK BGB Art. 10 Rom II-VO note 59; *Thorn*, in: Palandt, Art. 10 Rom II-VO note 12.

282 Reasons for generally pursuing this approach are given in: *Mankowski*, in: von Bar/Mankowski, Internationales Privatrecht Bd. I: Allgemeine Lehren (2nd ed. 2003) § 7 notes 192–213.

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I. Object and purpose

The rule of Art. 11 is to address issues arising from varying concepts of *negotiorum gestio*. Similarly to Art. 10, Art. 11 aims to strike a balance between an intervenor's and a principal's interest in its complexity[1]. It may be classified only as a partially self-standing provision and thus adopts the regime of Art. 10 (unjust enrichment), subsection 1 of Art. 11 contains the accessory connection and subsection 4 of Art. 11 adopts an escape clause and ultimately permits choice of law in compliance with Art. 14. This all is undoubtedly to resolve possible problems with classification of negotiorum gestio.[2] **1**

By construing the very choice of law Regulation in the commented article, the European legislators tried to avoid the problems related to the hardly uniformly defined institution *negotiorum gestio*.[3] It can be described as a partially non-independent conflict-of-law rule, **2**

1 *Spickhoff*, in: Bamberger/Roth Art. 11 note 1; *Junker*, in: Münchener Kommentar Art. 11 note 1.
2 See *infra* note 12 *et seq*.
3 Cf. Hamburg Group for Private International Law, RabelsZ 67 (2003), 11.

because it copies the regime of Art. 10 (unjust enrichment), includes an accessory connection in Recital 1, avoids its own solution by an escape clause in Recital 4 and at the end allows the choice of law under circumstances of Art. 14. By this, the legislators undoubtedly aimed to solve qualification difficulties.

3 Connection governed by Art. 11 is characterised by a cascade of three-degree connection governed in the first three paragraphs of Art. 11.[4] Precedence is given to the accessory connection tied to law applicable to a relationship existing between the parties. In the absence thereof ties to common habitual residence are to be considered. In case when even these cannot be applied, the connection follows the place of *negotiorum gestio* (Art. 11 (3)). Similarly to the cases of connection by unjust enrichment and delict (Art. 10 (4) and Art. 4 (3)), the escape clause in Art. 11 (4) applies. Nonetheless, choice of law under Art. 14 is given precedence to the connections provided for in Art. 11.

II. Legislative history

4 The Commission draft from 22nd July 2003[5] contained in contrast to the draft from 3rd May 2002,[6] a specific Regulation of *negotiorum gestio* which was, however, restricted solely to the physical protection of a person or securing of a physical object. The law of the State in which the person or the object is located was designed to be governing law. However, this provision was left out from the amended draft from 21st February 2006.[7] Furthermore, the connecting factor of the principal's habitual residence was changed to the place where the agency took place. There were critical voices during the formation, but also after the Regulation was adopted; e.g. in the comments the conflict-of-law-rule is criticized for not taking over the Regulation from Art. 39 para. 2 (of the German) EGBGB.[8]

III. Notion of negotiorum gestio

1. Introduction

5 *Negotiorum gestio*, as an institute which is known[9] especially to the Roman legal systems and the German BGB, is a creation of Roman law.[10] Essentially, it can be characterised as conduct affecting the rights and interests of another person undertaken intentionally but in the absence of a contractual relationship between the intervenor and the principal that would

4 *G. Wagner*, IPRax 2008, 11.

5 Cf. COM (2003) 427 final, 24, 39.

6 On this cf. Hamburg Group for Private International Law, RabelsZ 67 (2003), 31 *et seq.* Interestingly enough, this report considers the inclusion of negotiorum gestio in II Rome Regulation "bold attempt".

7 On development of the European legislative see *Leible*/*Lehmann*, RIW 2007, 732.

8 Cf. *Junker*, in: Münchener Kommentar Art. 11 note 8, mainly critical see *Sonnentag*, ZVglR Wiss, 105 (2016) 305 *et seq*; *von Hein*, VersR 2007, 450.

9 However, the concept of *negotiorum gestio* is unknown to the legal system of several EU Member States. On the spread of *negotiorum gestio* see Commission's Explanatory Memorandum, COM(2003) 427, 21.

10 *Jansen*, in: Basedow et al., Handwörterbuch des Europäischen Privatrechts 2009. 708 *et seq*.; *Stoljar*, Negotiorum gestio, 19 *et seq*.

govern the said conduct.[11] A typical feature is an effort to adequately allocate benefits and risks stemming from liability in the absence of a contractual agreement and protection of the principal from unsolicited interference on one hand and recognition of performance provided by the intervenor on the other. In light of *non negotiorum's* autonomous interpretation (see above) and the absence of its legal definition, a definition of the term in the ECJ case law is expected. However, the starting point must always be the fact that delictual relationships resulting from non *negotiorum* must be connected in accordance with conflict of law rules.[12]

Negotiorum gestio has a dual function. Firstly, it establishes compensation claims, which serve the restitution of assets and costs and it functionally corresponds to unjust enrichment so far. Secondly it also constitutes special care and conduct duties and it appears to be a certain parallel e.g. to employment relationships. This is manifested in the commonly known compensation and reward claims, which evolved into this form. **6**

The spectrum of individual cases is very wide.[13] On one hand there are regress claims from foreign debt repayment, on the other hand performance in favour of a third person like, for example, the securing of a house in disrepair during the absence of the owner and similar situations. The unordered purchase of goods belongs here, as well as sacrifices during rescue operations.[14] The claims however are more or less the claims from unjust enrichment, and claims for settling the costs and benefits between parties; in other cases the conception resembles a basis of contract relations. The attitudes of the EU Member-States towards *negotiorum gestio* differ substantially. The common law systems refuse such an unclear legal institution and focus on solving particular cases.[15] Austrian law proceeds likewise – it considers foreign intervention to be as a rule inadmissible.[16] Therefore, the Austrian jurisprudence defines this concept very narrowly. Even in other continental legal systems there is no unity in defining this concept.[17] **7**

Negotiorum gestio is therefore considered a sort of chameleon[18], whose function is to fill in the gaps or alleged gaps in contract law, but also tort law. Therefore, the question is being raised, of whether it makes sense to attempt a single legal institution. **8**

The Study Group on the European Civil Code project (DCFR) tried to resolve this.[19] Nonetheless, the codification of this institution in DCFR is conceptually one-sided as it is based solely on conduct in cases of necessity. **9**

11 *Jacob*/*Picht*, in: Rauscher Art. 12 note 6, 890, 12, definition introduced by the Hamburg Group for Private International Law in Art. 10b, 1, RabelsZ 67 (2003), 30.

12 *Dickinson*, art. 11, note 11.08 *et seq*.

13 *Ranieri*, Europäisches Obligationenrecht, 3rd ed. 2009, 1757 *et seq*.

14 *Jansen*, in: Basedow et al., Handwörterbuch des Europäischen Privatrechts 2009, 708.

15 *Birks* 24(1971) Curr. Leg. Probl., 110–132.

16 Cf. § 1035 ABGB and *Koziol*, in: KBB, ABGB Kurzkommentar, § 1035 note 3.

17 *Meissel*, Geschäftsführung ohne Auftrag (1993), passim.

18 *Jansen*, in: Basedow et al., Handwörterbuch des Europäischen Privatrechts 2009. 706.

19 Benevolent intervention in another's affairs, Book V. Artt. 1:101–3.106.

10 Also the spread of *negotiorum gestio* in the EU is very different.[20] In some Member States, it plays an insignificant role, in other States it is not known at all.[21] Despite or because of this it is necessary to interpret this concept autonomously, uniformly for the EU. Recital 11 of the Preamble serves to understand, or more precisely to explain this concept. Its substance is the conduct of a third person (intervenor, also called intervener or gestor) with the prevailing aim to enrich another person (principal). It is relevant for answering the question to determine if a certain conduct means the intervention into the affairs of other person.[22] The determination of governing law will according to the statute of *negotiorum gestio* not necessarily lead to the application of legal norms, which terminologically will not include this concept. The problems reside in distinguishing the *negotiorum gestio* from contractual obligations and relations from the unjust enrichment and delicts. The commented Regulation however explicitly deals with this problem in Art. 11 para. 1.

11 Excluded from the notion (definition) are cases in which the "intervenor" knowingly affects another's affairs acting exclusively in his own interest.[23] Uncertainty may exist in situations where the action of the intervenor is performed in both interest of other person and in his own interest. Similar problem may arise when considering justified and unjustified intervention. Here, the question of evaluation is of relevance. Should the basis of such evaluation be reasonableness or conformity with the interest of the principle or should the principle of proportionality play any role?[24] Therefore, in both situations the substantive law qualification does not seem reasonable to elaborate further. Both kinds of claims, namely the combined interest of intervention[25] as well as unjustified intervention should fall into the scope of definition of *negotiorum gestio* under Art. 11.[26]

2. Qualification

12 Under "qualification" in this chapter the so called substantive law (contrary to choice of law qualification) qualification is understood. In this sense "qualification" of negotiorum gestio and material scope (chapter IV) overlap.

One of the main purposes of the Rome II Regulation is the harmonisation of the non-contractual obligations. To implement this is especially difficult in cases of such legal phenomena like *negotiorum gestio* which are very different in individual national legal systems of EU Member

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20 *von Bar*/*Clive* (eds.), Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR), vol. III, 2877 *et seq*.

21 This is the case in common law, *Stoljar*, Negotiorum gestio, 54.

22 Cf. *Jakob*/*Picht*, in: Rauscher Art. 11 note 6; *Dickinson*, 11.02, also see ECJ Case C-47/07 P – Masdar [2008] ECR I – 9761 para. 67.

23 Cf. *Schinkels*, in: Calliess, Art. 11 note 3; see on moral justification *Stoljar*, Negotiorum gestio, 12 *et seq*.

24 This is the case of Belgium, France, Italy, Luxembourg, Malta, Netherlands, Spain – according to *von Bar*, Benevolent Intervention in another's affairs, 2006, 61.

25 See *supra* in this note.

26 Cf. *Dickinson*, note 11.07; *Schinkels*, in: Calliess, Art. 11 note 4; *Looschelders*, IPRax 2014, 408; *Plender*/*Wilderspin*, Art. 11 note 25–019; *Jakob*/*Picht*, in: Rauscher Art. 11 note 7; *Rushworth*/*Scott*, MCLQ 2008, 289; *Limbach*, in: Nomos, Art. 11 note 6.

States.[27] This concerns both the concept and interpretation and also the spread of *negotiorum gestio*. Therefore, it is quite consequent that the EU legislator requires the EU to have its own autonomous qualification verifying the applicability.[28] Autonomous qualification has its basis in Recital 11 of the Preamble defining non-contractual obligations including *negotiorum gestio* as an autonomous concept although any definition of this category is missing.

13 It is an ambition of these comments to presuppose three main factual scenarios as connecting subjects of *negotiorum gestio* including their conditions and consequences: aid in emergency situations (first aid), intervention in another's legal matters, and redemption of another's obligation. The assistance in emergency situations includes any protective actions in favour of third persons and their matters.[29] Intervention is another's legal matters in terms of the preservation of another's property[30] represents any acts towards another's legal matters irrespective of the way of such actions except the aid in emergency situation; i.e. it includes the use of matters, their changes, and in particular in sense of their repair, change, improvement etc. Redemption means payment of an outstanding debt of a principal without any legal duty of an intervenor.[31] The claims arising from these obligations can be asserted by damages, revindication etc.

14 If the intervenor is familiar with the fact that he is taking care of foreign affairs, he will not do so on the basis of the alleged legal relationship between him and the principal. Obligations arise from a situation in which one party, in belief of the invalidity of an error, concluded unordered contractual acts for the other party, and the acts qualify contractually according to Art. 12 (1) Rome I.[32] The contractual relationship is the existing relationship between parties; (not merely a hypothetical relationship), which would take the place of *negotiorum gestio* in case the intervenor would have had an opportunity and will agree with such a contract. Such a solution is not possible even in the case that, on the basis of the relationship between the consumer and the businessman, it would be necessary to connect the contemplated consumer contract and apply the Art. 6 Rome I Regulation[33] because it could actually harm the consumer, if the substantive law of the country of the intervenor is less advantageous than the law of the country where the act occured. The connection of the existing legal relationship comes into question with regards to the representation contract (mandatum), work contract or employment contract, if the intervenor proceeds concretely without the orders of the principal, or more precisely the employer, because that reflects his interest and his assumed will.[34] This can be a case of a patient who, during the check finds a failure of brakes, which he repairs, without getting the consent of the principal in the first place.[35] This

27 Cf. *von Bar*/*Clive* (eds.), Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference, vol. III, 2900 *et seq*.

28 *Limbach*, in: Nomos Kommentar Art. 11 note 4; *Backmann*, in: Juris PK-BGB Art. 11 note 15.

29 *Junker*, in: Münchener Kommentar Art. 11 note 10; *Jakob*/*Picht*, in: Rauscher Art. 11 note 9.

30 Cf. *Stoljar*, Negotiorum gestio, 94 *et seq*. and *Jakob*/*Picht*, in: Rauscher Art. 11 note 10.

31 *Junker*, in: Münchener Kommentar Art. 11 note 10, 28; *Jakob*/*Picht*, in: Rauscher Art. 11 note 8; *Plender*/*Wilderspin*, Art. 11 note 25, see also *infra* note 18.

32 *Limbach*, in: Nomos Art. 11 note 10; *Jakob*/*Picht*, in: Rauscher Art. 11 note 10.

33 *Limbach*, in: Nomos Kommentar Art. 11 note 4; *Backmann*, in: Juris PK-BGB Art. 11 note 15, who holds the view of narrow interpretation of Art. 11.

34 *Limbach*, in: Nomos Kommentar Art. 11 note 4; *Backmann*, in: Juris PK-BGB Art. 11, note 10.

35 *Limbach*, in: Nomos Kommentar Art. 11 note 4; *Backmann*, in: Juris PK-BGB Art. 11, note 10.

opens the door for unjust enrichment not according to Art. 11, but according to Art. 10 para. 1.[36] A particular case of an act without due authority is the liability of the so called "falsus procurator"[37] who as an agent exceeds his power to act and establishes contractual relations between the principal and a third party.

15 If the intervenor does not know that he is interfering into foreign affairs by his actions, it is possible to not evaluate such conduct as *negotiorum gestio*, even if the result from the action are in favour of the principal.[38] However, when the intervenor knows that he is interfering into the third person's affairs and is doing so from egotistic incentives[39] or even with the intention to harm the principal, then his conduct cannot be qualified as *negotiorum gestio* and does not fall into the scope of Art. 11.[40] Where every reasonable person in the situation of an intervenor obviously can see that the principal will not be advantaged, it is not a *negotiorum gestio*. If this limitation becomes part of the conflict-of-law rule, the courts are relieved from the task of evaluating the intervenor's conduct.

IV. Scope of application

1. Material scope (applicability of ratione materiae)

16 The effect of the commented norm can be defined positively (ad a), and also negatively (ad b), namely as a set of items that are excluded from the application of Art. 11.

a) Covered matters

17 *Negotiorum gestio* in Art. 11 should be interpreted restrictively.[41] with exclusion of cases of inter alia benevolent intervention aiming at a profit of the intervenor. Thus it is necessary to exclude relationships that can be subsumed under Art. 12 (1)(e) of the Rome I Regulation or Art. 4 or 10 of Rome I Regulation. Similarly, precedence must be given in cases of business-consumer relationships to the connection to the intended consumer contract.[42]

18 *Negotiorum gestio* includes by its nature very different claims[43], or more specifically relations of different kinds, which are not easy to define. The concept of *negotiorum gestio* on the level of conflict of laws should determine all laws that potentially provide claims for the plaintiff.[44] Otherwise it would be barely possible to achieve the goal as pursued by the creator and the effective concurrence with other obligations/legal relations would be endangered.[45] The scope of the conflict-of-law rule includes the claims of the intervenor, as well as of the

36 *Limbach*, in: Nomos Kommentar Art. 11 note 4; *Backmann*, in: Juris PK-BGB Art. 11, note 5.

37 Cf. *Dickinson* Art. 11 note 11.05 and note 41 *infra*.

38 Opposite view, *Bach*, in: Huber Art. 11 note 11.

39 See *supra* note 11.

40 In agreement with majority view: *Dickinson* note 11:05; *Limbach*, in: Nomos Art. 11 note 6; *Rushworth*/*Scott* Lloyd's M.C.L.Q. 2008, 288; *Thorn*, in: Palandt Art. 11 note 2. Opposite view see *Jakob*/*Picht*, in: Rauscher Art. 12 note 7.

41 *Limbach*, in: Nomos Art. 11 note 10, see also notes 11 and 15.

42 Cf. note 14.

43 Cf. *supra* note 7.

44 *Bach*, in: Huber Art. 11 note 7.

45 *Junker*, in: Münchener Kommentar Art. 11 note 10; *Jakob*/*Picht*, in: Rauscher Art. 11 note 15.

principal[46], while the goal of these claims is not decisive. By their nature they can represent the compensation of expended costs, as well as the compensation for harm; this also applies for the incidental claims regarding the information or payment of interests.[47] The following questions, especially, fall into the scope of the norm the question regarding who are the parties to this obligation relationship, the questions of ascribing and the results including questions of error in persona of the intervenor[48], as well as the questions of assumptions of the individual claims and their results including the standard of care of the scope of cause. The statute includes also the questions of time-lapse and the termination of obligation relationships.[49] The scope of the commented conflict-of-law-rule includes various case types including damage averting, affecting (saving) foreign assets and redemption of foreign debts.[50]

Cases of assistance (first aid) are not restricted solely to the protection of the physical integrity of a person.[51] Aid within the meaning of prevention always occurs when the intervenor intends to protect strange persons or items, even though it does not involve securement or physical protection.[52] Property of another may be affected in a variety of manners, especially by its change, preservation, transaction etc.[53] **19**

b) Excluded matters (Art. 1)

Three kinds of issues that *prima facie* fall into the scope of Art. 11 are excluded of its application. Art. 28 (1) gives precedence to international convention relating to non-contractual obligations of which at least one Member State is a party and that are not exclusively concluded by Member States (i). Second group of issues is explicitly excluded by Art. 1 (2) Rome II Regulation (ii). Third kind of matters falls into the scope of Rome II Regulation but enjoys special regime (iii). **20**

There are two international treaties, to which some EU Member States are members. It is the International Convention on Salvage of 28 April 1989 and the International Convention for Unification of Certain Rules of Law related to Assistance and Salvage at Sea of 29 September 1910. This convention was de facto superseded by the first one. Bulgaria, Czech Republic and Slovakia are not members of either convention.[54] **21**

It is not quite certain in the literature[55] whether The Hague Convention on maintenance of 2 October 1973 is completely out of the subject matter of Rome II Regulation or whether it might fall under the scope of Art. 11[56]. Also it is unclear whether the interventions of public **22**

46 *Junker*, in: Münchener Kommentar Art. 11 note 10; *Jakob*/*Picht*, in: Rauscher Art. 11 note 15.

47 *Ofner* ZfRV 2008, 20; *Junker*, in: Münchener Kommentar Art. 11 note 28; *Jakob*/*Picht*, in: Rauscher Art. 11 note 15.

48 *Jakob*/*Picht*, in: Rauscher Art. 11 note 15.

49 *Jakob*/*Picht*, in: Rauscher Art. 11 note 15.

50 See *supra* note 13 and *infra* note 41.

51 But see *Limbach* (Nomos Art. 11 note 11) arguing in favor of Art. 4.

52 *Bach*, in: Huber Art. 11 note 9.

53 Cf. note 13 *supra*.

54 See the determination of law in note 64.

55 See e.g. *Schinkels*, in: Beck OGK Art. 11 note 8.

56 *Junker*, note 11; *Schinkels*, in: Calliess Art. 11 note 8.

powers can be considered "civil and commercial matter" and as a consequence be covered by Art. 11.[57] One should distinguish situations where the Member State exercises the state authority (acta iure imperii) and situations in which the public body is liable for acts of "état commer□ant". The first cases should be excluded the latter should fall into the scope of Art. 11.

23 Although we qualify the given set of facts as *negotiorum gestio*, Art. 11 is not applicable if this situation appears in areas taxatively listed for Art. 11 para. 2 a-g. In such cases the legal order results from the international treaty or autonomous choice-of-law rules of the Member States.

24 Furthermore, Art. 13 excludes from the effect of Art. 11 obligations that develop from a breach of copyright law. It is also necessary to exclude from the effect of Art. 11 relationships which originate in the violation of intellectual property rights, where Art. 8 is to apply. 2. Personal scope (applicability *ratione personae*)

25 The Rome II Regulation is applicable to both natural persons and legal entities with the exception of the State and other legal entities established under public law, i.e. public bodies and civil servants exercising State authority as acta iure imperii (second sentence of Art. 1 (1) and Recital 9 of the Preamble). The restriction of personal scope blends together with material scope. As a result, claims arising from *negotiorum gestio* under public law may fall outside the scope of the Regulation.[58]

2. Territorial scope (applicability *ratione soli, teritorii*)

26 Claims from culpa in *contrahendo negotiorum gestio* fall within the scope of the Regulation provided that there is a sufficient connection to the laws of different States (first sentence of Art. 1 (1) in the German language version). The English language version defines this scope differently, namely as situations involving the conflict of laws. The respective legal relationship must contain an element pertaining to the laws of at least two States.[59] The Rome II Regulation possesses characteristics of a so-called loi uniforme, i.e. it relates to situations or legal relationships both within and outside the EU (Art. 3 with exception of Denmark (Art. 1 (4)). This also follows from the wording of the provision, which does not refer to "Member States" but merely to "States". Hence it suffices, in an individual case that circumstances of the case pertain to the law of a foreign State.

3. Temporal scope (applicability *ratione temporis*)

27 Transitional provisions of Art. 31 refer to events giving rise to damage. This means, in the case of *culpa in contrahendo*, that Art. 11 applies to legal relationships arising from *culpa in contrahendo* provided that the cause of damage occurred after January 11, 2009.[60] The transitional provision of Art. 31 does not explicitly address *negotiorum gestio*. Nonetheless,

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57 Cf. *Jakob*/*Picht*, in: Rauscher Art. 11 note 14.

58 See very cautious attitude of *Jakob*/*Picht*, in: Rauscher Art. 12 note 12.

59 Cf. e.g. *Junker*, in: Münchener Kommentar Art. 3. note 2.

60 Cf. CJ EU, case C-412/10, Homawoo v. GMF Assurances SA [2011] ECR I 2011, 1162; *Junker*, JZ 2008, 170.

Art. 2 (1) stipulates that when interpreting Art. 31, an event giving rise to costs, within the meaning of *negotiorum gestio* under Art. 11, must be read in the place of "event giving rise to damage".[61] The *negotiorum gestio* commencement of an unordered conduct taking place after January 10, 2009 is therefore decisive.[62]

V. General provisions

1. Renvoi

28 The Rome II Regulation is based on the principle of connection to the norms of substantive law and therefore excludes the use of *renvoi* (Art. 24)[63], which leads to a connection to the conflict-of-law rule of the determined legal system. This is practical especially in situations with elements of the internal market which are in the scope of some international treaties, which bind some Member States. Art. 24, which is to be interpreted autonomously[64], prevents the courts of Member States from time consuming examination of foreign private international law rules and serves in favour legal certainty and predictability also in the field of *negotiorum gestio*. Prohibition of the use of *renvoi* will also apply in relation to third countries.[65]

2. Ordre public

29 The use of ordre public in the meaning of Art. 26, which aims to limit its usage to delict questions of damages, will be very rare under the effect of Art. 11 and which has to be applied ex officio.[66] The exclusion of a foreign legal order and its replacement by *lex fori*[67] is possible only when the consequences of the use of this legal order would be incompatible with the legal order of *ordre public* with *lex fori*. It is substantial that this legal order can only be defined according to Art. 11, as a legal order different than the legal order of *lex fori*. An other legal order is not only a legal order of a Member State, but also of third states.[68] Even in the case of *negotiorum gestio* while assessing the question of compatibility, it will be necessary to consider not only the relation of substantive core to *lex fori*, but also consistency with the values and objectives of the EU.[69] Hypothetically it could come to the exclusion of a foreign legal order, if it were to leave the claims by its nature and scope incompatible with the understanding of justice.[70]

VI. General structure and determination of applicable law

30 The general structure of the connection of the non-contractual obligation from *negotiorum gestio* overlaps with Art. 11 itself, since as a first step it is necessary to assess the cases which

61 *Hohloch*, in: Erman Art. 11 note 5 and decision of Landgericht München I Beck RS 2013, 1696.

62 See the comments on Artt. 31 and 32.

63 Cf. e.g., *Dicey/Morris/Collins*, Chapter 4.

64 *Altenkirch*, in: Huber Art. 24 note 1.

65 *Dickinson* Art. 11 note 3.05–3.12; *Huber/Bach*, IPRax 2005,811.

66 *Junker*, in: Münchener Kommentar Art. 26 note 13; *Leible/Lehmann*, RIW 2007,734.

67 *Heiss/Loacker*, JBl. 2007, 645; *Junker*, in: Münchener Kommentar Art. 26 note 26.

68 *Junker*, in: Münchener Kommentar Art. 26 note 14; *G. Wagner*, IPRax 2008, 16.

69 *Martiny*, in: FS Sonnenberger (2004), 533; *Junker*, in: Münchener Kommentar Art. 26 note 3, 4.

70 *Junker*, in: Münchener Kommentar Art. 26 note 22 *et seq.*

fall within the scope of Art. 11 (1) from the viewpoint of a possible subjective connecting factor (choice of law – Art. 14).[71] The structure of the connection of Art.11 consists of a three-level cascade of objective connecting factors and a so-called 'escape clause' consisting of a connection to a "flexible" connecting factor[72] of a manifestly closer link.

31 Between particular paragraphs of the three-level cascade included in Art. 11 paras. 1–3 the rank of connection in a descending way is also determined and the Art. 11 (1) accessory connection is of mandatory character.[73]

32 The way of determining the applicable law rests on three steps. At first it needs to be asked, whether a valid choice of law exists (Art. 14).[74] If it is not possible to determine the law validly chosen by the parties, then the next step will proceed according to the cascade of four connecting factors. If it is not possible to connect accessorily (step two, para. 1), then it is necessary to determine the law of the country of the habitual residence of the parties when the event causing the damage occurred (step three, para. 2). If the applicable law cannot be determined according to paras. 1 and 2, then it is necessary to take the law of the country where the act (*negotiorum gestio*) was performed (step four, para. 3). Even if the law is determined in step 2, 3 and 4, it is necessary to ask if there is a closer link to another state and in such case from this point of view the determined law is to be revised in favour of the law according to the escape clause (step 5, para. 4).

VII. Applicable law

1. Choice of law

33 The Rome II Regulation also provides for the choice of law in the case of a non- contractual relationship (Art. 14). From the determination of the governing law on the grounds of choice of law, even the cases of *negotiorum gestio* cannot be excluded[75], though their use will not be very frequent.

34 Limitations of the choice of law do not apply[76] to the cases of *negotiorum gestio*. The chosen legal system does not have to have any special relation to the particular case, or more specifically to the relationship between parties. However, it has to be a legal system which is valid in the particular country.[77] It is also possible to perform a partial choice.[78] The validity of the choice is assessed according to the prevailing opinion pursuant to the chosen

71 But see *supra* Art. 11 note 14 *(Tichý).* See notes 33 and 34.

72 *Leible*/*Lehmann*, RIW 2007, 721 (738).

73 *Huber*/*Bach*, IPRax 2005, 73 (80), but see critical remarks of *Heiss*/*Loacker*, JBl 2007, 642.

74 E.g. *Thorn*, in: Palandt Art. 11 note 4; *Backmann*, in: jurisPK-BGB art. 11 note 10.

75 *Bach*, in: Huber Art. 14 note 1.

76 See Art. 3, 6–8 of the Rome I Regulation but see the regime of the weaker party under Art. 14 (1)(b) and pursuant Art. 14 (2, 3).

77 Cf. *Leible*, RIW 2008, 261; *Junker*, in: Münchener Kommentar Art. 14 note 15; *Bach*, in: Huber Art. 14 note 9.

78 *Bach*, in: Huber Art. 14 note 10.

law and not *lex fori*.[79] The choice can also be done conclusively; there exist some guidelines referring to the will of parties, or more specifically awareness of an act of both parties.[80]

2. Accessory connection, Art. 11 (1)

a) In general

The solution is also consistent with Art. 11 (1), Art. 10 (1) and Art. 12 (1). An accessory connection is based on the idea of an already existing relationship between the parties. According to Art. 11 (1) one cannot connect on hypothetical relationship.[81] The existing obligation does not necessarily have to have been established by a contract or tort only.[82] It can also rest in other non-contractual obligations and it can have the nature of property law, like a lease contract, or relationships from a certain proximity of persons (relatives) or fiduciary relationships (trust, Treuhand etc.).[83] The accessory connection of *negotiorum gestio* with a contract applies if, for example the intervenor exceeds the limits of his authority. It is to permissible connect to a legal relationship even if the said relationship was established only simultaneously with *negotiorum gestio*[84] but not after since the accessory connection is restricted to existing relationships.[85] **35**

It is irrelevant whether or not the legal relationship falls within the scope of the Rome II Regulation.[86] Such a legal relationship does not have to be valid, its alleged existence is sufficient.[87] In favor of this solution speaks the wording of Art. 11 and a functional approach. The provision is indicative. **36**

Some authors hold the view that purely factual relationships cannot serve as a connecting factor as they don't have its prerequisites, simply because there is no law governing such a factual relations.[88] With regard to Art. 11 (1) particularly regarding "a relationship existing between the parties" as a requirement of the accessory connection a question arises what nature of such a relationship should be, more concretely whether the purely factual relationship meets the quality of this prerequisite, provided that such relationship can be legally classified e.g. subsumed under legal institution. Since the wording doesn't require a special legal nature, when speaking about relationship as such, the conclusion could be made that a factual relationship is a sufficient basis of accessory connection.[89] **37**

79 *Heiss/Loacker*, JBl 2007, 623.

80 *Spickhoff*, in: FS Kropholler 2008, 683.

81 *Jakob/Picht*, in: Rauscher Art. 11, note 6.

82 See *infra* notes 38 *et seq*. and 41.

83 *Jakob/Picht*, in: Rauscher Art.11 note 16; *Heiss/Loacker*, JBl 2007, 642; *contra Fricke*, VersR 2015, 741.

84 *Backmann*, in: Juris PK-BGB Art. 11 note 12.

85 The preexistence in not condition of a valid connection. But see opposite view of *Dickinson* note 10.

86 *Nehne*, IPRax 2012, 138; *Backmann*, in: jurisPK-BGB Art. 11 note 12; contrary view *Légier*, 159.

87 *Backmann*, in: Juris PK-BGB Art. 11 note 13.

88 E.g. *Backmann*, in: Juris PK-BGB Art. 11 note 14.

89 Cf. *Nehne*, IPRax 2012, 138; *Légier*, in: Corneloup/Joubert 161; *Fawcett/Carruthers/North*, in: Cheshire/North/Fawcett, Private International Law, 14. ed. 2008, 832.

38 An example of accessory connection to an existing contractual relationship is the exceeding of the contract authorization (e.g. during the medical intervention)[90] or cases in which the contract is not valid or in force or when it has ceased to exist.[91]

39 Another debatable situation could be when the *negotiorum gestio* is connected to two or more relationships. In this case it is also stated that this provision is not going to use results from the grammatical interpretation (relationship in singular form). The solution follows from the assertion that one of these relationships can be considered as more important than another relation existing in the crucial moment and the law governing this "main" relationship has to be applied to the *negotiorum gestio*.[92]

40 If the *negotiorum gestio* is the payment to the third person, the preliminary relation does not exist. A discussion is held about whether the commented upon provision allows the accessory connection to the law, which is being used for the obligation which the intervenor fulfilled. This interpretation is out of keeping with Art. 11 (1) according to the grammatical interpretation.[93] In this situation the intervenor (a voluntary payer) is third party vis-à-vis existing relationship. Whether the obligation of a debtor of such relationship is fulfilled decides the governing law which is a law applicable pursuant Art. 12 Rome I Regulation. If the intervenor carries out such a performance without having any relationship to the debtor, the question arises whether Art. 12 (1) is applicable. Since this provision presupposes existing relationship, the answer is negative.[94] Particularly, in a situation of pure voluntary payment one has to underline the interests of the benevolent intervenor and not to address primarily the law governing the relationship of "foreign parties"[95], be it bilateral or multilateral relationship stemming from a contract, tort or other legal basis.

41 If the agent in the framework of an ordered agency breaches his duty, it establishes the claim for damages for the principal[96] (see the error of a doctor operating on the fainted patient). In such a case, the opinion is advocated that while determining the applicable law for *negotiorum gestio* it is necessary to connect accessorily *negotiorum gestio* to wrongful act. In such a situation *negotiorum gestio* appears to be the decisive legal relationship, which defines the space for tort.[97] Therefore, it is correct that the law of *negotiorum gestio* does not follow the legal order of *negotiorum gestio*, but according to Art. 4 subs. 3 sentence 2 on the other hand the law of the illicit conduct follows the law of *negotiorum gestio*.[98] If there is a close con-

90 *Fischer*, in: FS Spellenberg, 162; *Junker*, in Münchener Kommentar Art. 11 note 13; *Thorn*, in: Palandt Art. 11 note 5.

91 *Junker*, in: Münchener Kommentar Art. 11 note 13; *Thorn*, in: Palandt Art. 11 note 5; *Dutoit*, in: FS Pocar 2009, 323.

92 *Bach*, in: Huber Art. 11 note 17, also cf. ECJ Case C-386/05 – Color Drack, [2007] ECR I – 3699 para. 40.

93 *Bach*, in: Huber Art. 11 note 18.

94 In agreement with the majority opinion: *Fischer*, in: FS Spellenberg, 163, 165; *Junker*, in: Münchener Kommentar Art. 11 note 12, 19, 27; *Légier*, 164 *et seq*.; *Martiny*, note 466; *Spickhoff*, in: Bamberger/Roth Art. 11 note 3; *Nehne*, 139; *Schinkels*, in: Calliess Art. 11 note 15, 16.

95 This is the solution of *Schinkels* (*Schinkels*, in: Calliess Art. 11 note 16) according to whom the claims of the payer (intervenor) against the debtor should be subject to the law governing the satisfied obligation.

96 E.g. this can happen due the error of a doctor operating on the fainted patient.

97 *G. Fischer*, in: FS Spellenberg, 163.

98 *Limbach*, in: Nomos Art. 11 note 11.

nection with *negotiorum gestio*, there is no reason to judge any rights to the accessory to the tortious relationship from the *negotiorum gestio*. If, as a result of his negligence, a bicyclist causes an accident and loses consciousness the claims of a victim based on safety measures he has taken in favour of the wrongdoer are considered as *negotiorum gestio*.[99] Furthermore, claims arising from security measures taken by the injured party in the benefit of the person inflicting damage, who subsequently fell unconscious, shall be also assessed under the law applicable to the tort. Questionable can be the word "event" in sentence "time of the event which gave arise to the damage". The event in the context of benevolent intervention is the act (behavior) of the intervenor.[100] Relevant is the place where the act of benevolent intervention was performed. The connecting factor of common habitual residence must exist at the time when *negotiorum gestio* occurred.[101]

b) Close connection

Another prerequisite for an accessory connection is the close connection ("closely connected" – Art.11(1)) between the *negotiorum gestio* and existing relationship. This connection is involved, for example, when the legal relationship simultaneously also founds the *negotiorum gestio* (taking over the item in order to secure it or if the owed activity was in accordance with a given legal order an impulse to *negotiorum gestio* without representing a certain debt oneself).[102] The most frequent connecting subject is a contract. The connection in such a contract happens on the contractually applicable law on the basis of Art. 11 (1). If the subject of negotiation exceeds one part of the subject of the contract with which it is concurrently in material (content) link, it is the *negotiorum gestio*. One example is the contract about house administration, which does not cover administration (management) of the garden.[103] While fulfilling his duty, the administrator discovers that an old tree is going to fall in the garden and allows it to be cut down without informing the owner about it in due time. The administrator acts outside of the terms of the contract, but his action is in such a close link with it, that the claims to *negotiorum gestio* are able to evaluate the action in compliance with the applicable law of the contract. Long-term obligations that follow from an employment contract are similar to those of a property management contract. **42**

3. Common habitual residence, Art. 11 (2)

If it is not possible to establish a connection to an existing relationship between the parties, connection to their (common) habitual residence may be considered.[104] This second connecting factor supposes that the parties have at the decisive time the habitual residence in the same country. The relevant time is the occurrence of *negotiorum gestio* as an event causing the damage.[105] This time has its basis in the wording of Art. 11 (2), which determines the time of circumstance that caused the property transfer (cost) and not, for **43**

99 *Backmann*, in: Juris PK-BGB Art. 11 note 18.

100 *Fischer*, in: FS Spellenberg, 164; *Nehne*, 139.

101 *Rudolf*, 306; *Kadner Graziano*, 65; *Wagner*, IPRax 2008, 314.

102 *Backmann*, in: Juris PK-BGB Art. 11 note 16.

103 *Backmann*, in: Juris PK-BGB Art. 11 note 17.

104 Another legal rules of the regulation contain the same connection as e.g. Art. 4 (2) refer to Art. 5 (par. 1), respectively Art. 6 (par. 2) and Art. 9, Art. 10 (par. 2) and Art. 12 (par. 2b).

105 *Thorn*, in: Palandt Art. 11 note 7; *Junker*, in: Münchener Kommentar Art. 11 note 15.

example, the origin time of this transfer.[106] Although the *negotiorum gestio* do not lead to a claim for damages, but rather compensation of investments (costs), this term is not wrong since according to Art. 2 (1) the term "damage" includes all consequences of *negotiorum gestio*.

44 Questionable can be the word "event" in the sentence "time of the event which gave arise to the damage". The event in the context of benevolent intervention is the act of the intervenor.[107] Relevant is the place where the act of benevolent intervention was performed. The connecting factor of common habitual residence must exist at the time when *negotiorum gestio* occurred.[108]

45 The purpose of the drafters apparently works on the presumption that the idea of common surroundings and its legal framework is relevant at the moment in which the intervenor decides whether and how he will realize his actions (measures). The criticized inaccuracy in formulation should be possible to remove as this wording should be interpreted in the sense of "the moment of origin the non-contractual legal relationship or to the origin of agency".[109] A prerequisite for this connection is that the parties at the moment of the event causing loss have the habitual residence in the same country.

46 Cases of prevention of damages are relevant and they will doubtless be more practical than linking the place of performance of *negotiorum gestio* (Art. 11 (3)). In the case of unscheduled and hurried actions (measures), which are connected with the places of residence (domicile, seat) it would not be practical to link another legal order than the one concerning the common habitual residence with which the parties are familiarized. Usually it will have a beneficial effect for the parties on the determination of potential jurisdiction.[110]

47 In the case of the preservation of property this establishment can be practical in the case of movables. This applies in cases involving the prevention of damage. If a third person who does not have the identical habitual residence is involved, more parallel applicable legal orders are to be expected.[111] This applies undoubtedly to the redemption of foreign obligations, where it will be practical to connect basically on Art. 11 (4).[112]

48 The requirement of the existence of concourse with other obligation relationships is also relevant. This is especially important with regard to relationships arising from a delict and relationships arising from unjust enrichment. However, a possible concourse with a property relationship and its connection to the location of an item is also relevant. Nonetheless, frequently it is not necessary to use the escape clause as the requisite concourse can also be achieved in accordance with Art.11(1) or (2) or (3).

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106 Cf. *Junker*, in: Münchener Kommentar Art. 11 note 15.

107 *Fischer*, in: FS Spellenberg, 164; *Nehne*, IPRax 2012, 139.

108 *Rudolf*, OJZ 2010, 306; *Kadner Graziano*, RabelsZ 2009, 65; *Wagner*, IPRax 2008, 314.

109 *Kreuzer*, in: Reichelt/Rechberger 45.

110 *Jakob*/*Picht*, in: Rauscher Art. 11 note 21; Hamburg Group for Private International Law, RabelsZ 67 (2003), 32.

111 *Jakob*/*Picht*, in: Rauscher Art. 11 note 22.

112 See *infra* note 58 *et seq*.

4. Place of negotiorum gestio

If either the conditions of connection in Art.11 (1–2) are not met, it is necessary to apply the law of the country in which the *negotiorum gestio* took place. This connecting factor was agreed upon instead of the original proposal of the Commission[113] of the principal's habitual residence, which can prefer the beneficiary in view of the fact of his knowledge of this legal order. The final solution (lex loci gestionis) relies on the concept[114] that there is no reason to favour the principal against over the intervenor.[115]. **49**

The place of performance is the location on which the intervenor's actions materialised on the object of the performance. In cases when the place of performance and place of its consequence differ, the first shall be decisive. Connecting factor of the place of performance is a shift from the basic principle, which is critical for the connection in the case of a tort (Art. 4). Not only the English but also the Spanish and French wording of this provision are very clear. If the place of the act of intervenor differs from the place (country) where the damage occurred, the wording itself gives a clear answer in favor of the first one. The German debate caused also by the German official wording and supported by the arguments of the harmony of conflict of law solution is not convincing[116]. The relevant connecting factor should be the place where the intervenor decided to intervene. This solution is questionable due its subjective nature. Schinkels arguments supporting the place of occurrence of damage (consequence of intervention) are not convincing enough. Differences in language of Art. 11 (2) ("event giving rise to damage" and "act was performed") and historical interpretation are too weak compared with the clear language, particularly in English, French, Spanish and other official wordings[117]. **50**

The majority of commentators however, follows a different opinion considering the place of consequence of performing an act a decisive connecting factor.[118] Such a solution goes however contrary to the explicit wording of Art. 11 (3). **51**

If benevolent intervention occurs in more countries one should differentiate between two situations. First scenario deals with various independent actions coming from different countries it carried out by one or more intervenors. Other scenario means a consecutive actions during a process in which the principal finds himself. **52**

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113 Cf. COM (2003) 427 final, 35 *et seq*.

114 E.g. *Heiss*/Loacker, 642, 643.

115 *Jakob*/*Picht*, in: Rauscher Art. 11 note 25.

116 In favor of this solution see *Nehne*, 140; *Beig*/*Graf-Schimek*/*Grupinger*/*Schackerrreiter*, 86; *Heiss*/*Loacker*, 613; *Rudolf* 306; *Junker*, in: Münchener Kommentar Art. 11 note 17; *Limbach*, in: Nomos, Art. 11 note 13. Contrary position *Leible*/*Lehmann*, RIW 2007, 732; *Schinkels*, in: Calliess, Art. 11 note 20; *Fischer*, in: FS Spellenberg, 164 *et seq*.; *Looschelders*, 410; *Jakob*/*Picht*, in: Rauscher, 26; *Thorn*, in: Palandt, Art. 11 note 8; *Spickhoff*, in: Bamberger/Roth, Art. 11 note 8. Other solution *Plender*/*Wilderspin*.

117 *Plender*/*Wilderspin*, note 25–034, *Schinkels*, in: Calliess, Art. 11 note 39.

118 *Thorn*, in: Palandt Art. 11 note 8; G. *Fischer*, in: FS Spellenberg, 165, *Heiss*/*Loacker* JBl 2007, 643; *Leible*/*Lehmann*, RIW 2007, 732.

53 In the scenario of various independent actions, prominent authors propose a mosaic solution[119]. One main act which should be the connecting factor is important for Spickhoff[120]. The place of the first impact of the intervention on the interest of the principle is the solution proposed by Schinkels[121]. In these situations, also another connecting factor may be considered, namely, the centre of mass of *negotiorum gestio*. It is certain, that on the term "centre of mass" no low requirements should be placed. As the *negotiorum gestio* usually occurs in the context of more interests and opposite values, it must reflect the complex situation in the process of solving the question of the centre of mass.

54 Regarding the consecutive action there are solutions consisting in the begin of the action[122]. The end of the action is the solution of Rushworth and Scott[123]. Again, the center of all actions is the solution of Spickhoff and Plender and Wilderspin[124]. For sake of the legal certainty and the efficiency of determination of governing law the place of beginning of such action matters.[125]

55 Special solution for an inaction finds as a connecting factor place where the intervenor decided not to act (where the inaction decided upon by the intervenor occurs or if it occurs in more than one place substantially occurs)[126].

56 One should take into consideration all proposed solutions. However, in recommending own approach one should think of one more aspect. This is apart from very limited likelihood of the occurrence of plurality of intervenors, the fact that there is also very limited likelihood of too many benevolent intervenors. Based on that it seems that the predictability and legal certainty would be prevalent criterions for a resolution. Under these circumstances the aspect of time-consuming proceedings doesn't play any importance. Therefore, the recommendation should prefer individual approach to any action, be it is the scenario plurality of actors within short period of time or in the scenario of a continuous process with subsequent actions (for instance the transportation of an injured skier through cross boarding area). Irrespective of number of acts and actors one should determine the governing law for every individual relationship (obligation) separately.

57 The requirement of the existence of the concurrence with other obligation relationships is also relevant. This is especially important with regard to the relationship arising from a tort and relationships arising from unjust enrichment. However, a possible concurrence with property relationships connected with *lex rei sitae* and their connection to the location of a

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119 *Heiss/Loacker*, 643; *Spickhoff*, in: Bamberger, Roth, Art. 11 note 6; *Schinkels*, in: Calliess, Art. 11 note 21; *Limbach*, in: Nomos, Art. 11 note 13; *Plender/Wilderspin*, Art. 11 note 25–003; *Jakob/Picht*, in: Rauscher, Art. 11 note 26.

120 *Spickhoff*, in: Bamberger/Roth, Art. 11 note 6.

121 *Schinkels*, in: Beck OGK, Art. 11 note 40.

122 *Nehne*, IPRax 2012, 140; which has a opposition in solution of *Junker*, in: Münchener Kommentar, Art. 11 note 18; *Rudolf*, 307; *Thorn*, in: Palandt, Art. 11 note 8.

123 *Rushworth/Scott*, MCLQ 2008, 289.

124 *Spickhoff*, in: Bamberger/Roth, Art. 11 note 7; *Plender/Wilderspin*, Art. 11 note 25–037.

125 *Junker*, in: Münchener Kommentar Art. 11 note 18; *Thorn*, in: Palandt Art. 11 note 8.

126 *Plender/Wilderspin*, Art. 11 note 25–040.

thing is also relevant.[127] Nonetheless, frequently it is not necessary to use the escape clause as the requisite concurrence can also be achieved in accordance with Art.11(1) or (2) or (3).

5. Escape clause, Art. 11 (4)

58 The escape clause is an exceptional Regulation, whose nature is apparent from the very wording of this provision ("manifestly more closely connected"). It shall be applied only occasionally due to the uniform treatment of the Regulation within the EU. This "fall-back solution" will be implemented in the event that the previous connections would not lead to its goal.[128]. Escape clause is a gap filling provision[129] Going parallel to the basic rule of Art. 4 (3) which enables to use the interpretation developed there.[130] Generally, it is accepted that the claims to the redemption of an obligation are accessorily connected to relationship existing between principal and his creditor through the escape clause. This connection applies also in case of sea rescue operations as the law of the rescued ship is not the place of the act or an example of special circumstances of the specific example, unless the international Convention is applicable.

59 The cascade structure of connecting factors means inter alia that escape clause can be applied once the law applicable according to the precedent provisions (Art. 11 (1–3)) was taken into consideration and their requirements were not met. Even after this evaluation (determination) one can decide whether the non-contractual obligation is manifestly closely connected with another country[131]. This is particularly important for the situation of ships on the high sea[132].

VIII. The scope of applicable law

60 Although the wording of Art. 15 (lit. a – h)applies to delictual relationships, it must also be applied to other non-contractual relationships, including those arising from *negotiorum gestio*. The term "damage" as it is used in Art. 15 must be interpreted in light of Art. 2 (1) as all consequences of non-contractual relations and the term "liability" must be understood as "responsibility". All questions concerning *negotiorum gestio* are to be connected under the law applicable to it.[133]

61 Also the application of Art. 11 must be based on the fundamental principle of uniform connection, i.e. from the broadest possible scope of the legal order that should govern the relationship. In other words, splitting governing legal order must be avoided and cases of right to information, actio negatoria and actions on removal of a thing/state must be connected in a uniform manner.[134] The scope of the applicable law also covers issues of liability

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127 *Backmann*, in: Juris PK-BGB Art. 11 note 19.

128 *Backmann*, in: Juris PK-BGB Art. 11 note 27.

129 *Spickhoff*, in: Bamberger/Roth Art. 11 note 7.

130 Cf. *Junker*, in: Münchener Kommentar Art. 11 note 19.

131 Cf. *Schinkels*, in: Calliess, Art. 11 note 8.

132 *Schinkels*, in: Calliess, Art. 11 note 24.

133 *Junker*, in: Münchener Kommentar Art. 11 note 28.

134 *Backmann*, in: Juris PK-BGB Art. 11 note 28.

of third parties and notably the regime of defences and of other defence instruments as stipulated by Art. 11.

62 Finally, it must be emphasized that the list of issues that are, according to Art. 15, to be governed by the applicable law is not exhaustive (see "in particular"). Therefore, an intervenor's claims arising from damages or compensation of costs as well the principal's claims, especially on surrounding acquired property are to be connected under the law determined by Art. 11.

63 Certain claims of a delictual nature that arise from *negotiorum gestio* must be distinguished as they must be connected in accordance with the rules for torts (Art. 4 et al.). Article 15 stipulates that prerequisites of claims arising from *negotiorum gestio* are determined by the respective *negotiorum gestio*. This is similar to preconditions of a justified agency and to consequences that are tied to different types of *negotiorum gestio*. In principle, the applicable law is to be applied broadly when establishing a basic connection and effective concurrence with other obligation relationships, especially with those arising from a delict or from unjust enrichment. It is not decisive whether it is a principal's or an intervenor's claim. The objective of the claim is also irrelevant, whether it is damages, compensation of costs, side claims or information on interest payment.

IX. Negotiorum gestio on the high sea

64 Outside the scope of the International Convention[135] it is possible to define the applicable law according to Art. 11. In the case of both an absence of the legal relationship between the parties (Art. 11 (1)) and the habitual residence of the parties in the same state (Art. 11 (2)), it is the law of the state, where the *negotiorum gestio* was accomplished, applies. This implies to connect to the place of or rescue measures. If *negotiorum gestio* was performed onboard a ship or airplane, then the solution depends on the circumstance, whether the act was performed in the territorial waters or airspace or in international water or airspace. In the first situation the law of the affected country is to apply or the law of vessel's flag or the port of the departure or destination if there is a closer connection. In the latter situation the law of the flag is inapplicable. Instead, courts should apply the law of the flag or the port of departure or destination under the escape clause of Art. 11 (4).[136] Under Art. 11 (3) the situation could be subsumed if the country of the flag of the ship that the action of the intervenor impacted.[137]

Article 12: Culpa in contrahendo

1. The law applicable to a non-contractual obligation arising out of dealings prior to the conclusion of a contract, regardless of whether the contract was actually concluded or not, shall be the law that applies to the contract or that would have been applicable to it had it been entered into.
2. Where the law applicable cannot be determined on the basis of paragraph 1, it shall be:

135 On Salvage of 28 April 1989.

136 *Bach*, in: Huber Art. 11 note 22.

137 *Schinkels*, in: Beck OGK, Art. 11 note 42; *Hohloch*, in: Erman Art. 11 note 9; *Jakob*/*Picht*, in: Rauscher, Art. 11 note 31; *Backmann*, in: Juris PK-BGB, Art. 11 note 26.

(a) 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 occurred; or
(b) where the parties have their habitual residence in the same country at the time when the event giving rise to the damage occurs, the law of that country; or
(c) where it is clear from all the circumstances of the case that the non-contractual obligation arising out of dealings prior to the conclusion of a contract is manifestly more closely connected with a country other than that indicated in points (a) and (b), the law of that other country.

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I. Purpose

The regime of Art. 12 Rome II is one of the first, or may even be the very first, conflict-of-law codification of *culpa in contrahendo*. It is relevant that *culpa in contrahendo*, and obligations arising from it, constitute a separate category towards relationships of contractual and delictual liability.[1] The law applicable to *culpa in contrahendo* is determined independently of the law applicable to a contract or to a tort. The Rome II Regulation introduced the unified regime of *culpa in contrahendo* as autonomous concept which must be construed also in autonomous way. Due the definition of the notion of culpa of contrahendo the European legislator provided for specific material scope of this institution which differs from the national concepts. One of the characteristic features of the new conception is the borderline between transactional duties whose violation may lead to the claims from culpa in contrahendo on the one hand, and general duties whose violation falls into the general regime of the tort (Art. 4) on the other hand. The European legislator created a specific regime of determination of governing law which are slightly different from the other provisions for non-contractual obligations (in Art. , 11). **1**

Article 12, linking *culpa in contrahendo* as a borderline institute between a contract and a tort, aims to accommodate relevant interests and to achieve a systemic symmetry.[2] The scope of *culpa in contrahendo* was also extended by Art. 12 to (functionally delictual) cases (non-contractual, pre-contractual)[3], which corresponds with the perception of justice.[4] Pre-contractual obligations in Art. 12 arise out of the hypothetical contracts. Thus, it effectively refers to conflict-of-law rules governing contractual relationships within the regime of the Rome I Regulation, which also addresses the question of whether *culpa in contrahendo* falls within the scope of the Rome I or the Rome II Regulation.[5] The connection to a hypothetical contractual law applicable to the contract is proof that Art. 12 thus contains a modification of the connection schemes of Arts. 10 and 11. *Culpa in contrahendo* as a non-contractual institution in Art. 12 includes the following concepts: (i) Breaches of pre-contractual duties to disclose information regarding relevant circumstances that must be communicated with the other party in compliance with the principle of good faith; (ii). Breaking off of contractual negotiations without a legitimate cause; and (iii). Cases pertaining to third parties engaged in contract negotiation.[6] Decisive criterion of *culpa in contrahendo* in the sense of Art. 12 is the (causal) direct link between violation of specifically transactional duty and damage caused to other party. **2**

1 "Neither purely contractual nor purely non-contractual" (*Bach*, in: Huber Art. 12 note 1).

2 *Junker*, in: Münchener Kommentar Art. 12 note 1.

3 "... other than a tort/delict ..." – Recital 29 of the Regulation.

4 *von Hein*, GPR 2007, 61.

5 *Leible/Lehmann*, RIW 2007, 733.

6 Compare *Stoll*, in: FS Georgiades, 941, 942.

3 Primary rule in paragraph 1 of Art. 12 is based on the law applicable to the contract or contemplated contract between the parties (accessory connection) and then, in a cascade system, the applicable law for torts also comes into consideration.[7] Thus, on the conflict of law level, the conflict between a tortious and contractual qualification of *culpa in contrahendo* was resolved by a compromise. A conception based on a clear borderline between contractual and pre-contractual obligations on the one hand and distinguishing between the pre-contractual and tortious relationships on the other was rather overcome by a specific, autonomous category of non-contractual obligations, also including unjust enrichment and *negotiorum gestio*.[8]

II. Legislative history

4 Neither the Commission Proposal of 22 July 2003[9] nor the Commission Amended Proposal of 21 February 2006[10] contained a rule dealing with the category of *culpa in contrahendo*. However, even before publication of the Proposal (2002), the Court of Justice decided in *Tacconi v. Wagner*[11] that an obligation to remedy damage caused by the unjustified breaking off of contractual negotiations has to be classified in a tortious way and not as a contractual relationship. Article 12 emerged firstly after the work of the Councils Committee[12] in the Common Position of the Council of 25 September 2006[13] following the provisions on unjust enrichment and *negotiorum gestio* and was reflected in Recital 30 of the Preamble of the Rome II Regulation and in Art. 1 (2)(i) of the Rome I Regulation.[14]

III. Notion of culpa contrahendo

1. Introduction

5 Relationships formed prior to the conclusion of a contract do not have a clear nature. Their link to a contract is only apparent in formation. The conduct of parties to a contract during negotiations may be wrongful; hence, such relationships may have both contractual and delictual nature. Certain liabilities arising from pre-contractual relationships are frequently referred to as obligations from *culpa in contrahendo* (liability for *culpa in contrahendo*). Yet even legal systems employing this reference interpret *culpa in contrahendo* differently.[15]

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7 Cf. *infra* note 43 *et seq*. and *Dickinson*, The Rome II Regulation, para. 12.12.

8 Cf. *Junker* speaks of third way ("dritte Spur") between international contract and tort law (*Junker*, in: Münchener Kommentar Art. 12 note 6). See also *von Hein*, GPR 2007, 59 and *Hartley*, Int. Comp. L. Q. 57 (2008), 907; opposite view *Spickhoff*, in: Bamberger, Roth Art. 12 note 1; *Lüttringhaus*, RIW 2008, 196 *et seq*.

9 Proposal of the Commission of July 22, 2003, COM (2003), 427 final.

10 Amended proposal of the Commission of February 21, 2006, COM (2006), 83 final.

11 Case C-334/00, *Fonderie Officine Meccaniche Tacconi SpA v. Heinrich Wagner Sinto Maschinenfabrik GmbH* [2002] ECR I 7357, para. 26.

12 Cf. Council document 7709/06 [3.5.2006] and Council document 7432 [16.3.2006].

13 Common Position, Art. 12, OJ 2006 C 289 E, 68.

14 See the reference in Recital 10 of the Preamble of the Rome I Regulation. Further on the legislative history see inter alia *Junker*, in: Münchener Kommentar vor Art. 1 note 4, 5 and *Dickinson* para. 12.02 and *Budzikiewicz*, in: Nomos Kommentar, Art. 12 notes 4–10.

15 *von Bar*/*Drobnig*, The Interaction of Contract Law and Tort and Property Law in Europe, 246, note 381.

Therefore Recital 30 of the Preamble of Rome II expressly stipulates an autonomous interpretation of *culpa in contrahendo* that typically does not correspond with the concepts of *culpa in contrahendo* as contained in the "national law" of EU Member States.[16]

6 The legal institution of *culpa in contrahendo*, first described by von Jhering, is a category by which it remains controversial whether it falls within the scope of the law of contracts or delicts.[17] For instance, in Germany *culpa in contrahendo* was recognised solely in case law and it was not until 2001 when it was finally codified (§ 311 BGB). Nowadays, it is applicable to a vast field of relationships. The German concept of *culpa in contrahendo* served as a source of inspiration to other jurisdictions, including Austria, yet *culpa in contrahendo* as such is known in many European jurisdictions[18].

7 In these jurisdictions there are some common characteristic features. First of all, there is the principle of good faith (and fair dealing). This principle represents a benchmark by which the legitimacy of the conduct (dealing) of the parties has to be assessed. A dealing contrary to good faith is the main condition for any remedy of the other party.[19] Austria follows this model in some reduced way[20]. This conception has been followed in Italy and codified in Art. 1337–1338 of Codice civile of 1942.[21] A similar attitude was also adopted by Greek law, as codified in Art. 197–198 of Civil Code, and Portuguese law, in Art. 227 Codigo Civile.[22] *Culpa in contrahendo* is also known by a group of Eastern European countries, namely Estonia (§ 127 paragraph 2 of the Law of obligations of 2002), Hungary (§ 5: 129–5:130 of the Civil Code 2013) and the Czech Republic (§ 1728–1730 of the Civil Code of 2012). The principle of good faith and fair dealing is one of the principles of international academic projects. PECL (Art. 2: 301). PICC (Art. 2.1.15) and DCFR (Art. 3:301) codified liability for an unjustified breakdown of contractual negotiations. All three of these projects provided for protection against issues of confidential information (PECL – Art. 2:301, PICC – Art. 2.1.16, and DCFR – Art. 3: 302). Also Danish law[23] and Dutch law (Art. 3:296 NBW) employed distinctive pre-contractual claims for compensation of damage provided that the party to the contract interrupts contractual negotiations in breach of the principle of good faith. Finnish courts have also imposed liability for *culpa in contrahendo*.[24] In most of these jurisdictions the remedy is damages, although sometimes restitution is awarded. In the case of breach of confidentiality, an

16 Cf. "non-contractual obligation sui generis" – correct classification of *Dörner*, HK-BGB Art. 12 note 1 and *Junker*, in Münchener Kommentar Art. 12 note 6. Against the qualification of culpa in contrahendo as tortious relationship see Max Planck Institute, Comments on Rome II Proposal, RabelsZ 71(2007), 225, 238–240.

17 Cf. *von Jhering*, Culpa in contrahendo oder Schadenersatz bei nichtigen oder nicht zur Perfektion gelangten Verträgen, JhJb. 4 [1861] 1 *et seq*.

18 *Ranieri*, Europäisches Obligationenrecht, 2009, 205 *et seq*.

19 Cf. *von Bar*/*Clive* (eds.), Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR), 2010, Volume I, 241–246.

20 Cf *Koziol*, Von der rechtsgeschäftlichen Bindung zur Vertragshaftung, in: FS Iro 2013, 81–100.

21 *Ranieri*, Europäisches Obligationenrecht 2009, 205 with references to C. Turco, interesse negativo e responsabilità precontractuale, Milano 1990.

22 *Ranieri*, Europäisches Obligationenrecht 2009, 206.

23 Supreme Court ruling of 30 April 1985, Ufr 1985 550.

24 Supreme Court in its decision of 23 April 1999, KKO 1999: 48.

injunction can be required (II.3: 302 paragraph 2 DCFR). The person who acted against good faith is liable for losses incurred. The scope may differ substantively. It may include expenses of many types (travel expenses, etc.), work done, loss on transactions made in reliance of the expected contract.

8 *Culpa in contrahendo* may vary imminently. It may typically cover three types of violations of contractual duties. The first potential violation is the breakdown of negotiations without a justified reason (contrary to good faith). Secondly, breaches of contractual duties of disclosure regarding relevant circumstances contrary to good faith (e.g. misrepresentation) may be actionable. Thirdly, situations may include cases in which third parties violate their duties. The liability for damage in *culpa in contrahendo* may be more extensive and cover other various scenarios. PECL, PICC and DCFR include the protection of "confidential information"[25] against a breach of confidentiality, i.e., conduct leading to disclosure or use for "the recipient's own purpose" if the contract has not been concluded. Personal injury cases caused by violation of general duties of safety (e.g. so called linoleum and salad leaf cases at live accidents) may also fall under *culpa in contrahendo*. This is typical for Germany[26]. According to Italian law[27], the conclusion of a contract under these advantageous circumstances also falls into the category of *culpa in contrahendo*. French law doesn't know *culpa in contrahendo* in the previously described sense. As the general clause of tort law in Code civil is very broad, French law deals with a claim for damages as a tort. However, a substantive doctrinal change followed by case law of the French Cour de Cassation and the Reform of Code civil.[28] Since English law doesn't contain the general principle of good faith on its own, the courts resolve these problems based on plurality and to some extent functionally equivalent categories (for example, estoppel, duress, misrepresentation, mistake). Liability for breaking off contractual negotiations is regarded sceptically due to a very narrow frame of party autonomy in this context.[29]

9 This shows that comparative analysis[30] has lesser importance in the context of Rome II Regulation, mainly as the concept of *culpa in contrahendo* is autonomous and "should not necessarily be interpreted within the meaning national law" (Recital 30 of the Rome II Regulation).

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25 See *supra* note 7 and *infra* note 34.

26 See decisions of Reichsgericht of 17 December 1911 (linoleum case RGZ 78, 239) and of Bundesgerichtshof of 28 January 1976 (salad leaf case, BGHZ 66, 51).

27 See *supra* note 7.

28 Code civil Cass. Com, ruling of 26 November 2003 and Art. 1112-1112-2 Ordonnance n° 2016-131 of 10 February 2016.

29 *Treitel*, The Law of Contract, 7th ed. 1987, 302. 302 *et seq*.; *von Hein*, in: Basedow/Hopt/Zimmermann (eds.), Handwörterbuch des Europäischen Privatrechts, 2009, vol. I, 290 *et seq*. See also *Dickinson*, The Rome II Regulation, para. 12.05.

30 Cf. also *von Bar*/*Drobnig*, Study on Property Law and Non-contractual Liability Law as they relate to Contract Law, SANCO B5–1000/02/00574.

2. Qualification

a) Introduction

The question regarding the applicability of the *culpa in contrahendo* conflict-of-law rule is closely connected with the understanding of this legal institute.[31] It thus involves the very controversial issue of claims qualification. Even the commented upon rule which emanated from the controversy of the question of qualification, which became obvious in the decision of the ECJ in the case of *Tacconi*,[32] does not absolve the commented rule of its fundamental significance. An important change compared with the traditional concept (mainly in Germany) in this respect is the qualification of personal injury claims which had been excluded from the scope of liability for *culpa in contrahendo* in the sense of Art. 12; the wording of the last sentence of Recital 30 of the Preamble is clear. **10**

The basis of the interpretation work is the Regulation itself which qualifies the notion of "non contractual obligation" (Recital 11 of the Preamble) as well as the notion "culpa in contrahendo" (Recital 30 of the Preamble) as an autonomous concept. In light of these provisions, any individual element of parties' dealings should logically be interpreted. It is also necessary to interpret autonomously the term "the violation of the duty of disclosure" or "the breakdown of contractual negotiations". This serves to underline the significance of the structural and terminological understanding of *culpa in contrahendo* in an autonomous sense. An autonomous interpretation does not mean an isolated one, but one taken in context particularly with the Rome I Regulation and Art. 4 – 9 the Rome II Regulation.[33] *Culpa in contrahendo* concerns more than just cases which fall into the scope of Rome II and which are delineated by Arts. 4 and 12. This is why wrongfulness during contract negotiations is mentioned, as well as non-contractual relationships in immediate connection with negotiations prior to the conclusion of the contract. **11**

An autonomous qualification that is distinctive from contractual obligations is also stipulated by Art. 1 (2)(i) of Rome I, which excludes the application of Rome I to obligations arising from a negotiation prior to the conclusion of the contract.[34] The phenomenon of *culpa in contrahendo* is an independent of the fact whether the concept was entered into validly or not[35]. Without personal contact (relationship) between the third person and the victim the tort rules apply[36]. Contractual qualification is excluded and no attention is payed to national concepts[37]. This supports the legal certainty, harmonizing of decision making. The claims should be qualified either contractually nor delictually[38] but autonomously-non-contractually. **12**

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31 See *supra* notes 5 *et seq*.

32 See *supra* note 4.

33 *Jakob*/*Picht*, in: Rauscher Art. 12 note 6; see also dealings of one party contrary to good morals aiming at the damage of other party and its qualification as tort pursuant to Art. 4, note 25.

34 See also Recital 10 of the Preamble of Rome I Regulation.

35 *Kurt*, culpa in contrahendo, 244.

36 *Kurt*, culpa in contrahendo, 234.

37 *Martiny*, ZEuP 2008, 85; *Lütringhaus*, RIW 2008, 196; *Francq*, Yb PIL, vol. VIII, 2006, 333.

38 *von Hein*, GPR 2007, 59; *Lütringhaus*, RIW 2008, 196.

13 A functional analysis (functional qualification) should be applied to resolve the disputed areas between the scope of the application of Rome II and Rome I and to the classification of legal relationships as either contractual or non-contractual. Provided that the legal relationship may be classed as a part of a relationship between the parties to a contract, such relationship is to protect the parties' interest in the performance of the contract and thus its classification as falling within the scope of Rome I seems to be correct.

b) Basis of liability for *culpa in contrahendo*

14 Thus Art. 12 must be applied in cases involving the protection of parties' interests in the conclusion of the contract during formation when the liability concerns a breach of duties linked to the transaction. Conversely, Art. 4 shall apply in cases aimed at the protection of the personal integrity or property sphere of a party.[39] Thus all duties requiring a party to a contract to aim at the conclusion of a valid contract may be subsumed under the term of *culpa in contrahendo*. Such duties includes the duty to inform the other party to the contract to ensure the contract in formation is valid. When one of the parties is aware, for instance, that Regulations governing foreign exchange may render the contract invalid[40], unless such contract is approved by the authorities and the regulation of such contract requires one party to notify the other party about this, this duty to inform falls within the scope of *culpa in contrahendo.* The scope of Art. 12 covers two types of claims: Firstly, claims for damages on the ground of frustrated, legitimate expectation of the conclusion of a contract or based on liability for trust, caused by unjustified breakdown of the negotiations by the other party. Secondly, there are claims at stake based on the damage sustained by the other party as a consequence of the invalid contract or of a contract with a content contrary to a legitimate expectation of the party, caused by a breach of the duty to disclose all information regarding both and the circumstances preventing he conclusion of a valid contract and the content of the contract.[41] A damage as a consequence of a violation of duty of disclosure represents the difference between a valid contract which has been concluded and a contract which has been expected by other party[42].

c) Good faith

15 The wording of Art. 12 indicates liability for unfair conduct prior to a contract[43] This is also corroborated by Recital 11 of the Preamble stating that this may also include obligations arising from strict liability.[44] Hence, Art. 12 also applies to liability for unwillfully providing a false piece of information during contract negotiations.[45]

16 Good faith or bad faith as characteristic feature of *culpa in contrahendo* in many jurisdictions is not required on the conflict-of-law Union level.

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39 On this question see *infra* note 36.

40 *Bach*, in Huber Art. 12 note 8.

41 Cf. *Hocke*, IPRax 2014, 307 (309), in same sense see *Fischer*, in: FS Kühne, 693 *et seq*.

42 *Kurt*, Culpa in contrahendo,137, 159; on this question see *infra* note 33.

43 Cf. *Dickinson* Art. 12 note 12.04. *Hocke*, IPRax 2014, 307 (309), in same sense see *Fischer*, in: FS Kühne, 693 *et seq*.

44 See note 28 *infra*.

45 See note 28 *infra*.

d) Third parties

Most legal orders recognise claims arising from *culpa in contrahendo* only if raised among potential parties to a contract.[46] The provisions of the German BGB (§ 311(3)) allowing claims stemming from *culpa in contrahendo* to be raised against third parties that substantially influenced contract negotiation are rare.[47] Yet due to the wording of Art. 12 such claims cannot be conclusively excluded. Claims stemming from *culpa in contrahendo* arise when a duty is established by the very negotiation prior to the conclusion of a contract.[48] **17**

Two basic situations are to be distinguished.[49] The first situation embraces three items: agents of the parties, experts and cases of prospectus liability. Agents of parties may influence contract negotiations while exceeding their competence or trust or persons acting as unauthorised agent (falsus procurator). According to the majority opinion, agents and other negotiation auxiliaries fall within the scope of Art. 12.[50] However, the position of a group of third parties that are neither immediately connected to parties, nor take immediately part in contractual negotiation is different[51], namely falling under Art. 4 and not Art. 12. In contrast to the latter situation distinct solution applies to the liability of experts who are retained by the parties. The liability in these cases presupposes a direct link (Recital 30 of the Preamble) of an expert to the concrete dealings, namely the expert's active role in the negotiations.[52] Then the claims against the expert fall under Art. 12 (2).[53] In contrast to the above-mentioned solutions, the liability of securities issues should not follow the regime of Art. 12, as there any direct link to the purchasers of the securities is missing.[54] **18**

The second basic situation, namely the liability of the parties to the negotiations against third persons should not fall under the regime of Art. 12. As they are linked to one or both parties by contract (as agents, experts etc.) their claims will be governed by the law determined by the Rome I Regulation. Their possible personal injuries will then fall under Art. 4 of the Rome II Regulation. **19**

e) Direct link

The decisive criterion of direct link can be for the qualification of an obligation falling within the scope of Art.12 (*culpa in contrahendo*) or as a purely delictual legal relationship under Art.4. A direct link (required by Recital 30 of the Preamble) is of key importance when delimitating the scope of Art. 12 and of *culpa in contrahendo* contained therein in **20**

46 *Supra* note 7.

47 The relationships between the opposite contracting party and the third person don't fall as a rule within the ambit of Art. 12. There is neither accessory connection, nor personal contact between the third persons and the victim (*Kurt*, Culpa in contrahendo, 232, 233). On that question see note 62 *infra*.

48 Cf. e.g. *Thorn*, in: Palandt Art. 12 note 2; *Budzikiewicz*, in: Nomos Art. 12 note 40.

49 Cf. *Bach*, in: Huber Art. 12 notes 15–17.

50 Cf. *Junker*, in: Münchener Kommentar Art. 12 note 17, 32; *Dörner*, in: Juris HK-BGB Art. 12 note 2, *Budzikiewicz*, in: Nomos Art. 12 note 40 *et seq*.; *Thorn*, in: Palandt Art. 12 note 2.

51 See *infra* note 38.

52 Cf. *Bach*, in: Huber Art. 12 note 16.

53 See *infra* note 55.

54 Cf. *Junker*, in: Münchener Kommentar Art. 12 note 15, *Bach*, in: Huber Art. 12 note 18.

relation to third parties.[55] A third party must demonstrate that the link is a qualified relationship especially with respect to potential parties to a contract. A direct link must exist between the claim (damages) and the negotiations duty or violation of a duty and negotiation.[56] The borderline between transactional duties and tort law general duties is basis of differentiation between *culpa in contrahendo* and tort. This is typical feature of this autonomous concept of *culpa in contrahendo* in Rome II Regulation. Excluding the general duties from the scope of Art. 12 causes the narrower scope of this notion compared to some national concepts.

21 Hence, it is necessary for a third party to be actively engaged in contract negotiations. Another solution would namely undermine the predictability of consequences that is one of Rome II's key objectives. Thus, the third party's (e.g. expert) liability falls within only when such a third party played an active role in the negotiations.[57] In every case, it must be examined whether the duty breached is directly linked to the concluded or intended contract so that it may be considered immediately linked to the contract. The personal liability of a representative for misrepresentation or lack of authority (falsus procurator) thus fall under the scope of Art. 12 because *culpa in contrahendo* protects parties to a contract when concluding the contract. When there is a direct link between an expert opinion and the result of negotiations, the expert's liability falls under Art. 12. Therefore, the liability for a prospectus remains outside the scope of Art. 12. An issuer of a prospectus most likely does not know who purchases its securities nor is it involved in negotiations leading to it.[58]

22 Like personal injury also a material harm (damage) incurred as a consequence of neglection of precautions, while a contract is being negotiated or even prior the negotiations, is not part of non-contractual obligation presenting a direct link with the dealing prior to the conclusion of the contract (Recital 30 of the Preamble). Thus scope of the notion of *culpa in contrahendo* is narrower than such an institution in many legal orders. In other words, the personal injury and material damage[59] which have no intellectual connection (see "direct link") with the existent or putative (hypothetical) contract.[60] What matters is transactional, expectation interest.

f) Concurrence of claims

23 The competition of two legal orders determined by Art. 12 must be resolved. In the event that the relationship between the parties has existed for a long time, then both transaction and integration duties may be breached independently of each other. In such cases, each relationship is to be assessed according to its own rules. The connection of different legal orders (statutes) in uncontroversial. These are two (or more) different sets of facts that are linked only through the pre-contractual relationship of the parties.[61]

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55 See *supra* notes 17–19 and *Spickhoff*, in: Bamberger, Roth Art. 12 note 6; *Thorn*, in: Palandt Art. 12 note 5; *Junker*, in: Münchener Kommentar Art. 12 note 17.

56 See *Schinkels*, in: Beck OGK, Art. 12 notes 4, 25.

57 *Bach*, in: Huber Art. 12 note 16.

58 *Bach*, in: Huber Art. 12 note 17.

59 *Kurt*, Culpa in contrahendo, 78.

60 *Leible/Lehmann*, RIW 2007, 733. Against a tort or non-contractual qualification very convincingly *Mankowski*, 127 *et seq*. 135.

61 Cf. *Stoll*, in: FS Georgiades, 957 *et seq*.

However, there may be cases when a breach of both transaction and integration duties follows from a single conduct, such as when false information induces the other party not only to conclude a contract, but also to carry out other actions, which result in damage to its property sphere. In such a case, it is permissible to use the adaptation of statutes through Art. 4 (3) as in most cases it is possible to determine that the hypothetical contractual statute within the meaning of Art. 12 (1) and Art. 12 (2) would apply. **24**

When the contemplated contract is concluded, concurrence may be reached through the connection of Art. 12 (1) and the second sentence of Art. 4 (3). It is not permissible to proceed in this manner if the contract was not concluded. However, one can to connect through the first sentence of Art. 4 (3) since the list in the second sentence of Art. 4 (3) is non-exhaustive. Such an adaptation is nonetheless restricted to cases when an internal link exists between a transactional and an integrational breach of duty.[62] **25**

g) Negotiation and duties of the future contracting parties

The key issue is the delimitation of negotiations vis-à-vis an already negotiated contract.[63] The mere entrance into a shop's premises or the inspection of displayed products in a market stall without any verbal or other expression are not typically considered negotiations. Negotiation presupposes contact after one party expressed interest in the conclusion of a contract. The precise moment of transformation of an informal contact in negotiation ("dealing") is irrelevant for the application of Art. 12.[64] What matters is the nature and subject matter of a negotiation.[65] **26**

The law applicable to a contract also governs elements of liability for the non-conclusion of a contract. It defines the duty to disclose the elements of a potential non-conclusion of a contract and liability for it. The law applicable to a contract also governs the validity of a contract on the progress of duties to negotiate and its consequences in the event that the parties concluded it. Notion of *culpa in contrahendo* within the scope of Art. 12 one should also include liability of a breach of confidentiality.[66] The obligation stemming from this wrongful act should be subsumed under regime of Art. 12.[67] **27**

European legislator provides for two kinds of duties whose violation may give rise obligations (claims, liabilities). One kind of these duties has explicit wording – duty of disclosure,– other kind has an implicit form – negotiate in accordance with good faith and fair dealing. Both kinds of duties are only examples.[68] A violation (breach) of duties linked with the concluding of the concern does not belong to the notion of the *culpa in contrahendo*.[69] Thus **28**

62 *Jakob/Picht*, in: Rauscher Art. 12 notes 15, 16.

63 *Budzikiewicz*, in: Nomos Art. 12 note 17 *et seq*.

64 *Junker*, in: Münchener Kommentar Art. 12 note 12.

65 Cf. *Budzikiewicz*, in: Nomos Art. 12 note 23. See further in note 28.

66 Cf. note 34 *infra*.

67 See *Schinkels*, in: Beck OGK, Art. 12 note 27, von Bar, Clive (eds.), Principles, Definitions and Model Rules of European Private Law, 2010, 248 and Art. II.-3: 302 DCFR; opposite view *Hocke*, IPRax 2014. 309. *Backmann*, in: Juris HK-BGB Art. 12 note 27; *Budzikiewicz*, in: Nomos Art. 12 note 34; *Leible*, in: Leible/Lehmann, RIW 2007, 733.

68 Cf. Recital 30 of the Preamble.

69 See *Schinkels*, in: Beck OGK, Art. 12 note 20.

scope of Art. 12 is narrower compared to the scope of some (German) national concept. One thinks of non-disclosure of defects of the products (etc.).

The duty (fair dealing) is based on an objective model. Its violation does not presuppose the fault.[70] In this sense the word *"culpa"* (cf. *"culpa in contrahendo")* is redundant. Thus culpa in contrahendo in the regime of Article 12 represents a clearly mere wrongful behavior (act). The category of the duty of contracting parties is very broad. It includes all obligations which are within the negotiation to be matt (full filled) provided that such obligations are of transactional nature[71] and are linked to the concrete subject matter.

29 Definition (notion) of culpa in contrahendo with the scope of Art. 12 one should also include breach of confidentiality. The obligation stemming from this wrongful act should be subsumed under regime of Art. 12.[72]

h) Breakdown of contractual negotiation and violation of the duty to disclose

30 The breakdown of contractual negotiations without a legitimate cause constitutes the first constellation (Recital 30, second sentence of the Preamble). It involves not only cases of express interruption but also cases of tacit breakdown after one party gives rise to the legitimate expectation of contract conclusion with the other party, yet the negotiation was interrupted for incomprehensible reasons. Duty of care and its violation is not the only criterion but also a base of the connection.

IV. Scope of Art. 12

1. Material scope (scope ratione materiae)

a) Covered matters

aa) Introduction

31 Even though the terminology is not always consistent, the starting point must always be the presumption that Rome II is applicable to the extent in which Rome I is not (see Art. 1 (2)(i) Rome I). It follows that legal relationships or connections to negotiations prior to contract conclusion fall, in general, into the scope of Rome II instead of Rome I. Despite this, it cannot be excluded that its edge areas may fall under the regime of *culpa in contrahendo* although they may fall within the scope of Rome I Regulation. A functional method must apply when assessing every case. Accordingly, it follows that a concrete legal relationship must be assessed and subsequently treated as a part of a regime of a later-concluded contract, which should protect the interests of parties in the due performance of contractual obligations. The scope of Art. 12 stretches to general pre-contractual duties to disclose as follows from

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70 See Recital 11 of the Preamble, also Art. II.3:101 – *et seq.* DCFR and Dickinson, The Rome II Regulation, para. 12.04.

71 *Schinkels*, in: Beck OGK, Art. 12 note 34.

72 See *Schinkels*, in: Beck OBG, Art. 12 note 27, von Bar/Clive (eds.), Principles, Definitions and Model Rules of European Private Law, 2010, 248 and Art. II.-3: 302 DCFR; opposite view *Hocke*, IPRax 2014, 309. *Backmann*, in: Juris HK-BGB Art. 12 note 27; *Budzikiewicz*, in: Nomos Art. 12 note 34; *Leible*/*Lehmann*, RIW 2007, 733.

Section 30 of the Preamble and thus cannot be excluded as they do not result from conduct occurring prior to the conclusion of a contract as claimed.[73]

bb) Void contracts

Art. 12 should cover the obligations regarding the avoidance of a contract as a consequence of a breach of duty of disclosure. The duty to disclose includes information which the other party needs to ensure validity of the contract.[74] If one party provides the other party with false information or even fails to inform the other party about for instance special control Regulations (exchange control, merger control etc.) that invalidate contract unless the parties obtain an approval, such a situation is to be characterized as *culpa in contrahendo* and the claims arising out of the liability for violation of the duty to disclose should be subsumed under Art. 12.[75] Since the violation of the duty of disclosure (Recital 30 of the Rome II "Regulation") is one of the main features of the autonomous concept of *culpa in contrahendo* under Art. 12 the mere fact of a contract's avoidance does not speak against the application of this provision.[76] The avoidance is one of the consequences of *culpa in contrahendo*, and as such falls in the ambit of the broad category of damage defined in Art. 2 (1). An invalid contract in this situation can not lead to reference of Art. 12 (10(e) Rome I Regulation. **32**

cc) Undesirable contracts

Conclusion of an undesirable contract involves situations when content of a concluded contract was formed as a result of incorrect information provided to one of the parties. Typically, it is argued that these constitute voidable contracts formed as a result of an error of one party amounting to formation of a contract with content undesirable for the other party. Also the claims stemming from a contract which contradicts the expectations of one party as a consequence of breach of the duty of disclosure should belong to the scope of Art. 12.[77] In the light of the concept of *culpa in contrahendo* as a non-contractual obligation are the arguments of remedies against error (mistake)[78] and therefore in favour of Art. 10 (1) or Art. 12 (1)(c–d) Rome I Regulation to be deemed as irrelevant. Furthermore the concept of damage of Art. 2 (1) Rome II Regulation supports the application of Art. 12.[79] **33**

dd) Breach of confidentiality

Breach of confidentiality by one party, i.e. publication of confidential information acquired during contract negotiation is also controversial. Some national concepts (PECL in Art. 2: 302 and DCFR 3: 302) qualify this situation as liability for contract negotiation and many authors deem it falling within the scope of Art. 12.[80] Here, one has to distinguish. If one party abused confidential information received during the negotiation from other party, and then withdrew from it, there is a case of double claims belonging to other aggrieved party and the **34**

73 *Leible*/*Lehmann*, RIW 2007,733.

74 See note 14 *supra*.

75 Cf. *Budzikiewicz*, in: Nomos Art. 12 note 30; *Bach*, in: Huber Art. 12 note 6; *Schinkels*, in: Beck OGK Art. 12 note 64.

76 Cf. *Jakob*/*Picht*, in: Rauscher Art. 12 note 10.

77 Cf. *Budzikiewicz*, in: Nomos Art. 12 note 31.

78 *Leible*/*Lehmann*, in: Ferrari/Leible (eds.), Ein neues internationales Vertragsrecht für Europa, 2007, 36 *et seq*.

79 *Budzikiewicz*, in: Nomos Art. 12 note 33; *Schinkels*, in: Callies Art. 12 note 7.

80 *Leible*/*Lehmann*, RIW 2007, 733; *Backmann*, in: Juris PK-BGB Art. 12 note 27.

solution mentioned above applies. Mere abuse of information does not fall in the scope of Art. 12 since this has to be qualified as a tort under Art. 4.[81]

b) Excluded matters

35 Claims arising from relationships under Art. 1 (2) are excluded from the scope of Rome II Regulation and do not fall within the scope of Art. 12, although they may qualify as *culpa in contrahendo*. Art. 13 excludes relationships stemming from a breach of duties in the field of intellectual property rights and claims based on personal injury (Recital 30 of the Preamble). In contrast to this, Art. 8 is applicable even if it is necessary to qualify a relationship as a *culpa in contrahendo* claim rather than a contractual claim. Uniform substantive law within the meaning of CISG is a specific situation.[82] In a situation when this law also provides for liability arising from *culpa in contrahendo*, there is no need to determine governing law.

36 Recital 30 of the Preamble stipulates that the above-mentioned cases shall be positive breaches of a contract which must be qualified as purely delictual claims under Arts. 4–9, i.e. as an infliction of damage resulting from a breach of the general duty of care in connection with the conclusion of a contract excluded from the scope of Art. 12.[83] These are the so-called pre-contractual facts of the case.[84] Although Section 30 explicitly refers solely to harm to health,[85] violation of integrity of property, i.e. pecuniary damage to a dress apart from damage to personal injury prior to purchase of the item are to be qualified apparently in the same manner. An exception constitutes material damage occurring during the purchase such as an accident during a test drive in a car.[86] Furthermore, Art. 12 may be applied to these cases if are there is a direct link to the situation prior to contract negotiation.

2. Personal scope (applicability ratione personae)

37 Rome II Regulation, including Art. 11 (Art. 12), is applicable to both natural persons and legal entities with the exception of the State and other legal entities established under public law, i.e. public bodies and civil servants exercising State authority as *acta iure imperii* (second sentence of Art. 1 (1)) and Recital 9 of the Preamble. Restriction of personal scope blends together with material scope. As a result, claims arising from *negotiorum gestio* under public law fall outside the scope of the Regulation. This, however, should not apply to *culpa in contrahendo* relationships arising out of negotiations aiming at private law contracts where the Member State acts as "état commerçant".

38 Agents and brokers, as a group that is not explicitly mentioned in the Preamble yet directly linked to negotiations prior to contract conclusion, are liable for damage suffered by the represented party[87] as a result of the fault of the agent or broker. However, an issue may arise

81 *Jakob*/*Picht*, in: Rauscher Art. 12 note 10; *Hocke*, IPRax 2014,310.

82 See *Magnus*, in: Staudinger, Art.4 CISG, note 42 *et seq*.

83 *Junker*, in: Münchener Kommentar Art. 12 note 13; *Leible*/*Lehmann*, RIW 2007, 733; *G. Wagner*, IPRax 2008, 13.

84 *Heiss*/*Loacker*, JBl. 2007, 513, 640.

85 Cf. the German cases: linoleum case – RGZ 78, 239 and salad leaf case – BGH 266, 51 in note 8 *supra*.

86 *Schinkels*, in: Beck OGK Art. 12 note 41.

87 See *supra* note 17 *et seq*.

as to whether liability of third parties that are not parties to a contract, should be connected accessorily to the contract under Art. 12 (1) or delictually under Art. 12 (2). If these third persons cause damage to other contracting party then they do not fall under Art. 12 but under Art. 4.[88]

3. Territorial scope (applicability ratione soli, teritorii)

39 Claims from *culpa in contrahendo* (*negotiorum gestio*) fall within the scope of the Regulation provided that there is a sufficient connection to laws of different States (first sentence of Art. 1 (1) in the German language version). The English language version defines this scope as situations involving conflict of laws. The respective legal relationship must contain an element pertaining to laws of at least two States.[89] The Rome II Regulation possesses characteristics of a so-called *loi uniforme*, i.e. it relates to situations or legal relationships both within and outside the EU (Art. 3) with exception of Denmark (Art. 1 (4)). This also follows from the wording of the provision, which does not refer to "Member States" and merely to "States". Hence it suffices in an individual case that circumstances of the case pertain to the law of a foreign State.

4. Temporal scope (applicability ratione temporis)

40 Transitional provisions of Art. 31 refer to events giving rise to damage. This means, in the case of *culpa in contrahendo*, that Art. 12 applies to legal relationships arising from *culpa in contrahendo* provided that the cause of damage occurred after January 11, 2009.[90] Transitional provision of Art. 31 does not explicitly address *negotiorum gestio*. Nonetheless, Art. 2 (1) stipulates that when interpreting Art. 31, an event giving rise to costs within the meaning of *negotiorum gestio* under Art. 12 must be read in the place of "event giving rise to damage". Therefore commencement of an unordered conduct taking place after January 10, 2009 is decisive according to *negotiorum gestio*.

V. General provisions

1. Renvoi (Art. 24)

41 Rome II Regulation is based on connection to substantive legal norms and thus it excludes employment of *renvoi*[91], which would lead to the application of the conflict-of-law rules of the respective legal order (Art. 24).[92] This is practical in situations involving Denmark (see Art. 1, para. 4) and elements of the internal market with these elements falling within the scope of international treaties that are binding on some Member States (Art. 28). Art. 24 prevents courts of States that are not parties to these treaties from the examination of foreign

88 For instance *Junker*, in: Münchener Kommentar Art. 12 note 13. In this sense also the German case law: OLG Frankfurt, IPRax 1986, 378; OLG Hamburg IPRspr. 1988 no. 34; OLG München, WM 1983, 1093 (1097) etc.

89 *Junker*, in: Münchener Kommentar Art. 3 note 2.

90 CJ EU, case C-412/10, Homawoo V. GMF Assurances SA [2011] ECR I 2011, 116; *Junker*, JZ 2008, 170.

91 Generally on *renvoi* see e.g. *Dicey*/*Morris*/*Collins*, Chapter 4.

92 See comments on Art. 24.

private international law and contributes to the legal certainty and predictability.[93] The prohibition of the application of *renvoi* shall also apply in relation to third States.[94]

2. Ordre public

42 The application of *ordre public* within the meaning of Art. 26 that primarily aims its restricted application to issues of delictual compensation for damage shall fall within the scope of Art. 12 only exceptionally. The application of ordre public, i.e. exclusion of a foreign legal order and its subsequent replacement with *lex fori*[95] is permissible only if the consequences of application of the foreign legal order would be incompatible with the *ordre public* of the *lex fori*. It is important that only the law determined in compliance with Art. 12 may constitute this legal order and it may be a legal order different from the law of *lex fori*. A different legal order may be not only the law of other Member States, but also the law of third States[96]. Thus, when assessing the compatibility of *negotiorum gestio*, regard must be paid not only to the relationship of the facts of the case to *lex fori*, but also to the connection to the values and objectives of the EU.[97]

VI. General structure and determination of applicable law

43 The commented provision contains a general conflict-of-law rule as a principle (accessory connection of Art. 12 (1)), and as an exception it stipulates three specific subsidiary connecting factors. The accessory connection is in this case of such an importance that it is separated from the other types of connection (Art. 12 (2) (a) – (c)).

44 Both objective and subjective connecting factors, such as choice of law of Art. 14[98], must be considered when determining the applicable law in the scope of Rome II. The system of objective factors for connecting the relationships established by *culpa in contrahendo* is divided into two categories of connection. The first category (Art. 12 (1)) governs accessory connection[99] to law governing, factually or potentially, a contract, had the contract been concluded. The second category of connection factors (Art. 12 (2)) entails three connecting factors in case an accessory connection does not suffice. The first factor in the escape clause (Art. 12 (2)(i) is the location where damage from *culpa in contrahendo* occurred, and the second one is the domicile of the parties (Art. 12 (2) (a) and (b)). The third factor is a flexible "connection" element (of the facts prior to the conclusion of a contract) of a manifestly closer connection of a non contractual obligation established by *culpa in contrahendo* stemming from a country other than the location where the damage occurred or the place of habitual residence of the parties.

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93 *Junker*, in: Münchener Kommentar Art. 24 note 4.

94 See comments on Art. 24.

95 See comments on Art. 26 and *Heiss*/*Loacker* JBl. 2007, 645; *Junker*, in: Münchener Kommentar Art. 26 note 26.

96 *Junker*, in: Münchener Kommentar Art. 26 note 14.

97 *Martiny*, in: FS Sonnenberger (2004), 533.

98 See *infra* notes 47, 48.

99 See *infra* note 49 *et seq*.

The determination of the applicable law may consist of up to five steps.[100] The first step is the identification of law according to the needs of parties (first step – Art. 14). The second one follows in the absence of a valid choice of law and subsists in an accessory connection to the law of the hypothetical contract (Art. 11 (1)). When the applicable law still cannot be determined, it shall be the law of the State in which the damage occurred (third step, Art. 12 (2)(a)). Should this yield no result, the applicable law can be determined by the law of the State of common habitual residence of the parties (fourth step). Nonetheless, the law of the state to which an extra-contractual relationship is manifestly more connected must be given precedence over the law determined according to the third and fourth steps. **45**

There is a cascade between Art. 12 (1) and Art. 12 (2). In other words, in determining the governing law according to Art. 12 (2) only when the requirements of Art. 12 (1) are not met. Thus, the escape clause of Art. 12 (2)(c) cannot have any precedence to accessory connection pursuant Art. 12 (1). **46**

VII. Applicable law

1. Choice of law

The choice of law has dual significance. If a party chooses the governing law for the contract, it thereby determines the law accordingly for connecting factors in the sense of Article 12(1). The parties also have the possibility to choose a legal order which will govern their relationship following from *culpa in contrahendo* (Art. 14). This choice of law has precedence over the determination of applicable law under Art. 12. This law and not the law of the court (*lex fori*) is, according to the prevailing opinion[101], relevant for assessing the validity of the choice. Restrictions (under Art. 14 (1)(b) applicable to the scope of Art. 14 shall apply to the obligation arising from *culpa in contrahendo.* Especially in cases of complex contractual relationships with a number of parties to them. **47**

Although cases of choice of law under Art.14 are deemed unlikely[102], they must be addressed. Choice of law may be reasonable especially in business relationships, for instance, in situations when difficult and time consuming contract negotiation is expected or in situations when negotiations failed and the parties agree on the law governing disputes arising from *culpa in contrahendo*. These situations are handled by Art. 14 (1)(a), which undoubtedly provides the parties with a solid starting point.[103] **48**

2. Accessory connection Art. 12 (1))

a) In General

Accessory connection to the law applicable for contracts applies both in the case of a concluded contract when the actual contractual statute is applicable and in the case of a **49**

100 *Junker*, in: Münchener Kommentar Art. 12 note 9.

101 *Heiss/Loacker*, JBl. 2007, 623; *Leible*, RIW 2008, 260; *Junker*, in: Münchener Kommentar Art. 14 note 25.

102 *Bach*, in: Huber Art. 12 note 23; *Spellenberg*, in: Münchener Kommentar Art. 12 note 2.

103 *Jakob/Picht*, in: Rauscher Art. 12 note 39.

non-concluded contract where a hypothetical contractual statute is applicable.[104] In both situations it is firstly necessary to inquire into the explicit choice of law, either hypothetical or genuine (under Art. 3 of Rome I Regulation) and then eventually to determine the contractual *lex causae* under objective criterions (Art.4 Rome I Regulation). In the second case, the solution typically equals connection to the law of the State of habitual residence of a party delivering specific performance (Art.4(1)(a)and(b) and Art. 4 (2) of Rome I Regulation).

50 Even obligations arising from contractual negotiations have, under the Regulation's autonomous concept, a non-contractual nature. However, paradoxically enough these non-contractual obligations are mostly governed by the law applicable to the contract. This is the consequence of the characterisation of *culpa in contrahendo* as an autonomous concept – a compromise between contractual and tortious obligations.[105] Despite this paradox, an accessory connection is only logical as it is based on the presumption of a single will of the parties from the very beginning of negotiations through conclusion of a contract until its performance. These phases create unity. This solution was adopted as there must be accord between the conception of *culpa in contrahendo* and conception of contract's validity or invalidity.

51 As a result, a court should always analyse the choice of law agreement in light of Art. 3 of the Rome I Regulation. Therefore, it should examine the formal and material validity of choice. Difficulties may arise when examining an implied choice of law. Especially in cases when a contract is not concluded in the end, it is frequently demanding to examine arguments of the parties regarding their intent to choose law or to change the chosen governing law. In cases when chosen law cannot be determined due to these arguments, the governing law must be based on the objective requirements of Arts. 3(3) and (4) of Rome I. When determining the objective connection it is necessary to analyse the nature and basic features of the future contract and its type – whether it shall be a contract of sale, contract for work, lease contract, etc.

52 In contrast to, for instance, the traditional German approach, claims from *culpa in contrahendo* are not automatically governed by conflict-of-law-rules for contracts.[106] An accessory connection to a mere hypothetical contractual statute applies only within the framework of Art. 12 (1) provided that negotiations took place prior to the contract's conclusion. After that it must be connected to an actually concluded contract or to a hypothetically concluded contract or, eventually, through Art. 4 of Rome I Regulation and it is necessary to determine performance characteristic for the contract.[107]

53 Violation of pre-contractual duties to inform and to advise falls within the scope of accessory connection under Art. 12 (1). Meanwhile, it is irrelevant for the connection whether the duties were breached prior to the conclusion of the contract or not.[108] Nonetheless, Art. 12 shall not apply in cases when the breach of duty to inform threatens the very validity of the

104 *Junker*, in: Münchener Kommentar Art. 12 note 19; *von Hein*, RabelsZ 73(2009), 501; *Dickinson*, The Rome II Regulation, para. 12.14.

105 See note 3 *supra*.

106 *Spickhoff*, in: Bamberger, Roth Art. 12 note 8.

107 *Spickhoff*, in: Bamberger, Roth Art. 12 note 6.

108 *Arnold*, IPRax 2013, 141 (145).

contract, as this is a direct consequence of invalidity. A claim to the settlement of an invalid contract falls within the scope of the contractual statute as stipulated by Art. 12 (1)(e) of Rome I and the claims of the entitled person, i.e. the claim for compensation of damages is governed by the statute of *negotiorum gestio*.

Art. 12 also extends to expert liability for damage caused by incorrect information, but excluding expert opinions delivered to other (opposite) contracting parties that subsequently influenced a disadvantageous wording of a contract.[109] Despite this, there remains a connection of the liability of third parties to Art. 12 (in principle), which is desirable with respect to the liability of agents, representatives, negotiators and managers who took advantage of the trust of third parties. In contrast to this, cases that do not fall within the scope of Art. 12 include experts that did not take part in negotiations and whose liability is governed by Art. 4.[110] **54**

The determination of applicable law is difficult especially when negotiations were interrupted. In such a case it will be necessary to examine the hypothetical will of the parties, i.e. the will of an ordinary, reasonable party to a contract, whether an entrepreneur or a consumer, would have if they had negotiated and concluded a contract under comparable conditions. **55**

b) Accompanying contract – accessory choice of law

aa) Introduction

The accessory connection to a contract is based on the presumption that drafting, conclusion and performance of a contract form an important single unit. Choice of law rules for contracts apply irrespective of whether a contract was later concluded or not. Nonetheless, in both cases it is necessary to ask for a chosen contractual statute or hypothetical choice of law within the meaning of Art. 3 of the Rome I Regulation and eventually for the objective contractual statute under Art. 4 of the Rome I Regulation which ultimately leads to the connection to the country of habitual residence of the party required to effect the characteristic performance of the contract under Art. 4 (1) (a) (b) and Art. 4 (2) of Rome I Regulation. However, conflict-of-law rules protecting the weaker party must be given precedence even by the accessory connection under Art. 12 (2) of the Rome II Regulation. **56**

bb) Validity of the choice

Article 5 *et seq*. of the Rome I Regulation may apply depending on the circumstances of the case. This also applies to consumer contracts under Art. 6 and individual employment contracts pursuant to Art. 8 of the Rome I Regulation. The validity of choice of law of the contract in these cases depends on respecting the conditions provided for in these provisions. The validity of choice of law applicable to a contract is limited by the conditions set out in Art. 3 (3) and (4) of the Rome I Regulation.[111] Should such choice of law be invalid, it cannot apply to claims stemming from *culpa in contrahendo* either. This also applies to cases of consumer or employment contracts. **57**

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109 See notes 18 and 37 *supra*. *Schinkels*, in: Beck OGK art. 12 note 57, thinks that subsumption of the claims under Art. 12 remains controversial.

110 *Bach*, in: Huber Art. 12 note 16; *Budzikiewicz*, in: Nomos Art. 12 note 41.

111 See comments on Art. 3 of the Rome I Regulation by *Martiny*, in Münchener Kommentar, note 108 and Comments on Art. 11 by Spellenberg notes 97 *et seq*.

cc) Invalid contract

58 In case of breaches of pre-contractual duties, it is irrelevant whether a contract was concluded as a result of a breach[112] since Art. 12 (1) deems this immaterial for the determination of governing law. Application of Art. 12 is excluded provided that breach of duty to disclose pertains to the validity of a contract (for instance fraudulent concealment of information). These are immediate results of invalidity.[113] The claims arising from a void contract fall in the scope of Art. 12 (1) (e) of the Rome I Regulation. However, the liability for damages as obligations arising from *culpa in contrahendo* will be governed by Art. 12. An accessory connection and subsequently the law applicable for contracts shall also apply to cases of wrongful breakdown of contractual negotiation that would be qualified as violation of duty of care (wrongful act) in a number of jurisdictions.[114] The place of determining applicable law in case of an invalid contract does not differ from previous constellations. Choice of law is necessary even in case of an invalid purchase contract and provided that the applicable law is not specified, it must be determined in accordance with objective criterions stipulated in Art. 4 *et seq*. of the Rome I Regulation.

dd) Hypothetical choice of law

59 Determination of a hypothetical contractual law thus equals the determination of relevant law that would have governed the contract together with possible *culpa in contrahendo* claims had the contract been validly concluded. This phase comes to mind when contractual negotiation fails. It subsists in determination of choice and not in the determination of law in accordance with objective connecting factors within the meaning of Art. 4 of the Rome I Regulation. Had the parties chosen applicable law under Art. 3 of Rome I Regulation before the breakdown negotiations, claims from *culpa in contrahendo* are governed by this law. A contract should be governed by the law chosen as applicable in the moment of breakdown of its negotiation. The mere fact that the parties could have chosen another governing law in later stages of negotiation is irrelevant.[115] Regarding the liability for unjustified interruption of negotiation, parties may have to abide only by duties that would arise from the law applicable for contracts (i.e. from the law applicable to the intended contract) in the moment of breakdown. Acceptance of a future hypothetical choice of law presupposes either an explicit revelation of prospective will or, in the absence of its revelation, that its absence follows clearly from the circumstances of the case. Prospective choice of law comes to mind for instance in situations when parties maintain a long-term business relationship or their contracts contain recurring clauses pertaining to choice of law. There may also be situations when contract negotiation already reached a stage when there was an available draft contract including a provision regarding choice of law.[116] The party claiming the existence of a hypothetical choice of law bears the burden of proof.[117]

60 In situations when a contract was not concluded, it is necessary to try to determine from the circumstances of the case not only the hypothetical contract but also the hypothetical choice of law that would have governed the contract. These circumstances may be, for instance,

112 *Junker*, in: Münchener Kommentar Art. 12 note 22; *Rudolf*, ÖJZ 2010, 307.

113 *Thorn*, in: Palandt, Art. 12 note5; *Junker*, in: Münchener Kommentar, Art. 12 note 23.

114 See note 26 *et seq*. *supra*.

115 *Budzikiewicz*, in: Nomos Art. 12 note 57; also apparently *Jakob*/*Picht*, in: Rauscher, Art. 12 note 23.

116 *Thorn*, in: Palandt Art. 12 note 5; *Budzikiewicz*, in: Nomos Art. 12 note 57.

117 *Budzikiewicz*, in: Nomos Art. 12 note 58.

practice of the parties in different cases in which they would always choose the same law. In these cases, a party would be presented with standard business terms by the other party and would accept them without any further modifications.[118]

3. Connection under Art. 12 (2)

a) Introduction

The substitute connection in Art. 12 (2) is of minor importance[119] as the scope of Art. 12 (1) is so significant that it only exceptionally comes to the application Art. 2 (a) and (b). In a situation when both parties seek to conclude a contract, at least an objective connection in Art. 4 of the Rome I Regulation can be found. Nonetheless, cases may arise when contract negotiation was interrupted at such an early stage[120] effectively excluding the determination of applicable law even under the objective connecting factors of Art. 4 of the Rome I Regulation, or regarding very complex matters.[121]. Furthermore, there are cases when the party providing specific performance under Art. 4 (2) of the Rome I Regulation changed its habitual residence and it is impossible to determine whether the contract was concluded prior to or after the change occurred.[122] **61**

Situations to which Art. 12 (2) shall be applicable generally vary to a much greater extent than situations governed by Art. 12 (1). In such a case, these will involve legal relationships of more than two persons.[123] Neither will they involve a hypothetical contractual relationship as such since a relationship must always be governed by a specific legal order. Hence, the cases left are these involving a word of advice or a piece of information outside the hypothetical law of contracts as well as third party cases[124] that are in no relation to the contract whatsoever. These typically include situations of ordinary commercial contracts or of contracts that are similar to them. Cases of banking information may serve as an example. Their qualification under this article will most likely not be drawn in consideration at all as these relationships are qualified as delictual in common law jurisdictions.[125] **62**

According to the majority opinion, this provision also applies to the liability of representatives and managers[126], i.e. relationships with an injured party that sustained damage without a breach of the general rules[127]. Such cases may involve, for instance, activities of a chairman **63**

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118 Cf. *Bach*, in: Huber Art. 12 note 28.

119 Cf. *G. Wagner*, IPRax 2008, 12; *Kadner Graziano*, RabelsZ (2009), 64 (73); *Bach*, in: Huber Art. 12 note 30.

120 Cf. *Bach*, in: Huber Art. 12 note 30; *Jakob*/*Picht*, in: Rauscher Art. 12 note 27; *Leible*/*Lehmann*, RIW 2007, 733.

121 *Plender*/*Wilderspin* Art. 12 note 26–019.

122 *Bach*, in: Huber Art. 12 note 30.

123 *Plender*/*Wilderspin* Art. 12 note 26–019, *Budzikiewicz*, in: Nomos Art. 12 note 65; Dutoit, in: FS Pocar 2009, 324; *Junker*, in: Münchener Kommentar Art. 12 note 29.

124 See *Junker*, in: Münchener Kommentar Art. 12 note 29.

125 Cf. Hedley Byrne & Co Ltd. V. Heller & Partners Ltd. [1963] 2 All E.R. 575 (HL) and Rushworth/Scott, Lloyd' M.C.L.Q. 2008, 290.

126 Cf. *Junker*, in: Münchener Kommentar Art. 12 note 32.

127 Cf. *Junker*, in: Münchener Kommentar Art. 12 note 32.

of a board of directors of a later insolvent business company that was engaged in negotiations for a loan to the company with a bank that was close to him.[128]

64 Art. 12 (2) (a) and (b) enumerate three connecting factors - place of occurrence of damage, place of habitual residence of the parties, and manifestly more close connection of precontractual conduct. These three provisions including three connecting factors are interconnected with the "or" conjunction. This wording causes a chaotic situation as to interpretation of the determination of the governing law under these provisions. One solution is based on the linguistic interpretation and considers the three connecting factors alternative options either for the parties of for the judge.[129] the alternative connection is opposed by the argument that in contrast to the regime of, for instance, Art. 18 the system of Art. 12 (2) is not governed by the principle of advantageousness that presupposes the weighing of interests in choosing one of the alternatives[130]. Regarding the "cascade" solution the commentators are not consistent enough. They argue that the provision of lit. b) "pushes away"[131] the provision of lit. a)[132] or that this latter provision should be read with "but".

65 Therefore, in recommending a different approach one should take into consideration the purpose of the autonomous concept of *culpa in contrahendo* as well as a systematic interpretation of the wording of the Art. 12 (2). Based on this one should prefer an interpretation by which the insertion of the conjunction "or" is a mere result of a legislator's error[133] which requires and adaptation of the provision in a sense of priority order (cascade structure) between lit. a) and lit. b) in following the approach of Artt. 4, 10 and 11. This approach reflects the principle of legal certainty and predictability of Art. 12. This in concreto means that the connecting factor of *lex loci dami infecti* (lit. a) must be applied first, followed by the common habitual residence of the parties (lit. b), while the escape clause (lit. c) may be applied cumulative to both previsions.

b) Place of Occurrence of Damage (Art. 12 (2) (a))

66 *Loci damni infectii* (the place of the occurrence of a damage) is a key connecting factor under Art. 4. Hence, it is possible to refer solely to this provision. This criterion differs from two other possible connecting factor – from the place of the event giving rise to the damage and from the place where the indirect or subsequent consequences occurred. This connection is similar to the connection to the location of the occurrence of damage under Art. 4 (1) and benefits the injured party. The different choice of words is of no substantive importance.[134] Because of that, reference can be made to comments on Art. 4, para. 1.

c) Common habitual residence

67 Unlike Art. 4 (2), Art. 12 (2) (b) sets out the connecting factor of the common habitual residence of the parties in different structure, namely at the time of the occurrence of the

128 Example given by *Junker*, in: Münchener Kommentar Art. 12 note 32 and decision of OLG Frankfurt in case Debraco, see, IPRax 1986, 373.

129 Cf. *Jakob*/*Picht*, in: Rauscher Art. 12 note 30 *et seq*.; *Lüttringhaus*, RIW 2008, 198 *et seq*.

130 *Budzikiewicz*, in: Nomos Art. 12 note 70.

131 *Rudolf*, ÖJZ 2010, 307.

132 *Wagner*, IPRax 2008, 12 (13).

133 *Budzikiewicz*, in: Nomos Art. 12 note 69.

134 *Spickhoff*, in: Bamberger/Roth Art. 12 note 9; *Junker*, in: Münchener Kommentar Art. 12 note 26.

event (conduct of the parties) causing the damage and not at the time of the occurrence of the damage and not at the time of the occurrence of the damage.[135] The right of the injured party to choose between the connection under (a) and (b) cannot be considered because Art. 4 aims at compatibility in connection where there is an undoubted cascade system of connecting factors under lit. a) to lit. c).[136]

This legal order constitutes a legal environment that is most closely connected to their conduct. Such an environment is, provided that it is common to both parties, the most appropriate legal order they undoubtedly wanted their legal relationships to be governed by when concluding the contract, unless they chose another governing law. Yet the connection's construction is quite remarkable as it differs from the construction in Art. 4 (2). While the latter is a common habitual residence at the moment when the damage occurred, the connecting factor as such is linked to the moment when the event giving rise to damage occurred. This moment is adequately chosen if this situation subsists in violation of the duty connected to the contract. It is placed in the moment when the parties most likely could have had adequate expectation in contract negotiation.[137] The similarity of this wording with Art. 2 (3)(a) is also significant. **68**

d) Escape clause

In contrast to the structure of Art. 10 and Art. 11, which also contain escape clauses, the escape clause in Art. 12 is not designed to be "absolute" in its nature, excluding also the basic connection to the contractual lex causae in Art. 12 (1).[138] It constitutes a mere escape from two previous specific connections to the location of occurrence of damage and to common habitual residence of parties. **69**

The escape clause means that the governing law determined pursuant to Art. 12 (2)(a) or 12(2) (b) can be displaced by the law of another country (also outside of EU) with which *culpa in contrahendo* is manifestly more closely connected. Such a step presupposes a comparable analysis of both solutions with the result favorizing the application of Art. 12 (2)(c). The actual scope of the escape clause should be broader thanks interpretation of the word ("prior to the conclusion of a contract") also the cases where not contract has been concluded.[139] The extension of the scope of 12(2)(c) should be equal as it is in Art. 12 (1). **70**

The escape clause is thus due to the desire for the principle of legal certainty to be interpreted similarly to Art. 4 (3).[140] Although the use of this connecting factor will not be too frequent its existence is not irrelevant.The target cases of its application should be the liability of various groups of third persons[141] provided "all the circumstances of the case" show that the **71**

135 Contrary the wording of Art. 12 (2) (b) *Junker*, in: Münchener Kommentar Art. 12 note 27 considers the time of occurrence of the damage as relevant.

136 Different view see *Spickhoff*, in: Bamberger/Roth Art. 4 note 2; *Junker*, NJW 2007, 3678; *Junker*, in: Münchener Kommentar Art. 12 note 27.

137 *Jakob*/*Picht*, in: Rauscher Art. 12 note 35.

138 See note 49 *et seq. supra*.

139 See *Dickinson* Art. 12 note 12.23; *Schinkels*, in: Callies Art. 12 note 30.

140 See comments on Art. 4.

141 See *supra* and *Jakob*/*Picht*, in: Rauscher Art. 12 note 36; *Budzikiewicz*, in: Nomos Art. 12 note 77; *Junker*, in: Münchener Kommentar Art. 12 note 28.

non-contractual obligation at stake "is manifestly more closely connected" with other country than under the regime of lit. a and b of Art. 12 (2).[142] The escape clause should be open (therefore it is also called "open clause")[143] if legal certainty or predictability would be threatened.[144]

VIII. Scope of applicable law

The scope of application within the meaning of the extent of law governing the conflict of law is vast and includes all elements and consequences of the claims concerned.

72 Article 15 may be, in principle, applicable, yet its provisions must be adapted to the specifics of *culpa in contrahendo*. The law governing *negotiorum gestio* thus includes the existence of pre-contractual relationships and transactional conduct duties arising from it (Art. 15 (a)), and their breach, including the issue of fault (Art. 15 (a)). The exclusion, extinguishment or tightening of responsibility (Art. 15, (b),(c),(h)) is one of the most severe interferences possible. The exact form of compensation, i.e. the issue of whether confidence costs or costs of interest on performance (Vertrauens-, Erfüllungsinteresse), must be paid. This also applies to a prescription and limitation (Art. 15 (h)) and transferability (Art. 15 (e)). A judge's powers to prevent and to terminate damage arising from it within the scope of governing law (Art. 15 (d)). Furthermore, the scope of applicable law also entails issues of the subrogation (Art. 19) and evidence (Art. 22).

73 Even in the case of Art. 12 the assessment must be based on a uniform connection and must minimise the possibility of splitting legal orders determined in accordance with this provision. Hence, the governing law must be applied with respect to all issues[145] related to claims arising from *culpa in contrahendo*. It must be applied to the elements, content and consequences of liability for the breach of duties relating to the conclusion of a contract. It determines the definitions of basic terms, including the duty to inform and the duty to instruct. Within its light the standards (claims) of legitimate expectation of the contract's conclusion as well as conditions of liability for assistants and third persons shall be assessed. The assessment of preliminary questions, i.e. questions of whether there are property or intellectual rights or claims involved, differs from the single statute.[146] Nonetheless, substantive law chosen according to the statute of *culpa in contrahendo* applies to issues of possible competing claims.

Article 13: Applicability of Article 8

For the purposes of this Chapter, Article 8 shall apply to non-contractual obligations arising from an infringement of an intellectual property right.

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142 Regarding this provision see comments on Art. 4 (3).

143 E.g. *Jakob*/*Picht*, in: Rauscher Art. 12 note 36.

144 *Jakob*/*Picht*, in: Rauscher Art. 12 note 38.

145 *Junker*, in: Münchener Kommentar Art. 12 note 36; *Hohloch*; in: Erman Art. 12 note 12.

146 *Junker*, in: Münchener Kommentar Art. 12 note 36; *Hohloch*; in: Erman Art. 12 note 12.

Art. 13 is rather an annex to Art. 8[1] and a welcome clarification erasing even the slightest doubts[2] (although the European Economic and Social Committee deemed it superfluous in the light of Art. 8[3]). It aims at avoiding any difficulties arising out of different characterisations.[4] It subjects all possible consequences of an infringement of an intellectual property right to Art. 8, irrespective and regardless of their characterisation.[5] IP rights are somewhat quarantined and kept apart from the regular conflicts rules in every possible respect.[6] Consequentially, the same law applies to all possibly concurring or competing claims.[7] Art. 13 ensures that in particular an obligation based on unjust enrichment arising from an infringement of an intellectual property right is governed by the same law as the infringement itself.[8] In order to accomplish that goal, the notions of intellectual property rights and of infringement must necessarily be the same as under Art. 8.[9] **1**

Art. 13 unambiguously and unmistakably extends Art. 8 to *all* kinds of non-contractual obligations covered by Chapter III, namely unjust enrichment, *negotiorum gestio* and *culpa on contrahendo*.[10] It liberates the scope and ambit of Art. 8 from all limitations which might possibly be deducted from Art. 8 being positioned in Chapter II,[11] and clearly goes beyond torts and delicts, the subjects of Chapter II. It breaks through possible borders between the two chapters. In short: Art. 13 makes Art. 8 take priority over Chapter III.[12] Consequentially, the reference is to all three paragraphs of Art. 8[13] since otherwise unwanted differentiations would persist. This includes petrification and rigidity due to the lack of an escape clause under Art. 8.[14] **2**

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1 *Illmer*, in: Peter Huber, Art. 13 note 1. Thus critical to Art. 13 ("gesetzgeberischer Fehlgriff") in consequence of being critical to Art. 8 *Schack*, in: FS Jan Kropholler (2008), p. 651, 656; to the same avail *van Engelen*, NIPR 2008, 440, 444 ("claustrophobic").

2 *Claudia Hahn*/*Oliver Tell*, in: Basedow/Drexl/Kur/Metzger (eds.), Intellectual Property in the Conflict of Laws (2005), p. 7, 13–14; *Dickinson* paras. 4.18, 8.20.

3 Opinion of the European Economic and Social Committee OJ EC 2004 C 241/5.

4 For a comparison Art. 3:605 CLIP Principles; *Kur*, in: Basedow/Drexl, Conflict of Laws in Intellectual Property, 2013, p. 339.

5 *Illmer*, in: Peter Huber, Art. 13 note 1; *Grünberger*, in: Nomos Kommentar BGB, Art. 13 Rom II-VO note 1; *McGuire*, in: OGK BGB, Art. 13 Rom II-VO note 2; *Junker*, Internationales Privatrecht (2nd ed. 2017) § 11 note 32.

6 *van Engelen*, NIPR 2008, 440, 444.

7 *Grünberger*, in: Nomos Kommentar BGB, Art. 13 Rom II-VO note 1; *McGuire*, in: OGK BGB, Art. 13 Rom II-VO note 2.

8 Commission Proposal COM (2003) 427 final p. 24 on Art. 9 (6) Proposal; *Grünberger*, in: Nomos Kommentar BGB, Art. 13 Rom II-VO note 1; *Christian Heinze*, in: juris PK BGB Art. 13 Rom II-VO note 1.

9 On the former Art. 8 notes 6–10, on the latter Art. 8 notes 11–15 (*Metzger*).

10 See only *van Engelen*, NIPR 2008, 440, 444; *Schack*, in: FS Jan Kropholler (2008), p. 651, 656; *Illmer*, in: Peter Huber, Art. 13 note 1; *Fawcett*/*Torremans*, Intellectual Property and Private International Law (2nd ed. 2011) para. 15.31; *Michael Hellner* p. 181; *McGuire*, in: OGK BGB, Art. 13 Rom II-VO note 2; *Christian Heinze*, in: juris PK BGB Art. 13 Rom II-VO note 1.

11 See *Michael Hellner* p. 181; *Drexl*, in: Münchener Kommentar zum BGB, vol. 11 (6th ed. 2015) IntImmGR note 151.

12 *Fawcett*/*Torremans*, Intellectual Property and Private International Law (2nd ed. 2011) para. 15.31.

13 See *Grünberger*, in: Nomos Kommentar BGB, Art. 13 Rom II-VO note 1.

14 *van Engelen*, NIPR 2008, 440, 444 ('claustrophobic'); *Schack*, in: Leible/Ohly (eds.), Intellectual Property and Private International Law (2009), p. 79, 83.

3 The idea justifying the very existence of Art. 13 is sensible since in some substantive laws the consequence of an infringement of intellectual property rights is exclusively or at least alternatively clad in terms of unjust enrichment and restitutionary remedies.[15] The frontrunners in this regard are the *Eingriffskondiktion* of German law and restitution for wrongdoing of English law,[16] joined e.g. by Finnish law.[17] In particular, the rather broad concept of unjust enrichment under German law appears to have influenced and eventually necessitated Art. 13.[18] On the other hand, it is hard to imagine and stretches the borders of juridical phantasy where a claim in *culpa in contrahendo* should be generated by the infringement of an intellectual property right.

4 Art. 13 does not lead to any re-characterisation of claims in unjust enrichment, *negotiorum gestio* and *culpa on contrahendo* arising from an infringement of an intellectual property right.[19] It does not alter the characterisation but operates on a later stage establishing a special conflicts rule for those claims differing from the ordinary conflicts rules which would be applicable absent Art. 13. It renders the connecting factors employed in Arts. 10–12 inoperative[20] plus Art. 4.[21] Sometimes this is coined an accessory connection with Art. 8 being the center to which Art. 13 is accessorily attached.[22] However, Art. 8 takes priority under any construction.[23] This rules out an accessory connection to a governing relationship between the parties, e.g. a contract, which would be the primary connecting factor under Art. 10 (1) or Art. 11 (1).[24]

5 Moreover, Art. 13 includes an extension also of Art. 8 (3). Accordingly, Art. 14 is also inoperative where Art. 13 reigns.[25] Parties are not allowed to choose the law applicable to

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15 *Gerhard Wagner*, IPRax 2008, 1 (11); *Moura Vicente*, RdC 335 (2008), 105, 354; *Claudia Rudolf*, ÖJZ 2010, 300 (306); *Illmer*, in: Peter Huber, Art. 13 note 1; *Dickinson*, in: Dicey/Morris/Collins para. 35–076; *Plender*/*Wilderspin* para. 22–009; *Thorn*, in: Palandt, Art. 13 Rom II-VO note 2.

16 *Spickhoff*, in: Bamberger/Herbert Roth, Art. 13 Rom II-VO note 1; *Schinkels*, in: Calliess, Art. 13 Rome II Regulation note 2; *Thorn*, in: Palandt, Art. 13 Rom II-VO note 1. Critical as to the latter *Dickinson* para. 8.20.

17 *Michael Hellner* p. 181.

18 *Dickinson* para. 8.20.

19 As contemplated by *Spickhoff*, in: Bamberger/Herbert Roth, Art. 13 Rom II-VO note 1; *Schinkels*, in: Calliess, Art. 13 Rome II Regulation note 2; *Grünberger*, in: Nomos Kommentar BGB, Art. 13 Rom II-VO note 1.

20 See only *Schinkels*, in: Calliess, Art. 13 Rome II Regulation note 2. *van Engelen*, NIPR 2008, 440, 444: 'fully quarantined', 'treated as if they have the plague'.

21 *Dickinson* para. 8.20.

22 *Gerhard Wagner*, IPRax 2008, 1 (11); *Fawcett*/*Carruthers*, in: Cheshire/North/Fawcett p. 819; *Hohloch*, in: Erman, Art. 13 Rom II-VO note 1; *Picht*, in: Rauscher, Art. 13 Rom II-VO note 1; *Grünberger*, in: Nomos Kommentar BGB, Art. 13 Rom II-VO note 1. *Contra McGuire*, in: OGK BGB, Art. 13 Rom II-VO note 13.

23 See *Dickinson* paras. 4.18, 8.20.

24 *Schack*, in: FS Jan Kropholler (2008), p. 651, 656; *Grünberger*, in: Nomos Kommentar BGB, Art. 13 Rom II-VO note 1; *McGuire*, in: OGK BGB, Art. 13 Rom II-VO note 2; *Christian Heinze*, in: juris PK BGB Art. 13 Rom II-VO note 1. Critical to this result for general reasons *Schack*, in: Leible/Ohly (eds.), Intellectual Property and Private International Law (2009), p. 79, 83–84.

25 *Leible*, RIW 2008, 257 (259); *Spickhoff*, in: Bamberger/Herbert Roth, Art. 13 Rom II-VO note 1; *Schinkels*,

the obligations between them arising from the infringement of an intellectual property right at all.

However, special claims for compensation which do not arise from an infringement (like for instance against libraries or databases which are *ex lege* entitled to use the protected works) do not fall under Art. 13,[26] but call for an analogy to Art. 8 outside Art. 13.[27] Whether an illicit infringement exists is a matter for substantive law.[28] Insofar as a not permitted use triggers an involuntary obligation for compensation, this is *per se* tortious conduct,[29] and consequentially Art. 8 applies directly. **6**

Not even Art. 13 will draw claims against the owner of a so called standard essential patent to grant a compulsory license on FRAND[30] terms under the regime of Art. 8. Such claims have their source not in an infringement of that patent, but rather in a potential abuse of the patent and the ensuing monopole; they are based on restrictions of competition and thus founded in cartel law (e.g. in Art. 102 TFEU).[31] In the arena of private international law, they are governed by Art. 6 (3), not by Art. 8 or 13. Insofar as FRAND agreements can be construed as operating to the benefit of third parties[32] such claims would even be contractual in nature and thus subject to the Rome I, not to the Rome II Regulation.[33] **7**

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in: Calliess, Art. 13 Rome II Regulation note 2; *Picht*, in: Rauscher, Art. 13 Rom II-VO note 1; *Grünberger*, in: Nomos Kommentar BGB, Art. 13 Rom II-VO note 1; *McGuire*, in: OGK BGB, Art. 13 Rom II-VO note 2; *Christian Heinze*, in: juris PK BGB Art. 13 Rom II-VO note 1; *Thorn*, in: Palandt, Art. 13 Rom II-VO note 1. But cf. Art. 3:606 CLIP Principles; *Kur*, in: Basedow/Drexl, Conflict of Laws in Intellectual Property, 2013, p. 342.

26 Favouring an application of Art. 13 due to a characterisation of such claims as unjust enrichment *McGuire*, in: OGK BGB, Art. 13 Rom II-VO note 11.

27 *Rolf Sack*, WRP 2008, 1405 (1410); *Beckstein*, Einschränkungen des Schutzlandprinzips (2010) p. 100; *Drexl*, in: Münchener Kommentar zum BGB, vol. 11 (6th ed. 2015) IntImmGR note 161; *Fezer/Koos*, in: Staudinger, BGB, Internationales Wirtschaftsrecht (2015) note 909.

28 But cf. Art. 8 note 24 (*Metzger*); *Sack*, WRP 2008, 1405 (1410); *Dickinson* para. 8.18; *Grünberger*, in: Nomos-Kommentar BGB, Art. 8 Rom II-VO note 47; *Heinze*, in: jurisPK BGB, Art. 8 Rom II-VO note 43; *Illmer*, in: Peter Huber Art. 8 Rome II Regulation note 55.

29 See *Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte GmbH v. Amazon Europe Sàrl et al.* (Case C-572/14), ECLI:EU:C:2016:286 paras. 27–44; A-G *Saugmansgaard Øe*, ECLI:EU:C: 2016:90 paras. 52–90; OGH ÖJZ 2016, 968 with note *Haidmayer* = ÖBl 2016, 284 with note *Anzenberger* = ecolex 2016, 711 with note *Zemann* = MR-Int 2016, 75 with note *Michel Walter* on Art. 5 pt. 3 Brussels I Regulation, relevant under the auspices of Recital (7). But cf. also the criticism leveled by *Lutzi*, IPRax 2016, 550 (552–553); *Azzi*, Dalloz IP/IT 2016, 358. In more detail *Katharina Apel*, Die kartellrechtliche Zwangslizenz im Lichte des europäischen Wettbewerbsrechts (2015); *Andreas Fuchs*, in: Hans-Jürgen Ahrens (2016), p. 79, 90–98; *Philipp Eckel*, NZKart 2017, 408 and 469; *Picht,* WuW 2018, 234 and 300.

30 Fair, Reasonable And Non-Discriminatory.

31 *Huawei Technologies Co. Ltd. v. ZTE Corp. and ZTE Deutschland GmbH* (Case C-370/13), ECLI:EU:C:2015:477 paras. 49–71: A-G *Wathelet*, ECLI:EU:C:2014:2391 paras. 59–103.

32 To this avail *Philipp Eckel*, NZKart 2017, 469, 470–473. *Contra Andreas Fuchs*, in: Hans-Jürgen Ahrens (2016), p. 79, 88–89.

33 See *Straus*, GRUR Int 2011, 469, 475–476. But cf. against the possibility of parties' choice of law LG Mannheim BeckRS 2011, 04156; LG Düsseldorf BeckRS 2012, 09682.

Chapter IV: **Freedom of Choice**

Article 14: Freedom of choice

(1) The parties may agree to submit non-contractual obligations to the law of their choice:
(a) by an agreement entered into after the event giving rise to the damage occurred; or
(b) where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred.
The choice shall be expressed or demonstrated with reasonable certainty by the circumstances of the case and shall not prejudice rights of third parties.
(2) Where all the elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.
(3) Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.

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I. General aspects

1. Party autonomy as a central and core element of the Rome II Regulation

Party autonomy and the parties' freedom to choose the law applicable to their non-contractual relationship are central elements and corner stones in the system of the Rome II Regulation. The entire Chapter IV is devoted to "Freedom of Choice". Yet it comes too late in the numerical order. Its proper place should be before what is now Chapter II. It is the true Chapter II for Art. 14 takes precedence over the objective connections listed in Arts. 4–13 (but for Arts. 6 and 8, plus possibly Arts. 7 and 9). These objective connections come only to the fore where Art. 14 is not applicable or operable. Putting what now is Art. 14 first would have had the additional advantage to mirror the systematic relationship between Arts. 3 and 4 Rome I Regulation.[1] Now in substance Art. 14 is the proper "Art. 4", the first conflicts rule to look for. This would be more evident for unexperienced or unwary practitioners if Art. 14 was put upfront, in the very first place it demands and deserves. To hide it and to relegate it to a position after one has checked all the objective connecting rules of now Arts. 4–13 obscures the picture. Practitioners might have invested much to ascertain the correct objective connection – only to learn that the first thing they should have looked for, was a choice of law clause. **1**

Recital (31) pronounces the program pursued: **2**

(31) To respect the principle of party autonomy and to enhance legal certainty, the parties should be allowed to make a choice of the law applicable to a non-contractual obligation. The choice should be expressed or demonstrated with reasonable certainty by the circumstances of the case. Where establishing the existence of the agreement, the court has to respect the intentions of the parties. Protection should be given to weaker parties by imposing certain conditions on the choice.

This is programmatic and telling in two respects: First and primarily, party autonomy is believed to contribute to legal stability and legal certainty.[2] Second, party autonomy is granted not in an unqualified manner, but is limited to cases in which the autonomy of the parties making the choice may be taken to be genuine and not constrained.[3] In general,

1 *von Hein*, in: Calliess, Art. 14 note 3.

2 Critical ("not very convincing") *de Boer*, YbPIL 9 (2007), 19, 22.

Recital (31) is rather scarce bearing in mind the importance attached to party autonomy in the system of the Rome II Regulation.[4] The program should have been spelt out in far more detail.

3 Party autonomy first and fundamentally developed as concept in the field of contracts. Only gradually it made its way into other areas. Non-contractual obligations were amongst the first candidates, obviously sharing the basic feature of being obligations with contractual obligations. Contracts were the pioneers, and non-contractual obligations came a distant second. This has the advantage that wherever a special rule for party autonomy with regard specifically to non-contractual obligations can not be found, the respective rules for party autonomy with regard to contractual obligations may supplement. This is evident for such an eminent issue as the existence and validity of the consent of the parties as to the choice of the applicable law. Art. 14 does not address this issue. Hence, Art. 3 (5) Rome I Regulation has to step in *per analogiam*.[5]

4 One should bear in mind that at the time when in 2007 the Rome II Regulation was promulgated, the Rome I Regulation of 2008 had not yet entered the scene, but its predecessor, the Rome Convention, still set the standard as far as party autonomy was concerned. Differences between the Rome Convention and the Rome I Regulation turned out to be rather technical and minor, not fundamental as far as party autonomy was concerned. On the other hand, (3) served as a kind of advance test case for Art. 3 (4) Rome I Regulation, deliberately and consciously going beyond Art. 3 (3) Rome Convention.

5 "Legal certainty" is enhanced by the guarantee of a recognised choice of law, which ought to be uniformly applied in all Member States. Recital (31) emphasises this.[6] Party autonomy is a doctrine of convenience and efficiency.[7] If PIL aims at fostering private interests, prevalence for party autonomy is the natural consequence.[8] In the specific case of the Rome II Regulation, three particular observations support and foster party autonomy: Firstly, the objective connections employ a flexible approach and contain escape clauses which in turn might be believed to generate at least some residual uncertainty. Such uncertainty can be overcome by admitting a clear-cut choice of law.[9] Secondly, there are issues of characterisation in the twilight zone between contract and tort. Party autonomy even for non-contractual matters moulds these differences for it allows parties to choose the applicable law in both fields concerned. If the same law is the *lex causae* for both contract and tort in a given case,

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3 *Briggs* para. 8.172.

4 *de Boer*, YbPIL 9 (2007), 19, 22: "not very convincing".

5 In detail *infra* Art. 14 notes 132–166 (*Mankowski*).

6 To the same avail *Mankowski*, RabelsZ 74 (2010), 182; *von Hein*, in: Callies, Art. 14 Rome II Regulation note 2; *Boele-Woelki*, in: FS Ingeborg Schwenzer (2011), p. 191.

7 *Werner Lorenz*, Vertragsschluss und Parteiwille im internationalen Obligationenrecht (1957) p. 154; *Junker*, IPRax 1993, 1 (2) *et seq.*; *Diedrich*, RIW 2009, 378 (379); *Marc-Philippe Weller*, IPRax 2011, 429 (433).

8 *Flessner*, Interessenjurisprudenz im Internationalen Privatrecht (1990) p. 99; supported by *Diedrich*, RIW 2009, 378 (379).

9 *von Hein*, in: Calliess, Art. 14 Rome II Regulation note 2.

characterisation differences at the level of subtantive law do not matter anymore.[10] Thirdly, such convergent choice solves the problem which law governs whether there is a principle of *non cumul* or whether there can be concurring claims in contract and tort.

2. Systematic place of party autonomy and its limitations in the Rome II Regulation

6 In principle, Art. 14 encompasses all kinds of non-contractual obligations covered by the Rome II Regulation. It is not limited to torts or delicts, but also applies to unjust enrichment, *negotiorum gestio* and *culpa in contrahendo* (although it might be said to generate only limited effect in these fields, given Arts. 10 (1); 11 (1); 12 (1) Rome II Regulation[11]). One should not be misled by the terminology of "damage" employed in (1) (a) and (b). "Damage" has to be understood in the light of Art. 2 (1), (3) as any consequence arising out of tort/delict, unjust enrichment, *negotiorum gestio* or *culpa in contrahendo*.[12]

7 Borderless freedom without any limitations would be a feast for the lions. It would enable parties to opt out of Regulation and to undermine any regulatory purposes of domestic laws.[13] In a very considerate, yet sometimes complicated manner, the Rome II Regulation adopts appropriate counter-measures in order to keep such dangers at bay. In the Rome II Regulation there are a number of limitations on party autonomy, starting with (2) and (3), continuing with the protection of weaker parties by virtue of (1) (b) in particular, and reserving *lois de police* or *lois d'application immediate* in Art. 16. Legitimate regulation is protected against being overwhelmed and overpowered by autonomy by the persons to be regulated.

8 Express exceptions to Art. 14 are established in Art. 6 (4) with regard to unfair competition and acts restricting free competition and in Art. 8 (3) with regard to the infringement of intellectual property rights. The wording of these rules is clear and unambiguous, but its reduction has been advocated for in instances where a dispute does not threaten third party or common interests.[14]

9 An express exception is not to be found in Art. 7,[15] but arguably environmental damage afflicts the interests of the general public extending beyond any individual victim's objects,[16] hence there might not be a proper partner for the tortfeasor to conclude a choice of law agreement due to collective action problems. Also "Polluter pays" is said to militate in favour of excluding party autonomy.[17] *De regulatione lata* the *argumentum e contrario* that Art. 7 does not feature a parallel to Arts. 6 (4); 8 (3) carries quite some weight and is

10 *von Hein*, in: Calliess, Art. 14 Rome II Regulation note 2.

11 *Rugullis*, IPRax 2008, 319 (322); *Rühl*, in: OGK Art. 14 Rom II-VO note 39.

12 *Bach*, in: Peter Huber, Art. 14 Rome II Regulation note 1.

13 See only *Renner*, (2009) 26 J. Int. Arb. 533, 535.

14 *Leible*, RIW 2008, 257 (259); *Bach*, in: Peter Huber, Art. 14 note 3; *Wurmnest*, in: jurisPK Art. 14 note 8.

15 *Vogeler* p. 122.

16 *de Boer*, YbPIL 9 (2007), 19, 25.

17 *Fallon*, in: Basedow/Baum/Nishitani (eds.), Japanese and European Private International Law (Tübingen 2008), p. 261, 270–271.

rather forceful.[18] Art. 7 pursues a rather individualistic view on environmental damage and does not, at least not primarily, reflect the damage to the common good.[19] Common interests might be regarded as sufficiently safeguarded by Art. 17.[20] Hence, conceptionally it fits that such a parallel is missing from its wording. Furthermore, Art. 7 gives a unilateral option to the creditor. There would be some tension if one excluded bilateral party autonomy.[21]

10 Whether party autonomy can be really permitted in the field of industrial actions addressed by Art. 9 might also be subject to further consideration because of the possibly overriding social interests at stake[22] and the multiplicity of interested parties concerned. Another time, the *argumentum e contrario* that Art. 9 does not feature a parallel to Arts. 6 (4); 8 (3) carries quite some weight and is rather forceful.[23] If making the special conflicts rule in Art. 9 mandatory and the law of the place of the industrial action was the only viable option,[24] the European legislator should have fortified this expressly. But it would be even more convincing if Art. 9 was based on a fully considered approach reflecting any respectable position towards party autonomy. But the issue did simply not arise. To deduct a legislative intent from the lack of an express exclusion is a rather speculative exercise. To relegate public interests to the admissibility of industrial actions and to believe this not to be covered by a rather limited scope of Art. 9 (restricted to issues of civil liability) might provide additional if only tentative support.[25]

11 Further limitations to party autonomy can be found in Art. 16 and Art. 17 respectively. Both relate to overriding provisions. Finally, (2) and (3) contain restrictions prevailing over the parties' choice of law.

12 In practice, a choice of law does not take place in actions for injunctory relief under the Injunctions Directive 2009/22/EC[26] where competitors, consumer associations or other qualified entities under Art. 4 Injunctions Directive sue.[27] Materially, Art. 6 (4) provides an explanation in the majority of instances.

13 A teleological inhibition of party autonomy and respective reduction of Art. 14 has been strongly advocated in the field of capital or financial market liability. Its main aim is to prevent the choice of a Third State law escaping the European regulatory framework in

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18 *von Hein*, ZEuP 2009, 6 (23).

19 See *Vogeler* pp. 125–126.

20 *Vogeler* pp. 127–128.

21 *von Hein*, RabelsZ 73 (2009), 461 (499).

22 *de Boer*, YbPIL 9 (2007), 19, 25; *Ofner*, ZfRV 2008, 13, 20.

23 *Dickinson*, in: Dicey/Morris/Collins, para. 34–044; *Picht*, in: Rauscher, Art. 14 note 8; *von Hein*, in: Calliess, Art. 14 note 7; see also *Knöfel*, EuZA 2008, 228 (246).

24 To this avail *Gerhard Wagner*, IPRax 2006, 372 (386); *Gerhard Wagner*, IPRax 2008, 1 (10).

25 *Vogeler* pp. 133–134.

26 Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, OJ EU 2009 L 110/30.

27 *Keck/Wäßle*, K&R 2016, 591 (592).

particular with regard to prospectus liability.[28] The *effet utile* of the regulatory framework is advanced in support of such approach.[29]

By virtue of Art. 288 subpara. 2 TFEU Art. 14 enjoys hierarchical precedence over any national PIL rules which might take a more restrictive or more liberal stance towards party autonomy for non-contractual obligations.[30] **14**

3. Bipolar splitting in the event of a multiplicity of creditors or debtors

Even in "ordinary" torts (i.e. torts beyond the market-related torts referred to in Arts., 6; 8) a multiplicity of persons on the creditors' or the debtors' side is a common occurrence. (1) requires such multiplicity on either side to be split into bipolar relationships between the single creditor and the single debtor. A choice of law agreement is a bipolar, contractual relationship. It might be that a single creditor or debtor represents a number of his fellow creditors or debtors as consented agent or that a single creditor or debtor serves as a pioneering front-runner for others. But this still leaves the fundamental bipolar structure unaffected since it can be explained and integrated by means borrowed from the law of contract tailor-made for agreements. To make it explicit and evident: A choice of law consented by one creditor or debtor cannot bind another creditor or debtor lacking that other creditor's or debtor's personal consent. **15**

Who becomes party to the choice of court agreement and whether someone is acting as an agent for others is to be judged according to the potentially chosen law by virtue of Art. 3 (5) in conjunction with Art. 10 (1) Rome I Regulation *per analogiam*. These aspects feature amongst the notion of "existence" of the agreement. Whether someone acting in another person's name has the power to properly represent this other person is an incidental question to be answered applicable to the law which the PIL of the forum declares to be applicable to agency issues. Municipal conflicts rules are operative in this regard since Art. 1 (2) (g) Rome I Regulation is appropriately applied *per analogiam*. **16**

4. "Indirect" party autonomy

Art. 14 addresses party autonomy only in so far as it might be granted directly by the Rome II Regulation. Yet there are important instances where party autonomy indirectly ingresses by the backdoor. The door opened to party autonomy granted by other conflicts rules not contained in the Rome II Regulation can be found in the accessory connections in Arts. 4 (3) 2nd sentence; 5 (2) 2nd sentence; 10 (1); 11 (1); 12 (1): If the respective relationship existing between the parties is subject to party autonomy as established by the conflicts rules governing that relationship the Rome II Regulation follows suit. Accessory connections do not alter the conflicts rules governing the dominant relationship. **17**

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28 *Steinrötter*, Beschränkte Rechtswahl im Internationalen Kapitalmarktprivatrecht und akzessorische Anknüpfung an das Kapitalmarktordnungsstatut (2014) pp. 172 *et seq*.; *Steinrötter*, RIW 2015, 407 (412); see also *von Hein*, in: Perspektiven des Wirtschaftsrechts – Beiträge für Klaus J. Hopt (2008), p. 371, 395; *Einsele*, ZEuP 2012, 23 (42)-43.

29 *Steinrötter*, RIW 2015, 407 (412).

30 *Scott*/*Rushworth*, [2008] LMCLQ 274, 291; *Dickinson* para. 13.19; *Rühl*, in: OGK Art. 14 Rom II-VO note 42.

18 In particular, where the dominant relationship is a contract Art. 3 (1) Rome I Regulation will set the standard. Even where a dominant contract is a consumer contract or an individual employment and is thus governed by the protective regimes of Art. 6 or Art. 8 Rome I Regulation respectively, Art. 3 (1) Rome I Regulation will determine the applicable law by virtue of Arts. 6 (2) 1st sentence or Art. 8 (1) 1st sentence Rome I Regulation respectively. Where the dominant contract is an insurance contract - save for Art. 7 (1), (2) Rome I Regulation - or a contract for the carriage of passengers Art. 7 (3) or Art. 5 (2) subpara. 2 Rome I Regulation respectively limit the options for the laws which parties are permitted to choose.

19 Systematically, "indirect" party autonomy has the same place in the order of a case as the rule establishing the underlying accessory connection. The rank of this place might vary. Arts. 10 (1); 11 (1); 12 (1) outrightly give first place to accessory connections when it comes to objectively determining the applicable law. Art. 4 (3) 2nd sentence at first glance appears to be the main exemplification of the escape clause in Art. 4 (3) 1st sentence and thus to become only operative after one has ascertained which law would be applicable by virtue of Art. 4 (1) or (2). But in fact, Art. 4 (3) 2nd sentence reverses order and should be considered before addressing Art. 4 (2) or (1).

II. Features common to (1) (a) and (1) (b)

1. Express choice of law

20 Express choice of law is the optimal choice of law. It saves transaction costs by reducing uncertainty. Parties should spell out explicitly what they jointly want. Explicitness saves some need to interpret and vastly enhances certainty and reliability. A party later on becoming disinclined would shy away from renouncing its own word given expressly, to a larger extent than it would be prepared to argue against inferences to be drawn from other conduct. In so far as the parties unambiguously express their common understanding and intention as to which law shall be applicable to their contract in a mutually consented choice of law agreement they exert the liberty vested in them and could not do better. Parties are then left to the maxim that they know best what is in their interest. Parties should check whether and if so, to which extent, all jurisdictions possible relevant to the contract allow party autonomy or whether some of them disregard some options like conditional choice of law clauses.[31]

21 Express choice might be used as an instrument to harmonise jurisdiction and applicable law by contractual means in so far as a choice-of-law clause identical to the parties' choice of forum or other dispute resolution agreement is designed to track that dispute solution provision.[32] On the other side, an exclusive choice of forum clause in favour of courts in State A might interact badly with a choice of the law of State B.[33] Optimally, prudent and

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31 See the elaborate and skilfully devised checklist by *Lutz Christian Wolff*, The Law of Cross-Border Business Transactions (2013) p. 78.

32 *Born*, International Arbitration and Forum Selection Agreements: Drafting and Enforcing (4th ed. 2013) p. 160.

33 *Born*, International Arbitration and Forum Selection Agreements: Drafting and Enforcing (4th ed. 2013) p. 164.

foresighted parties should take into account the legal and linguistic abilities of the chosen forum.[34]

Nothing in (1) requires that the choice of law should be made separately and in complete isolation from other agreements. It can merge with a combined choice of law in contract. Most instances of an express choice of law for non-contractual obligations will be found in a contractual environment, namely in choice of law clauses for all claims or disputes arising out of, or in connection with, a certain contract. Formally, this combines two elements which legally have to be kept separately and analysed distinctly for they have to meet different yardsticks. The mental separation is a technical operation only and must not prompt formal separation already in the wording of the agreement. However, parties intending an express choice of law should make their intention express also in so far as they should expressly name non-contractual issues in their choice of law agreement not leaving it to the risks and chances of inferring whether the agreement covers such issues or not. An express choice generates more certainty - and less leeway for a party trying to get out of the bargain, than an implicit or tacit choice of law. **22**

2. Implicit or tacit choice of law

a) General aspects

A choice of law does not have to be made expressly. An implicit or tacit (sometimes also called implied) choice of law exists when an unexpressed agreement between the parties is demonstrated with reasonable certainty by the circumstances of the case.[35] Unlike Art. 3 (1) 2nd sentence Rome I Regulation, (1) 2nd sentence refers only to the circumstances of the case, not also to the terms of the contract. This is certainly owed to the fact that (1) operates only in the non-contractual arena. However, the circumstances of the case should not be read quite as narrowly as they can be understood under Art. 3 (1) 2nd sentence Rome I Regulation, but should be taken as including any reference made in the agreement possibly amounting to a choice of law agreement. Choice of law *agreements* are agreements after all, and an implicit choice of law might very well be extracted from the terms the parties have eventually come to in an agreement. Hence, how seductive the contractual/non-contractual argument might appear at first glance it should not prevent from investing comprehensive circumspection. **23**

In another respect, the wording of (1) 2nd sentence happens to differ from that of Art. 3 (1) 2nd sentence Rome I Regulation: Whereas the latter demands the choice to be "clearly" demonstrated, the former calls for the choice to be demonstrated "with reasonable certainty". The difference can be explained by the reverse order in time, the Rome II Regulation being the frontrunner to the Rome I Regulation. The Rome II Regulation could not profit from those ideas which influenced only the later stages in the genesis of the Rome I Regulation, and could look only to Art. 3 (1) 2nd sentence Rome Convention copying its wording.[36] **24**

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34 *Born*, International Arbitration and Forum Selection Agreements: Drafting and Enforcing (4th ed. 2013) pp. 163–164.

35 *Penadés Font*, (2015) 78 Mod. L. Rev. 241, 242.

36 *Basedow*, in: von Hein/Rühl (eds.), Kohärenz im Internationalen Privat- und Verfahrensrecht der Europäischen Union (2016), p. 3, 11–12.

25 The original Proposal for Art. 3 Rome I Regulation still featured "with reasonable certainty". Afterwards, this was subject to a protracted legislative history.[37] Trouble commenced with an attempt of the Commission unilaterally to retract the word "reasonable" from Art. 3 (1) 2nd sentence Proposal which referred to "reasonable certainty".[38] Albeit supported by some, this attempt met fierce opposition by the majority of the Member States.[39] Germany,[40] the United Kingdom,[41] and Ireland[42] in particular were adamant that some flexibility should be maintained. Counterproposals by the Finnish Presidency to qualify "certainty" by adding "sufficient" did not succeed, either. The United Kingdom resolved the dispute by offering compromise amendments[43] which were accepted by the first Finnish and then German Presidency.[44] By introducing "clearly" the threshold was gradually raised.[45] The criterion was borrowed from the formula which the Hague Conventions[46] employ where they are dealing with tacit choice of law by the parties.[47] Furthermore, the previously in part diverging linguistic versions of the Rome Convention[48] were brought into line and realigned.[49]

26 All these elements did not form part in the drafting process leading to (1) 2nd sentence. That explains the linguistic differences. If the idea behind the introduction of "clearly" instead of "with reasonable certainty" was to raise the threshold, (1) 2nd sentence in keeping the older formula sticks with the old yardsticks. Art. 3 (1) 2nd sentence Rome I Regulation deliberately left them behind in order to limit judges' discretion to find a tacit choice of law more than under Art. 3 (1) 2nd sentence Rome Convention,[50] in order to egalise the differences in the case law of national courts which had developed under the Rome Convention, with French courts adopting a more restrictive approach[51] than their

37 *McParland* paras. 9.51–9.64.

38 Council Doc. 9618/06 (6 June 2006).

39 *McParland* para. 9.60 reproduces the respective part of the Minutes of the 26–27 October 2006 meeting of the Council's Rome I Committee.

40 Council Doc. 13035/06 ADD 12 (27 September 2006).

41 Council Doc. 13035/06 ADD 4 (22 September 2006).

42 Council Doc. 13035/06 ADD 15 (2 October 2006).

43 Council Doc. 14691/06 ADD 1 (31 October 2006).

44 Council Doc. 16353/06 JUSTCIV 276 CODEC 1485 (12 December 2006); Council Doc. 6935/07 JUSTCIV 44 CODEC 168 (2 March 2007).

45 E.g. *Thode*, NZBau 2011, 449 (453).

46 In particular, Art. 7 (1) Hague Convention of 22 December 1986 on the Law Applicable to the International Sale of Goods; Art. 4 Hague Convention of 5 July 2006 on intermediary-held securities.

47 *Gardella*, NLCC 2009, 611, 626; *McParland* para. 9.62.

48 See *Coester-Waltjen*, in: FS Hans Jürgen Sonnenberger (2004), p. 343, 348 *et seq.*

49 *Wulf-Henning Roth*, in: FS Apostolos Georgiades (2005), p. 905, 913; *Thüsing*, in: Graf v. Westphalen, Vertragsrecht und AGB-Klauselwerke (28th ed. 2010) Rechtswahlklauseln Art. 14 Rom II-VO note 8; see also *Hohloch/Kjelland*, IPRax 2002, 30 (32); *Mankowski*, in: Leible, p. 63, 84 *et seq.*; *Maxi Scherer*, in: Corneloup/Joubert (dir.), Le Règlement communautaire "Rome I" et le choix de loi dans les contrats internationaux (2011), p. 253, 266–272.

50 See only *Joubert*, in: Corneloup/Joubert (dir.), Le Règlement communautaire "Rome I" et le choix de loi dans les contrats internationaux (2011), p. 229, 230; *McParland* para. 9.66.

51 Cass. RCDIP 95 (2006), 94 with note *Lagarde* = D. 2006, 1498 with note *Courbe* = Clunet 133 (2006), 985 with note *Sinay-Cytermann* = Dr. & patr. 142 (2005), 113 with note *Marie-Elodie Ancel*; CA Paris JCP G 1994 II 22314 with note *Bernard Audit* = Clunet 121 (1994), 678 with note *Jacquet*.

German, Dutch or English counterparts,[52] and to make these differences disappear. However, a lower threshold would be barely compatible with parties' choice of law being a way more familiar and less sensitive concept in the field of contracts than in the field of non-contractual obligations. If different yardsticks were to be employed at all, the stricter ones should apply with regard to non-contractual obligations. Yet the most elegant way to avoid any impasse appears to be to apply similar standards and not to implement differences as to substance in general. This is the more advisable since in overlapping matters of parties' choice of law the Rome I Regulation should take the lead for it triggers by far the greater number of cases and instances of application.

Neither (1) 2nd sentence nor any Recital explain the notion of "circumstances of the case". **27**
Seen in isolation, it could be understood as a wide and open concept. It would have been helpful to find some examples at least. But the EU legislator refrained from establishing a list or catalogue of factors and elements possibly to be considered as indicating a tacit choice of law. To proceed the other way would have burdened the wording and would have put a relative emphasis on the phenomenon that would have been out of proportion compared to the basic rule in (1) 1st sentence on the one hand and the importance of express choices on the other hand. The fundamental difficulty to draw the fine line between an implicit, but real intention on the one hand and a mere hypothetical or imputed intention on the other hand remains[53] and might pose a conundrum insoluble at an abstract level.[54] A court must not speculate what the parties might have intended if they had considered it but has to decide whether they expressed any real intention or not.[55] It is certainly wrong to deduce from the absence of an explicit choice of law in the contract that there is not any implicit choice of law, either.[56] Institutionally, tacit choice of law is a source of uncertainty. But this is not justification enough for completely abandoning tacit choice of law as an institution[57] since it undeniably meets a need in modern contractual practice.

Since the Rome II Regulation is an act of EU legislation it is to be interpreted uniformly and **28**
autonomously rather than of the basis of a national law including the *lex fori*.[58] This involves a purposive approach to interpretation of terms contained in it rather than a narrow and literal reading.[59] On the other hand a court must not strive to find a choice of law where none exists. An implied choice still is a real choice which must be demonstrated else objective

52 Explained e.g. by *Joubert*, in: Corneloup/Joubert (dir.), Le Règlement communautaire "Rome I" et le choix de loi dans les contrats internationaux (2011), p. 229, 234–237.

53 See only *Wautelet*, in: Liber amicorum Johan Erauw (2014), p. 305, 329–330.

54 *Joubert*, in: Corneloup/Joubert (dir.), Le Règlement communautaire "Rome I" et le choix de loi dans les contrats internationaux (2011), p. 229, 231.

55 See *Timothy Joseph Lawlor v. Sandvik Mining and Construction Mobile Crushers and Screens Ltd.* [2012] EWHC 1188 (QB) [45] (Q.B.D., Judge *Mackie* QC); *Plender/Wilderspin* para. 6–038.

56 This mishap is taken from Rb. Rotterdam NIPR 2014 Nr. 44 p. 98.

57 As *Wautelet*, in: Liber amicorum Johan Erauw (2014), p. 305, 334–336 advocates for.

58 See only *Friedrich Lürssen Werft v. Halle* [2009] EWHC 2607 (Comm), [2010] 2 Lloyd's Rep. 20, 24 [20] (Q.B.D., *Simon* J.).

59 See only *Egon Oldendorff v. Libera Corp.* [1996] 1 Lloyd's Rep. 380, 387 (Q.B.D., *Clarke* J.); *Friedrich Lürssen Werft v. Halle* [2009] EWHC 2607 (Comm), [2010] 2 Lloyd's Rep. 20, 25 [33] (2) (Q.B.D., *Simon* J.).

connections would be rendered nugatory.[60] The possibility of an implied choice does not permit to infer a choice of law where the parties show no clear intention to make such a choice.[61] The mere fact that a court regards such choice as being reasonable is plainly insufficient.[62] The tacit choice of law has to be made "with reasonable certainty", "de façon certaine", "mit hinreichender Sicherheit".

29 There is one major difference between Art. 3 (1) 2nd sentence Rome I Regulation and (1) 2nd sentence which must be strictly observed and must not be disregarded or blurred whilst transferring ideas: Like an express choice of law, any tacit or implicit choice of law for non-contractual obligations can only operate in the framework and within the confines established by (1) 1st sentence. In principle ideas, criteria and sub-concepts developed under Arts. 3 (1) 2nd Rome Convention; 3 (1) 2nd sentence Rome I Regulation can be transferred to the realm of (1) 2nd sentence.[63] But such transfer must not be used to undermine (1) 1st sentence (b) in particular.[64] That, after the event giving rise to the damage occurred, the parties may confirm a (previously invalid) choice made before the event giving rise to the damage occurred, is a theoretically conceivable option[65] but is rather unlikely, though.

30 To draw a distinction between an "implicit" and a "tacit" choice of law, if only by nuances,[66] means overstating the linguistical case, though. To distinguish in that regard would trigger a necessity to establish two sub-definitions demarcating the borderline at high dogmatic cost without an equalising benefit.

31 The conclusion of the tacit choice of law agreement is not relegated to an analogy to Art. 3 (5) Rome I Regulation and to the bootstrap principle, but is governed by (1) 2nd sentence itself.[67] The conflict rules of the *lex fori* are the naturals to answer this question since party autonomy can only be granted, and its extension can only be defined, by these rules.[68] Unanimously, consensus of all parties concerned is required for a tacit choice of law not less than for an express choice of law.[69] The one-sided intention by one party only does not

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60 See only *Friedrich Lürssen Werft v. Halle* [2009] EWHC 2607 (Comm), [2010] 2 Lloyd's Rep. 20, 25 [33] (3) (Q.B.D., *Simon* J.).

61 See only *Friedrich Lürssen Werft v. Halle* [2009] EWHC 2607 (Comm), [2010] 2 Lloyd's Rep. 20, 25 [33] (4) (Q.B.D., *Simon* J.); *Wulf-Henning Roth*, in: FS Apostolos Georgiades (2005), p. 905, 906.

62 See only *American Motorists Insurance Co. (Amico) v. Cellstar Corp*. [2003] Lloyd's IR [44] (C.A., per *Mance* L.J.); *Friedrich Lürssen Werft v. Halle* [2009] EWHC 2607 (Comm), [2010] 2 Lloyd's Rep. 20, 25 [33] (5) (Q.B.D., *Simon* J.).

63 *Vogeler* p. 198; *Picht*, in: Rauscher, Art. 14 Rom II-VO note 30.

64 *Heiss/Loacker*, JBl 2007, 613, 623; *Leible*, RIW 2008, 257 (261); *Vogeler* pp. 198, 200; *Junker*, in: Münchener Kommentar zum BGB Art. 14 Rom II-VO note 30; *Picht*, in: Rauscher, Art. 14 Rom II-VO note 32.

65 *Picht*, in: Rauscher, Art. 14 Rom II-VO note 33; *Vogeler* p. 200.

66 As *Joubert*, in: Corneloup/Joubert (dir.), Le Règlement communautaire "Rome I" et le choix de loi dans les contrats internationaux (2011), p. 229, 232 does.

67 *Egon Lorenz*, RIW 1992, 697 (699); *Hohloch/Kjelland*, IPRax 2002, 30 (31) *et seq*.; *Mankowski*, in: Leible, p. 63, 64; *Coester-Waltjen*, in: FS Hans Jürgen Sonnenberger (2004), p. 343, 350; *Wulf-Henning Roth*, in: FS Apostolos Georgiades (2005), p. 905, 914.

68 *Hohloch/Kjelland*, IPRax 2002, 30 (31).

69 See only *Coester-Waltjen*, in: FS Hans Jürgen Sonnenberger (2004), p. 343, 345.

suffice.[70] Generally, both parties must have parallel intentions. In particular, it would not suffice if one of the parties tabled a draft which contained a certain choice of law clause and if the other party struck out that very clause or insisted that it be removed, to infer a common intention to choose the law referred to in that clause impliedly.[71]

To demand a *Rechtswahlbewusstsein* in the sense of a conscious reflection that a choice of law in particular is made should not be required, though.[72] If parties to a contract reflected choice of law consciously, they would have opted for an express choice of law, indeed, in order to avoid any uncertainties and to exert the utmost clarity in expressing their intention. Intention and *Rechtswahlbewusstsein* work on a lower and lesser level. **32**

Subsequent conduct of the parties after the conclusion of the agreement is admissible to the extent that it sheds light on what if anything the parties impliedly agreed at the time the contract was entered into.[73] Likewise, evidence coming into existence after the contract between the parties has been entered into is admissible.[74] **33**

Correspondence, both prior and subsequent to the conclusion of the agreement, might serve as evidence for the parties' intentions. But it has to be looked at in its entirety, and reliance upon a few selected and handpicked sentences out of context might not be a very reliable guide.[75] In the specific surroundings of (1) 2nd sentence, (1) 1st sentence (a) does not cut off the relevance of correspondence prior to the event giving rise to the damage occurred for assessing the parties' respective intentions and mindsets if only the eventual consensus was reached only after that event. **34**

b) Exclusive jurisdiction clauses

aa) General features

Traditionally, in the leading field of contract exclusive jurisdiction clauses have been the most important example for a tacit choice of law. This has, to a certain extent, been reinforced by Recital (12) Rome I Regulation[76] which reads: **35**

(12) An agreement between the parties to confer on one or more courts or tribunals of a Member State exclusive jurisdiction to determine disputes under the contract should be one

70 *Joubert*, in: Corneloup/Joubert (dir.), Le Règlement communautaire "Rome I" et le choix de loi dans les contrats internationaux (2011), p. 229, 241.

71 *Plender/Wilderspin* para. 6–039.

72 But cf. *Wautelet*, in: Liber amicorum Johan Erauw (2014), p. 305, 320–322.

73 *Print Concept GmbH v. GEW (EC) Ltd.* [2001] EWCA Civ 352 (C.A., per *Longmore* L.J.); *Lupofresh Ltd. v. Sapporo Breweries Ltd.* [2013] EWCA Civ 948, [2014] 1 All ER (Comm) 484 [17] (C.A., per *Tomlinson* L. J.); *Timothy Joseph Lawlor v. Sandvik Mining and Construction Mobile Crushers and Screens Ltd.* [2012] EWHC 1188 (QB) [12] (Q.B.D., Judge *Mackie* QC); *Dicey/Morris/Collins/Morse* para. 32–037; *Andrew Scott*, (2013) 84 BYIL 485, 522; *Plender/Wilderspin* para. 6–045.

74 *Timothy Joseph Lawlor v. Sandvik Mining and Construction Mobile Crushers and Screens Ltd.* [2012] EWHC 1188 (QB) [47] (Q.B.D., Judge *Mackie* QC).

75 *Lupofresh Ltd. v. Sapporo Breweries Ltd.* [2013] EWCA Civ 948, [2014] 1 All ER (Comm) 484 [20] (C.A., per *Tomlinson* L.J.).

76 On its genesis in short *Mankowski*, in: Magnus/Mankowski, Art. 3 Rome I Regulation note 116.

of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated.

36 The main inference to be drawn from Recital (12) is that exclusive jurisdiction clauses rank very high as indications for a tacit choice of law. They are the only factor that gets expressly mentioned, and at least this elevates them above the rest of the bunch. *Qui eligit forum vel iudicem eligit ius* in its strict version might not be quite the maxim of the day, though. It is rather the slightly down-graded version: *Qui eligit forum vel iudicem apparet eligere ius*. Nonetheless, it is sensible to assume that parties might want the chosen court to apply its own *lex fori*. The court is most familiar with its own law, there is no language barrier for the court, and the tertiary costs of law enforcement are reduced for the court does not to have to inquire into law which is foreign or even alien to it. One of the main functions of a choice of forum is the selection of a tribunal which is familiar with the law in question, and so best placed to determine and apply that law to any dispute which has arisen so as to uphold the parties' rights; a primary function of a jurisdiction clause is securing this protection.[77]

37 "To be taken into account" diminishes and reduces the decisiveness of the jurisdiction clause with regard to its consequences in the conflict of laws. In exceptional cases, an exclusive jurisdiction might not carry the implication of a choice of the law of the chosen forum.[78] But generally it ought to be presumed that parties 'purchasing' dispute resolution offered by a certain State court have the rational intention to purchase high quality services at the lowest possible price which goal is best achieved it the chosen forum applies its own law.[79]

Only an *exclusive* jurisdiction clause carries the effect described in Recital (12) Rome I Regulation. A merely optional or facultative jurisdiction clause does not.[80] If parties add a named jurisdiction without derogating others or if one of the parties unilaterally is granted an option to choose from a range or a menu of jurisdictions this does not suffice to trigger the implication that a certain choice of law might have been made and intended mutually even if the respective option is actualised later-on.

38 A jurisdiction clause is exclusive if only *one* jurisdiction is chosen and any other jurisdiction is derogated. If parties designate a competent court in a Member State without expressly stating whether this should be an exclusive choice or not, Art. 25 (1) 2nd sentence Brussels I*bis* Regulation establishes a presumption that such choice of jurisdiction is an exclusive one if the chosen court is a court in a Member State of the Brussels I Regulation. This presumption is rebuttable in principle but a very strong one, though, which should not be regarded as rebutted ordinarily and regularly and which should not be put aside lightly.

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77 *AMT Futures Ltd. v. Marzillier, Dr. Meier & Dr. Guntner Rechtsanwaltsgesellschaft mbH* [2014] EWHC 1085 (Comm), [2015] 2 WLR 187 [43] (Q.B.D., *Popplewell* J.).

78 Even more hostile against any regular implication *Bogdan*, NIPR 2009, 407, 408.

79 *Mankowski*, in: Leible, p. 63, 82–84.

80 See *Armadora Occidental SA v. Horace Mann Insurance Co.* [1977] 2 Lloyd's Rep. 406 (Q.B.D.); *Cantieri Navali Riuniti SpA v. NV Omne Justitia* [1985] 2 Lloyd's Rep. 428 (Q.B.D.); *EI Du Pont de Nemours & Co. v. Agnew* [1987] 2 Lloyd's Rep. 585 (Q.B.D.); *King v. Brandywine Reinsurance Co. (UK) Ltd.* [2004] 1 Lloyd's Rep. I.R. 846 (Q.B.D.).

Recital (12) Rome I Regulation only mentions the exclusive choice of courts in Member States, obviously before the background of Brussels I*bis*, but should not be read strictly literally.[81] To disregard exclusive choice of court agreements vesting jurisdiction in courts in non-Member States would fit ill with the principle of universal application in Art. 3,[82] let alone for reasons of substance.[83] A reference to "countries" instead of "Member States" was ventilated as a possible option[84] but not pursued further and even less adopted eventually. This should not carry any implication[85] since a reasoned rejection cannot be detected, and sloppy drafting is a possible alternative explanation.[86] On aggregate, an integrative interpretation of Recital (12) Rome I Regulation (*per analogiam)* in the context of (1) subpara. 2 is called for.[87] **39**

bb) Qui eligit forum vel iudicem eligit ius and the ensuing presumption

Qui eligit forum vel iudicem eligit ius features amongst the oldest doctrines of the entire PIL. It is based on the presumption that the parties intend to combine *forum* and *ius* and want the chosen *forum* to apply its own law, the *lex fori.* This saves time and at least for the court research and information costs for inquiring the content of the law to be applied.[88] Furthermore, the quality of decisions might be enhanced in so far as, and by the degree to which, the court is more familiar with its own law than with foreign law.[89] **40**

An exclusive choice of forum carries a tacit choice even if there is nothing else to support it.[90] It is not necessary that further elements support such contention[91] as the parties are deemed to act in their very own self-interest.[92] Of course such supporting elements might exist: e.g., the choice of forum might form part of a standard setting commonly used in the market of the forum state,[93] for instance the London reinsurance market. In this event, the chosen forum could represent the State of a market on the conditions of which the contract was **41**

81 *Lagarde*/*Tenenbaum*, RCDIP 97 (2008), 727, 733; *Kenfack*, Clunet 136 (2009), 1, 14.

82 *Bogdan*, NIPR 2009, 407, 408.

83 Tentatively to the opposite result *Maxi Scherer*, in: Corneloup/Joubert (dir.), Le règlement communautaire "Rome I" et le choix de loi dans les contrats internationales (2011), p. 253, 273 *et seq.*

84 Council Doc. 13853/96 JUSTCIV 224 CODEC 1085 (12 October 2006).

85 *Lagarde*/*Tenenbaum*, RCDIP 97 (2008), 727, 736; *Garcimartín Alférez*, EuLF 2008, I-61, I-65; *Carrascosa González*, La ley aplicable a los contratos internacionales: El Reglamento Roma I (2009) p. 131; *Dicey*/*Morris*/*Collins*/*Morse* para. 32–069; *Plender*/*Wilderspin* para. 6–037. *Contra McParland* para. 9.102.

86 *Plender*/*Wilderspin* para. 6–037.

87 *Penadés Fons* Elección tacita de ley en los contratos internacionales (2012) pp. 133–141; see also *Leible*, RIW 2008, 257 (261); *Vogeler* pp. 203–206; *Wurmnest*, in: jurisPK BGB Art. 14 Rom II-VO note 16.

88 See only *Bernard Audit*, Droit international privé (7th ed. 2013) para. 796.

89 See only *Fentiman*, (1992) 108 LQR 142, 152 *et seq.* and generally LG Karlsruhe, IPRspr. 1999 Nr. 32A p. 84.

90 Anders Trib.arr. Luxembourg, RDIPP 1991, 1092; *Lagarde*, RCDIP 80 (1991), 287, 303; *von Bar*, Internationales Privatrecht II: Besonderer Teil, 1991, paras. 469 *et seq.*

91 *Contra* Trib.arr. Luxembourg RDIPP 1991, 1092; *Lagarde*, RCDIP 80 (1991), 287, 303; *von Bar*, paras. 469 *et seq.*

92 *Junker*, RIW 2001, 94 (97).

93 *Groupama Navigation et Transports v. Catatumbo CA Seguros* [2000] 2 Lloyd's Rep. 350, 355 = [2000] 2 All ER (Comm) 193, 200 (C.A., per *Mance* L.J.); *Mankowski*, VersR 2002, 1177 (1180).

designed.[94]. A subsequent choice of forum generally has the same weight as an initial choice of forum,[95] yet the possibility of altering the applicable law has to be considered.

42 The maxim *qui eligit forum vel iudicem eligit ius* in principle applies irrespective of whether the chosen court is the court of a Member State of the Brussels I Regulation, the Revised Lugano Convention, any other Treaty or Convention to which the EU is party, or not.[96]

43 *Qui eligit forum vel iudicem eligit ius* is a rational rule. It might not be rebutted simply because other intentions carried the parties' thinking, particularly such as being more related to procedure and proceedings as such for instance that the chosen forum promises particularly appropriate, or cost reduced, or expeditious proceedings or that the parties wanted to avail themselves of specific rules of evidence (with discovery as the most prominent example),[97] or convenience of geographical access, fairness of the process or independence and integrity or reputation of the judicial system of the chosen forum[98] or rapidity and efficiency of the judicial process.[99] Such procedural elements might even be the primary reasons underlying the parties' choice of forum. Yet they do not automatically exclude consequences as to the choice of law, but can even support such consequences particularly so as parties interested in expeditious proceedings are equally interested in the court not being bothered and burdened with foreign law.[100] Synchronisation of forum und law saves time and costs.[101] It does on the other hand not make sense to coerce parties which have thought about the relative optimum, into concluding an express parallel choice of law in each and every case.[102] For instance, they might prefer the combination of a "neutral" forum and a law with particular sophistication for the specific activity at stake providing particularly appropriate substantive answers.[103]

44 Even less one should develop a *conclusio e contrario* from the fact that the parties have not in the same context where they made their choice of court, spelled out an express choice of law and a choice of the *lex fori prorogati* at that.[104] Parties simply are not forced to conclude an express choice of law else the entire institution of tacit choice of law would be robbed of its right to exist. An argument along said lines would be incompatible with the very existence of the tacit choice of law as an institution of PIL. It would be at least one step too far to assume that parties who strive for optimal quality of a court decision

94 *Groupama Navigation et Transports v. Catatumbo CA Seguros* [2000] 2 Lloyd's Rep. 350, 355 = [2000] 2 All ER (Comm.) 193, 200 (C.A., per *Mance* L.J.); *Mankowski*, VersR 2002, 1177 (1180).

95 *Mitterer* p. 92.

96 *Bogdan*, NIPR 2009, 407, 408.

97 *Mankowski*, in: Leible, p. 63, 66.

98 *Boele-Woelki*, in: FS Ingeborg Schwenzer (Bern 2011), p. 191, 200.

99 *Ragno*, in: Ferrari, Art. 3 Rom I-VO note 37.

100 *Mankowski*, in: Leible, p. 63, 66.

101 Comments of Max Planck Institute for Comparative and Private International Law on the Commission Proposal, RabelsZ 71 (2007), 225 (243).

102 *Mankowski*, in: Leible, p. 63, 66. *Contra Mitterer* p. 89.

103 *Boele-Woelki*, in: FS Ingeborg Schwenzer (Bern 2011), p. 191, 200.

104 *Contra Garcimartín Alférez*, EuLF 2008, I-61, I-67; *Boele-Woelki*, in: FS Ingeborg Schwenzer (Bern 2011), p. 191, 202; *Ragno*, in: Ferrari, Art. 3 Rom I-VO note 37.

would not solely conclude a choice of forum agreement but add an express choice of law agreement.[105] Legal experience of the parties, combined with the assumption that they know about the freedom to choose the applicable law, is no counter-indication, either.[106] An *argumentum e contrario* that the parties have not made an express choice of law is even less admissible.[107]

The ensuing presumption[108] is strong, but not irrefutable. Choice of forum clauses might in some instances not state an intention to choose the *lex fori.* But the presumption is a rule of reason. This rule is not rebutted if it can be proven that behind the choice of forum agreement were primarily other, procedural motivations, for instance that parties expected particularly expeditive, appropriate or cost-reducing proceedings in the chosen forum or that the parties wanted to avail themselves of certain rules as to proof, particularly so discovery. Rather often such procedural motivations will underlie choice of forum agreements. But they do not summarily dismiss or exclude an intention to choose the *lex fori* as the applicable law, but can co-exist with such intention.[109] On particular, a party interested in speedy and less cost-intensive proceedings will have no intention to bother the court with the cost- and time-intensive research of a foreign law.[110] **45**

Neither party must be at liberty and permitted to argue and allege *ex post* that it had not considered possible consequences of a choice-of-court clause made for the choice of law. Else such party would have too great an opportunity for seeking booty and too great a bargaining chip. The risk of *ex post* opportunism would be too high.[111] One must not foster any risk of such *ex post* opportunism in any way. Conversely, every party challenging the presumption has to produce or to prove intersubjectively recognisable counter-indications. The party turning its back against the presumption must argue and provide proof that there are counter-indications of at least equal weight.[112] *Ex post* opportunism must not be rewarded but discouraged by putting the risk and the burding on the opportunistic party. **46**

cc) Conditions of a valid prorogation

Implied precondition is that the choice of forum agreement is valid according to the rules regulating it. Only a valid choice of forum can exert the full force of a presumption.[113] If the **47**

105 *Contra Mitterer* p. 89; *Maxi Scherer*, in: Corneloup/Joubert (dir.), Le Règlement communautaire "Rome I" et le choix de loi dans les contrats internationaux (2011), p. 253, 282.

106 *Contra Mitterer* p. 91.

107 *Contra* Trib. arr. Luxembourg RDIPP 1991, 1092.

108 Against attributing Recital (12) the strength of a presumption but keeping it to a mere indication below the level of a presumption *Lagarde/Tenenbaum*, RCDIP 97 (2008), 727, 733; *Francq*, Clunet 136 (2009), 41, 53; *Maxi Scherer*, in: Corneloup/Joubert (dir.), Le Règlement communautaire "Rome I" et le choix de loi dans les contrats internationaux (2011), p. 253, 277 *et seq.*

109 See only *Mankowski*, in: Leible, p. 63, 66.

110 See only *Mankowski*, in: Leible, p. 63, 66.

111 See only *Mankowski*, in: Leible, p. 63, 66.

112 See only *Mankowski*, in: Leible, p. 63, 66.

113 See only *Mankowski*, Seerechtliche Vertragsverhältnisse im Internationalen Privatrecht (1995) p. 34; *Mankowski*, RabelsZ 63 (1999), 203 (213); *Tang*, (2008) 4 JPrIL 35, 48; *Gebauer*, in: Nomos Kommentar Art. 14 note 25; *Picht*, in: Rauscher, Art. 14 note 32.

choice of forum agreement is itself invalid it can not provide the ground for coordination of law and jurisdiction by agreement.[114] The parties fail to reach their primary goal. Particularly sensitive are the form requirements established e.g. by Art. 25 Brussels I*bis* Regulation. But a jurisdiction clause might alternatively fall victim to Art. 15 or 19 or 23 in conjunction with Art. 25 (4) Brussels I*bis* Regulation.[115]

48 Whether parties want to retain their secondary intention to reach an agreement as to choice of law is a subsequent question.[116] The basis of the presumption falters but only in its normative and not necessarily in its factual element. The parties have undeniably concluded a certain choice of forum agreement after considering it. This factual element and the considerations in the drafting process are still existent even if the choice of forum lacks normative effectiveness.[117] Whether they still carry a mutual intention as to choose a particular law or should be superseded if the choice of forum as such fails remains to be answered.[118]

49 The parties may choose the *lex fori* regardless whether the choice of forum clause as such and judged in isolation is formally valid or not.[119] But it cannot be assumed that they do so regularly. The parties want the designated court to apply its own law and they want *forum* and *ius* to coincide. The designated court shall have the most expedient means at hands and shall have the fastest access to the applicable law since the latter is its own law and not a law alien to it which it has to investigate time, cost and effort or alternatively which either party has to proof under a doctrine of foreign law as a fact. But such parallel between *forum* and *ius* cannot be properly established if the court designated is in fact not designated. If the designated court is not to decide the case at all and particularly if it does not judge the merits of the case, the intention to establish synchronist between *forum* and *ius* fails.[120] Or from another perspective: The intention to choose the *lex fori prorogati* is made dependent upon the condition precedent that the *forum prorogatum* does decide the case on the merits.[121] Once the choice of court agreement is dismissed as invalid or ineffective it does not carry an intention by the parties to choose the *lex fori (non) prorogati* unless such intention is clearly corrobated by other means than the choice of court agreement.

dd) Non-exclusive choice of jurisdiction clauses

50 Non-exclusive choice of jurisdiction clauses[122] do not procure a like indication for an in-

114 *Mankowski*, RabelsZ 63 (1999), 203 (213).

115 For examples with regard to Art. 21 Brussels I Regulation see BAG RIW 2014, 691 (693) and Hessisches LAG IPRspr. 2012 Nr. 68 p. 131.

116 *Mankowski*, IPRax 2015, 309 (310).

117 See only Hessisches LAG IPRspr. 2012 Nr. 68 p. 131; *Mankowski*, in: Leible, p. 63, 67.

118 See Cassaz. RDIPP 2011, 431, 434–435.

119 Comp. BAG RIW 2014, 691 (693) in a case where the jurisdiction agreement was rendered invalid by Art. 21 Brussels I Regulation.

120 *Mankowski*, IPRax 2015, 309 (310)-311.

121 *Mankowski*, IPRax 2015, 309 (311).

122 For their permissibility see Art. 23 (1) 2nd sentence Brussels Regulation and under Art. 17 (1) Brussels Convention *Nikolaus Meeth/Fa. Glacetal* (Case 23/78), [1978] ECR 2133, 2141 para. 5 = RCDIP (1981), 127 with note *Gaudemet-Tallon* = Ned. Jur. 1979 Nr. 538 with note *Jan C. Schultsz* (further annotations by *André Huet*, Clunet 106 [1979], 663); OLG München RIW 1982, 281; *Insured Financial Structures Ltd v.*

tention to choose the *lex fori*.[123] This is at least the case for facultative or optional choice of forum clauses granting only one party to select from a menu wider than the objectively founded grounds of jurisdictions applicable in the case.[124] This lacks a derogative effect and does not provide for concentration in a single *forum*; therefore, the multiplicity of possible *fora* is at odds with an intention to choose any particular law of any additional or optional *forum* or of the eventually selected *forum*.[125] The same is true for alternative choice of forum clauses granting the parties in their respective roles as plaintiff or defendant a right to select between two or more *fora*.[126]

A tacit choice of law could follow from a non-exclusive, facultative, optional, alternative or reciprocal choice of forum clause only after proceedings are commenced, since only then the necessary concretisation is possible.[127] Still that could not have the advantages of an initial choice of law, and a change of the applicable law is threatened with ensuing problems. In particular, the latter momentum has to be weighed very carefully against the advantages stemming from an application of the *lex fori*. **51**

c) Tacit choice of law by choosing an arbitral tribunal with specific local grounding

Second most important indication might be an arbitration agreement.[128] *Qui eligit arbitrum eligit ius* is an established and time-honoured maxim in the PIL of contracts. Basic requirement is another time that the arbitration agreement as such is valid, in particular formally valid.[129] Furthermore, the arbitration agreement at stake must extend to non-contractual matters.[130] If it is limited to contractual matters, a choice of law for non-contractual matters cannot be implied. **52**

Even where the arbitration agreement extends to non-contractual matters and is valid, a substantial fact must concur in order to indicate an implicit choice of law: The arbitral tribunal must be grounded in a certain legal order to the degree that – absent any diverging agreement by the parties – it applies the law of its seat which the parties must have rumi- **53**

Electrocieplownia Tychy SA [2003] 2 WLR 656 (C.A.); *Kurz v. Stella Musical VeranstaltungsGmbH* [1992] Ch. 196, 203 (Ch. D., *Hoffmann* J.) = RIW 1992, 140 with note *Ebert-Weidenfeller*; *IP Metal Ltd. v. Route OZ SpA* [1993] 2 Lloyd's Rep. 60, 67 (Q.B.D., *Waller* J.); *Gamlestaden plc v. Casa de Suecia SA* [1994] 1 Lloyd's Rep. 433 (Q.B.D., *Potter* J.); *Hough v. P&O Containers Ltd.* [1998] 2 Lloyd's Rep. 318, 323 (Q.B.D., *Rix* J.); *Lafi Office and International Business SL v. Meriden Animal Health Ltd.* [2000] 2 Lloyd's Rep. 51, 59 (Q.B.D., Judge *Symons* Q.C.).

123 *McParland*, The Rome I Regulation (2015) para. 9.103.

124 See only *Patrzek*, Die vertragsakzessorische Anknüpfung im Internationalen Privatrecht (1992) p. 9; *Mankowski*, Seerechtliche Vertragsverhältnisse im Internationalen Privatrecht (1995) p. 35; *Heiss*, in: Czernich/Heiss Art. 3 EVÜ Art. 14 Rom II-VO note 10.

125 *Contra* tentatively OLG München, IPRspr. 1997 Nr. 51 pp. 90 *et seq.*

126 *The "Star Texas"* [1993] 2 Lloyd's Rep. 445, 448 (C.A., per *Lloyd* L.J.); *Mitterer* p. 93.

127 *Fawcett*, [2001] LMCLQ 234, 253; *Mankowski*, VersR 2002, 1177 (1180).

128 See only OLG Düsseldorf TranspR 1992, 415 (417); OLG Hamm, NJW-RR 1993, 1445; *The "Aeolian"* [2001] 2 Lloyd's Rep. 641, 647 (C.A., per *Mance* L.J.); *Egon Oldendorff v. Libera Corp.* [1996] 1 Lloyd's Rep. 380, 389 *et seq.* (Q.B.D., *Clarke* J.); LG Berlin RIW 1997, 873; SchiedsG Handelskammer Hamburg NJW 1996, 3229 (3230); Schiedsgericht Hamburger Freundschaftliche Arbitrage RIW 1999, 394 (395).

129 See only *Martiny*, in: Reithmann/Martiny, Art. 14 Rom II-VO note 120; *Magnus*, in: Staudinger, Art. 3 Rom I-VO note 81.

130 See only *Tiburcio*, Re. Arb. Med. 50 (2016), 95.

nated about when concluding the arbitration agreement.[131] Otherwise, there would not be a sufficient basis for the presumption that the parties wanted to choose the law of seat of the arbitral tribunal.[132] In particular, ICC arbitration tribunals do not fit the bill.[133] Ad hoc arbitration tribunals usually are out of the game, too.[134]

54 Generally, arbitration tribunals have scarce experience of sitting over matters in tort, unjust enrichment, *negotiorum gestio* or *culpa in contrahendo*. Arbitration tribunals are 'derivatives' of party autonomy in contract. In principle, they are designed and destined to adjudicate contracts. However at least in so far as the parties have also submitted concurring claims in tort to arbitration they cannot avoid adjudicating such claims, too. Furthermore, the bulk of the most important instances of unjust enrichment, the *condictiones indebiti* and the *condictiones causa data causa non secuta* (or *conditiones ob rem*) are to be characterised as contractual by virtue of Art. 12 (1) (e) Rome I Regulation anyway.

55 A choice of law cannot be implied from agreements on *amiable composition*, conciliation, mediation or other modes of ADR.[135]

d) Inference from a choice of law agreement in contract

56 Choice of law agreements, in particular if concluded B2B *ex ante*, will regularly be found in contracts. Where the contracts contain a choice of law agreement which extends to all claim arising in connection with, or out of, the contract or the relationship between the parties this amounts to an express choice of law at least for concurring non-contractual claims. Only where choice of law agreements does not device such openly extending language, a tacit choice of law could be at stake drawing inferences from a choice of law agreement in contract to the non-contractual realm. But if the choice of law agreement is specifically devoted to contractual matters alone, such inference cannot be drawn.[136] Only if it is worded open enough such inference appears feasible.[137] If the exact wording cannot be ascertained (e.g. since the agreement was made orally) the fundament for an implication is not set.[138]

e) Tacit choice of law by parties' conduct in court proceedings

57 With regard to (1) (a), an old problem well known from the realm of contract can arise: to imply a tacit choice of the law of the forum where all parties concerned argue the case on the ground of that *lex fori* (*stillschweigende Rechtswahl durch Prozessverhalten* or *processuele rechtskeuze* respectively). Such an alleged tacit choice of law can be misused as a vehicle to disguise a homeward trend by courts.[139] As a subsequent choice of law this

131 For examples see *Mankowski*, in: Magnus/Mankowski, Art. 3 Rome I Regulation note 136.

132 See only OLG Hamm NJW 1990, 652 (653); *Mankowski*, VersR 2002, 1177 (1180).

133 *Mankowski*, in: Magnus/Mankowski, Art. 3 Rome I Regulation notes 138–139.

134 *Mankowski*, in: Magnus/Mankowski, Art. 3 Rome I Regulation note 140.

135 *Mankowski*, in: Magnus/Mankowski, Art. 3 Rome I Regulation notes 141–142.

136 *Kadner Graziano*, in: Ahern/Binchy p. 113, 121–122; *Bertoli*, RDIPP 2009, 697, 709; *Vogeler* p. 200.

137 *Kadner Graziano*, in: Ahern/Binchy p. 113, 122; *Bertoli*, RDIPP 2009, 697, 709; *Vogeler* p. 200.

138 *Contra Vogeler* p. 200.

139 See only *Schack*, NJW 1984, 2763 (2764); *Schack*, IPRax 1986, 272; *Wenner*, BauR 1993, 257 (260); *Wenner*, RIW 1998, 173; *Wenner*, in: FS Reinhold Thode (2005), p. 661, 661–663; *Wenner*, Internationales Vertragsrecht (3rd ed. 2013) para. 283; *Maxi Scherer*, in: Corneloup/Joubert (dir.), Le Règlement communautaire "Rome I" et le choix de loi dans les contrats internationaux (2011), p. 253, 281.

triggers the protection of third party as provided for in (1) 2nd sentence and all negative consequences stemming from an alteration of the applicable law.[140] This requires careful consideration. Choice requires a conscious decision. To proceed on the basis of a certain law because that law is believed to be applicable anyway, does not amount to a proper choice.[141] Passive submission must not be equated with actively consenting,[142] the latter in the assumed conscience to possibly alter the course of things and to deviate from the *status quo*. Mere ignorance or sloppiness, even if mutual, do not constitute consensus.[143] Not objecting and keeping silent is not tantamount to consenting.[144] Two corresponding mistakes or wrongs do not make a right.[145] That the claimant might not be thinking at all about a choice of law is evident if he bases his allegation that a certain law is applicable on the basis of Art. 4 etc.[146] and thus on an *objective* connection which becomes only operable absent a choice of law.

58 In particular, a danger is inherent that a parties' intention to the said avail is rather constructive and hypothetic,[147] especially so if choosing the *lex fori* would be detrimental for either party.[148] Besides the additional danger of triggering counsels' liability,[149] this comes dangerously close to a facultative application of PIL.[150] Any intra- or supranational Act unifying conflicts rules aims at an opposite goal: Unification can not be reached if the application of the Act as such depended on the parties' intentions. The case that all parties commonly plead on the basis of the same foreign law is different anyway.[151] Strictly speaking, parties should have a common intention to shape the ground of their legal relationship.[152]

59 A limit to any assumption that the parties have impliedly agreed on the application of a certain law might be reached if one of the parties pleads another law at the very first occasion when the matter and its possible implications are consciously discussed.[153] But on the other hand this raises the danger of *ex post* opportunism and would generate a kind of withdrawal from a previous agreement if such agreement was really concluded.

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140 *Sandrock*, JZ 2000, 1118 (1120).

141 *Ofner*, ZfRV 1995, 149; *Ofner*, ZfRV 2014, 124; *Ofner*, ZfRV 2016, 80.

142 *Ofner*, ZfRV 1995, 149.

143 See *Michael Stürner*, in: FS Rolf Stürner (2013), p. 1071, 1083.

144 *Schack*, IPRax 1986, 272 (273); *Schwenzer*, IPRax 1991, 129; *Mankowski*, Seerechtliche Vertragsverhältnisse im Internationalen Privatrecht (1995) p. 36; *Fauvarque-Cosson*, in: Mélanges Paul Lagarde (2005), p. 263, 270; *Gaudemet-Tallon*, in: Mélanges Pierre Mayer (2015), p. 255, 263.

145 *Mankowski*, AP H. 3/2015 § 130 BGB Nr. 26.

146 *de Heer*, NIPR 2009, 144, 147.

147 *Heiss*, in: Czernich/Heiss Art. 3 EVÜ Art. 14 Rom II-VO note 10.

148 BGH NJW 2009, 1205 (1206); *Michael Stürner*, in: FS Rolf Stürner (2013), p. 1071, 1084.

149 *Wenner*, Internationales Vertragsrecht (3rd ed. 2013) para. 288.

150 See only *Bolka*, ZfRV 1972, 241, 250 *et seq*.

151 BGH NJW-RR 1990, 248 (249); OLG Celle RIW 1990, 320 (322); *Magnus*, in: Staudinger Art. 3 Rom I-VO note 82.

152 BGH NJW 2009, 1205 (1206); *Schack*, NJW 1984, 2736 (2739); *Mansel*, ZvglRWiss 86 (1987), 1, 13.

153 BGH NJW 2009, 1205 (1206). See also *de Heer*, NIPR 2009, 144, 147.

aa) Principal-agent-conflict and the power of attorney

60 If both parties plead on the basis of the substantive law of the *lex fori* the intention to choose the *Lex fori* tacitly might be imputed to the parties. This would subject their standing as to the law applicable to the rather often quite defective knowledge of PIL germane to their counsels (in so far as pleadings with regard to the applicability of a certain law are deemed covered by the respective power of attorney[154] as to be judged by the standards of the law applicable in this regard, which is the *lex fori*[155]).

61 An additional danger is the inherent principal-agent-conflict: The attorney has a strong self-interest – particularly so if he is billing on a time basis – that the proceedings are on the basis of the substantive law of the *lex fori* in which he is experienced and that he does not have to share earnings with a foreign colleague.[156]

62 Indirectly, the *horror alieni*, the fear of foreign law, precipitates tendencies to agree to conclude less beneficial and overall inefficient settlements.[157]

63 On the other hand, attorneys are subjected to liability (which might not become all too practical, though). In the event that their respective party loses legal advantages due to the attorney's deficient conduct of proceedings without any balance obtained[158] and that the tacit choice of law imputed causes grave disadvantages as compared to the law applicable without such a tacit choice of law a violation of advocatorial duties and obligations is at stake.

bb) Modes of consensus

64 Mere submission is not a positive assent.[159] A proper choice of law requires mutual consensus and requires the parties to become active, to express an intention to choose a certain law.[160] Courts show a tendency to lower this threshold by relying on mere submission.[161] In so far they neglect the missing counterpart to Art. 26 Brussels I*bis* Regulation in PIL. Even with regard the proper interpretation of Art. 26 Brussels I*bis* Regulation there are two opposing camps: Is

154 See on the necessity of a respective power of attorney only *Schack*, NJW 1984, 2736 (2739); *Mansel*, ZVglRWiss 86 (1987), 1 (13); *Herkner*, Die Grenzen der Rechtswahl im internationalen Deliktsrecht (2003) pp. 136 *et seq*.

155 To the closest connection of a power of attorney to be exercised in a given set of proceedings BGH MDR 1958, 319; OLG München WM 1969, 731.

156 *Mankowski*, in: Claus Ott/Hans-Bernd Schäfer (eds.), Vereinheitlichung und Diversität des Zivilrechts in transnationalen Wirtschaftsräumen (2002), p. 118, 121.

157 See only *Purcell*, 40 UCLA L. Rev. 423, 447 (1992); *Mankowski*, in: Claus Ott/Hans-Bernd Schäfer (eds.), Vereinheitlichung und Diversität des Zivilrechts in transnationalen Wirtschaftsräumen (2002), p. 118, 121.

158 *Jaspers*, Nachträgliche Rechtswahl im internationalen Schuldvertragsrecht (2002) pp. 185 *et seq*.

159 *Schack*, IPRax 1986, 272 (273); *Schwenzer*, IPRax 1991, 129; *Mankowski*, Seerechtliche Vertragsverhältnisse im Internationalen Privatrecht (1995) S. 36; *Coester-Waltjen*, in: FS Hans Jürgen Sonnenberger (2004), p. 343, 351.

160 See only BGH NJW 2009, 1205 (1206); OLG Köln RIW 1992, 1021 (1023) *et seq*.; OLG München RIW 1996, 329 (330); *Mankowski*, Seerechtliche Vertragsverhältnisse im Internationalen Privatrecht (1995) pp. 35 *et seq*.; *Thüsing*, in: Graf v. Westphalen, Vertragsrecht und AGB-Klauselwerke (28th ed. 2010) Rechtswahlklauseln note 11.

161 See e.g. BGH NJW 1991, 1292 (1293) (with reference to BGH NJW-RR 1986, 456 = IPRax 1986, 292); OLG Celle IPRspr. 1999 Nr. 31 p. 77.

submission a tacit choice of forum,[162] or does it have to be understood as some rule of preclusion[163]? Rules of preclusion can preclude certain objections which are not raised or not raised timely enough. To raise objections is a self-obligation of the respective party.

With regard to a choice of law one is not talking about preclusion but about a positive intention to choose a certain law. Otherwise the proposing party would gain to strong a position in negotiations as it could impose a self-obligation to raise an objection upon the other party.[164] Such a self-obligation would foster a dangerous race for tabling the proposal and would not enhance the climate for conducting negotiations on an equal footing.[165] A back and forth of conflicting initiatives would be the extreme consequence. Furthermore, one would threaten to bind parties on the ground of a mistake at law and thus would reverse the alleged freedom of the parties.[166] **65**

Likewise, it would be fallible to impute that the plaintiff by suing the defendant in the State the courts of which have general jurisdiction against the defendant, utters an intention to submit to the *lex fori* and to forsake a foreign *lex contractus*.[167] At least, attorneys might be held liable.[168] **66**

cc) Dangers inherent in a bias favouring the application of the *lex fori*

National particularities leading to a precocious application of the *lex fori* endanger the uniform interpretation and application of the European conflicts rules.[169] Furthermore, they are detrimental to the trust in justice since they cause distrust in the impartiality of the court.[170] **67**

Lastly, national particularities leading to a precocious application of the *lex fori* enhance the danger of forum shopping. This would be incompatible and inconsistent with fundamentals of the PIL of contracts. European PIL has set its mind against forum shopping and wants to reduce incentives for forum shopping.[171] Forum shopping is inefficient, enhances transaction costs and reduces overall welfare.[172] **68**

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162 Favouring this i.a. EuGH, Slg. 1981, 1671 (1684) para. 8 – Elefanten Schuh GmbH/Pierre Jacqmain and Hoge Raad N.J. 1985 Nr. 698 with note *Jan C. Schultsz*; östOGH JBl 1998, 726, 728; *Droz*, Compétence judiciare et effets des jugements dans le Marché commun (1972) paras. 221, 230 *et seq.*; *Arthur Bülow*, RabelsZ 38 (1974), 262 (270).

163 Favouring this in particular *Sabine Schulte-Beckhausen*, Internationale Zuständigkeit durch rügelose Einlassung im Europäischen Zivilprozeßrecht (1994) pp. 100–106; *Mankowski*, NJW 1995, 2540 and *Walter J. Habscheid*, ZfRV 1973, 262, 266; *Samtleben*, NJW 1974, 1590 (1594); *Piltz*, NJW 1979, 1071 (1072) fn. 28.

164 *Herkner*, Die Grenzen der Rechtswahl im internationalen Deliktsrecht (2003) p. 129.

165 *Mankowski*, in: Leible, p. 63, 74.

166 *Fudickar*, Die nachträgliche Rechtswahl im internationalen Schuldvertragsrecht (1983) p. 88; *Herkner*, Die Grenzen der Rechtswahl im internationalen Deliktsrecht (2003) p. 134.

167 But see to this avail OLG Frankfurt TranspR 2000, 260.

168 *Schack*, NJW 1984, 2736 (2738) *et seq.*; IPRax 1986, 272 (273).

169 *Schack*, NJW 1984, 2736 (2739) *et seq.*; *Jaspers*, Nachträgliche Rechtswahl im internationalen Schuldvertragsrecht (2002) p. 183.

170 *Mankowski*, in: Leible, p. 63, 74.

171 Report *Giuliano/Lagarde*, OJ EEC 1980 C 282/1 Introduction note 2.

172 See in more detail *Mankowski*, in: Claus Ott/Hans-Bernd Schäfer (eds.), Vereinheitlichung und Diversität des Zivilrechts in transnationalen Wirtschaftsräumen (2002), p. 118, 119–124.

dd) Judicial duties

69 Any serious judge should ask the parties whether their conduct in the proceedings should really carry an intention to choose the *lex fori*. He should elevate matters from the realm of the only implied to the realm of the truly expressed. This is particularly appropriate if the parties have expressly chosen a different law previously.[173] If both parties declare that they now want the *lex fori* to be applied this amounts to an express choice of law. Under German procedural rules, a respective duty is imposed on the judge by § 139 (2) ZPO.[174]

70 Duties to ask and to investigate the parties' intentions are a matter of procedural law. In principle, they are thus governed by the procedural rules of the forum.[175] There are two alternative ways to solve this conundrum:

- Firstly, one could rule out all and any implicit choice of law in running proceedings.
- Secondly, a judicial duty to investigate whether the parties really want to choose the *lex fori*, could be imposed upon courts and judges.

71 The first solution would be the more radical one. On the other hand it would not invade into the territory of national procedural laws and would not produce frictions there, particularly where the judge is limited to a generally receptive and passive role.[176] It would accord better with jurisdictions where parties must plead the law and where *iura novit curia* is not a valid maxim. In particular, it would accord better with jurisdictions where PIL is not applied *ex officio*. But such tendencies were not compatible with the Rome Convention and are the less compatible with the Rome I Regulation.[177] This first solution would reach certainty by rigidity. It would introduce special rules for tacit choice of law once proceedings have been commenced.[178]

72 The second solution is the more lenient one. Within the overall system of PIL it is more compatible with general principles. It provides for clarity and certainty by compelling the parties to make an express decision. On the other hand, it imposes a duty upon the judge which the judge might not know like features from his national procedural law.[179] Another

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173 See only Rb. Arnhem NIPR 2001 Nr. 20 p. 79.

174 *Fudickar*, Die nachträgliche Rechtswahl im internationalen Schuldvertragsrecht (1983) pp. 94–97; *Schack*, NJW 1984, 2736 (2739); *Schack*, IPRax 1986, 272 (274); *Buchta*, Die nachträgliche Bestimmung des Schuldstatuts durch Prozessverhalten im deutschen, österreichischen und schweizerischen IPR (1986) pp. 61 *et seq*.; *Mitterer* p. 139; *Thode*, WuB IV A. § 817 BGB 2.94, 312, 313 *et seq*.; *Steinle*, ZVglRWiss 93 (1994), 300 (313); *Mankowski*, Seerechtliche Vertragsverhältnisse im Internationalen Privatrecht (1995) p. 36; *Mankowski*, in: Leible, p. 63, 75–76; *Mankowski*, in: FS Tuğrul Ansay (2006), p. 189, 211; *Herkner*, Die Grenzen der Rechtswahl im internationalen Deliktsrecht (2003) p. 129; *Michael Stürner*, in: FS Rolf Stürner (2013), p. 1071, 1084.

175 *Mankowski*, in: Leible p. 63, 75; *Joubert*, in: Corneloup/Joubert (dir.), Le Règlement communautaire "Rome I" et le choix de loi dans les contrats internationaux (2011), p. 229, 252.

176 *Mankowski*, in: Leible p. 63, 75; see also *Trautmann*, Europäisches Kollisionsrecht und ausländisches Recht im nationalen Zivilverfahren (2011) pp. 422 *et seq*.

177 *Fentiman*, (1992) 108 LQR 142, 144 *et seq*.; *Fentiman*, Foreign Law in English Courts: Pleading, Proof and Choice of Law (1998); *Hartmut Ost*, EVÜ und fact doctrine (1996) pp. 209–229.

178 *Mankowski*, in: Leible p. 63, 75.

problem are the sanctions: If the applicable national procedural law does not provide proper sanctions against a judge not complying with duties to inform the parties since it does not know such judicial duties at all.[180] One might justify this by an annex competence of the EU following from Art. 81 (1), (2) TFEU in order to enhance the effectiveness of EU PIL by adding the necessary procedural devices and instruments.[181]

The judge might propose the choice of a certain law to the parties.[182] If the judge does so the parties are under no obligation whatsoever to accept this proposal. Parties might not seize upon the occasion and might not positively assent to the proposal. In this event there is no choice of law by the parties, and the applicable law ought to be determined objectively.[183] **73**

f) References to rules or institutions of a certain law

In contract, the express reference in the agreement mutually consented[184] to rules or institutions of a certain national law[185] indicates the choice of that law.[186] The use of legal terminology developed under the auspices of a certain legal order and germane to that legal order might be a (weak) indication that parties wanted to choose the respective law, too.[187] Said assumption is particularly important if the parties employ a standard contract or General Terms and Conditions drafted on the basis of a certain law.[188] **74**

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179 *Mankowski*, in: Leible p. 63, 75.

180 *Mankowski*, in: Leible p. 63, 75.

181 *Mankowski*, in: Leible p. 63, 75.

182 Rb. Rotterdam S&S 2014 Nr. 3 p. 17.

183 Rb. Rotterdam S&S 2014 Nr. 121 p. 817.

184 The unilateral reference by only one party is not sufficient; OLG Brandenburg, NJ 2001, 257 (258) with note *Ehlers* = IPRspr. 2000 Nr. 28 p. 64.

185 Like e.g. the German DIN rules.

186 See only Report *Giuliano/Lagarde*, ABl. EG 1980 C 282/17; BGH NJW 1992, 618; BGH NJW-RR 1996, 1034 (1035); BGH RIW 1997, 426; BGH WM 1999, 1177 (1178); BGH WM 2000, 1643 (1644) = IPRax 2002, 37 (38); BGH WM 2004, 2066 (2068); BGH NJW 2013, 308 (310); BAGE 100, 130 (134); BAG RIW 2014, 534 (535); Cass. soc. RCDIP 102 (2013), 518, 522; OLG Köln RIW 1993, 414 (415); OLG Köln IPRspr. 2000 Nr. 21 p. 52; OLG Brandenburg NJW-RR 2012, 535; OLG Saarbrücken 11 June 2015 – Case 4 U 109/14 [26], [31]; CA Luxembourg 15.7.1992 – Hames/Spaarkrediet; Hof Arnhem-Leeuwarden, locatie Leeuwarden NIPR 2014 Nr. 38 p. 88; LAG Düsseldorf IPRspr. 2008 Nr. 40a pp. 107–108; Trib. arr. Luxembourg RDIPP 1991, 1097; AG Rostock RRa 1997, 163 = IPRspr. 1997 Nr. 30 p. 56–57; AG Hamburg NJW-RR 2000, 352 (353); *Mitterer* pp. 142–147; *Mankowski*, AR-Blattei ES 920 Nr. 6 p. 6, 7 (Nov. 1999); *Dicey/Morris/Lawrence Collins* para. 32–096; *Pulkowski*, IPRax 2001, 306 (309); *Wenner*, Internationales Vertragsrecht (3rd ed. 2013) para. 256; *Siehr*, RdA 2014, 206 (207). See also the case of conflicting references to rules of different laws OLG Hamburg IHR 2013, 63 (64) with note *Magnus*.

187 OLG Hamm IPRspr. 2012 Nr. 35 p. 59; OLG Frankfurt GmbHR 2013, 139; *Faraday Reinsurance Co. Ltd. v. Howden North America Inc.* [2012] EWCA Civ 980, [2012] 2 Lloyd's Rep. 631 [10]-[12],[31] (C.A., per *Longmore* L.J.); *CGU International Insurance plc v. Ashleigh V. Szabo* [2002] 1 All ER (Comm) 83 [33] (Q. B.D.).

188 E.g. BGH NJW 1997, 397 (399); BGH NJW 2013, 308 (310); BAG BeckRS 2013, 65309; *Gard Marine & Energy Ltd. v. Glacier Reinsurance AG* [2010] EWCA Civ 1052, [2010] 2 CLC 430 (C.A.); Trib. arr. Luxembourg RDIPP 1991, 1097; *Wenner*, Internationales Vertragsrecht (3rd ed. 2013) para. 264; *Briggs*, Private International Law in English Courts (2014) para. 7.102.

75 In non-contractual matters, such reference will rarely if ever occur. It might form part of a regime which the parties specifically design in an overarching or general agreement devoted to non-contractual matters. It might also occur if a contract sets out a common regime for contractual and concurring non-contractual aspects. A reference to DIN (Deutsche Industrie-Norm) might serve as a conceivable example. However, if the reference is only to such rules or institutions germane to contractual issues, even greater caution is required before implying any choice of law for non-contractual purposes. Generally, caution is called for before wantonly asserting a tacit choice of law.[189]

76 A particular *caveat* applies where the specific (statutory) rule referred to ought to be characterised as an internationally mandatory rule, as a *Eingriffsnorm* by the standards of Art. 16. In this event, such reference might be a mere precautionary measure and might not express any further intention on the parties' side since the parties believe that they cannot escape from such rule by agreement.

77 On the other hand, a reference to certain national standards like the German DIN might be only a weak indication if they coincide to be the standards of the jurisdiction where the place of performance of a contract is localised.[190] In so far local customs and local rules are to be taken into account in the contractual realm already by virtue of Art. 12 (2) Rome I Regulation. This should hold true also in the non-contractual realm even though Art. 15 does not contain a direct parallel to Art. 12 (2) Rome I Regulation. The case might be different if all parties concerned constantly refer to concepts typical of, and peculiar to, a certain legal order.[191]

3. Partial choice of law

a) Dépeçage as phenomenon in general

78 *Dépeçage* would split a formally uniform non-contractual relationship into two or more partial relationships.[192] It subjects these partial relationships to different laws.[193] In contrast to a *Teilfrage*[194] the characterisation remains the same for the entire non-contractual relationship. The partial relationships are not subject to different conflict rules. Hence, *dépeçage* is not identical with an issue approach.[195]

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189 See Trib. Bologna RDIPP 2017, 126.

190 See *Wenner*, EWiR Art. 27 EGBGB 1/99, 353, 354; *Pulkowski*, IPRax 2001, 306 (309).

191 OLG Düsseldorf TranspR 2014, 234, 242; Trib. Varese RDIPP 2013, 798; *Marchetti*, RDIPP 2017, 883, 904.

192 On *dépeçage* as a phenomenon in general and with regard to contracts in particular *Lagarde*, RDIPP 1975, 649; *Ekelmans*, in: Mélanges Raymond Vander Elst, vol I (1986), p. 243; *Jayme*, in: FS Gerhard Kegel zum 75. Geb. (1987), p. 253; *McLachlan* (1990) 61 BYIL 311; *Carrascosa González*, El contrato internacional (fraccionamiento versus unidad) (1992); *Cocteau-Senn*, Dépeçage et coordination dans le règlement des conflits de lois (2001); *Mankowski*, in: FS Ulrich Spellenberg (2010), p. 261; *Nourissat*, in: Corneloup/Joubert (dir.), Le Règlement communautaire "Rome I" et le choix de loi dans les contrats internationaux (2011), p. 205.

193 See only *Kropholler*, Internationales Privatrecht (6th ed. 2006) p. 131 (§ 18 I).

194 See only *Mankowski* in: von Bar/Mankowski, Internationales Privatrecht I: Allgemeine Lehren (2nd ed. München 2003) § 7 note 185.

195 *Spellenberg*, in: Münchener Kommentar zum BGB, vol. 10: Arts. 1–46 EGBGB; IPR (4th ed. 2006) Vor

Dépeçage aims at conflicts justice. It is concerned about the ideal notion of justice in PIL.[196] On the other hand, it enhances complexity[197] since the separated parts of the contract must fit together as an ensemble nonetheless. There must not be gaps or frictions. There must not be irreconcilable inconsistencies.[198] The partial contracts must be able to survive as separated contracts. In so far they must be autonomous in relation to each other.[199] If these preconditions are not fulfilled the envisaged choice of law fails, and objective conflict rules become applicable.[200] **79**

b) Party autonomy and partial choice of law

aa) Reverting to Art. 3 (1) 3rd sentence Rome I Regulation

Art. 14 does not explicitly express any stance towards admissibility or non-admissibility of a partial choice of law. It does relate to this issue at all. Hence, an express permission cannot be found but neither can an *argumentum e contrario* be founded.[201] Apparently, the side issue was not considered. The "natural" solution to fill the ensuing gap would be to revert to Art. 3 (1) 3rd sentence Rome I Regulation following the general principles that Art. 3 Rome I Regulation should be seized upon where Art. 14 itself does not itself take any side. **80**

bb) Limits: severability of issues

A partial choice of law must not lead to a law mix producing conflicting and inconsistent results.[202] The consistence of the non-contractual relationship limits the opportunities open to the parties.[203] Severability of issues is the basic requirement for a partial choice of law. A partial choice of law is only permissible and possible in so far as the issue at stake is severable and in so far as two partial relationships each in its own force can be identified. Proper object for partial choice can only be such part of the overall relationship which does not have **81**

Art. 11 EGBGB note 22 (not reappearing in 5th ed. 2010 or 6th ed. 2015); *Mankowski*, in: FS Ulrich Spellenberg (2010), p. 261, 262.

196 *Spellenberg*, in: Münchener Kommentar zum BGB, vol. 10: Arts. 1–46 EGBGB; IPR (4th ed. 2006) Vor Art. 11 EGBGB note 23.

197 *Mankowski*, in: FS Ulrich Spellenberg (2010), p. 261, 262; see *C. G. Stevenson* 2003 Indiana L. Rev. 303.

198 *Marrella*, in: Franzina (a cura di), La legge applicabile ai contratti nella Proposta di Regolamento "Roma I" (2006), p. 28, 32–33; *Ragno*, in: Ferrari, Art. 3 Rome I Regulation note 45.

199 *Intercontainer Interfrigo SC (ICF) v. Balkenende Oosthuizen BV u. MIC Operations BV* (Case C-133/08), [2009] ECR I-9687 paras. 45 *et seq.* = TranspR 2009, 491 with note *Mankowski*.

200 Report *Giuliano/Lagarde*, OJ EEC 1980 C 282/21; *Nygh*, Autonomy in International Contracts (1999) pp. 128–133; *Carrascosa González*, La ley aplicable a los contratos internacionales: el Reglamento Roma I (2009) p. 159.

201 To the same avail *Mills*, in: Ahern/Binchy p. 133, 148; *Vogeler* p. 327; *Hohloch*, in: Erman, Art. 14 Rom II-VO note 7; *Spickhoff*, in: Bamberger/Roth, Art. 14 Rom II-VO note 2. *Contra* in the latter regard *de Lima Pinheiro*, RDIPP 2008, 5, 13; *Dickinson* para. 13.20; *Xandra E. Kramer*, NIPR 2008, 414, 423.

202 Report *Giuliano/Lagarde*, OJ EEC 1980 C 282/17 Art. 4 Rome Convention note (8); Opinion of G-A *Yves Bot* in Case 133/08, [2009] ECR I-9690 para. 86; *Heiss*, in: Czernich/Heiss Art. 3 EVÜ note 34; *Marrella*, in: Boschiero (a cura di), La nuova disciplina comunitaria della legge applicabile ai contratti (Roma I) (2009), p. 15, 33.

203 *Marrella*, in: Boschiero (a cura di), La nuova disciplina comunitaria della legge applicabile ai contratti (Roma I) (2009), p. 15, 33.

inseparable connections with other parts of the relationship.[204] The object of a choice of law must have the inherent force to exist as an independent relationship hypothetically.[205] This might be the case in particular if a majority of parties is involved.

82 On the other hand, severability is not guaranteed quasi-automatically if performance takes place in a number of jurisdictions.[206] The more a partial contract could exist independently of the others and the less important it is for the overall structure of the entire transaction the more severability can be admitted.[207] – Generally, the rules on characterisation as contained in Art. 15 could possibly serve as an initial indication as to which issues can be regarded as separable.[208] A partial choice of law might also be an option in order to pay specific regard to certain local rules for separable issues.[209]

83 In so far as a partial choice of law leads to inherently conflicting results which can not be cured and solved by interpretation or adaptation, it is invalid due to perplexity.[210] Conflicting results might in particular arise where inseparable connections exist.

84 Generally, a cautionary approach towards positively ascertaining a partial choice of law in a concrete case should be advocated for. Partial choice of law is an untested quantity in the non-contractual realm and might lead to more trouble than it might be good for. Parties should be submitted to such ordeal only if they are explicitly asking for it. Affirming the possibility of a partial choice on an abstract level is one thing, ascertaining such choice in a concrete case is quite another thing. Taking a positive stance towards party autonomy on the doctrinal level[211] should not lead to concrete results dogmatically without further consideration.

cc) Tacit partial choice

85 Theoretically, it is possible to combine partial and tacit choice of law. There can be something like a tacit partial choice of law. But one has to be extremely careful and cautious in any concrete case and should not assume such a choice of law light-handedly. The consequences if the partial choice of law fails are too grave for such attempt. Partial choices of law are rather exceptional, and this should be the more the case if they can only be implied.

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204 *Windmöller*, Die Vertragsspaltung im Internationalen Privatrecht des EGBGB und des EGVVG (2000) p. 74; *Leible* in: NomosKomm BGB Art. 3 Rom I-VO note 39.

205 *Windmöller*, Die Vertragsspaltung im Internationalen Privatrecht des EGBGB und des EGVVG (2000) p. 74; *Leible* in: NomosKomm BGB Art. 3 Rom I-VO note 39.

206 *Lagarde* RCDIP 80 (1991), 287, 302.

207 *Mankowski*, in: FS Ulrich Spellenberg (2010), p. 261, 264; *Mankowski*, AP H 5/2005 Nr. 21 zu § 38 ZPO Internationale Zuständigkeit Bl. 3R, 7.

208 *Jayme*, FS Gerhard Kegel zum 75. Geb (1987), p. 253, 263; compare with regard to Art. 12 Rome I regulation *Helmut Horn* Internationales Vertragsrecht (Wien 1999) p. 81; *Mankowski*, in: FS Ulrich Spellenberg (2010), p. 261, 264–265. But sceptical *Vogeler* pp. 332–333.

209 *Magnus*, in: Staudinger, Art. 3 Rom I-VO note 106.

210 *Windmöller*, Die Vertragsspaltung im Internationalen Privatrecht des EGBGB und des EGVVG (2000) p. 74; *Leible*, in: NomosKomm BGB Art. 3 Rom I-VO note 39; *Vogeler* p. 334; see also *Ferrari*, in: Ferrari/Kieninger/Mankowski/Karsten Otte/Saenger/Götz Schulze/Ansgar Staudinger Art. 3 Rom I-VO note 39.

211 As e.g. *Vogeler* p. 327 does.

dd) Consequences in the event of lacking severability

If the parties make a partial choice in the event that the parts of the relationship are in fact inseverable that partial choice of law is invalid and ineffective. This is simply because the consequences intended by the parties can not be implemented, and the premises for a valid choice of law are lacking. **86**

4. Freedom of choice

a) General aspects

Art. 14 carries the heading "freedom of choice". This programmatically announces that the parties are at liberty to choose whichever law they want to choose. There are no restrictions to the menu in this regard. The parties are not limited to picking from a preselected variety of laws. In particular, it is not required that the chosen law must have a strong connection with the case. Even less, such connections are spelled out in detail. (1) does not establish a comprehensive catalogue of option from which alone the parties may choose. This liberal attitude and genuine freedom of choice is an eminently political decision.[212] It avoids any need to identify the *locus damni* or the place where the harmful event giving rise to the damage occurred for the purpose of evaluating the validity of a choice of law. It avoids reintroducing elements of legal uncertainty by the backdoor which the introduction of party autonomy has thrown out by the frontdoor in the first place. Parties are not burdened with such uncertainty in order which to avoid they enter into a choice of law agreement.[213] It is the parties' choice alone that matters, full stop. **87**

In so far as (1) still keeps reservations against admitting party autonomy in the field of non-contractual obligations, it employs a different technique to voice these reservations: It limits the instances where party autonomy is admitted *a priori*. (1) 1st sentence is not a limitless guarantee of party autonomy by any means. On the contrary, it establishes a rather narrow gauntlet, through which the parties have to pass. But once they have passed the free prairie opens **88**

b) Choice of a "neutral" law

It is not required that the parties have a reasonable interest for choosing particularly this law or that any objective connection with the State of the chosen law must exist.[214] "Neutral" is this context basically means not more than "not the home law of either party". It does not *per se* imply political neutrality of the State whose law is chosen, nor equidistance to the parties. The underlying assertion is that neither party has its domicile nor any relevant place of business in the jurisdiction of the law chosen. Stability, developedness, accessibility and workability might be factors featuring in the selection which "neutral" law to pick.[215] Political stability in particular ranks high on the list, at least in contract.[216] **89**

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212 *Bosković*, D. 2009, 1639, 1640 prefers a limitation of party autonomy to a certain number of eligible, but rather *de regulatione ferenda*; see also *de Boer*, YbPIL 9 (2007), 19, 22.

213 *von Hein*, RabelsZ 64 (2000), 595 (612); *von Hein*, in: Calliess, Art, 14 Art. 14 Rom II-VO note 31.

214 See only *Garcimartín Alférez*, EuLF 2008, I-61, I-66; *Bonomi*, (2008) 10 Yb. PIL 165, 170; *Matthias Weller*/*Nordmeier*, in: Spindler/Schuster, Recht der elektronischen Medien (3rd ed. 2015) Art. 3 Rom I-VO note 2; *McParland* para. 9.12; *Siehr*, RHDI 67 (2014), 801, 803.

215 See only *Pörnbacher*/*Sebastian Baur*, in: FS Rolf A. Schütze zum 80. Geb. (2014), p. 431, 434.

216 *Meira Moser*, Unif. L. Rev. 2015, 19, 37.

90 Yet such compromise comes with a price. By not permitting the other party to have a "home game" without asserting an own "home game" each party consents to having an "away game". On aggregate, both parties have "away games".[217] Both parties are in principle submitting their contractual position to a law they are not familiar with on a day-to-day basis. Each party leaves familiar ground and incurs search costs and information costs since if it is confronted with an unfamiliar legal basis.[218] This is a severe disadvantage – for both parties.[219] In theory, legal staffs on both sides are out of their reach. Accordingly, the choice of a "neutral" law might turn out to be an expensive compromise possibly more than doubling the overall sum of transaction and enforcement costs involved.[220] In turn, the fear of incurring such costs (in particular if they are not recoverable) might lead to a sub-optimal level of enforcement and might undermine to a certain extent any enforcement threat.

91 Furthermore, parties will rather likely not be repeat players with regard to the chosen "neutral law" and might be faced with a severe principal-agent conflict in so far as the services of foreign lawyers have to be employed.[221]

92 In particular, parties in their minds might mix political neutrality with neutrality as between the positions of the sides of the agreement.[222] Some legal orders take firmer stances against tortfeasors and might impose more or stricter liability whereas others might levitate the burden and at least would allow for a contractual limitation of liability more generously. In the areas of unjust enrichment or *negotiorum gestio*, parties should be aware that these concepts are alien to, or underdeveloped in, quite a number of jurisdictions whereas they might be the object of hypertroph discussion in others.

93 So, the "neutral" law might contain quite some chestnuts to chew upon which ought to be considered in advance. A "neutral" law is not a guaranteed insurance policy against undesirable or unpredictable substantive results.[223] Each party is well advised to check the content of the intended "neutral" law before finally agreeing to its choice.[224] Else suboptimal choice of law costs might arise.[225]

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217 *Mankowski*, in: FS Hans-Bernd Schäfer (2008), p. 369, 373 *et seq.*; *Wenner*, in: FS Ulrich Werner (2005), p. 39, 45.

218 See only *Land*, BB 2013, 2697 (2698).

219 *Werlauff*, International Contracts (København 2013) p. 19.

220 See only *Garcimartín Alférez*, REDI 1995, 11, 28; *Brödermann*, in: MünchHdb IWR § 6 Art. 14 Rom II-VO note131.

221 See generally *Brödermann*, in: MünchHdb IWR § 6 Art. 14 Rom II-VO note 121.

222 See only *Mankowski*, RIW 2003, 2,5; *Wenner*, in: FS Ulrich Werner (2005), p. 39, 44; *Schwenzer/Hachem*, 57 Am. J. Comp. L. 457, 465–466 (2009); *Spagnolo*, CISG Exclusion and Legal Efficiency (2014) p. 106.

223 *Schwenzer/Hachem*, 57 Am. J. Comp. L. 457, 464 (2009); *Meira Moser*, Unif. L. Rev. 2015, 19, 28.

224 *Courvoisier/Zogg*, in: Peter Münch/Passadelis/Jens Lehne (eds.), Handbuch internationales Handels- und Wirtschaftsrecht (2015) para. 8.13.

225 See *Alexander J. Wulf*, Institutional Comparison between Optional Codes in European Contract Law (2014) pp. 119–121.

c) Choice of the allegedly "most elaborate law", market standard setting and network effects

In contract, the choice of an allegedly "most elaborate law" is a common feature. Liberating such allegation form any kind of self-promotion and self-marketing by interested circles this boils down to law setting the market standards: The laws of the respective jurisdictions might have become the legal standard for the respective type of transactions or in the respective market.[226] Parties might minimise their learning investment if they choose a law which is basically known to both of them and can be relied on as the market standard.[227] The sheer dominance of a certain law in the respective market sector drastically clouds perceptions of its substantive merit as choice of law.[228] **94**

The shared knowledge of a particular law causes network effects[229] and might even generate positive economies of scale. Using the same law creates a network, and alliance to a network of users confers an advantage because it facilitates transactions with other members of the same network and reduces the need to learn about the content of another law.[230] The larger the network grows, the more beneficial it becomes as members have access to a larger pool of potential partners.[231] The more contracts conform to a single model, the greater flexibility there might be on the other hand to bargain for, and finetune, the level of risk each party is willing to bear.[232] **95**

Businesses are unlikely to ponder choices of law in unspecific every day transactions; they follow path dependencies, being locked into certain choices because of a historical path of events[233] and presumed positive experiences. Past choices are irrationally attractive due to a status quo bias as a cognitive bias.[234] Risk-averse rules of thumb help to reduce complexity by simplifying decision-making strategies.[235] Fast and frugal heuristics might imitate seemingly fruitful activities by others[236] or single out one, perhaps the relatively best available information,[237] being economical within the confines of limited time, limited information or high **96**

226 *Engert*, in: Eidenmüller (ed.), Regulatory Competition in Contract Law and Dispute Resolution (München/Oxford/Baden 2013), p. 304, 305.

227 *Engert*, in: Eidenmüller (ed.), Regulatory Competition in Contract Law and Dispute Resolution (München/Oxford/Baden 2013), p. 304, 305.

228 *Spagnolo*, (2010) 6 JPrIL 417, 433.

229 *Klausner*, 81 Va. L. Rev. 757, 785 (1995); *Druzin*, 18 Tulane J. Int'l. & Comp. L. 131, 165 (2009); *Engert*, in: Eidenmüller (ed.), Regulatory Competition in Contract Law and Dispute Resolution (München/Oxford/Baden 2013), p. 304, 305; *Rühl*, in: FS Christian Kirchner (2014), p. 975, 978; *Spagnolo* p. 210; *Reps*, p. 110; *O'Hara O'Connor*, Unif. L. Rev. 2016, 41, 55–56.

230 *Engert*, in: Eidenmüller (ed.), Regulatory Competition in Contract Law and Dispute Resolution (München/Oxford/Baden 2013), p. 304, 305.

231 *Engert*, in: Eidenmüller (ed.), Regulatory Competition in Contract Law and Dispute Resolution (München/Oxford/Baden 2013), p. 304, 305; *Reps*, p. 111.

232 *Spagnolo*, (2010) 6 JPrIL 417, 459.

233 *Spagnolo*, (2010) 6 JPrIL 417, 435; *Spagnolo* p. 186.

234 *Spagnolo*, (2010) 6 JPrIL 417, 441; *Spagnolo* p. 186 with fn. 14.

235 *Spagnolo*, (2010) 6 JPrIL 417, 442.

236 *Hertwig*, in: Gigerenzer/Christoph Engel (eds.), Heuristics and the Law (2006), p. 391, 398; *Mankowski*, in: FS Helmut Köhler (2014), p. 477, 483.

237 Seminal *Gigerenzer*/*Todd*/ABC researcher Group, Simple Heuristics That Make Us Smart (1999) (in

probability that better information might not guarantee better results.[238] Furthermore, a herd effect[239] might be influential. Herding occurs when private parties choose the law provided in model or sample forms or the laws known to be chosen by others, not because they necessarily provide benefits but, rather, because the parties wish to free ride on the potentially informed choices of others.[240] One might feast on presumed information costs possibly invested by the first movers and market-makers. Plus, there might be an excuse for acting agents and functionaries in the case of eventual displeasure: If you follow the market and the presumed market leaders, you do not commit an individual fault and cannot be held responsible for being too idiosyncratic or eccentric.

97 Not every choice of law is truly negotiable; often the decision is preordained by standard form contracts designed and sanctioned by industries.[241] Commodity markets provide the prime example: There the influence of the trade associations on the choice of law is profound; learning costs and familiarity will be inconsequential, and individual preferences of parties or advising lawyers matter little.[242]

98 Proposing the choice of a law which sets the standard on the respective market, is a case of signalling, too. The party proposing such choice sends a number of positive signals: firstly, that it is up-to-date; secondly, that it is prepared to comply with the market standard; thirdly, that it is not striving for a comparative advantage over the other party (this signal is only sent where the proposing party is not resident in the jurisdiction of choice or enjoys native speakers' advantages). The signal might convey the positive message that the proposing party is truly willing to perform.[243] Yet negative externalities to the detriment of the uncunning and unwary cannot be ruled out completely.[244]

99 In non-contractual obligations market structures might be less evident and less prevailing. Nonetheless, certain laws are chosen more often than others in combined choice of law clauses for both contract and non-contractual obligations. Given the lesser extent to which a choice of law is permitted in the non-contractual realm, this might still bear the risk of 'limping' choices in that realm. A policy of 'follow the leader' is often implemented, i.e. that non-contractual obligations are treated accessorily to contractual ones and thus subjected to the contractual choice of law leading. However, provident businesses should be aware that setting the market standard for contractual features does not automatically imply that certain law is also very appropriate for accompanying non-contractual features.

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particular *Gigerenzer*/*Goldstein*, ibid., p. 75) and *Goldstein*/*Gigerenzer*/*Hogarth* et al., in: Gigerenzer/Selten (eds.), Bounded Rationality: The Adaptive Toolbox (1002), p. 173; *Henrich*/*Albers*/*Boyd* et al., p. 343.

238 *Cooter*, in: Gigerenzer/Christoph Engel (eds.), Heuristics and the Law (2006), p. 379, 381; *Mankowski*, in: FS Helmut Köhler (2014), p. 477, 483.

239 On herding in general e.g. *Scharfstein*/*Jeremy C. Stein*, 80 Am. Econ. Rev. 465 (1990); *Banerjee*, 107 Q. J. Econ. 797 (1992); *Bikchandani*/*Hirschleifer*/*Welch*, 100 J. Pol. Economics 992 (1992).

240 *O'Hara O'Connor*, Unif. L. Rev. 2016, 41, 55.

241 *Spagnolo*, (2010) 6 JPrIL 417, 428.

242 *Spagnolo*, (2010) 6 JPrIL 417, 429; *Spagnolo* pp. 208–209.

243 *Gulati*/*Zettelmeyer*, 7 Capital Markets L.J. 169 (2012); *Julian Schumacher*/*Trebesch*/*Henrik Enderlein*, 58 J. L. & Econ. 585, 617 (2015).

244 *Reps* p. 148.

d) Choice of the law of a "Transition State"

Another example for a choice of law with inherent problems might be the choice of a law in transition or the law of a so called "Transition State".[245] It might be cured in so far as the choice of law is interpreted as a dynamic one, thus including reforms implemented at the time when disputes arise. **100**

e) Choice of the law of a State not existing anymore

The law of a State that does not exist anymore cannot be chosen. Examples might be provided by the law of the former GDR,[246] the law of zaristic Russia[247] or ancient Roman law (including the Digestes, the Institutiones or other elements of the Corpus Iuris Civilis). The designated law does not exist anymore actually. A dynamization is impossible due to the respective legislature having ceased to exist. Matters might be different if there is a State who has directly succeeded to the former State and has developed its own law starting from the laws of the former State,[248] e.g. the States who have succeeded former Yugoslavia. **101**

f) Choice of a future law

The choice of a law that does not exist at the time when the choice of law agreement is concluded, a purely future law is theoretically conceivable.[249] This is not an "ordinary" choice of law with its usual dynamic reference to the law chosen as it actually stands at any given point of time. In so far, but only in so far an "ordinary" choice of law clause covers future developments in the law chosen. The choice of a purely future law begs to differ in so far as the law selected shall not be chosen in its current version at the time of the conclusion of the choice of law agreement.[250] The purpose behind such limited choice of law is to wait for future reforms in the law chosen even if this comes with the price of a subsequent change of the applicable law.[251] Its effects are those of a subsequent choice of law under the condition that the envisaged reforms become effective.[252] But the choice of law agreement is fully concluded at an earlier point of time and thus is not a genuine subsequent choice of law.[253] It happens to differ from floating choice of law clauses in so far as the conditional provision does not refer to any party's future conduct, but to future developments beyond the parties' reach.[254] **102**

g) Choice of the law of a not existing State

Rather fun and practical jokes are choices of the law of not existing States. Whether a State does exist is question of international law, namely as to whether this would-be State is recognised by a sufficient number of fellow States. Artificial "micro-States" likee.g. Sealand **103**

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245 *Kessedjian*, Rev. int. dr. comp. 1995, 373, 383.

246 *Kodek*, in: Verschraegen p. 85, 90.

247 *Carrascosa González*, La ley aplicable a los contratos internacionales: El Reglamento Roma I (2009) p. 141.

248 *Mankowski*, in: FS Dieter Martiny (2014), p. 449, 464.

249 *Schwander*, in: FS Ingeborg Schwenzer (Bern 2011), p. 1581, 1586.

250 *Mankowski*, in: FS Dieter Martiny (2014), p. 449, 464.

251 *Schwander*, in: FS Ingeborg Schwenzer (Bern 2011), p. 1581, 1586; *Mankowski*, in: FS Dieter Martiny (2014), p. 449, 464–465.

252 *Mankowski*, in: FS Dieter Martiny (2014), p. 449, 465.

253 *Mankowski*, in: FS Dieter Martiny (2014), p. 449, 465.

254 *Mankowski*, in: FS Dieter Martiny (2014), p. 449, 465.

or Seborga are not amongst the qualifiers[255] (whereas Monaco, San Marino, Andorra, the Vatican State, Bhutan, Kiribati, Vanuatu, Tuvalu, Nauru, St. Kitts and Nevis and their Caribean or Pacific consorts are very well existing States for good measure). A challenge which international law must resolve is Palestine.

h) Choice of law under exclusion of PIL rules

104 A certain species of choice-of-law clauses in contracts has become commonplace in which the applicable law is chosen "under exclusion of the private international law".[256] This is at best not reflected and at worst highly paradoxical. It would be paradoxical in so far as only PIL rules (namely that of the PIL of the respective *forum*) grant party autonomy as a starting point. Without PIL rules permitting the parties to choose the applicable law party autonomy would be questionable.[257] Furthermore, the Rome II Regulation itself mandatorily calls for its application and must not be derogated from.[258]

105 In so far as the exclusion is construed as been related to the PIL rules of the chosen law this issue of *renvoi* will be dealt with by Arts. 20 Rome I Regulation; 24 Rome II Regulation already, at least from the European perspective.[259] *Renvoi* has almost been extinguished from the PIL of contracts, and the more so if one is considering parties' choice of law. Developed jurisdictions accomplish the result of interpreting a choice of law clause as not referring to the conflict rules of the chosen law even without any express anti-*renvoi* provision.[260] The mentioned type of clauses generates from the context of non-European, particularly American conflicts laws which are less firm and decided in establishing the principle of parties' free choice of law, but rather demand e.g. some connection between the contract and the chosen law, some kind of genuine link.[261] Generally, one should regard such American style-clause as superfluous and redundant in Member States of the Rome I and II Regulations outside their American background, but not as genuinely detrimental.[262] The clause makes it at least unambiguously clear that parties want to exclude any *renvoi*.[263]

106 On the other hand the clause generates certain risks. It might convey the impression to the unwary and to the uncanny that the parties might intend to open up to party autonomy such areas of the law which are not open to it, like the PIL of chattels or international company law.[264] Or such clause in a contract with a typically weaker party might be taken to intend to

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255 *Carrascosa González*, La ley aplicable a los contratos internacionales: El Reglamento Roma I (2009) p. 141.

256 See e.g. *Gruson*, 37 Int'l. Lawyer 1023 (2003).

257 *Mankowski*, RIW 2003, 2 (8); *Mallmann*, NJW 2008, 2953 (2954) *et seq.*; *Wenner*, Internationales Vertragsrecht (3rd ed. 2013) para. 219; *Vidmar*, ZfRV 2015, 219, 220.

258 *Vidmar*, ZfRV 2015, 219, 220.

259 *Göthel*, in: Göthel (ed.), Grenzüberschreitende M&A-Transaktionen (4th ed. 2015) § 6 note 65.

260 *Born*, International Arbitration and Forum Selection Agreements: Drafting and Enforcing (4th ed. 2013) p. 161.

261 *Mankowski*, RIW 2003, 2 (7) *et seq.*; *Mallmann*, NJW 2008, 2953.

262 To a similar avail *Wegen*, in: FS Wilhelm Haarmann (2015), p. 233, 240.

263 *Lutz Christian Wolff*, The Law of Cross-Border Business Transactions (2013) p. 77.

264 *Mallmann*, NJW 2008, 2953 (2955); *Göthel*, in: Göthel (ed.), Grenzüberschreitende M&A-Transaktionen (4th ed. 2015) § 6 note 64.

avoid and circumvent the protective regime (which it could not do).[265] In turn, this submits the clause to the risk that a court renders it invalid in so far as it oversteps the limits of party autonomy drawn by the PIL of the *lex fori* and might declare it invalid in its entirety thus erasing any effect even with regard to the choice of law.[266] In short, an assumed step too far might endanger and jeopardise the commercial venture. In "simple" commercial contracts an interpretation ignoring the addition of the incriminated part of the clause might be a cure, though.[267]

i) Conditional choice of law

The parties are free to subject their choice of law to whichever conditions they want. They could make no choice at all, and a conditional choice is a *maius* to a non-choice. They could make a full, unconditional choice, and a conditional choice is a *minus* to that. Party autonomy is the basis and the fundament, and accordingly the parties' intentions should govern and should be given their way wherever feasible. **107**

Likewise, parties are free to agree on any condition they want to introduce. Conditions agreed upon might be of an objective nature or of a subjective nature. Conditions might be defined as to depend for a second tier on the outcome at the level of the first tier.[268] Hierarchical choice of law clauses are the most prominent example for this.[269] **108**

k) Choice of federal law or choice of the law of a Member State

If the parties resort to the law of a federal State this is prone to incur problems where a federal body of law does not exist for the respective area of contract Regulation. Art. 22 serves as the tie-breaker for the purposes of European PIL.[270] **109**

If the parties choose the law of a Member State of a federal State, e.g. Californian law, it is a matter of interpretation whether this comprises those parts of federal law which have been approved by the respective Member State legislature. **110**

l) Choice of conflict rules, in particular in Rules of Arbitration

Art. 14 does not expressly address the question whether parties are free to choose conflict of law rules[271] or are forced to choose a substantive law.[272] The seemingly strict wording of Art. 20 marks one opposite not allowing for a primary determination through a parties' choice of law.[273] The other opposite is defined by the parties' interests and the governing principle of party autonomy: generally, parties should be allowed to act as they please.[274] The **111**

265 *Vidmar*, ZfRV 2015, 219, 221.

266 *Göthel*, in: Göthel (ed.), Grenzüberschreitende M&A-Transaktionen (4th ed. 2015) § 6 note 65; *Vidmar*, ZfRV 2015, 219, 221.

267 *Vidmar*, ZfRV 2015, 219, 221.

268 See *Wenner*, Internationales Vertragsrecht (3rd ed. 2013) paras. 167 *et seq*.

269 Art. 3 Rom I-VO notes 367–371 (*Mankowski*).

270 *Magnus*, in: Staudinger, Art. 3 Rom I-VO note 21; *Ragno*, in: Ferrari, Art. 3 Rom I-VO note 25.

271 Favouring this solution e.g. *Siehr*, in: FS Claus-Wilhelm Canaris zum 70. Geb., vol. II (2007), pp. 815, 822 *et seq*.; *Otto Sandrock*, in: FS Gunther Kühne (2009), p. 881, 896.

272 Extensive discussion by *Rugullis*, ZvglRWiss 106 (2007), 217.

273 In particular *Rugullis*, ZvglRWiss 106 (2007), 217, 226 *et passim*.

274 E.g. *Otto Sandrock*, in: FS Gunther Kühne (2009), p. 881, 888.

former line of argument is of formal, the latter of material nature. On principle, material aspects should outweigh merely formal aspects.[275] If party autonomy constitutes the fundamental and leading maxim of European Private International Law it should also be adhered to in the interpretation of details.

112 Art. 24 excludes the use of *renvoi* as many Member States generally oppose the use of *renvoi* and also because of faith in the strength and beauty of the connecting factors created through the Rome II Regulation. A *renvoi* should not tear apart what took so much effort in harmonizing and putting together.[276] Additionally, any *Gesamtverweisung* to a Member State's national law would be reduced to a useless intermediate step as the Rome II Regulation itself is part of the respective Member State's PIL. These arguments, however, are not viable – at least not to the same extent – in the case of a parties' choice of law. In this case, there is no uncertainty; therefore, a primacy of the parties' wishes covered by the fundamental principle of party autonomy needs to be discussed. In a conflict of principles, party autonomy as a maxim higher in value and rank and needs to prevail. Especially with respect to arbitrational proceedings that might involve a complex array of contracts with numerous parties party autonomy exhibits an increased significance when it comes to the task of harmonising the statutes governing the various contracts.[277] An attempt at consolidating the formal and material perspectives can be seen in reading into Art. 1 (1) 1st sentence an empowerment of the parties to choose private international law clauses and viewing this as a special rule allowed under Art. 24.[278]

113 In any case, one should take the following into consideration: What is the scope of the *renvoi* exclusion? The exclusion of *renvoi* is aimed at the conflict of laws rules present in the applicable law. Applicable law, however, under the Rome II Regulation needs to be *state* law. In what way does the scope of the *renvoi* exclusion then include "rules" concerning the applicable law in rules of arbitration? These "rules" are not state law. They are considered as being mere contractual agreements. In this way, they cannot be subject to the scope of the *renvoi*-exclusion in Art. 24 Rome II Regulation. This causes a differentiated treatment according to the content of the respective "rule".

114 Admittedly, the exclusion of *renvoi* does not include all those "rules" that directly choose material law even if these leave the law's actual designation to the discretion of the court of arbitration. If the parties themselves had agreed upon the applicability of the seemingly most appropriate law, this would constitute the choice of the applicable substantive law – the mere fact that the substantive law is to be determined by the court of arbitration does not change that very clause's character. It is solely the delegation of the authority to choose the respective substantive law.[279] The parties do choose the substantive law themselves, even if indirectly through the court of arbitration as their agent.[280] On the international scene, Art. 21 (2)

275 *Mankowski*, RIW 2011, 30 (40).

276 See Report *Giuliano/Lagarde*, OJ EEC 1980 C 282/37–38 Art. 15; *Martiny*, in: Münchener Kommentar BGB, Art. 20 Rom I-VO note 2.

277 *Otto Sandrock*, in: FS Gunther Kühne (2009), p. 881, 894–896.

278 *Symeonides*, in: Liber amicorum Kurt Siehr (2010), p. 513, 536 *et seq.*; *Mankowski*, RIW 2011, 30 (40).

279 *Aden*, Internationale Handelsschiedsgerichtsbarkeit (2nd ed. 2003) § 17 ICC-SchiedsO note 9; *Poudret/Besson*, Comparative Law of International Arbitration (2nd ed. 1997) para. 683.

280 *Courvoisier*, In der Sache anwendbares Recht vor internationalen Schiedsgerichten mit Sitz in der

2nd sentence ICC Rules of Arbitration is the most important case of an indirect choice of law clause.[281] The court of arbitration needs to justify its decision to the parties and to present substantial reasons for choosing in this way.[282] Any clause within any set of rules of arbitration rests on the parties' intentions and desires and is considered to be just that. They do not constitute a conflict of laws regime that could supersede national PIL.[283]

m) Non-state law

aa) Generalities

In contract, it has been perhaps the most political and the most hotly debated issue whether parties might be permitted to properly choose non-state law. The legislative genesis of Art. 3 (2) Rome I Regulation put an end to that debate and decided for all practical purposes that Art. 3 (1) Rome I Regulation does *not* permit such choice as true conflictual choice but relegated such "choice" to the lesser rank of a mere contractual incorporation which has to muddle its way through the intricacies of the internally mandatory rules of the *lex causae*.[284] Although Art. 14 precedes Art. 3 Rome I Regulation in time, it should adopt this result and reasoning. It would be startling and disturbing if party autonomy in non-contractual matters exceeded party autonomy in contract with regard to this particular issue. On the contrary, Art. 14 (1) did not integrate a clause benefitting non-state law as the Commission had proposed in its initial Proposal for Art. 3 (2) Rome I Regulation which was clearly available as a possible blueprint at the time when the Rome II Regulation was promulgated. Art. 14 (1) does not ask for it explicitly.[285] **115**

There are strong supporting second-line arguments why Art. 14 should not be regarded as permitting the choice of a non-State "law". First, the plenty of Arts. 1 (1); 3; 14 (2); 14 (3); 24; 25 clearly indicate that references in the Rome II Regulation are only to State law.[286] Second, one could argue that Recital (13) Rome I Regulation might have some impact on, and might **116**

Schweiz (Zürich 2005) pp. 408–410; *Heini*, in: Zürcher Kommentar zum IPRG (2nd ed. Zürich 2004) Art. 187 schwIPRG note 12; *Kaufmann-Kohler/Rigozzi*, Arbitrage international (Bern/Zürich/Basel/Génève 2006) para. 617; *Bernhard Berger/Kellerhals*, Interne und internationale Schiedsgerichtsbarkeit der Schweiz (Zürich 2006) para. 1275; *Poudret/Besson*, Comparative Law of International Arbitration (2nd ed. 1997) para. 683; *Karrer*, in: Basler Kommentar Internationales Privatrecht (2nd ed. Basel/Genf/Zürich 2007) Art. 187 schwIPRG Art. 14 Rom II-VO note 124.

281 *Kaufmann-Kohler/Rigozzi*, Arbitrage international (Bern/Zürich/Basel/Génève 2006) para. 622.

282 *Derains/Schwartz*, A Guide to ICC Arbitration (2nd ed. 2005) p. 242; *Kaufmann-Kohler/Rigozzi*, Arbitrage international (Bern/Zürich/Basel/Génève 2006) para. 623; *Thomas Pfeiffer*, in: Graf v. Westphalen (ed.), Arbeitsgemeinschaft Internationaler Rechtsverkehr – Deutsches Recht im Wettbewerb – 20 Jahre transnationaler Dialog (2009), pp. 178, 186.

283 *Mankowski*, RIW 2011, 30 (40). But see to this avail e.g. *Schmidt-Ahrends/Schmitt*, Jura 2010, 520, 526.

284 On that genesis in detail *Mankowski*, in: Magnus/Mankowski, Art. 3 Rome I Regulation notes 248–255, for further supporting reasons *loc. cit.*, notes 256–265.

285 See only *Leible*, RIW 2008, 257 (261); *Leible*, AEDIPr 7 (2007), 219, 232 *et seq.*; *Rühl*, FS Jan Kropholler (2008), p. 187, 190; *Rühl*, in: OGK Art. 14 Rom II-VO note 78; *von Hein*, ZEuP 2009, 6 (22); *von Hein*, RabelsZ 73 (2009), 461 (490); *Vogeler* pp. 296; *Plender/Wilderspin*, para. 29–015.

286 See only *Rühl*, in: Gottschalk/Michaels/Rühl/von Hein (eds.), Conflict of Laws in a Globalized World (2007), p. 153, 164; *Sujecki*, EWS 2009, 310 (314); *Bach*, in: Peter Huber, Art. 14 Rome II Regulation note 9; *Vogeler* p. 297.

exert some ramifications under, the Rome II Regulation, too, since Recitals (7) Rome I and Rome II Regulation call for a triangulation of these two instruments and the Brussel I(bis) Regulation wherever possible.[287] It would be very questionable if party autonomy gained more leeway on its newly acquired territory of non-contractual obligations than on its traditional home turf in contracts. Third, the notion of "law" should be consistently and coherently interpreted throughout all Rome Regulations. It should factor that non-State law is not exerting binding force *per se* and lacks the judicial infrastructure to enforce it.[288]

117 Furthermore, whereas the issue might have at least some theoretical relevance in contract, this can not be said in non-contractual matters. The debate in contract focused on PECL and PICC (UNIDROIT Principles), with C abbreviating "Contract", and *lex mercatoria*.[289] All these phenomena do not have proper counterparts in the non-contractual realm but for the PECL. Their counterpart is the European Principles of Tort Law.[290] Unfortunately, the PETL have remained a purely academic feature and have gained no practical relevance and acceptance howsoever.

118 Besides the PETL, only the DCFR might be a feasible object of attention and attraction in both areas for it also covers non-contractual obligations. But despite all its inherent qualities the DCFR has for long (since 2011) fallen out of grace with the political instances and will never mature to a CFR. This does not increase the likelihood that it will ever be "chosen" in non-contractual affairs. For all practical purposes a proper object of a choice of non-State law does not exist in non-contractual matters.

119 There simply is no pressing practical need to allow for any such highly political incursion of permitting a conflictual choice of non-State "law". The PIL of on-contractual obligations should not be taken as playground for experiments one does not dare implement even for contracts. Still, the parties are free to agree on any set of rules of non-State "law" which they deem appropriate. But this will only have the effect of a *materiellrechtliche Verweisung*, of an incorporation into their agreement with the same rank as any contract clause, thus subjected to, and severely curtailed by, all mandatory rules of the objectively applicable *lex causae*.[291]

bb) "International Law"

120 Parties sometimes opt for "international law" to be applied, particularly so in contracts between States and private investors,[292] extending such "choice" in the non-contractual realm by an all-embracing wording. The private investor wants to slip away from the grip of the State in which he is investing. The seemingly neutral "international law" shall become some kind of safeguard against this State legislating in its own favour.[293] But "international law" is a dark horse and does not generate precise implications suited for a *lex causae* for any kind of obligation. "International law" most likely will not contain specific rules on non-

287 *Rühl*, in: OGK Art. 14 Rom II-VO note 78.

288 More cautious *Vogeler* pp. 300–303.

289 In detail *Mankowski*, in: Magnus/Mankowski, Art. 3 Rome I Regulation notes 266–310.

290 European Principles of Tort Law, designed by the European Principles on Tort Law (2005).

291 *Vogeler* p. 299; *Picht*, in: Rauscher, Art. 14 Rom II-VO note 37; *Rühl*, in: OGK Art. 14 Rom II-VO note 80. *Wurmnest*, in: juris PK BGB, Art. 14 Rom II-VO note 5.

292 Thorough discussion by *Booysen*, RabelsZ 59 (1995), 253.

293 *Jud*, JBl 2006, 695, 696.

contractual obligations at all.[294] A certain degree of uncertainty as to whether the State concerned will honour and in practice accept the choice of law clause remains anyway. If it is willing to deprive the foreign investors it will find a way to do so. Furthermore, international law traditionally is law between States, and positions at law which private subjects could enforce, are scarce at best.[295] "Principles of international law" fares little if any better than "international law" as an object of choice.

So-called concurrent choice of law clauses[296] providing for the application of the law of the respective State in so far as it is consistent with international law fare little better if any, too. "Internationalising" an obligation provides only a small degree of protection against unilateral state action[297] and does not immunise the contract enough. **121**

cc) "European Law"

"European Law" (or "EEC law" or "EU law") is also a qualifier for a miscast agreement for there is nothing like a corpus of European law open for choice.[298] The body of EU law is far from complete. Something like an official common private law of the EU Member States does not exist. The object of the intended choice thus cannot be identified, applying even the most benevolent standards of interpretation. **122**

dd) Religious Laws

Choice of a religious law if not tied to the legal order of a certain State (like Saudi-Arabia, Bahrain, Indonesia, or Israel) can constitute a *materiellrechtliche Verweisung* subject to, and in the framework of, the domestically mandatory rules of the applicable law.[299] Of course, even a *materiellrechtliche Verweisung* is subject to the public policy of the forum state, too. A priori, parties can not agree on any criminal law's penal sanction being applicable lest capital punishment or torture can invade via the backdoor of seemingly private tort law. **123**

(1) Sharia

The most common example is a choice of the Sharia without nominating it as part of the legal order of a certain Islamic State. It does not establish a valid conflicts choice of law.[300] Even the *materiellrechtliche Verweisung* will have to cope with the difficulty to identify those rather rare elements of the Sharia which are related to contracts; in fact issues might concentrate on the riba, the interdiction to demand interest directly and the ensuing constructions to reach the same commercial results by other means particularly by a system of crediting and re-lending a higher sum. **124**

294 *Wenner*, Internationales Vertragsrecht (3rd ed. 2013) para. 100.

295 *Carrascosa González* p. 136.

296 *Born*, International Arbitration and Forum Selection Agreements: Drafting and Enforcing (4th ed. 2013) pp. 165–166.

297 *Born*, International Arbitration and Forum Selection Agreements: Drafting and Enforcing (4th ed. 2013) p. 166.

298 *Brödermann*, in: FS Dieter Martiny (2014), p. 1045, 1063.

299 See only *Magnus*, in: Staudinger, Art. 3 Rom I-VO note 49.

300 *Shamil Bank of Bahrain v. Beximco Pharmaceuticals Ltd.* [2004] 1 WLR 1784 (C.A.); Art. 14 Rom II-VO noted i.a. by *Bälz*, IPRax 2005, 44; approvingly *Sambugaro*, EuLF 2008, I-126, I-128; *McParland* para. 4.89.

125 In the context of Islamic Banking[301] or Islamic Finance[302] the Sharia lurks around the corner.[303] There it potentially gains practical importance and some prominence.[304] To ban religious rules from the realm of choice of law for obligations is a very important argument why non-State law should not be the object of a conflicts choice of law,[305] the more so since they are inherently likely to find expression in archaic language and broad moral principles the precise application of which to modern commercial disputes will be difficult.[306] Furthermore, there might be a quarrel between different schools of thinking, or the sources of law lack clarity.[307] The Sharia lacks two essentials of law in the modern sense, namely impartiality of its drafters and proper accessibility.[308] If courts in the Western world are called upon to resolve an ensuing dispute the choice of the Sharia is a risky and not recommendable avenue.[309]

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301 On this phenomenon e.g. *Kabir Hassan*/*Mervyn K. Lewis*, Handbook of Islamic Banking (2007); *Ashrati*, Islamic Banking (2008); *Bolsinger*/*Breschendorf*, ZBB 2009, 460; *Grieser*, WM 2009, 586; *Zerwas*/*Demgensky*, WM 2010, 692; *Momen*, RIW 2010, 367; *Casper*, ZBB 2010, 345; *Casper*, in: FS Klaus J. Hopt (2010), p. 457; *Casper*, RWiss 2011, 251; *Sorge*, ZBB 2010, 363; *Sacarcelik*, SZW 2010, 10; *Sacarcelik*, ZBB 2010, 439; *Yahya Baamir*, Shari'a Law in Commercial and Banking Arbitration (2010); *Lasserre Capdeville*, Rev. dr. banc. fin. mars-avril 2011, p. 24; *Achi*/*Forget*, Rev. dr. banc. fin. mars-avril 2011, p. 27; *Zeyyad Cekici*, Rev. dr. banc. fin. mars-avril 2011, p. 31; *Durand*/*Hazoug*, Rev. dr. banc. fin. mars-avril 2011, p. 34; *Storck*/*Zeyyad*, Rev. dr. banc. fin. mars-avril 2011, p. 38; *Riassetto*, Rev. dr. banc. fin. mars-avril 2011, p. 43; *Colón*, 46 Texas Int'l. L.J. 411 (2011); *Aldohni*, The Legal and Regulatory Aspects of Islamic Banking (2011); *Masud*, 32 U. Pa. J. Int'l. L. 1133 (2011); *Charbonnier*, Islam: droit, finance et assurance (Bruxelles 2011); *Aldohni*, The Legal and Regulatory Aspects of Islamic Banking (2011); *Hart*/*Childs*, (2011) 26 JIBFL 425; *Nethercott*/*David M. Eisenberg* (eds.), Islamic Finance – Law and Practice (2012); *Abdallah*, Bull. Joly Bourse 2013, 374; *Posch*, in: FS Attila Fenyves (2013), p. 729; *Rasyid*, Arab L. Q. 27 (2013), 343; *Sacarcelik*, Rechtsfragen islamischer Zertifikate (Sukuk) (2013); *Garba*, (2014) 29 JIBLR 166; *Rupert Reed*, [2014] JIBFL 573; *Scott Morrison*, (2014) 29 JIBLR 417; *Scott Morrison*, (2015) 30 JIBLR 151; *Al-Zarqā*, Introduction to Islamic Jurisprudence (Kuala Lumpur 2014*); Hashim Kamali*/*Ainon Yussof*, Islamic Transactions and Finance (Kuala Lumpur 2014); *Malkawi*, (2015) 30 JIBLR 143; *Decock*, TBH 2015, 160; *Choudhury,* Islamic Financial Economy and Islamic Banking (2016); *Alkhamess,* A critique of creative Shari'a compliance in the Islamic finance industry (2017).

302 On this e.g. *Momen*, RIW 2010, 367; *Hans-Georg Ebert*/*Thiessen* (eds.), Das islamkonforme Finanzgeschäft, 2010; *El-Gamal*, Finance islamique (Bruxelles 2010); *Gassner*/*Wackerbeck*, Islamic Finance (2nd ed. 2010); *Charbonnier*, Islam: droit, finance et assurance (Bruxelles 2011); *Hart*/*Childs*, (2011) 26 JIBFL 425; *Nethercott*/*David M. Eisenberg* (eds.), Islamic Finance – Law and Practice, Oxford 2012; *Abdallah*, Bull. Joly Bourse 2013, 374; *Posch*, in: FS Attila Fenyves (2013), p. 729; *Rasyid*, Arab L. Q. 27 (2013), 343.

303 See only *Djaraouane*/*Serhal*, RDAI/IBLJ 2009, 115, 119 *et seq*.; *Aldohni*, [2009] JIBFL 350; *Luttermann*, JZ 2009, 706; *Lemeux*, Euredia 2009, 387.

304 *Shamil Bank of Bahrain E.C. v. Beximco Pharmaceuticals Ltd.* [2004] EWCA Civ 19, [2004] 1 WLR 1784 at [48] (C.A., per *Potter* L.J.); *Halpern v. Halpern* [2007] EWCA Civ 291, [2007] 2 All ER (Comm) 330, [2007] 3 All ER 478 at [22] (C.A., per *Waller* L.J.); *Lemeux*, Euredia 2009, 387.

305 *Briggs* para. 10.08; *Briggs*, (2009) 125 LQR 191 *et seq*.

306 *Briggs* para. 10.08.

307 *Wenner*, Internationales Vertragsrecht (3rd ed. 2013) para. 86.

308 *Pillet*/*Boskovic*, in: Corneloup/Joubert (dir.), Le Règlement communautaire "Rome I" et le choix de loi dans les contrats internationaux (2011), p. 173, 197.

309 *Pillet*/*Boskovic*, in: Corneloup/Joubert (dir.), Le Règlement communautaire "Rome I" et le choix de loi dans les contrats internationaux (2011), p. 173, 201.

A combination with a choice of State law appears generally feasible.[310] A clause "Subject to the Principles of the Glorious Sharia'a, all obligations arising form, or in connection with, this Agreement shall be governed by and construed in accordance with the law of England." thus should be recognised[311] and not invalidated for perplexity.[312] Too much respect for religious law is undue, the more so if this would lead to a State court rejecting even a *materiellrechtliche Verweisung* with the argument that it is not for State courts to control religious law.[313] **126**

The choice of the law of State which is based on the Sharia or compatible with the Sharia does not pose similar problems for it nonetheless is a traditional choice of State law even it produces the effect of an indirect choice of the Sharia.[314] But the supplemental regime is clear, and the hierarchy of sources is equally clear. **127**

(2) Jewish Law

General Jewish law, the Halachah, as such and not as part of the legal order of Israel or any other country which is religiously split referring to the law of the respective religious community cannot be the object of a valid conflicts choice, either.[315] **128**

ee) Private sets of rules (e.g. FIFA)

If the parties agree to apply a given private set of rules (e.g. FIFA rules) this establishes a *materiellrechtliche Verweisung* and cannot deviate from the domestically mandatory rules of the applicable law.[316] However international the own ambition of such private set of rules and however far reaching the self-regulatory and self-sufficient the own understanding of such private set of rules, it can not escape being regulated by the law objective applicable to the non-contractual obligation.[317] **129**

ff) Hague Principles on Choice of Law

The Hague Principles on Choice of Law in International Commercial Contracts operate only and solely in the contractual realm as their own denomination clearly demonstrates without the slightest doubt. They can not find application in the non-contractual realm. **130**

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310 *Pillet/Boskovic*, in: Corneloup/Joubert (dir.), Le Règlement communautaire "Rome I" et le choix de loi dans les contrats internationaux (2011), p. 173, 197.

311 *Magnus*, in: Staudinger, Art. 3 Rom I-VO note 49.

312 To this avail *Briggs*, para. 10.07; *von Hein*, in: Rauscher, Art. 3 Rom I-VO note 60.

313 As *Shamil Bank of Bahrain v. Beximco Pharmaceuticals Ltd.* [2004] 1 WLR 1784 (C.A.) does. One might speculate about the true reasons behind this decision which might be highly politically on both levels of domestic and foreign policy. Who dares imagine what might happen if a State court in a western country declared the riba of the glorious Sharia'a unenforceable?

314 See *The Investment Dar Co. KSCC v. Blom Developments Bank SA* [2009] EWHC 3545 (Ch); *Pillet/Boskovic*, in: Corneloup/Joubert (dir.), Le Règlement communautaire "Rome I" et le choix de loi dans les contrats internationaux (2011), p. 173, 198.

315 *Halpern v. Halpern* [2007] 1 All ER 478 (C.A.) = ZEuP 2008, 618 with note *Heidemann*; *von Hein*, in: Rauscher, Art. 3 Rom I-VO note 60; *Magnus*, in: Staudinger, Art. 3 Rom I-VO note 49; *McParland* para. 4.90.

316 See only *Martiny*, in: Münchener Kommentar zum BGB BGB Art. 3 Rom I-VO note 33; *Magnus*, in: Staudinger, Art. 3 Rom I-VO note 57.

317 BGE 132 III 285; in detail *Kondring*, IPRax 2007, 241.

n) Negative choice of law

131 A so-called negative choice of law, a phenomenon occasionally appearing in contract, excludes only a certain law from application without positively designating any other law as the chosen law; its consequence is the search for the objectively applicable law.[318] Such clauses are generally admissible in contract.[319] A negative choice might even be inferred if a reference to a certain law is deleted from an earlier draft and one of the parties was at least content to allow the other party to continue in its belief that this law would not apply.[320] But the advisability and practicability of such negative choice is just another question.[321] In particular it is inadvisable if it excludes the very law which would be the objectively applicable law pursuant to Arts. 4–12.[322]

5. "Bootstrap principle", Art. 3 (5) in conjunction with Art. 10 (1) Rome I Regulation *per analogiam*

a) General aspects

132 Choice of law agreements are agreements. They need consensus of all parties concerned. They are contracts if only particular ones. But from their general nature as contracts, it follows that they have to fulfil certain contractual features. They need to be concluded, and amongst the issues of conclusion consensus features as the most prominent. Error, mistake, duress, and rights of withdrawal follow suit.

133 The respective issues are not subjected to the substantive law of the *lex fori*[323] for this would undermine the uniformity of the Rome regimes.[324] It would possibly lead to different evaluations and different results in different Member States. To jump back if the evaluation of the choice of law clause results in a negative result would be doubling and would lead into severe problems if the objective *lex contractus*, i.e. the law applicable absent a valid choice of law, now judged the choice of law agreement as valid.

134 It is true that – in contrast to the situation under the Rome I Regulation - a choice of law agreement in the non-contractual field has not to be aligned with a main contract.[325] Yet advance planning and a reliable assessment of the validity of the choice of law agreement could not be made before claim was actually filed if one resorted to the *lex fori*.[326] This would not conform with the legal certainty aspired at.[327] Furthermore it would possibly multiply the number of legal orders to be investigated into.[328]

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318 *Magnus*, in: Staudinger, Art. 3 Rom I-VO note 67; *Ringe*, in: jurisPK Art. 3 Rom I-VO note 11.

319 See only *Wenner*, in: FS Ulrich Werner (2005), p. 39, 40; *Wenner*, Internationales Vertragsrecht (3rd ed. 2013) para. 184. *Contra Schwander*, in: FS Max Keller (1989), p. 473, 480 *et seq.*

320 Final Award ICC Case no. 16816, Yb. Comm. Arb. XL (2015), 236, 264.

321 *Gardella*, NLCC 2009, 611, 626; *Carrascosa González* p. 141.

322 *Wenner*, in: FS Ulrich Werner (2005), p. 39, 40; *Wenner*, Internationales Vertragsrecht (3rd ed. 2013) para. 184.

323 As advocated for by *Junker*, in: Münchener Kommentar, Art. 14 Rom II-VO note 26; *Thorn*, in: Palandt, Art. 14 Rom II-VO note 11.

324 *Gardella*, NLCC 2009, 611, 628.

325 *Junker*, in: Münchener Kommentar, Art. 14 Rom II-VO note 26.

326 *Rühl*, in: OGK Art. 14 Rom II-VO note 109.

327 *Vogeler* pp. 146–147.

The issue is not subjected to the law that would be objectively applicable absent a party choice, either. In the event of a positive result under this objective *lex causae* such an approach would entail double research and information costs for parties would have to inquire about the content of two laws, firstly that objective *lex causae* and secondly the chosen law. Furthermore, it would be odd and would raise a distortion if the objective *lex causae* could dictate that a law should govern the contract which would not regard itself as applicable to the contract in question.[329] A positive result under the objective *lex causae* as to consent would squarely fit with the putatively chosen law reaching a negative result. It begs explanation why the law that would be applied should be disregarded when it comes to its own applicability the more so since a lack of consensus with regard to the choice of law agreement under the putatively law would in most instances be accompanied by a lack of consensus with regard to the main contract under that law. **135**

In the footsteps of Art. 3 (4) Rome Convention, Art. 3 (5) Rome I Regulation decided against a genuine substantive law being incorporated in Art. 3 Rome I Regulation and opted for a reference to the putative applicable law.[330] This route should be followed under the Rome II Regulation. The correct methodological instrument to reach this aim is an analogy to Art. 3 (5) in conjunction with Art. 10 (1) Rome I Regulation.[331] **136**

"Bootstrap principle" is a very illustrative and convenient denomination. But it is not the parties who are able to pull themselves out of the swamp by their own bootstrap (like the proverbial liars' king, the Baron of Münchhausen) but rather the conflicts law of the *forum* opting for a particular solution.[332] Art. 3 (5) Rome I Regulation might look circular, but only at first glance. Conversely, it breaks through the *circulus vitiosus* and does so better than any alternative solution.[333] Any allegation that it constitutes a *circulus vitiosus* as they have been raised time and again,[334] misses crucial points. The *lex causae* of the main contract is not determined by itself, but by the choice of law agreement[335] which, in turn, needs to be ascertained as consented and valid in the first place. Furthermore, it there are different **137**

328 *Vogeler* p. 147.

329 *Morse*, (1982) 2 Yb. Eur. L. 107, 119; *McParland* para. 9.193.

330 *Stankewitsch* p. 468.

331 *Heiss/Loacker*, JBl 2007, 613, 623; *Leible*, RIW 2008, 257 (260); *Leible*, AEDIPR 2007, 219, 229; *Andrew Scott/Rushworth*, [2008] LMCLW 274, 292; *Dickinson* paras. 13.18–13.19; *Kadner Graziano*, RabelsZ 73 (2009), 1 (13); *Kadner Graziano*, in: Ahern/Binchy p. 113, 123; *Bertoli*, Riv. dir. int. 2009, 697, 708; *Pfütze*, ZeuS 2011, 35, 52; *Bach*, in: Peter Huber, Art. 14 Rome II Regulation note 17; *Vogeler* pp. 146–150; *Mansel*, in: Leible/Unberath p. 241, 273; *Kroll-Ludwigs* p. 93; *Picht*, in: Rauscher, Art. 14 Rom II-VO note 27; *von Hein*, in: Calliess, Art. 14 Rome II Regulation note 29; *Rühl*, in: OGK Art. 14 Rom II-VO note 109; *Renate Schaub*, in: PWW, Art. 14 Rom II-VO note 3; see also *Jayme*, in: Jud/Rechberger/Reichelt (eds.), Kollisionsrecht in der Europäischen Union (2008), p. 63, 71; *Crawford/Carruthers*, (2014) 63 ICLQ 1, 16.

332 Not differentiating enough *North/Fawcett/Carruthers*, Private International Law (14th ed. 2008) pp. 745; *Stoll*, in: FS Anton Heini (1995), p. 429, 434.

333 *Kühn*, in: Spickhoff (ed.), Symposium Parteiautonomie im Europäischen Internationalen Privatrecht (2014), p. 9, 12.

334 For instance by *Kuipers*, EU Law and Private International Law (2012) p. 48; *Ragno*, in: Ferrari, Art. 3 Rom I-VO note 14.

335 *Schacherreiter/Thiede*, ÖJZ 2015, 598 (602).

bodies of rules to govern different types of contract within the law referred to in the choice of law agreement, it is for this law to sort out which of its parts is the relevant one.

138 Choice of law agreement and any main contract are two different issues regardless whether formally the former appears as clause X in a uniform document and might convey the impression to be one of the consecutive issues of the main contract. There might not be a "make or fail" approach if the choice of law agreement is added with the help of a Standard Term or that, conversely, the parties first negotiated which law shall be applicable and made this the integrative basis for their contract. Neither constellation makes the choice of law agreement and the main contract intertwined with each other to such an extent that they could not be extricated and separated from one another.[336]

139 The choice of law agreement is an independent contract genuinely choosing the substantive law.[337] One could call this a principle of severability. Like jurisdiction clauses for which this principle now is enshrined and codified in Art. 25 (5) Brussels I*bis* Regulation, choice of law clauses follow their own yardsticks independent from those applicable to the main contract. The choice of law agreement is a *pactum de lege utenda*[338] and owns a quality which the main contract as a legal institution purely based of substantive law cannot have.

140 But it can be safely assumed that ordinary parties' minds would tend to subject the choice of law agreement to the same law as the main contract. Both are issues separated from each other, but only rarely parties would cater for really different treatment as to substance if considering the matter. There is an inner nexus between the two of them.[339] Neither Art. 3 (5) Rome I Regulation nor its predecessor, Art. 3 (4) Rome Convention, have given rise to any concerns in operation.[340] That might be the best testimony for the soundness and reasonability of the bootstrap principle. The very existence of Art. 3 (5) Rome I Regulation destroys any expectation that either party could be granted protection following from the rules concerning validity and formation of contracts in the objectively applicable law. Allegations to the contrary[341] are circular in themselves: They disregard and ignore that Art. 3 (5) Rome I Regulation constitutes the basis on which expectations have to be built. Eventually, the bootstrap principle might not constitute an absolute optimum, but it at least reaches a relative optimum, being superior to any alternatives theoretically conceivable.

141 It is the parties' risk and fault it they choose a law which regards their choice of law as invalid for reasons covered by Art. 3 (5) in conjunction with Art. 10 (1) Rome I Regulation.[342] It the

336 *Contra Schwander*, in: FS Eugen Bucher zum 80. Geb. (2009), 711, 714.

337 *Wulf-Henning Roth*, in: FS Apostolos Georgiades (2005), p. 905, 906.

338 See only *Curti Gialdino*, Rec. des Cours 137 (1972 III), 743, 778–784; *Holleaux/Foyer/de Geouffré de La Pradelle*, Droit international privé (1987) pp. 593–595; *Carrascosa González* p. 143.

339 *Freitag*, in: Rauscher, Art. 10 Rom I-VO note 1; *Kühn*, in: Spickhoff (ed.), Symposium Parteiautonomie im Europäischen Internationalen Privatrecht (2014), p. 9, 13; *Spellenberg*, in: Münchener Kommentar zum GB Art. 10 Rom I-VO note 7.

340 *McParland* para. 9.194.

341 As raised by *Siesby*, in: Lando/von Hoffmann/Siehr (eds.), European Private International Law of Obligations (Tübingen 1975), p. 206, 208.

342 *Jacquet*, Clunet 118 (1991), 679; *Jacquet*, Le contrat international (1992) pp. 55–59; *Carrascosa González* p. 146.

law putatively chosen invalidates the choice of law for lack of necessary consensus or allows either party to vitiate it due to mistake, fraud or duress, so be it. There is not something like a *lex validitatis* approach which would make it the paramount aim to uphold the choice of law.

b) Object of regulation

Art. 3 (5) Rome I Regulation has only a limited ambit, though. Its object of Regulation are only the consent and the material validity of the choice of law agreement. The heading of Art. 10 (1), the rule referred to, clarifies this. The English version of Art. 3 (5) Rome I Regulation is very precise: It ascertains as its object the "existence and validity *of the consent of the parties* as to the choice of the applicable law".[343] The German version aligns with that ("Zustandekommen und die Wirksamkeit *der Einigung*") as do the versions in French ("L'existence et la validité *du consentement*"), Italian ("L'esistensa et la validità *del consento*"), Spanish ("existencia y la validez *del consentimiento*"), Portuguese ("existência y a validade *do consentimento*"), Swedish ("förekomsten och gildigheten *av* paternas *samtycke*"), Romanian ("Existenţa şi valabilitatea *consimţământului* părţilor"), and Polish ("istnienia i ważności *porozumienia*").[344] The specific point on which a strong argument can be based is the genitive after "validity" etc. which is a common feature recurring in all these versions.[345] **142**

The substantive scope of application comprises:[346] consensus; fraud, deception, coercion, or economic duress and materially whether one party's freedom of contract was undermined by the other; rights to withdraw or to rescind. One should be cautious to transfer any doctrine of *clausula rebus sic stantibus* or *Wegfall* or *Störung der Geschäftsgrundlage* into the realm of parties' choice of law, though.[347] Yet it is for the law referred to in the choice of law clause to determine the level and preconditions for consensus required, particularly so with regard to Standard Terms and Conditions.[348] **143**

Nonetheless, the law referred to in the choice of law clause is not free to impose a requirement that a choice of law may be made in Standard Terms and Conditions only expressly,[349] since this question has already been decided by (1) 2nd sentence and is not a matter left to Art. 3 (5) Rome I Regulation. An analogy must only be resorted to where a *lacuna* exists. **144**

Whether a choice of law agreement was entered into due to fraud, deception, coercion, or economic duress and materially one party's freedom of contract was undermined by the other is sometimes alleged to be subjected to a substantive rule supposedly to be found in the **145**

343 Emphasis added.

344 Emphasis added respectively.

345 The Dutch version begs to differ slightly in its linguistical structure: "De kwestie of er overeenstimming tussen de partijen is to stand gekomen over het keuze van het toepasselijke recht en of deze overeenstemming geldig is".

346 Art. 10 Art. 14 Rom II-VO note 3 (*Ferrari*); *Mankowski*, RIW 1996, 382 (384) *et seq.*; *Mäsch*, IPRax 1995, 371 (372); *Stankewitsch* pp. 300–309, 312–319; *Carrascosa González* p. 145; *Magnus*, in: Staudinger, Art. 10 Art. 14 Rom II-VO notes 13–25.

347 Tentatively *contra Stankewitsch* pp. 310–311.

348 See e.g. Rb. Rotterdam S&S 2016 Nr. 32 p. 233.

349 *Contra Vorwerk*, in: FS Wolfgang Schlick (2015), p. 373, 380–381.

Rome I system.[350] But proper yardsticks for such substantive rule which under the present regime would be unwritten can not be discerned and can not be borrowed from comparative law, either.

c) Fact of choice

146 The parties' intention to contract on the fundament of a certain legal is quintessential part of their *consensus ad idem*.[351] The fact of the choice cannot be wiped out and denied even if the choice fails.[352] The parties convey the impression that they have concluded *choice* of law agreement, and this fact and impression is sufficient enough to serve as a connecting factor for determining the law according to which consensus and validity of the choice of law agreement have to be judged.[353]

147 This is not a *petitio principii.* Charges that the bootstrap principle is impractical and offends logic[354] are unjustified. Firstly, the connecting factor is not the parties' choice of law as such but the mere factual completion of this agreement, the *fact* of choice.[355] The connecting factor is not the choice of law, but the *putative* choice of law. That marks a fundamental difference. Secondly, the scope of application of Art. 3 (5) in conjunction with Art. 10 (1) Rome I Regulation is very limited. Art. 3 (5) in conjunction with Art. 10 (1) Rome I Regulation does not set out to determine the *lex contractus* for the main contract in particular.

148 Thirdly, in the event that the law designated in the choice of law agreement regards the choice of law agreement as invalid, the choice of law agreement for the main contract fails.[356] To put it in drastic terms, the "bootstrap" can strangulate the choice of law agreement. The parties can to a certain extent employ special devices in order to protect themselves against further consequences of such unfavourable result: On the one hand, they can provide for a default solution and agree on a back-up choice of another law.[357] On the other hand, they can make the choice of law agreement itself object of a separate choice of law agreement of the second degree.[358]

149 There might be exceptional cases where it might not be that clear which law was chosen factually. The external impression might be unclear, veiled or even contradictory. An example (however rare) is provided by the parties simulating a certain choice of a law in a contract veiling and concealing the "real" deal whereas the "real" deal intended contains a different choice of law.[359]

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350 *Stoll*, in: FS Anton Heini (1995), p. 429, 442 *et seq.*; see also *Wengler*, in: Mélanges Pierre Lalive (1993), p. 211.

351 *Stoll*, in: FS Anton Heini (1995), p. 429, 435.

352 *Stoll*, in: FS Anton Heini (1995), p. 429, 435.

353 See OLG Celle ZIP 2001, 1724; *von Hein*, in: Rauscher, Art. 3 Rom I-VO note 40; *Wulf-Henning Roth*, IPRax 2013, 515 (520) *et seq.*; *Martiny*, in: Münchener Kommentar zum BGB, Art. 3 Rom I-VO note 105.

354 To this avail e.g. *Cavers*, 48 So. Cal. L. Rev. 603, 609–611 (1975); *Nadelmann*, 24 Am. J. Comp. L. 1, 8–9 (1976).

355 *Martiny*, in: Münchener Kommentar zum BGB, Art. 3 Rom I-VO note 105.

356 *Wenner*, Internationales Vertragsrecht (3rd ed. 2013) para. 67.

357 *Schwander*, in: FS Max Keller (1989), p. 473, 480; *Wenner*, Internationales Vertragsrecht (3rd ed. 2013) para. 68.

358 *Wenner*, Internationales Vertragsrecht (3rd ed. 2013) para. 69; *Amstutz/Vogt/Wang*, in: Basler Kommentar Internationales Privatrecht (3rd ed. 2014) Art. 166 [Swiss] IPRG Art. 14 Rom II-VO note 35.

d) No review of content as to substance

Art. 14 it very self-governs comprehensively and exclusively any permissible content of a choice of law clause, i.e. the question as to which content a choice of law clause is permitted to have. The principle of party autonomy and free choice of law is cemented by (1) 1st sentence. **150**

A material review of the contents of a choice of law clause as to its substance is not permitted,[360] neither according to the standards of the *lex fori*[361] nor according to standards of the law designated in the choice of law agreement.[362] An evaluation of the contents of choice of law clauses is, genuinely, a conflict of laws question to be answered by the PIL of the deciding court. The validity of a choice of law clause is only to be decided by the PIL of the *lex fori*.[363] Notably, the European PIL does not allow for a content review even according to the standards of the chosen law.[364] Art. 3 (5) in conjunction with Art. 10 (1) Rome I Regulation is not applicable in so far,[365] the less by a double analogy (first overstepping its limits and then extending it into the realm of non-contractual obligations).[366] This is because there is no need for a deferral as the question is answered by the European PIL, in (1) itself. **151**

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359 *Freitag*, in: Rauscher, Art. 10 Rom I-VO note 13 fn. 11; *Kühn*, in: Spickhoff (ed.), Symposium Parteiautonomie im Europäischen Internationalen Privatrecht (2014), p. 9, 13.

360 *Vogeler* pp. 181–183. In contract to the same avail *Mankowski*, RIW 1993, 453 (455) *et seq.*; *Mankowski*, RIW 1994, 421; *Mankowski*, VuR 1999, 138; *Mankowski*, in: v. Bar/Mankowski, Internationales Privatrecht I: Allgemeine Lehren (2nd ed. 2003) § 7 Art. 14 Rom II-VO notes 84 *et seq. Stoll*, in: FS Anton Heini (1995), p. 429, 440; *Joustra*, De internationale consumentenovereenkomst (1997) p. 228; *Spellenberg*, in: MK BGB Art. 10 Art. 14 Rom II-VO note 166; *Thüsing*, in: Graf v. Westphalen, Vertragsrecht und AGB-Klauselwerke (28th ed. 2010) Rechtswahlklauseln Art. 14 Rom II-VO note 23; *Thode*, NZBau 2011, 449 (453); *Ostendorf*, IHR 2012, 177 (179); *Wulf-Henning Roth*, IPRax 2013, 515 (521). *Contra Heiss/Loacker*, JBl 2007, 613, 623; *Leible*, RIW 2008, 257 (260); *Pfütze*, ZeuS 2011, 35, 66 and in contract *Heiss*, RabelsZ 65 (2001), 634 (638).

361 Propagated by OLG Düsseldorf ZIP 1994, 288 = RIW 1994, 420 with opposing Art. 14 Rom II-VO note *Mankowski;* OLG Düsseldorf WM 1995, 1349; see also LG Hamburg MMR 2012, 96 (98); *Schütze*, GS Manfred Wolf (2011), p. 551, 553.

362 Propagated by KG VuR 1999, 138; OLG Köln RdTW 2015, 136, 138; LG Limburg NJW-RR 1989, 119 *et seq.*; LG Hamburg NJW-RR 1990, 695 (697); LG Hildesheim IPRax 1993, 173; *Matthias Weller/Nordmeier*, in: Spindler/Schuster, in: Spindler/Schuster, Recht der elektronischen Medien (3rd ed. 2015) Art. 3 Rom I-VO note 11; see also BGH NJW 1994, 26.

363 See only *Siehr*, FS Max Keller (1989), p. 485, 486; *Mankowski*, RIW 1996, 382 (383); *Baumert*, RIW 1997, 805 (809); *Diedrich*, RIW 2009, 378 (379); *Martiny*, in: Münchener Kommentar zum BGB, Art. 3 Rom I-VO note 8; *Spellenberg*, in: MK BGB Art. 10 Rom I-VO note 166; *von Hein*, in: Rauscher, Art. 3 Rom I-VO note 43; *Rauscher/Freitag*, Art. 10 Rom I-VO note 12, *Ferrari*, in: Ferrari/Kieninger/Mankowski/Karsten Otte/Saenger/Götz Schulze/Ansgar Staudinger Art. 3 Rom I-VO note 10, Art. 10 Rom I-VO note 36; *Thorn*, in: Palandt, Art. 3 Rom I-VO note 9 as well as BGHZ 135, 124 (137).

364 *Meyer-Sparenberg*, RIW 1989, 347 (350); *Grundmann*, IPRax 1992, 1 (2); *Mäsch*, Rechtswahlfreiheit und Verbraucherschutz (1993) p. 116; *Mankowski*, RIW 1993, 453 (455); *Mankowski*, RIW 1994, 421 (422); *Mankowski*, VuR 1999, 140 (141); *Mankowski*, in: von Bar/Mankowski, Internationales Privatrecht I: Allgemeine Lehren (2nd ed. 2003) § 7 Art. 14 Rom II-VO notes 84 *et seq.*; *Kost*, Konsensprobleme im internationalen Schuldvertragsrecht (1995) p. 27; *von Hoffmann*, in: Soergel, BGB, vol. 10 (12th ed. 1996) Art. 31 EGBGB Art. 14 Rom II-VO note 11; *Martiny*, ZEuP 1997, 107 (116); *Joustra*, De internationale consumentenovereenkomst (1997) p. 238; *Junker*, RIW 1999, 809 (817).

365 *Wulf-Henning Roth*, IPRax 2013, 515 (519).

152 The European PIL of Obligations decided on a free choice of law without a review of the clause's content. In so far as there is the need for protection of certain groups of people, this is not achieved through forbidding of choice of law clauses or the requirement of certain objective connecting factors to the applicable law. (1)–(3) lay down a complete code of what laws may be chosen[367] and which conflictual consequences any choice triggers. A strong supporting *argumentum e contrario* ought to be drawn from (2), (3) and Arts. 3 (3); 3 (4); 5 (2); 7 (3); 9 Rome I Regulation: Where the Rome I or II Regulation intend to restrict the free choice they expressly implement such restrictions. The absence of restrictions implies that a policy of truly free choice has been adopted.[368] There is no gap in the system; only an express rule on the issue is missing,[369] deplorably and unfortunately.

153 Good faith is institutionalised where, and only where, it shall prevail. Hence, it can not carry an application of the law against unfair contract terms to choice of law clauses.[370] Recital (10) 2nd sentence Directive 93/13/EEC is not to the opposite avail[371] for it evidently does not relate to conflictual choice of law but to the types and categories of contracts covered. The less it can be invoked in the non-contractual realm.

154 In Germany, the former §10 pt. 8 AGBG required for a choice of law clause in Standard Terms and Conditions to be valid a relationship between the circumstances of the case and the chosen law. It was duly deleted on 1 September 1986 without any substitute taking its place when the German version of the Rome Convention entered into force. Yet §§ 307 *et seq*. BGB are still not applicable to choice of law clauses as this would contravene (1).[372]

155 Recital (16) Rome I Regulation does not lead to an opposite result for it does not give courts discretion to intervene with a choice of law by the parties but is solely concerned with the objective determination of the applicable law if such choice of lack is lacking, under Art. 4 Rome I Regulation.[373] A basic content review might be some demand of justice but its precise form is shaped and governed by the Rome I and II systems.[374] That the line between control as to consensus – which Art. 3 (5) in conjunction with Art. 10 (1) Rome I Regulation *per analogiam* submits to the designated law – and content review is not clearly drawn in every aspect and does leave room for some grey areas cannot be used as a justification for the introduction of a content control of choice of law clauses.[375]

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366 To the same result *Vogeler* pp. 179–183.

367 *Plender/Wilderspin* para. 6–074.

368 See only *Mankowski*, VuR 1999, 138 (140); *Mankowski*, in: Magnus/Mankowski Art. 3 Rome I Regulation note 447. *Contra Heiss*, RabelsZ 65 (2001), 634 (642)-644.

369 Imprecisely *Pfütze*, ZEuS 2011, 35, 64.

370 *Contra Pfeiffer*, in: FS Egon Lorenz zum 80. Geb. (2014), p. 843, 854–855.

371 *Contra Pfeiffer*, in: FS Egon Lorenz zum 80. Geb. (2014), p. 843, 855.

372 OLG Hamm IHR 2016, 30 (32); *Wurmnest*, in: Münchener Kommentar zum BGB, vol. II: §§ 241–432 BGB (6th ed. 2013) § 307 BGB Art. 14 Rom II-VO note 236.

373 That is overlooked by *Pfütze*, ZEuS 2011, 35, 64.

374 Tentatively to a different avail *Pfütze*, ZEuS 2011, 35, 68.

375 *Contra Heiss*, RabelsZ 65 (2001), 634 (639); *Pfütze*, ZEuS 2011, 35, 69; see also *Renate Schaub*, in: Riesenhuber/Karakostas (eds.), Inhaltskontrolle im nationalen und europäischen Privatrecht (2009) p. 197; *Thüsing*, in: Graf v. Westphalen, Vertragsrecht und AGB-Klauselwerke (28th ed. 2010) Rechtswahlklauseln Art. 14 Rom II-VO note 6.

A general content review might be in accordance with one's own personal sense of justice, however, its precise form is governed by the system of the Rome I and II Regulations.[376] But one has to distinguish clearly between an evaluation merely as to whether consensus and agreement exist which has to be executed - according to the chosen law as set forth by Art. 3 (5) in conjunction with Art. 10 (1) Rome I Regulation *per analogiam* - on the one hand and a proper review as to content on the other hand. The European legislator protects the consumer against unfair clauses through the use of private international law, not through the consumer protection regimes of the *lex fori* or the *lex causae*. **156**

In European PIL, the protection of typically weaker parties, i.e. the groups most deserving of, and dependent on, protection, is achieved through Arts. 6 (2); 8 (1) Rome I Regulation by testing the substantive protective measures of the law applicable without a choice of law clause against those of the substantive law chosen and applying the more favourable rules. This constitutes an alternative model to the restriction of choice of law clauses that would be part of a content evaluation of choice of law clauses.[377] Art. 6 (2) Rome I Regulation, specifically, does not render the choice of law clause invalid[378] but actually requires its validity to conduct the test.[379] It allows for the possibility of "double protection", i.e. under the chose law and the law which would be applicable absent a parties' choice of law.[380] Extending this evaluation of the more favourable law to an evaluation of choice of law clauses would constitute a major systematic inconsistency, though.[381] The principle of the more favourable law can negate some effects of a choice of law, but not negate the choice of law as such.[382] The choice of law as such is left to (1) – as to Art. 3 Rome I Regulation in the contractual realm - and in particular to Art. 3 (5) in conjunction with Art. 10 Rome I Regulation *per analogiam*; the choice of law agreement as such is not subjected to a more favourable law principle, a *Günstigkeitsvergleich*.[383] **157**

The argument that the Rome Regulations contain express limitations on party autonomy if such limitations are warranted for, gathers further strength and is firmly invigorated by the existence of (1) 1st sentence (b) on the one hand and (2), (3) on the other hand.[384] **158**

An evaluation of the content of choice of law clauses according to the standards of the chosen law would, where leading to negative results, result in a paradox, as the law chosen would attest itself to have an inadequate content.[385] An evaluation of the content of a choice **159**

376 Tentatively *contra Pfütze*, ZEuS 2011, 35, 68.

377 *Jayme*, FS Werner Lorenz zum 70. Geb. (1991), p. 435, 438; *Mankowski*, RIW 1993, 453 (456); *Mankowski*, RIW 1994, 421 (422) *et seq*.; *Mankowski*, RIW 1996, 1001 (1002); *Stoll*, FS Anton Heini (1995), p. 429, 439 *et seq*.; *Baumert*, RIW 1997, 805 (809); similarly *Bröcker*, Verbraucherschutz im Europäischen Kollisionsrecht (1998) pp. 56 *et seq*.

378 See only *Briggs*, (2009) 125 LQR 191, 192; *Lambrecht*, RIW 2010, 783 (788).

379 *Mankowski*, RIW 1994, 421 (422); *Mankowski*, EWiR Art. 29 EGBGB 1/98, 455 *et seq*.

380 *Symeonides*, in: Essays in Honour of Spyridon Vl. Vrellis (2014), p. 909, 919.

381 *Pfeiffer*, LMK 2013, 343552; *Pfeiffer*, in: FS Egon Lorenz zum 80. Geb. (2014), p. 843, 846.

382 *Pfeiffer*, in: FS Egon Lorenz zum 80. Geb. (2014), p. 843, 846.

383 *Pfeiffer*, in: FS Egon Lorenz zum 80. Geb. (2014), p. 843, 847.

384 *Vogeler* p. 187 with regard to (2) and (3).

385 See only *Mankowski*, RIW 1995, 364 (366); *Christiane Rühl*, Rechtswahlfreiheit und Rechtswahlklauseln in Allgemeinen Geschäftsbedingungen (1999) p. 205.

of law clause could never be achieved by measuring solely against the standards of substantive law because choice of law limiting rules can only be found in the private international law of the chosen law. This would present a conflict with Art. 24 Rome II Regulation setting forth that choice of law clauses cannot be directed at a state's private international law (unless the parties expressly agreed upon it).[386] The European PIL has chosen a certain direction and will not authorise the chosen substantive law to change that very direction.[387] The European PIL's final verdict does not depend upon the chosen law's hypothetical answer to a question never asked.[388]

160 Even if one was generally inclined to control the choice of law as to substance, it would have to be held in accordance with the *boni mores* that a party strives for a legal "home game" and a comparative advantage.[389] Art. 3 (5) in conjunction with Art. 10 (1) Rome I Regulation by its very *modus operandi* gives some edge to the party claiming that a certain law has been chosen. This is a price coming with Art. 3 (5) in conjunction with Art. 10 (1) Rome I Regulation *per analogiam* establishing a way out of an impasse which would otherwise ensue.[390]

161 Likewise, the choice of a "neutral" law in a Standard Term should not be banned and disregarded as surprising or non-transparent in every instance.[391] A clear express choice of law unambiguously stating what is intended is transparent. "This contract is subject to Irish law" is as clear as it gets and even as it could possibly get.[392] It is not prone to any misunderstandings. It unmistakeably asserts that, firstly, a choice of law takes place and, secondly, which law is chosen. A choice of law complying with the requirements which (1) throws its way ought not to be subjected to stricter control and stricter yardsticks by Art. 5 1st sentence Directive 93/13/EEC.[393]

162 Furthermore, rules like § 305c (1), (2) or § 307 (1) 2nd sentence BGB, calling for transparency of Standard Terms and Conditions on the level of substantive law, must be read in the light of (1) in so far as choice of law clauses are at stake.[394] A choice of law clause in a consumer contract should not fall victim to them only for the reason that it would not reiterate Art. 6 (2) Rome I Regulation,[395] the more since it could appear questionable whether a clause

386 See only *Mankowski*, RIW 1993, 453 (455); *Christiane Rühl*, Rechtswahlfreiheit und Rechtswahlklauseln in Allgemeinen Geschäftsbedingungen (1999) pp. 201 *et seq.*

387 *Mankowski*, VuR 1999, 140 (141).

388 *Martiny*, ZEuP 1997, 107 (116).

389 *Schütze*, in: GS Manfred Wolf (2011), p. 551, 553.

390 See *Briggs* paras. 10.32–10.33; *Plender/Wilderspin* para. 6–080.

391 *Contra Pfeiffer*, in: Pfeiffer, Handbuch der Handelsgeschäfte (1999) § 21 Art. 14 Rom II-VO note 81. *Matthias Weller/Nordmeier*, in: Spindler/Schuster, in: Spindler/Schuster, Recht der elektronischen Medien (3rd ed. 2015) Art. 3 Rom I-VO note 11.

392 *Mankowski*, RRa 2014, 118 (122); see also *Pfeiffer*, LMK 2013, 343552.

393 *Mankowski*, RRa 2014, 118 (122). *Contra Pfeiffer*, in: FS Egon Lorenz zum 80. Geb. (2014), p. 843, 855.

394 Comp. LG Hamburg MMR 2012, 96 (97) = IPRspr. 2011 Nr. 22 p. 53. But cf. BGH IPRax 2013, 557 (561); OLG Köln RdTW 2015, 136, 138; *Wulf-Henning Roth*, in: FS Dieter Martiny (2014), p. 543, 547; *Pfeiffer*, in: FS Egon Lorenz zum 80. Geb. (2014), p. 843, 857–858.

395 But cf. OLG Oldenburg WRP 2014, 1507; LG Oldenburg WRP 2014, 1504. See also *Faber*, MMR 2013, 594.

repeating the wording of Art. 6 (2) Rome I Regulation with all its complexities could be even possibly transparent.[396] The party proposing and drafting a choice of law clause would find itself in a catch-22. That should be solved by recognising a clause merely copying the wording of Art. 6 (2) Rome I Regulation since the natural consequence of an invalidation of such a clause would be that Art. 6 (2) Rome I Regulation stepped in.[397]

Judged correctly, Art. 6 (2) Rome I Regulation conveys (*inter alia*) the message that the more favourable law principle, the *Günstigkeitsvergleich* (the more favourable law principle), is not deemed to be so complicated that it could not be legislatively forced upon consumers.[398] Furthermore it avoids that a consumer could justifiedly trust solely and exclusively in the law of his habitual residence being applicable.[399] Art. 6 (2) Rome I Regulation defines the ramifications and establishes the points of reference.[400] **163**

A choice of law which is unconditional if read on its face must be read in the light of, and subject to, Art. 6 (2) or Art. 8 (2) Rome I Regulation. The party drafting the choice of law clause is not requested to import Art. 6 (2) or Art. 8 (2) Rome I Regulation in the very wording of the clause. Nothing in these rules puts a burden on that party to inform the consumer or the employee about the existence or the content of these rules. Given the structural importance which a duty to inform would have (and a duty to inform about something as complex as the more favourable law principle, the *Günstigkeitsvergleich*, at that[401]) such a duty must be implemented expressly if it was to be at all.[402] **164**

On its face the clause might imply that the law chosen is the only law applicable that solely and exclusively the law chosen would apply.[403] But read in the light of, and in conjunction, with the *Günstigkeitsvergleich* (the more favourable law principle) it becomes clear that such implication would not withstand scrutiny. It must be called back to attention yet again that neither Art. 6 (2) nor Art. 8 (2) Rome I Regulation renders the parties' choice of law invalid but, conversely, refers to Art. 3 Rome I Regulation without any restriction added to this reference. The reference is unconditional and does not contain any modification of Art. 3 **165**

396 *Mankowski*, RRa 2014, 118 (122).

397 Compare at the level of (German) substantive law without recourse specifically to Art. 6 (2), but hinting towards (now) § 306 (2) BGB BGH NJW 1993, 1061 (1063); BGH NJW 2005, 2919 (2920); OLG Stuttgart 23 January 2014 – Case 2 U 57/13 sub B 3 a cc; *Thüsing*, in: Graf von Westphalen (ed.), AGB-Klauselwerke und Vertragsrecht (looseleaf) Vertragsrecht (Transparenzgebot) Art. 14 Rom II-VO note 2; *Pfeiffer*, in: Manfred Wolf/Lindacher/Pfeiffer, AGB-Recht (6th ed. 2013) § 307 BGB Art. 14 Rom II-VO note 331; *Armbrüster*, DNotZ 2004, 437 (443)-444; *Grüneberg*, in: Palandt, BGB (74th ed. 2015) § 307 Art. 14 Rom II-VO note 50; *Robert Koch*, VersR 2015, 133 (133). *Contra Andreas Fuchs*, in: Peter Ulmer/Brandner/Hensen/Harry Schmidt, AGB-Recht (11th ed. 2011) § 307 GB Art. 14 Rom II-VO note 35; *Hubert Schmidt*, in: Bamberger/Herbert Roth, BGB (3rd ed. 2012) § 307 BGB Art. 14 Rom II-VO note 72; *Coester*, in: Staudinger, BGB, §§ 305–310 BGB (2013) § 307 BGB Art. 14 Rom II-VO note 309.

398 *Mankowski*, RRa 2014, 118 (122). See also BGH IPRax 2013, 557 (561).

399 KG MMR 2013, 591 (592).

400 *Mankowski*, RRa 2014, 118 (122); see also KG MMR 2013, 591 (592).

401 On duties to inform about the applicable law see *Wulf-Henning Roth*, in: FS Dieter Martiny (2014), p. 543.

402 *Mankowski*, RRa 2014, 118 (122).

403 See *Faber*, MMR 2013, 594.

Rome I Regulation,[404] even where all rules of the Rome I Regulation are applied *per analogiam*.

166 A different issue is as to whether the scope and ambit of the concrete choice of law clause is worded transparently enough, for instance if it calls for the application of the law chosen to all disputes between the parties or all claims arising out of the relationship between the parties.[405]

6. Formal validity

167 Art. 14 does not expressly address the formal validity of a choice of law agreement. In the usual fashion to revert to Art. 3 Rome I Regulation where Art. 14 contains a *lacuna*, one should apply Art. 3 (5) in connection with Art. 11 Rome I Regulation *per analogiam*.[406] This would be rather generous for it would lead to an alternative connection affirming the formal validity of the choice of law agreement if either the *lex causae* (i.e. the law designated in that agreement) or the law(s) of the place(s) where the choice of law agreement was concluded, do so. On the level of substantive law, this might stir quite some trouble since only few laws will expressly state which form they demand for a choice of law agreement for non-contractual obligations.[407]

III. Party autonomy *ex post*, (1) (a)

1. General aspects

168 After the event giving rise to the damage occurred (1) (a) permits an agreement to submit a non-contractual obligation to a chose law. (1) (a) grants party autonomy *ex post* without imposing any further restrictions. It does not purport at protecting any particular classes of potential parties to such agreements made *post actum*. It does *not* grant any kind of special protection to consumers or employees.

169 In practice, a genuine *ex post* choice of law will be offered on an individual basis. It is highly unlikely that Standard Terms and Conditions are used in such *ex post* modus.[408] Hiding choice of clauses in a plethora of other clauses on the one side and signing without reading on the other side thus are less of a danger, and the European legislator did not deem it appropriate to implement a specific protective mechanism against it, in contrast to *ex ante* choices which are regulated way more restrictively by (1) (b). However, if a stronger party offers a choice of law *ex post* using a set of Standard Terms and Condition, possibly trying to veil and mask this by "proposing" an amendment of a pre-existing concurring contract, the lack of a protective mechanism could fire back. Giving the systematic structure of (1) and the contrast between (1) (a) and (b) it would be a bold step to introduce the additional requirement of the choice of law requiring free negotiation - as under (1) (b) – into (1) (a).[409]

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404 *Mankowski*, RRa 2014, 118 (122).

405 *Pfeiffer*, in: FS Egon Lorenz zum 80. Geb. (2014), p. 843, 860.

406 *Bach*, in: Peter Huber Art. 14 note 20; *Spickhoff*, in: Bamberger/Herbert Roth Art. 14 Rom II-VO note 3; *Vogeler* p. 226; *Crawford/Carruthers*, (2014) 63 ICLQ 1, 14; *Rühl*, in: OGK Art. 14 Rom II-VO note 110.

407 *Vogeler* p. 226–227.

408 *Vogeler* p. 171.

409 See *Heiss/Loacker*, JBl 2007, 613, 623; *Vogeler* pp. 172–173.

(1) (a) does not require an *informed* choice of law. It does not even require that the parties are aware of the event giving rise to the damage.[410] This is a sharp contrast to the approach taken by Recital (18) Rome III Regulation with regard to a parties' choice of law in divorce matters in principle permitted by Art. 5 Rome III Regulation. At least theoretically, a weaker party might be lured into a detrimental choice which in practical effect leads to this party disposing of its non-contractual claim (as acquired under its original proper law) for good, or rather: for worse, if one is permitted playing with words. **170**

The difference that an informed choice is not required under (1) (a) might be felt in cases of asymmetric information about the facts: The debtor does know about his activities already done whereas the creditor is not aware of them. The debtor knows that the proposed choice of law would be *ex post* whereas the creditor is left in the dark. Lacking knowledge of the relevant facts, the creditor does not even recognise that he has already become a creditor and does not feel any necessity to seek legal advice about his position. Any assertion that the weaker party might be alerted and might thus raise its willingness to invest into information about the law proposed to choose,[411] carries only so far as the weaker party is aware of the facts and is aware of probably having a claim. **171**

In so far the case is different from the scenario envisaged by Arts. 19 pt. 1; 23 pt. 1; 15 pt. 1 Brussels I*bis* Regulation in contract. Whereas (1) (a) permits party autonomy already after the event giving rise to the damage occurred those rules become operative only after the dispute has arisen. After a dispute has arisen the weaker party is alerted or is at least normatively deemed to be alerted once it is now confronted with the stronger party's proposal for altering jurisdiction or applicable law.[412] The dispute alarms the weaker party – an event giving rise to damage which is possibly unbeknown to the weaker party does not, at least not reliably. **172**

The wisdom of (1) (a) might be challenged on another count:[413] Ordinarily, weaker parties are not repeat player parties versed in cross-border activities whereas stronger parties are (or at least might be). Weaker parties have lesser incentives to invest into information about the content of the possibly applicable law because they will not be confronted with a foreign law on a regular basis and any investment would be a one-off with return only in the concrete case. Amortisation depends on the amount of damages at stake. Positive economies of scale cannot be expected. **173**

At the very start of the European PIL of obligations in 1972, the Convention Draft[414] did not contain any permission of party autonomy for non-contractual obligations. The time was not ripe for that step yet. Matters had changed considerably by 1998 when the GEDIP **174**

410 *Dickinson* para. 13.35.

411 *Brière*, Clunet 135 (2008), 31, 58; *von Hein*, 82 Tulane L. Rev. 1663, 1694 (2008); *von Hein*, in: Calliess, Art. 14 Rome II Regulation note 18; *Rühl*, Statut und Effizienz (2011) p. 605; *Rühl*, in: OGK Art. 14 Rom II-VO note 48.

412 See only *Mankowski*/*Peter Arnt Nielsen*, in: Magnus/Mankowski, Brussels Ibis Regulation (2016) Art. 19 Brussels Ibis Regulation note 18.

413 *Rühl*, in: OGK Art. 14 Rom II-VO note 54.

414 EEC Draft Convention on the law applicable to contractual and non-contractual obligations of 1972, reprinted in: RabelsZ 38 (1974), 211 (218).

ventured to allow party autonomy to agreements entered into after the dispute has arisen,[415] reflecting the watershed by that time already firmly established in Arts. 10 (1); 15 (1) Brussels Convention. The Commission ventured to go even a progressive step further by deleting that restriction in its Internal Draft of 1999[416] and its Draft Proposal of 2002[417]. Yet the official Proposal[418] in its Art. 10 (1) 1st sentence reintroduced a restriction declaring the event giving rise to the damage to be the watershed. That stage being reached, party autonomy *ex post* appeared to be a natural and a given token[419] not prompting any further discussion and even less in-depth reflection.[420] The question whether to go beyond this and to grant party autonomy *ex ante*, occupied the minds and attracted all attention.

2. Relevant point in time

175 The event giving rise to the damage occurred is the relevant activity[421] and demarcates the watershed between (a) and (b). This must be clearly distinguished form the resulting damage.[422] This standard appears appropriate also in cases of unjust enrichment or *negotiorum gestio*[423] notwithstanding difficulties to circumscribe what exactly might constitute a qualifying activity in these fields of law.[424] The opportunity for a choice of law made *ex post* in (1) (a) impliedly carries a sector-specific design: The event giving rise to the damage depends on the tort or other non-contractual obligation at stake.[425] As far as possible taking into account the different standards, a parallel should be seen with Arts. 15 (1); 19 (1); 23 (1) Brussels I*bis* Regulation.[426] All these rules allow choice of forum agreements even with typically weaker parties after the dispute has arisen.

176 (1) (a) is a reflected compromise: On the one hand, it delimits the moral hazard involved. More liberal yardsticks apply only *after* the potential tortfeasor or other non-contractual debtor has exerted his relevant activity. The deed is done in so far. Only the consequences of the deed are uncertain at this point of time if and in so far the damage caused by the activity has not occurred yet.

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415 Art. 8 (1) 1st sentence GEDIP Proposal for a European Convention on the law applicable to non-contractual obligations, reprinted i.a. in: NILR 1996, 465, 469.

416 Art. 6 (1) 1st sentence Commission Internal Draft of 21 June 1999, reprinted in: *von Hoffmann*, in: Staudinger, BGB, Artt. 38–42 EGBGB, 13th ed. 2001, Vor Art. 38 EGBGB note 16.

417 Art. 11 (1) 1st sentence Commission Draft Proposal of 2002, reprinted in: RabelsZ 67 (2003), 1.

418 COM (2003) 427 final.

419 *von Hein*, in: Calliess Art. 14 Rome II Regulation note 16.

420 See Art. 3 (1) 1st sentence Position of the European Parliament adopted at first reading with a view to the adoption of Regulation EC No. …/2005 of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II), reprinted in: Malatesta p. 392; Art. 4 (1) Amended Commission Proposal, COM (2006) 83 final; Art. 14 Council Common Position of 25 September 2006, OJ 2006 C/289E/68.

421 See only *Gerhard Wagner*, IPRax 2008, 1 (14); *Mankowski*, IPRax 2010, 389 (399); *Vogeler* p. 241; *Wurmnest*, in: jurisPK-BGB Art. 14 Rom II-VO note 9; *Rühl*, in: OGK Art. 14 Rom II-VO note 57.

422 See only *Rühl*, in: OGK Art. 14 Rom II-VO note 57.

423 *Vogeler* p. 241; see also *Rühl*, in: OGK Art. 14 Rom II-VO note 56.

424 In detail *Vogeler* pp. 243–244.

425 See only *Mankowski*, IPRax 2010, 389 (399); *Rugullis*, IPRax 2008, 319 (322); *Vogeler* p. 239.

426 *Mankowski*, IPRax 2010, 389 (399).

On the other hand, in tort cases the victim might not be fully alerted if only the event giving rise to the damage, but not the damage as such has occurred at the time when the choice of law is made.[427] The ordinary victim becomes fully alerted once he feels patrimonial, physical or personal consequences in his assets, or, more bluntly, once the tortfeasor's activity has hit home in the victim's sphere.[428] The victim might not even know about the tortfeasor having exacted relevant activity unless such activity and its consequences reach the victim's sphere. In the extreme, the tortfeasor might lure the victim into a choice of law favourable to the tortfeasor, but disfavouring the victim (as compared to the *status quo* without such choice of law) in the space of time between the event giving rise to the damage and the time when the damage is caused (or, in practice, when the victim about the damage). **177**

In so far a difference exists to Arts. 15 (1); 19 (1); 23 (1) Brussels I*bis* Regulation: They all apply only after a dispute has arisen. A dispute has arisen if the parties disagree on at least one specific point and legal proceedings are imminent or contemplated.[429] Legal proceedings should be immediately threatening or should have some likelihood in due course.[430] A mere difference of opinion and a simple exchange of polite letters should not be deemed sufficient.[431] Under these stricter prerequisites it is guaranteed that each party is aware that a claim could exist. The GEDIP Proposal which was backed by a plethora of expert knowledge reflected this.[432] Yet this was not to be. Presumably harmony and consistency with Art. 31 featured high amongst the considerations leading to the final wording.[433] **178**

If a choice of law agreement was concluded before the relevant activity but made subject to certain conditions and prerequisites which were fulfilled only after that activity (e.g. that insurance cover would be provided), the conclusion of the agreement matters: Such agreement is an agreement made *ex ante* and thus falls under the stricter regime of (1) (b).[434] **179**

3. Relevant parties

A choice of law made *ex post* should only be given effect if it is made between the debtor and the creditor of the original claim at stake. Third parties are not competent to alter the law **180**

427 Tentatively to a similar avail *Vogeler* p. 244.

428 *Symeonides*, 56 Am. J. Comp. L. 173, 215 (2008); *Bertoli*, RDIPP 2009, 697, 704; *Bertoli*, Dir. UE 2009, 231, 244; *Thorn*, in: FS Karsten Schmidt (2009), p. 1561, 1564–1565; *Vogeler* p. 245.

429 Report *Jenard*, OJ EEC 1979 C 59/33; *Mankowski*/*Peter Arnt Nielsen*, in: Magnus/Mankowski, Art. 19 Brussels Ibis Regulation note 16.

430 See Report *Jenard*/*Möller*, OJ EEC 1990 189/57; Rb. Breda NIPR 2009 Nr. 21 p. 65; *Junker*, in: FS Peter Schlosser (2005), p. 299, 318; *Junker*, in: FS Gunther Kühne (2009), p. 735, 740; *Simotta*, in: Fasching/Konecny, Kommentar zu den Zivilprozeßgesetzen, vol. 5/1 (2nd ed. 2008) Art. 21 EuGVVO note 10; *Mankowski*, in: Rauscher, Art. 23 Brüssel Ia-VO note 3; *Mankowski*/*Peter Arnt Nielsen*, in: Magnus/Mankowski, Art. 19 Brussels Ibis Regulation note 16.

431 *Auer*, in: Geimer/Schütze, Internationaler Rechtsverkehr in Zivil- und Handelssachen, Art. 21 EuGVVO note 5 (2005); *Mankowski*, AP issue 8/2012 Nr. 23 zu § 38 ZPO Internationale Zuständigkeit Bl. 7R, 9R; *Mankowski*/*Peter Arnt Nielsen*, in: Magnus/Mankowski, Art. 19 Brussels Ibis Regulation note 16.

432 Art. 8 (1) 1st sentence GEDIP Proposal for a European Convention on the law applicable to non-contractual obligations, reprinted i.a. in: NILR 1996, 465, 469.

433 *Vogeler* p. 246.

434 *Vogeler* p. 246.

applicable to a non-contractual claim. Yet an assignee from the original creditor is entitled to enter in to a choice of law agreement for at that point of time, i.e. after the assignment, only it is the legitimate creditor.

181 If there are multiple creditors or multiple debtors of the same claim all creditors and debtors of that same claim must consent in order to make the choice of law effective. Whether multi-person relationships concern a single claim or multiple separate claims must be judged according to the law originally applicable.

IV. Party autonomy *ex ante*, (1) (b)

1. General aspects

182 (1) (b) recognises a parties' choice of law made *ex ante* where all the parties are pursuing a commercial activity, by an agreement freely negotiated before the event giving rise to the damage occurred. (1) (b) is the almost revolutionary piece in Art. 14. It has been heralded as the most important innovation in the entire Rome II Regulation.[435] It certainly introduces a particularly modern and liberal element.[436] It is a major break-through and has been welcomed above all in England.[437] Party autonomy *ex ante* appears promising in the vicinity of complex contractual transactions in particular.[438] Even taking into account that Art. 4 (3) 2nd sentence supports an accessory connection to the chosen law of a contract a genuine extra-contractual choice of law is beneficial if the parties have not condensed their relationship into a contract yet or if a contract concluded is subject to uniform law.[439] At the very least a respective choice of law may lead to concurring contractual and non-contractual claims being subjected to the same law.[440] Certain industries have reacted in this vein.[441] This appears particularly sensible in the context of sale or carriage of dangerous goods.[442]

183 (1) (b) demarcates a major advance and a giant leap forward in the progress of party autonomy. It is progressive in the best sense.[443] Yet it does also reflect caution and a political compromise. Before its advent, party autonomy in torts was recognised only where the parties choose after the event giving rise to the damage had already occurred, i.e. under the circumstances which are now covered by (1) (a).

184 The restrictions implemented aim at protecting weaker parties. Recital (31) 4th sentence makes this unambiguously clear. If reflects the respective EU policy.[444] Already the Com-

435 Editorial, (2007) 44 CML Rev. 1567, 1570; see also *Bertoli*, Riv. dir. int. 2009, 697, 703.

436 *von Hein*, ZEuP 2009, 6 (20); *Kadner Graziano*, RabelsZ 73 (2009), 1 (5); *Sujecki*, EWS 2009, 310 (313).

437 *Briggs*, (2009) 125 LQR 191, 193.

438 *Dutoit*, in: Liber Fausto Pocar, vol. II (2009), p. 309, 313.

439 *Kadner Graziano*, RabelsZ 73 (2009), 1 (9).

440 *Bertoli*, Riv. dir. int. 2009, 697, 706; *Bertoli*, Dir. UE 2009, 231, 246.

441 *Bertoli*, Riv. dir. int. 2009, 697, 706 with reference to the Governing Law section of the Standard Documents of the Loan Market Association http://www.loan-market-assoc.com/documents.

442 *Bertoli*, Dir. UE 2009, 231, 246.

443 See only *Thorn*, in: FS Karsten Schmidt (2009), p. 1561, 1566; *Bertoli*, Riv. dir. int. 2009, 697, 699, 703.

444 See only *Bertoli*, Riv. dir. int. 2009, 697, 705; *Bertoli*, Dir. UE 2009, 231, 245.

mission's Explanatory memorandum ruminated that admitting party autonomy *ex ante* might adversely affect weaker parties.[445] The European Parliament took a different stance advocating party autonomy *ex ante* provided that there is a pre-existing arms-length relationship between traders of equal bargaining power.[446] The Commission in turn considered that criterion as too difficult to ascertain. Instead, the Commission introduced the standard of pursuing commercial activity,[447] which refrains from identifying the parties' respective bargaining strength and power and evaluating their respective impact on the result of the drafting of the agreement. But the European Parliament successfully inserted the second key element of the present wording, "freely negotiated" as qualifier,[448] which the Commission accepted[449] and the Council's Common Position endorsed.[450]

185 The deeper ratio underlying the restrictions to *ex ante* choice of law agreements inherent in (1) (b) is to protect presumably weaker parties against being exploited. Relationships between a stronger and a weaker party will most certainly suffer from an informational asymmetry favouring the former and disfavouring the latter.[451] Only the stronger party will employ pre-conceived and pre-formulated choice of law clauses urging for the application of law which either has a content favourable to the stronger party or allowing positive economies of scale for the stronger party will opt in favour of that law in a multiplicity of (roughly) parallel relationships. Only the stronger party will have a real opportunity to hide and bury a preconceived and pre-considered choice of law clause in small print or tons of boilerplate. The weaker party who is not doing such business routinely will resort to rational disinterest and sign without reading, not investing costs and effort in inquiring about the content of any law designated. Choice of law will gather returns on investment for the repeat player, but not for the single game player. The likelihood that a certain incident will occur, raises with the number of games played whereas investing too much in inquiring something which carries a small probability only, would not pay off.[452]

186 Informational asymmetry might be even more important in non-contractual relationships, particularly in tort, than in contract. Which weaker party will be so prudent and provident as to give a thought to possible future events doing harm either to it or to its stronger counterparty? Risk assessment requires some degree of smartness and in many instances a high level of information. Experience will contribute to gathering information. The information gathered will be the more valuable and telling the higher the number of repeat plays is and thus the amount of information gathered.

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445 COM (2003) 427 final p. 22.

446 Art. 3 (1) 1st sentence Position of the European Parliament adopted at first reading with a view to the adoption of Regulation EC No. …/2005 of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II), reprinted in: *Malatesta* p. 392.

447 Art. 4 (2) Amended Commission Proposal, COM (2006) 83 final.

448 Art. 3 (1) 1st sentence Position of the European Parliament adopted at first reading with a view to the adoption of Regulation EC No. …/2005 of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II), reprinted in: Malatesta p. 392.

449 Art. 4 (2) Amended Commission Proposal, COM (2006) 83 final.

450 Art. 14 (1) Art. 14 Council Common Position of 25 September 2006, OJ 2006 C/289E/68.

451 *Rühl*, in: OGK Art. 14 Rom II-VO note 48.

452 *Rühl*, in: OGK Art. 14 Rom II-VO note 48.

187 An employer will far better know about the latent risks of an employment in a certain job in a certain environment (including surroundings, structures, teams and working colleagues) than the employee however experienced or versed the employee might be. The instances where a consumer might harm an entrepreneur are scarce if ever existing. Conversely, the entrepreneur should know about the latent defects of the products he sells or the inherent vices of the services he offers.

188 Instances where a professional party tries to agree with a non-professional party on some choice of law for tortious affairs can also be imagined outside any context featuring employees or consumers. Just imagine an enterprise planning to erect a plant possibly at a border which is invariably destined to harm its environment, and to lure the proprietors of the estates in its vicinity into the choice of a law permitting for higher levels of emissions.

189 As to the other kinds of non-contractual obligations: Which weaker party will consider restitution of a contract it is just concluding? And which weaker party will be even aware that some legal institute called *negotium gestio* exists?

190 Weaker parties' disinterest in unlikely events is rational in so far as it saves from frustrating costs for preparing for a number of events that will never happen. But beneath it there might be a miscalculation equating small risks with zero risks, following the psychological law of small numbers.[453] Another interfering factor might consist of availability heuristics on the weaker party's side giving more weight to events of the near(er) past, in the media focus or more easily recollectable, than those events would deserve if they were measured purely statistically.[454]

191 Private persons employ heuristics,[455] based on assumed experience.[456] People are adopting patterns which seemingly guarantee the results warranted for; it they worked a number of times heuristics as instrument to reduce complexity will not be questioned anymore.[457] Expected repetition of experiences is more than just a model.[458] "Mental shortcuts" are rules of thumb deeply engrained in subconsciousness which help people master they every-day life.[459] Yet they are prone to be instrumentalised and exploited by others.[460]

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453 *Rühl*, in: OGK Art. 14 Rom II-VO note 49 with reference to *Tversky*/*Kahneman*, Psych. Bull. 76 (1971), 105.

454 *Rühl*, in: OGK Art. 14 Rom II-VO note 49 with reference to *Tversky*/*Kahneman*, Cogn. Psych. 5 (1973), 207; *Tversky*/*Kahneman,* in: Tversky/Kahneman (eds.), Judgment under Uncertainty: Heuristics and Biases (1982), 3, 11 *et seq*.; *Kuran*/*Sunstein*, 51 Stanford L. Rev. 683 (1999); *Kuran*/*Sunstein*, in: Sunstein (ed.), Behavioral Law and Economics (2000), p. 374.

455 Seminal on heuristics *Gigerenzer*/*Todd*/ABC Research Group, Simple Heuristics That Make Us Smart, (Oxford 1999) and *Gigerenzer*, Bauchentscheidungen (2007); for some law aspects see the contributions to Gigerenzer/Christoph Engel (eds.), Heuristics and the Law (2006).

456 Seminal *Cialdini*, Influence – The Psychology of Persuasion (3rd ed. 2007).

457 *Jiremez*, Wie Supermärkte Kunden verführen, Hamburger Abendblatt of 21 May 2012, p. 17; *Mankowski*, in: FS Helmut Köhler (2014), p. 477, 482–483.

458 See *Dickinson*/*Balleine*, in: Stevens' Handbook of Experimental Psychology, vol. III. Learning, Motivation and Emotion (3rd ed. New York 2001), p. 497; *Dayan*, in: Christoph Engel/Wolf Singer (eds.), Better Than Conscious? (Frankfurt 2007), p. 51, 58.

459 *Mankowski*, in: FS Helmut Köhler (2014), p. 477, 483.

460 *Jerry Burger*/*Hornisher*/*Valerie E. Martin*/*Gary Newman*/*Pringle*, J. App. Psych. 37 (2007), 2086; *Rohwetter*, Das will ich haben!, Die Zeit Nr. 18 of 26. April 2012, p. 21.

Overconfidence[461] and optimistic bias[462] lead to assumptions that one in one's life will **192**
experience more positive events than the average and less negative, leading into under an estimation of the probability of negative events. They are grounded in the limited rationality of human decision-making and the limited time one is willed to invest in finding a decision.[463] Overconfidence and optimistic bias are in particular employed where symbolic values are at stake.[464] Heuristics might not fit into the model of Rational Economic Man, but are more deeply rooted in reality.[465] They conform to a very large extend with the so called "guts feeling".[466] Seen in the general context of evolution, spontaneous decision-making is a very late development.[467] Fast and frugal heuristics might imitate seemingly successful behaviour by others[468] and rely only on the relatively best information.[469] Yet they conform with the limited time available, the limited information available and the high risk of miscalculating even if one invested more.[470] Heuristics are an attempt at an experience based optimisation of decision-making within the confines of limited time and incomplete, thus uncertain information. An interested person will not strive at collecting virtually all information for he knows that complete information cannot be reached at all or only at prohibitive costs; instead he will calculate the marginal gain of additional information in his rough-and-ready cost-gain scheme.[471] Yet following the heuristics-and-biases approach prevailing today heuristics are to a great extent based on prejudice and inclination.[472] Eventually it is a matter of detail[473] whether the underlying matrix reads 'availability, representativity and foundation'[474]or whether affective heuristics are the last

461 E.g. *Weinstein*, J. Pers. & Soc. Psych. 39 (1980) 806, 809 f.; *Fischhoff*/*Slovic*/*Lichtenstein*, 3 Journal of Experimental Psychology: Human Perception and Performance 552 (1997); *Jolls*, 51 Vand. L. Rev. 1653, 1659 et passim (1998); *Ulen*, in: Grundmann/Kerber/Weatherill (eds.), Party Autonomy and the Role of Information in the Internal Market (2001), p. 98, 117 *et seq*.; *Franck*, ZBB 2003, 334 (338).

462 Seminal *Weinstein*, J. Pers. & Soc. Psych. 39 (1980), 806, 809 f.; *Weinstein*, Behav. Med. 10 (1987), 461.

463 See only *B.D. Jones*, 1999 Ann. Rev. Pol. Sc. 297; *Kahneman*, Am. Econ. Rev. 93 (2003), 1449.

464 *Trzaskowski*, (2011) 34 J. Cons. Pol. 377, 387.

465 *Read Montague*, Your Brain Is (Almost) Perfect: How We Make Decisions (2007); *Trzaskowski*, (2011) 34 J. Cons. Pol. 377, 387; *Mankowski*, in: FS Helmut Köhler (2014), p. 477, 483.

466 See *Damasio*, Descartes' Errors (1994) pp. 170–175; *Arkes*/*Shaffer*, in: Gigerenzer/Christoph Engel (eds.), Heuristics and the Law (2006), p. 411.

467 *Evans*, Trends Cogn. Sci. 7 (2003), 454; *Kurzban*, in: Christoph Engel/Wolf Singer (eds.), Better Than Conscious? (2007), p. 155, 159.

468 Not simply copying, but adapting; see only *Hertwig*, in: Gigerenzer/Christoph Engel (eds.), Heuristics and the Law (2006), p. 391, 398 with further references.

469 Seminal also in this regard *Gigerenzer*/*Todd*/ABC Research Group, Simple Heuristics That Make Us Smart (Oxford 1999), especially *Gigerenzer*/*Goldstein*, op. cit., p. 75; see also *Goldstein*/*Gigerenzer*/*Hogarth et al.*, in: Gigerenzer/Selten (eds.), Bounded Rationality: The Adaptive Toolbox (2001), p. 173; *Henrich*/*Albers*/*Boyd et al.*, S. 343.

470 *Cooter*, in: Gigerenzer/Christoph Engel (eds.), Heuristics and the Law (2006), p. 379, 381.

471 *Mankowski*, in: FS Helmut Köhler (2014), p. 477, 483. Tentatively *contra Meffert*/*Steffenhagen*/*Freter*/*Silberer*, Konsumentenverhalten und Information (1979), p. 85, 101; *Niemöller*, Das Verbraucherleitbild in der deutschen und europäischen Rechtsprechung (1999) pp. 237 *et seq*.

472 See *Kahneman*/*Slovic*/*Tversky*, Judgment under Uncertainty: Heuristics and Biases (1982).

473 Critical on judging representativity *Kysar*/*Ayton*/*Frank et al.*, in: Gigerenzer/Christoph Engel (eds.), Heuristics and the Law (2006), p. 103, 120–121.

474 *Tversky*/*Kahneman*, Science 185 (1974), 1124.

element.[475] This approach also acknowledges that heuristics are valuable tools in order to make seemingly rational decisions within decent time.[476] Heuristics are a relative optimisation of marginal costs for reaching a decision. Generally, any kind of heuristics and simplification strategy might blur the picture although it helps to manage decision procedures.

193 Whether (1) (b) employs the optimal mechanism to protect weaker parties might be questioned, though, since importing the more favourable law principle from the PIL of contracts into the realm of the Rome II Regulation would have been the more consistent and more elegant approach.[477] (1) (b) has been criticised for being unduly and overly paternalistic.[478] Nonetheless, (1) (b) might muster the advantage of implementing a more clear-cut solution not leaving any opportunity to bury and hide a valid choice of law clause in wagonloads of small print in B2C relationships in order to shy the weaker party from trying its luck by allegedly imposing the choice of law clause as another hurdle in the weaker party's way.

2. Relevant parties

194 The relevant parties must be parties to the agreement, not the parties to any consequential lawsuit.[479] This makes a difference in particular whenever a claim in tort etc. has been assigned and the assignee tries to enforce it. The "all" in "all the parties" is only to ensure that every party to the agreement pursues a commercial activity.[480]

195 Since (1) (b) is only concerned with a choice of law made *ex ante*, i.e. before the respective non-contractual obligation comes into existence, the notion of "parties" cannot properly relate to an already existing non-contractual relationship. Yet Art. 2 (2) indicates that non-contractual obligations which are likely to arise, gain a rank equal with already existing non-contractual obligations. Accordingly, the relevant parties are parties to *both* the choice of law agreement *and* the future non-contractual obligation concerned that is likely to arise. Otherwise one would reach the odd and inacceptable result that in the extreme third parties were entitled to choose the law applicable to a non-contractual obligation of which they are not debtor or creditor. This would be an impermissible contradiction to *res inter alios acta tertio neque nocet neque prodest*.

196 The wording of (1) (b) is clear and unambiguous in so far as it refers to *all* the parties. This implies that a choice of law might be a tri- or multilateral affair[481] with a multiplicity of

475 *Kahneman/Frederick*, in: Gilovich/Griffin/Kahneman (eds.), Heuristics and Biases: The Psychology of Intuitive Judgments (2002), p. 49.

476 See *Guthrie*, in: Gigerenzer/Christoph Engel (eds.), Heuristics and the Law (2006), p. 425, 432.

477 *Gerhard Wagner*, IPRax 2006, 372 (387); *Mankowski*, IPRax 2010, 389 (401–402); *Rühl*, in: OGK Art. 14 Rom II-VO note 55.

478 *Leible*, in: Reichelt (ed.), Europäisches Gemeinschaftsrecht und Internationales Privatrecht (2007), p. 31, 45; *Leible*, RIW 2008, 257 (259); *Leible*, AEDIPr 7 (2007), 219, 227; *Briggs* para. 10.72; *Rühl*, in: OGK Art. 14 Rom II-VO note 52.

479 *Dickinson* paras. 13.09–13.10; *Briggs* para. 8.173.

480 *Gerhard Wagner*, IPRax 2008, 1 (13); *Vogeler* p. 248; *Junker*, in: Münchener Kommentar zum BGB Art. 14 Rom II-VO note 21.

481 *Vogeler* pp. 247–248.

potential creditors or debtors concerned. That (1) *in toto* commences on an Art. 14 Rom II-VO note of "The parties" is not contradictory but rather displays a lack of ultimate precision in drafting.[482]

If the non-contractual obligation concerns a multiplicity of persons it is not necessary that all of them subscribe to the choice of law agreement in order to make that choice of law agreement effective.[483] Yet the agreement will not be binding on those persons who do not consent to it. **197**

Furthermore, it is sufficient that all parties to the agreement pursue commercial activities respectively regardless whether consumers, employees or other non-commercial persons are directly or indirectly involved in the case.[484] Another time, the agreement will only be binding on its parties, but not on these other persons not party to it. The material involvement of non-commercial persons in the setting giving rise to the non-contractual relationship does not automatically and *per se* invalidate the choice of law agreement.[485] A choice of law agreement is a contract and consequentially renders its effects only relative not absolute. **198**

3. Relevant point in time

The choice of law must be concluded before the event giving rise to the damage occurred. After that event has already occurred (1) (a) exerts its more liberal regime, and the restrictions as contained in (1) (b) do not apply anymore. The event giving rise to the damage occurred is the relevant activity[486] and demarcates the watershed between (a) and (b). **199**

If parties erroneously assume that this event has not been staged at the time when the choice of law agreement was concluded, but establish that their agreement complies with (1) (b), their agreement will the more comply with (1) (a) and its lesser requirements. Parties unaware of the fact that the relevant event has already happened will assume that they are under the stricter standard. If they believe so and find that they are not in a B2B relationship serious and law-abiding parties will refrain from concluding any choice of law agreement with the consequence that not even (1) (a) will apply, for lack of an agreement. **200**

If, conversely, the parties erroneously assume that the relevant event was already staged, (1) (b) will apply nonetheless. The real and objective facts matter, not the parties' subjective impressions. Professionals must not get any incentives to allege that both they and their consumer etc. counterparts assumed to be under the more liberal regime of (1) (a). This would be too easy a way for tricksters to circumvene (1) (b). **201**

The principle of causality demands that the giving rise to the damage event necessarily precedes the damage in the chain of events and consequentially the coming into existence of **202**

482 See *Junker*, in: Münchener Kommentar zum BGB Art. 14 Rom II-VO note 21; *Vogeler* p. 248.

483 *Bach*, in: Peter Huber Art. 14 Rome II Regulation note 26 fn. 34.

484 *Bach*, in: Peter Huber Art. 14 Rome II Regulation note 26.

485 *Bach*, in: Peter Huber Art. 14 Rome II Regulation note 26.

486 *Gerhard Wagner*, IPRax 2008, 1 (14); *Mankowski*, IPRax 2010, 389 (399); *Wurmnest*, in: jurisPK-BGB Art. 14 Rom II-VO note 9.

the non-contractual relationship.[487] Yet the notion of that "event" has to be read in the light of Art. 2 (3) (a) whereas pursuant to Art. 2 (3) (b) the notion of "damage" shall include damage that has not yet occurred but is likely to occur. Hence, if there is an event only potentially giving rise to damage without having produced actual damage yet damage is likely to be staged, as is the case when *actiones negatoriae* with effect *in futurum* are pursued, damage is considered to have "occurred" at the point in time when such an event becomes likely to be staged.[488]

4. "Pursuing commercial activity"

203 That all parties to the agreement have to pursue a commercial activity is the crucial point in (1) (b). The notion of a person who pursues a commercial activity, is a terminological novelty. Precisely this language has not been employed before or afterwards in any other rule of EU law. In particular, this language does not reiterate, or employ, the time-honoured and veneered notion of "professional", "entrepeneur", or "business" as counterpart to consumer.[489] Art. 17 (1) Brussels I*bis* Regulation presupposes that a consumer acts "outside his trade or profession" as does Art. 6 (1) Rome I Regulation. Art. 6 (1) Rome I Regulation additionally defines the other party to a consumer contract as "another person acting in the exercise of his trade or profession (the professional)". This gains interpretative importance *via* Recital (7).[490] Otherwise more than only a terminological inconsistency would threaten.[491]

204 Recital (31) 4st sentence and the drafting history underlying (1) (b) lend further support to this contention:[492] The present wording was introduced in order to protect consumers and employees from ill-thought out choices.[493] But its coverage stretches beyond consumers and employees. It also covers companies which are not concluding the agreement in a commercial capacity. Furthermore, "consumer" is a notion taken from the realm of contract where it relates to the concrete role a party assumes under a concrete contract, i.e. whether that party is concluding that contract or private or professional purposes.

205 "Pursuing commercial activity" is not explained or defined any further.[494] But there is no reason identifiable which would justify or compel to deviate from the conception which is commonplace and ubiquitary in EU consumer law: to oppose "consumer/private" to "professional". (1) (b) should follow that dichotomy, too.[495] On the other hand, "commercial matters" in Arts. 1 (1) Brussels I*bis* Regulation; 1 (1) Service Regulation; 1 (1) Evidence

487 *Vogeler* p. 239.

488 *Bach*, in: Peter Huber Art. 14 Rome II Regulation note 22.

489 *Gerhard Wagner*, IPRax 2008, 1 (13); *Ofner*, ZfRV 2008, 13, 21; *Thorn*, FS Karsten Schmidt, 2009, S. 1561, 1566.

490 *von Hein*, ZEuP 2009, 6 (20); *Mankowski*, IPRax 2010, 389 (400).

491 See *Bach*, in: Peter Huber Art. 14 Rome II Regulation note 23; *von Hein*, in: Calliess Art. 14 Rome II Regulation note 19.

492 *Mankowski*, RIW 2009, 98 (116); *von Hein*, in: Calliess Art. 14 Rome II Regulation note 19.

493 COM (2006) 83 final p. 3.

494 *Gerhard Wagner*, IPRax 2008, 1 (13); *Ofner*, ZfRV 2008, 13, 21; *Leible*, RIW 2008, 257 (259); *von Hein*, RabelsZ 73 (2009), 461 (489).

495 *Gerhard Wagner*, IPRax 2008, 1 (13); *Thorn*, FS Karsten Schmidt, 2009, S. 1561, 1566 *et seq.*; *Sujecki*, EWS

Regulation; 1 (1) Rome I Regulation carries not enough weight independent from "civil matters" in order to guide the interpretation of "commercial activity" as a crucial and core notion of (1) (b).[496]

206 The term "commercial activity" at its core aims at covering all activities which can be attributed to professional business as distinct from private affairs; he is acting commercially who in a professional or self-employed capacity actively participates on a market.[497] The notion is not explicitly restricted to regular, habitual, or permanent traders or service providers. Even less it requires a formal status or registration.[498]

207 On the other hand, a formal status or registration does not automatically render the respective persons as pursuing a commercial activity. Persons who qualify as merchants, *commerçants*, *Kaufleute* etc. under domestic laws do not automatically qualify as pursuing a commercial activity. On top of registration etc. there must be real and actual activity.

208 An inactive or materially closed-down business is not relevant "activity". Materially commercial activity might also require some minimum degree of regularity, repetitiveness or permanence.[499] Irregular or occasional trading one and then does not make a commercial man or a business.[500]

209 Any intention to make profit is not necessarily required.[501] Non-profit organisations might pursue commercial activity if they indulge in professional trading or in providing services whichever purpose they use the revenues generated for afterwards. Likewise, publicly owned entities are covered.[502]

210 Art. 2 (c) Unfair Contract Terms Directive[503] uses "seller and supplier" as opposed to "consumer" (Art. 2 (b) Unfair Contract Terms Directive). This covers only the supply side of the market whereas (1) (b) rightly also relates to the demand side, easily explained by the lack of a restriction on the demand side to "consumers" which is so characteristical for the Unfair Contract Terms Directive.

211 Sometimes it is surmised that acting for commercial, professional or business purposes might only occur in the contractual, but not in the non-contractual arena.[504] Product liabi-

2009, 310 (313); *Wurmnest*, in: jurisPK-BGB Art. 14 Rom II-VO note 10; vgl. auch *Kreuzer*, in: Malatesta p. 45, 55.

496 *Vogeler* pp. 249–250.

497 *Gerhard Wagner*, IPRax 2008, 1 (13); *Leible*, RIW 2008, 257 (260); *Sujecki*, EWS 2009, 310 (313); *Mankowski*, IPRax 2010, 389 (401).

498 *von Hein*, in: Calliess Art. 14 Rome II Regulation note 19.

499 *Vogeler* p. 252; *von Hein*, in: Calliess Rome II Regulation note 19; see also *Picht*, in: Rauscher, Art. 14 Rom II-VO note 20.

500 *Vogeler* p. 252.

501 *Vogeler* pp. 253–254 with reference to BGHZ 155, 240 (245).

502 *Vogeler* p. 253 with reference to *Udo Steymann v. Staatssecretaris van Justitie* (Case 196/87), [1988] ECR 6159 paras. 11 *et seq*.

503 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ EC 1993 L 95/29.

504 *Leible*/*Matthias Lehmann*, RIW 2007, 721 (726).

lity, environmental liability resulting from production processes, unfair commercial practices, unfair competition obviously evidence the opposite.[505] Every choice of law clause inserted in a commercial contract but extending or specifically covering non-contractual liability, is proof of its own commercial context.[506]

212 To recur on Art. 2 (d) Unfair Commercial Practices Directive[507] and its definition of unfair commercial practices[508] appears less promising. Unfair commercial practices means any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directed connected with the promotion, sale or supply of a product to consumers. This definition is germane to the law of unfair commercial practices and cannot be generalised. In the present context, it is more appropriate to look at the Rome I Regulation since choice of law agreements are agreements and thus contracts.

213 Between the commercial activity pursued and the non-contractual relation at stake there must be a sufficient nexus in order to permit a choice of law:[509] The choice of law agreement must form an integral part of the commercial activity.[510] The event giving rise to the damage and consequentially the (actual or likely future) damage must stem from that commercial activity.[511]

214 They are grey zones, though. Art. 6 (1) Rome I Regulation talks of "trade or profession". This is believed to encompass self-employed persons besides proper commercial ventures. The main examples are lawyers. "Commercial" (as in "commercial activities") carries certain restrictions in the legal orders of some Member States. But this should not result in self-employed persons being excluded from "pursuing commercial activity". Self-employed persons are generally subjected to the vices of EU consumer protection law as the ECJ demonstrated for lawyers to the letter.[512] Yet they may act outside their profession and have to be judged as private persons in such regard.[513] For instance, a lawyer causing a road accident does not act in his professional capacity.

215 Relations between employers and employees are another grey zone. Examples of employees committing torts against their employers can be easily imagined, e.g. employees negligently causing physical damage to tools, machines or even products owned by their employers, or

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505 *Mankowski*, IPRax 2010, 389 (401).

506 *Mankowski*, IPRax 2010, 389 (401).

507 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive), OJ EU 2005 L 149/22.

508 As *Leible*, RIW 2008, 257 (260) proposes.

509 See *Leible*/*Lehmann*, RIW 2007, 721 (726); *Leible*, RIW 2008, 257 (260).

510 *Leible*/*Lehmann*, RIW 2007, 721 (727); *Leible*, RIW 2008, 257 (260); *Mankowski*, IPRax 2010, 389 (401).

511 *Loquin*, in: Corneloup (dir), Le règlement communautaire "Rome II" sur la loi applicable aux obligations non-contractuelles (2008), p. 35, 52; *Kadner Graziano*, RabelsZ 73 (2009), 1 (8); *Mankowski*, IPRax 2010, 389 (401).

512 *Birute Šiba v. Arūnas Devėnas* (Case C-357/13), ECLI:EU:C:2015:14 paras. 23–35.

513 See *Criminal Proceedings against Patrice Di Pinto* (Case C-381/89), [1991] ECR I-1189 para. 15; *Horaţiu Ovidiu Costea v. SC Volksbank România SA* (Case C-110/14), ECLI:EU:C:2015:538 paras. 25–30.

doing physical harm to their working colleagues for which the latter can claim reimbursement from the common employer. Employees revealing trade secrets to their employers' competitors are another example, even taking into account Art. 6 (4) which would only apply in the relationship between the employer and its competitors. On the other hand, employers might breach duties of care owned towards their employees. Machinery, tools or materiel (e.g. chemicals) provided by the employer might hurt employees. Or misinstructions might result in physical damage to the employees' health or assets.

For the purposes of (1) (b), employees are not pursuing commercial activities.[514] *Per definitionem* employees are not self-employed. They are not independent but dependent. They are subject to their employers' directives. Art. 8 Rome I Regulation clearly conveys that EU PIL regards true and genuine employees as weaker parties, and Recital (31) 4th sentence wants to protect weaker parties against party autonomy *ex ante* in non-contractual matters. The drafting history of (1) (b) explicitly mentioning employees as weaker parties[515] provides ample support. **216**

Who is a true and genuine employee should be judged by the same material, not formal yardsticks as under Art. 20 Brussels I*bis* Regulation.[516] Persons who are formally self-employed but materially only work for a single contracting partner, are to be regarded as employees,[517] for instance if their former employer outsourced them and forced them into only nominal self-employment (as has become a commonplace feature in particular in the transportation sector). **217**

The restrictions in (1) (b) are alleged to be over-protective in so far as they also exclude party autonomy *ex ante* for non-contractual obligations between *two* private parties, in particular C2C, for in such cases informational asymmetry might not be surmised.[518] **218**

5. "Freely negotiated"

(1) (b) requires the choice of law to be freely negotiated. One party must not dictate it to, and force it upon, the other party.[519] Misrepresentation is detrimental anyway.[520] A lack of free **219**

514 *Petch*, [2006] JIBLR 449, 453; *Heiss/Loacker*, JBl 2007, 613, 623; *Leible/Matthias Lehmann*, RIW 2007, 721 (727); *Symeonides*, YbPIL 9 (2007), 149, 170–171; *Symeonides*, NIPR 2010, 191, 204–205; *Gerhard Wagner*, IPRax 2008, 1 (13); *Ofner*, ZfRV 2008, 13, 22; *Leible*, RIW 2008, 257 (263); *Kadner Graziano*, in: Ahern/Binchy p. 113, 120–121; *Kadner Graziano*, RabelsZ 73 (2009), 1 (7); *von Hein*, 82 Tulane L. Rev. 1663, 1694 (2008); *von Hein*, ZEuP 2009, 6 (20); *Vogeler* pp. 259–260; *Wurmnest*, in: jurisPK BGB Art. 14 Rom II-VO note 14; *Picht*, in: Rauscher, Art. 14 Rom II-VO note 20.

515 COM (2006) 83 final p. 3.

516 For the latter see in extensive detail *Mankowski*, in: Rauscher, Art. 20 Brüssel Ia-VO notes 9–14 with ample references.

517 *Debra Allonby v. Accrington & Rosendale College* (Case C-256/01), [2004] ECR I-873 para. 72; LAG Düsseldorf IHR 2014, 242 (244) with note *Mankowski*; *Mankowski*, in: Rauscher, Art. 20 Brüssel Ia-VO note 14.

518 *Rühl*, in: OGK Art. 14 Rom II-VO note 52; see also *Hans-Bernd Schäfer/Lantermann*, in: Basedow/Kono (eds.), An Economic Analysis of Private International Law (2006), p. 87, 94.

519 *Calvo Caravaca/Carrascosa González* pp. 92–93.

520 *Dickinson* para. 13.39.

negotiation can be (rebuttably) presumed where a choice of law clause has been preconceived by, or forms part of the General Terms and Condition of, a single party.[521] This is not a *per se*, automatical and immutable verdict rendered against each and every standard form choice of law clause.[522] To avoid a verdict or incrimination the clause must have been specific object of negotiations in the concrete case.[523] At the least the other party must have been given a fair opportunity to influence it even if the clause eventually was retained as it had been proposed initially, be it only since the other party got compensation in other issues.[524]

220 Otherwise there would be a contradiction with concept and notion of unfair terms as conceived in Art. 3 (2) subparas. 1, 2 Directive 93/13/EEC.[525] That Art. 3 Unfair Contract Terms Directive uses "*individually* negotiated" instead of "*freely* negotiated"[526] should not amount to any material difference.[527] To use "individually negotiated" was even proposed by some Member State delegations[528] although the Council's Common Position did eventually not follow this.[529] But this should not develop into an *argumentum e contrario* barring the borrowing of sensible ideas, either.

221 The Unfair Contract Terms Directive as it is limited to consumer contracts, is certainly not applicable in the strict sense to B2B contracts. But it should be formative in so far as it contains general and generalisable concepts. In the end, "freely" does not add anything substantial to "negotiated".[530] Hence, having recourse to the more elaborate regime as contained in Art. 3 (2) Unfair Contract Terms Directive would provide better guidance for interpretation.[531] Yet Art. 3 (2) subpara. 2 Unfair Contract Terms Directive should be imported only in so far as it also befits choice of law agreements.[532] Of course, any specific reference to consumers' needs to be eliminated.[533]

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521 *Heiss*/*Loacker*, JBl 2007, 613, 623; *de Lima Pinheiro*, RDIPP 2008, 5, 12; *Franzina*, in: Calvo Caravaca/Castellaños Ruiz (dir.), La Unión Europea ante el derecho de la globalización (2008), p. 299, 358; *Leible*, RIW 2008, 257 (260); *Rushworth*/*Scott*, [2008] LMCLQ 274, 293; *Kadner Graziano*, RabelsZ 73 (2009), 1 (8); *Calvo Caravaca*/*Carrascosa González* p. 92; *Francq*, Rev. eur. dr. consomm. 2007–2008, 319, 330, 334; *Dutoit*, in: Liber Fausto Pocar, tomo II (2009), p. 309, 313; *Garofalo*, in: Liber Fausto Pocar, tomo II (2009), p. 413, 418; *Boskovic*, D. 2009, 1639, 1641; *Sujecki*, EWS 2009, 310 (313); *Wurmnest*, in: jurisPK BGB Art. 14 Rom II-VO note 11; see also *Kreuzer*, in: Malatesta p. 45, 54–55; *Pertegás*, in: Malatesta p. 221, 236. *Contra Gerhard Wagner*, IPRax 2008, 1 (14); *Ofner*, ZfRV 2008, 13, 22.

522 As *Rushworth*/*Scott*, [2008] LMCLQ 274, 293 fear.

523 See only *Calvo Caravaca*/*Carrascosa González* p. 92.

524 *Mankowski*, IPRax 2010, 389 (400); to a similar avail *Dickinson* para. 13.41; *Kadner Graziano*, RabelsZ 73 (2009), 1 (8); *Bertoli*, Riv. dir. int. 2009, 697, 710; *Bach*, in: Peter Huber Art. 14 Rome II Regulation note 28.

525 *Leible*, RIW 2008, 257 (260); *Dickinson* para. 13.41; *Mankowski*, IPRax 2010, 389 (400).

526 Emphasis added respectively.

527 *Dickinson* para. 13.40. But cf. *Bach*, in: Peter Huber Art. 14 Rome II Regulation note 28.

528 Council Doc. 6161/06, 3.

529 *Dickinson* para. 13.40.

530 Tentatively stricter *Rugullis*, IPRax 2008, 319 (322).

531 *Dickinson* para. 13.40; *Mankowski*, IPRax 2010, 389 (400).

532 *Mankowski*, IPRax 2010, 389 (400).

533 *Mankowski*, IPRax 2010, 389 (400).

The European Parliament tried to introduce a more transactional standard of arms-length commercial relationships.[534] The Commission subsequently rejected this approach. Instead, "freely negotiated" which the European Parliament had also propagated,[535] became the dish of the day.[536] The reason for the rejection was the difficulty to establish in a concrete case whether a relationship was at arms-length or not. Already the European Parliament itself explained that consumer contracts and agreements not freely negotiated (such as most prominently standard-form contracts, *contrats d'adhésion*) where the parties do not have equal bargaining power were to be excluded.[537] Furthermore, examplewise it named insurance, franchise and licensing contracts as possible instances to be excluded.[538] **222**

Anyway, it does not matter whether the choice of law agreement is formally separated from the any substantive agreement or whether it must be signed separately.[539] This would be a mere formality, but not a material element. On the other hand, elevating such standard to become a requirement would impose additional transactional costs and would be an extraordinary measure without a genuine parallel anywhere in the realm of European PIL in the wider sense. **223**

Contract parties who cater for a choice of law extending to all claims arising out of, or in connection with, the contract might be confronted with an unexpected result, though:[540] Their seemingly unitary choice of law clause would be split. Whereas the part related to contract would be upheld, the part to tort would fail, at least as a direct choice of law. **224**

6. More favourable law approach?

a) Lack of an express implementation

If the prerequisites which (1) (b) establishes are not met a choice of law made *ex ante* is not permitted. A choice of law made *ex ante* ignoring this is thus invalid. Yet with a comparing view at Arts. 6 (2) 2nd sentence; 8 (1) 2nd sentence Rome I Regulation one could feel tempted to import a more favourable law approach for the benefit of the weaker party to be protected. The law chosen might provide for damages in the weaker party's favour where the law applicable absent a choice might not or at least not to this amount, or, conversely, might exempt the weaker party from liability.[541] The weaker party might have profited and benefited if the choice of law had been upheld. Invalidating the choice in turn might benefit the stronger party, the professional.[542] **225**

534 Art. 3 (1) 1st sentence Position of the European Parliament adopted at first reading with a view to the adoption of Regulation EC No. …/2005 of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II), reprinted in: *Malatesta* p. 392.

535 Art. 3 (1) 1st sentence Position of the European Parliament adopted at first reading with a view to the adoption of Regulation EC No. …/2005 of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II), reprinted in: *Malatesta* p. 392.

536 Art. 4 (2) Amended Commission proposal, COM (2006) 83 final.

537 European Parliament, JURI Committee Report, A6–0211/2005 final p. 17.

538 European Parliament, JURI Committee Report, A6–0211/2005 final p. 17.

539 But cf. *Kadner Graziano*, RabelsZ 73 (2009), 1 (8); *Wurmnest*, in: jurisPK BGB Art. 14 Rom II-VO note 11.

540 *Mankowski*, IPRax 2010, 389 (401).

541 *Bach*, in: Peter Huber Art. 14 Rom II-VO note 29.

542 *Bach*, in: Peter Huber Art. 14 Rom II-VO note 29.

226 Generally, executing a more favourable law approach in detail would not be the easiest task. It would force to answer the question whether more lenient causes of liability or higher amounts of damages as against the business would be more favourable.[543]

227 Methodologically, importing the more favourable law principle would be by way of a teleological reduction of (1) (b). Another means of reaching the same result would be to apply (1) (b) only if the weaker party invokes that rule or raises a respective objection.[544] However tempting the result might appear, all roads to it are blocked.[545] (1) (b) indubitably opts for invalidating the choice of law. The more favourable law approach was already a known quantity at the time when (1) (b) was implemented. Arts. 5 (2); 6 (1) Rome Convention, its epitome, had already been implemented for more than a quarter of a century then. Invalidating a choice of law and establishing a more favourable law principle are strictly alternative approaches.[546] The European legislator in (1) (b) clearly decided in favour of the former. (1) (b) does not contain a proviso that it would only come into operation if that favours the weaker party.[547]

b) Impact and conclusion from the indirect application of choice of law rules for contracts via the backdoor of an accessory connection

228 Yet the more favourable law approach is not entirely out of the game, but only for the direct choice of law in tort: After a choice of law in tort not compliant with (1) (b) is invalidated, one is thrown back to the looking for objective connecting factors. Most choices of law in tort might accompany a like choice of law in a contract. Hence, enter Art. 4 (3) 2nd sentence: The tort at stake in most instances will be accessorily connected to the *lex causae* of the contract in the vicinity. For contractual purposes, the choice of law will be upheld – but in B2C contracts or employment contracts subject to the operation of the more favourable law principle.[548]

aa) Structures parallel to Art. 3 Rome I Regulation given general choice of law clauses in the B2B context

229 The question is the more imminent since the Rome I Regulation does not implement a like control mechanism in the contractual realm. Art. 3 Rome I Regulation does not contain a counterpart to "freely negotiated". Whether a choice of law clause in contract becomes part of the contract is subjected to the law designated in that very choice of law by virtue of Art. 3 (5) in conjunction with Art. 10 (1) Rome I Regulation. (1) (b) deviates from that. But (1) (b) has lost its sway once a choice of law for non-contractual obligations cannot be established in a given case.[549] (1) (b) is not applicable anymore if one has reached the stage o objective connections including the accessory connection.

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543 *Mankowski*, IPRax 2010, 389 (401).

544 See *Bach*, in: Peter Huber Art. 14 Rom II-VO note 30.

545 To the same avail *Bach*, in: Peter Huber Art. 14 Rom II-VO note 30.

546 In detail *Mankowski*, ZvglRWiss 105 (2006), 121, 150–160.

547 *Bach*, in: Peter Huber Art. 14 Rom II-VO note 30.

548 *Mankowski*, IPRax 2010, 389 (401).

549 *de Boer*, YbPIL 9 (2007), 19, 27; *Briggs* para. 10.73; *Mankowski*, IPRax 2010, 389 (402); *Landbrecht*, RIW 2010, 783 (787)-788; *Vogeler* pp. 284–291; *Wurmnest*, in: jurisPK-BGB Art. 14 Rom II-VO note 17; *Rühl*, in: OGK Art. 14 Rom II-VO note 31. *Contra Kadner Graziano*, in: Ahern/Binchy p. 113, 124 *et seq.*;

In practice, a choice of law for non-contractual relationships does not take place separately and in isolation, but rather combined with a choice of law in contract, regularly so even in a general clause, in a unitary phrase declaring a certain law to be applicable for all claims arising out of or in connection with the contract. Contracting parties are not likely to swallow why a formally unified and unitary clause should be judged by rather differing yardsticks depending on the concrete realm touched upon.[550] The less likely they are to swallow if a formally unified and unitary choice of law clause was held valid in one regard but invalid in the other. This would not meet business people's mind (nor that of their advisers) and thus disappoint commercial expectations.[551] On the other hand, commercial expectations should not be the sole guidance for PIL since that would give parties too much power. **230**

bb) Indirect applicability of Art. 3 Rome I Regulation in the event of an accessory connection lacking a proper choice of law in the non-contractual realm

An *ex ante* choice of law particularly in tort regularly happens to occur in a direct nexus with contractual relations. In this regular case another aspect calls for attention: If a genuine choice of law in tort is not staged, in these instances an accessory connection in favour of applying the *lex contractus* will be implemented via Art. 4 (3) 2nd sentence Rome II Regulation. Indirectly, a choice of law in contract would then govern the law applicable to the respective tort.[552] Thus, paradoxically, one should rather advise parties not to invest into any attempt to make a proper choice in tort, but instead to rely on any choice in contract to work its magic by virtue of the accessory connection.[553] Indirectly attributing such effect to the PIL rules for contracts by admitting such "indirect" choice of law one imports the standards for an agreement prevailing in the PIL for contracts. "Freely negotiated" is bypassed and circumvented since it does not have a proper counterpart in the Rome I Regulation and the accessory connection gives effect to the contractual choice of law.[554] **231**

cc) Keeping track with Art. 19 pt. 2 Brussels I*bis* Regulation?

Another puzzling question in detail arises if the evident parallel between (1) (a) and Art. 19 pt. 1 Brussels I*bis* Regulation is taken into account, namely as to whether a like parallel exists between (1) (b) and Art. 19 pt. 2 Brussels I*bis* Regulation.[555] Why should an optional choice of law not be permitted along lines paralleling Art. 19 pt. 2 Brussels I*bis* Regulation in so far as it benefits the weaker party?[556] Furthermore, this would establish a certain parallel to Art. 6 (2) Rome I Regulation where an *ex ante* choice of law in a B2C contract can only benefit the consumer (at least in theory). Proceeding down such avenue it would be consequent, though, to look for a B2C relationship or an employment agreement as prerequisite, thus excluding C2C relationships.[557] **232**

Kadner Graziano, RabelsZ 73 (2009), 1 (21) *et seq*.; *Thiede*, in: Verschraegen (Hrsg.), Rechtswahl (2010), p. 51, 67.

550 *Mankowski*, IPRax 2010, 389 (401).

551 See *Fentiman*, (2002) 61 CLJ 50.

552 *Supra* Art. 14 notes 17–19 (*Mankowski*).

553 *Mankowski*, IPRax 2010, 389 (401).

554 *Mankowski*, IPRax 2010, 389 (401).

555 *Mankowski*, IPRax 2010, 389 (401).

556 *De Boer*, YbPIL 9 (2007), 19, 27–28.

557 *Mankowski*, IPRax 2010, 389 (401).

dd) Keeping track with Arts. 6 (2); 8 (1) Rome I Regulation

233 An even more progressive step forward would be to admit a choice of law to the extent that it leads to a law which grants more or better protection to the weaker and thus demanding party than the law objectively applicable. This would establish a more favourable law approach. Institutionally, a more favourable law approach is enshrined in the PIL of consumer or employment contracts by virtue of Arts. 6 (2); 8 (1) Rome I Regulation.[558] Yet this would mirror the result of an accessory connection.[559]

ee) Undermining the intended protection of the weaker party by accessory connection under Art. 4 (3) 2nd sentence?

234 (1) (b) is designed to protect the weaker party against possible dangers arising from a choice of law which the weaker party will hardly if ever have reflected properly. Such intended protection appears to be undermined by the objective connection in the most important scenarios, though: A choice of law will most likely occur in connection with a contract, in an attempt by the stronger party to subject all claims in the context, bet they contractual or non-contractual, to the same choice of law.[560] In a B2C relationship, (1) (b) crosses out any direct choice of law in tort. Yet lacking a direct choice of law the claims in tort will be subject to an accessory connection under Art. 4 (3) 2nd sentence and will be submitted to the *lex contractus*.

235 The *lex contractus* in turn can be designated by a choice of law. Indirectly, the choice of law in contracts has effect on the claims in tort.[561] Where now is the intended protection against a detrimental choice of law? Arguing this way would disregard the protective mechanism which the PIL of contracts implements against choice of law in asymmetric relations. In B2C contracts the more favourable law principle as enshrined by Art. 6 (2) Rome I Regulation reigns. The consumer gains the required protection. It is also consequential to apply this more favourable law principles also with regard to the accessory connection under Art. 4 (3) 2nd sentence.[562] At the first level this is not a matter of discretion but of simply applying rules.[563] If rules do not grant enough protection to the weaker party discretion might become a factor, but only under the escape clause at the second level.[564]

7. Conflicting or colliding choice of law clauses

236 Conflicting choice of law clauses can be experienced with regard to non-contractual obligations but less frequent as in contract where they are a common feature. One has only to imagine each party contracting on the ground of that party's set of Standard Terms and Conditions which in turn contain a choice of law clause in favour of that party's "own" law, i.

558 *Vogeler* pp. 290–291.

559 *Mankowski*, IPRax 2010, 389 (402); *Rühl*, in: OGK Art. 14 Rom II-VO note 33; *Wurmnest*, in: jurisPK Art. 14 Rom II-VO note 17.

560 To the same avail *Bertoli*, Riv. dir. int. 2009, 697, 706.

561 *De Boer*, WPNR 6780 (2008), 988, 990; *De Boer*, NILR 2009, 295, 326; see also *Peter Huber*/*Bach*, IPRax 2005, 73; *von Hein*, RabelsZ 73 (2009), 461 (490); *von Hein*, ZEuP 2009, 6 (21).

562 *Mankowski*, IPRax 2010, 389 (402); *Rühl*, in: OGK Art. 14 Rom II-VO note 33; *Wurmnest*, in: jurisPK Art. 14 Rom II-VO note 17.

563 Tentatively *von Hein*, RabelsZ 73 (2009), 461 (490); *von Hein*, ZEuP 2009, 6 (21).

564 Compare *Boskovic*, D. 2009, 1639, 1641 and also *Symeonides*, 56 Am. J. Comp. L. 173, 185 *et seq*., 200 *et seq*. (2008); *Xandra E. Kramer*, NIPR 2008, 414, 420.

e. the law of the respective party's seat or relevant place of business,[565] and such choice of law clause aspires at covering non-contractual obligations, too. This clash of standard forms, the feared "battle of forms", is even the usual and most common scenario in contract.[566] In contract a choice of law in Standard Terms and Conditions does not carry a lesser legitimacy than a mutually negotiated choice of law agreement.[567]

237 Why do conflicting choice of law clauses occur? They stem from the constellation that either party quasi-automatically introduces its own Standard Terms and ignores the other party's Standard Terms.[568] At the level of contract conclusion this does not result in an open conflict all too often. Regularly there will not be any contradiction against a single clause or any demand to alter single clauses.[569] Ordinary business does not leave time and space for such demands, and on the other hand the dealers who are at a rather low level in the hierarchy of their employing firm, do not have the respective competences.[570] Even if a dealer has the respective competences, he cannot confidently rely on finding a counterpart with like competences.[571] Dealers are interested in making deals and concluding contracts. They only provide for the core issues of the contract and leave the nitty-gritty and its preparation to the in-house legal staff or to external legal advisers who in turn will not take notice of the other party's Standard Terms.[572] There would even be a contradiction to the very standardisation purpose of Standard Terms and the ensuing reduction of transaction costs if parties negotiated individually every single clause in every contract.[573]

238 A particular interest in the content of Standard Terms in all likelihood arises only if an actual controversy breaks out.[574] Business managers across the world put their faith in the reliability of contracts entered into with foreigners. They simply believe that the clauses are there because they generally work; if their advisers have told them that this is so, it is because that is what experience has shown.[575] Conflicting choice of law clauses are not investigated upon in the vast majority of contracts because no relevant controversy

565 See only *Mankowski*, Interessenpolitik und europäisches Kollisionsrecht (2011) p. 19.

566 *Fountoulakis*, Eur. J. Leg. Reform 7 (2005), 303, 305.

567 See only *Schwander*, in: FS Ingeborg Schwenzer (2011), p. 1582 at 1582.

568 *van der Velden*, in: Contributions in Honour of Jean Georges Sauveplanne (1984), p. 241, 242; *Burkart*, Interpretatives Zusammenspiel von CISG und UNIDROIT Principles (2000) p. 224; *Kröll*/*Hennecke* RIW 2001, 736 (739).

569 *Burkart*, Interpretatives Zusammenspiel von CISG und UNIDROIT Principles (2000) p. 224.

570 *Ben-Shahar*, John M. Olin Working Paper 32 (2004), pp. 17 *et seq.*; *Ben-Shahar*, Int. Rev. L. & Econ. 25 (2005), 350, 364 with reference to *Keating*, 98 Mich. L. Rev. 2678, 2699 *et seq.* (2000).

571 *Ben-Shahar*, John M. Olin Working Paper 32 (2004), p. 18; *Ben-Shahar*, Int. Rev. L. & Econ. 25 (2005), 350, 364.

572 *Ben-Shahar*, John M. Olin Working Paper 32 (2004), p. 19; *Ben-Shahar*, Int. Rev. L. & Econ. 25 (2005), 350, 365; *Wildner*, 20 Pace Int'l. L. Rev. 1, 28 (2008).

573 *Ben-Shahar*, John M. Olin Working Paper 32 (2004), p. 21; *Ben-Shahar*, Int. Rev. L. & Econ. 25 (2005), 350, 366 *et seq*.

574 See only *Lando*/*Beale* (eds.), The Principles of European Contract Law Parts I and II (2000) p. 181; *Forte*, in: MacQueen/Zimmermann (eds.), European Contract Law: Scots and South African Perspectives (2006) p. 98; *Magnus*, in: Commercial Challenges in the 21st Century – Jan Hellner in memoriam (2007), p. 185, 187; *Wildner*, 20 Pace Int'l. L. Rev. 1, 28 (2008).

575 *Jan Paulsson*, J. Int. Arb. 30 (2013), 345, 347.

arises.[576] Even when a controversy arises, sorting and even worse fighting it out might not appeal to many businessmen's minds, and the will settle for commercial solutions.[577]

239 In the non-contractual realm, (1) (b) sets the stakes way higher for Standard Terms and Conditions than Art. 3 Rome I Regulation does in contract: They have to overcome the high hurdle that an *ex ante* choice of law must be "freely negotiated".[578] If one reads this as excluding a choice of law in Standard Terms and Conditions the most common scenario of conflicting or colliding choice of law clauses is solved at an abstract level: Neither choice of law clause in any set of Standard Terms and Conditions by either party can prevail. Neither of it qualifies under the auspices of (1) (b).[579]

240 With regard to *ex post* choices of law, (1) (a) does not impose a criterion that they have to be "freely negotiated".[580] Hence, it is conceivable that preformulated choice of law of clauses might be found of both sides of e.g. a settlement or a golden handshake.[581]

241 In these cases under (1) (a) and in so far as one were to accept that a choice of law in Standard Terms and Condition can be regarded as "freely negotiated" for the purposes of (1) (b) five cases or approaches for a legal solution of the battle of forms concerning choice of law clauses can be distinguished. The matrix runs as follows:

242 – Firstly, the parties both have their respective places of business in the State of the chosen law or for which ever reason both favour the same law as applicable in their respective sets of Standards Terms and Conditions. This is the simple one: In fact both choice of law clauses happen to coincide and do not collide.[582]

243 – Secondly, in the first place Art. 3 (5) in conjunction with Art. 10 (1) Rome I Regulation *per analogiam* is applied separately to each of the both choice of law clauses, and it is each judged for each choice of law clauses separately as to whether it is consensually valid according the law designated in it; the respective law designated provides its Regulation of Standard Terms and Conditions, and here "Knock out"-rule or "Theory of the last (uncontested) word" bear relevance.[583] Such separate judgment leads to the result that

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576 See only *Mankowski*, Interessenpolitik und europäisches Kollisionsrecht (2011) p. 21.

577 See only *Mankowski*, Interessenpolitik und europäisches Kollisionsrecht (2011) p. 21.

578 *Rühl*, in: OGK Art. 14 Rom II-VO note 106.

579 *Rühl*, in: OGK Art. 14 Rom II-VO note 106.

580 *Heiss/Loacker*, JBl 2007, 613, 623; *Vogeler* p. 173.

581 *Heiss/Loacker*, JBl 2007, 613, 623; *Leible*, RIW 2008, 257 (260); *Vogeler* p. 171; *Rühl*, in: OGK Art. 14 Rom II-VO note 106.

582 See only *Mankowski*, Seerechtliche Vertragsverhältnisse im Internationalen Privatrecht (1995) pp. 30 *et seq.; Mankowski*, in: Spindler (eds.), Vertragsrecht der Internet-Provider (2nd ed. 2004) Part III Art. 14 Rom II-VO note 12; *Pfeiffer*, in: Gounalakis (ed.), Handbuch E-Business (2003), § 12 Art. 14 Rom II-VO note. 53; *Matthias Weller/Nordmeier*, in: Spindler/Schuster, Recht der elektronischen Medien (3rd ed. 2015) Art. 3 Rom I-VO note 12 and also *Hill*, (2004) 53 ICLQ 325, 326.

583 To this avail *Meyer-Sparenberg*, RIW 1989, 347 (348); *Stefan Tiedemann*, IPRax 1991, 424 (425); *Egeler*, Konsensprobleme im internationalen Schuldvertragsrecht (1994) pp. 202–208; *Mankowski*, Seerechtliche Vertragsverhältnisse im Internationalen Privatrecht (1995) pp. 30 *et seq.*; *Mankowski*, Interessenpolitik und europäisches Kollisionsrecht (2011) p. 21; *Oliver Sieg*, RIW 1997, 811 (817); *Schwander*,

each of the choice of law clauses does not hold up to the Regulation of the law designated in it respectively. In the next step an unwritten tie-breaker rule is introduced into Art. 3 (5) in conjunction with Art. 10 (1) Rome I Regulation *per analogiam* denying any conflicting choice of law clauses for lack of validity.[584]

– Thirdly, in the first place Art. 3 (5) in conjunction with Art. 10 (1) Rome I Regulation *per analogiam* is applied separately to each of the both choice of law clauses, and it is each judged for each choice of law clauses separately as to whether it is consensually valid according the law designated in it; the respective law designated provides its Regulation of Standard Terms and Conditions, and here "Knock out"-rule or "Theory of the last (uncontested) word" gain their relevance.[585] Such separate judgment leads to the result that only one of the choice of law clauses is valid according to the Regulation of the law designated in it respectively. In the next step an unwritten tie-breaker rule is introduced into Art. 3 (5) in conjunction with Art. 10 (1) Rome I Regulation *per analogiam* appreciating the choice of law in the only "surviving" choice of law clause.[586] **244**

– Fourthly, in the first place Art. 3 (5) in conjunction with Art. 10 (1) Rome I Regulation *per analogiam* is applied separately to each of the both choice of law clauses, and is judged for each choice of law clauses separately as to whether it is consensually valid according to the law designated in it.[587] The respective law designated provides its Regulation of Standard Terms and Conditions, and here "Knock out" rule or "Theory of the last (uncontested) word" gain relevance. Such separate judgment leads to the result that each of the choice of law clauses holds up to the regulation of the law designated in it respectively. In the next step an unwritten tie-breaker rule is introduced into Art. 3 (5) in conjunction with Art. 10 (1) Rome I Regulation which declares the law applicable that would be applicable in the absence of a consensually valid choice with regard to the question of consensual validity.[588] This would militate against the principle that Arts. 20 Rome I Regulation; 24 Rome II Regulation exclude *renvoi* and consequentially the private international law rules of any other law do not have any sway whatsoever.[589] **245**

SZIER 1998, 408, 420; *Dannemann*, in: Lex Mercatoria – Essays in Honour of Henry Merryman (2000), p. 199, 210.

584 To the same avail *Carrascosa González* p. 147.

585 To this avail consistently yet again the authors cited in the preceding footnote.

586 *Mankowski*, Seerechtliche Vertragsverhältnisse im Internationalen Privatrecht (1995) pp. 30 *et seq.*; *Mankowski*, Interessenpolitik und europäisches Kollisionsrecht (2011) p. 21; *Carrascosa González* p. 147; *Matthias Weller*/*Nordmeier*, in: Spindler/Schuster, Recht der elektronischen Medien (3rd ed. 2015) Art. 3 Rom I-VO note 12; *Magnus*, in: Staudinger Art. 3 Rom I-VO note 174; *Wenner*, Internationales Vertragsrecht (3rd ed. 2013) para. 74; see also *Lando*, RabelsZ 38 (1974), 388 (391); *Kaczorowska*, Rev. dr. int. dr. comp. 1991, 294.

587 To this avail *Dutta*, ZvglRWiss 104 (2005), 461, 471–477.

588 *Mankowski*, Seerechtliche Vertragsverhältnisse im Internationalen Privatrecht (1995) pp. 30 *et seq.*; *Matthias Weller*/*Nordmeier*, in: Spindler/Schuster, in: Spindler/Schuster, Recht der elektronischen Medien (3rd ed. 2015) Art. 3 Rom I-VO note 12; *Magnus*, in: Staudinger Art. 3 Rom I-VO note 174; *Wenner*, Internationales Vertragsrecht (3rd ed. 2013) para. 74.

589 *Vogeler* p. 165 and in contract *Egon Lorenz*, RIW 1992, 697 (698–700); *Heinrich Dörner*, LM H. 9/2000 Art. 27 EGBGB 1986 Nr. 8 fol. 4; *Mankowski*, EWiR Art. 27 EGBGB 1/2000, 967, 968; *Hohloch*/*Kjelland*, IPRax 2002, 30 (31); see also BGH NJW-RR 2000, 1002 = IPRax 2002, 37.

246 – Fifthly, the parties are assumed to forsake any impression of a choice of law, and the law objectively determined applies.[590] It can be very well put forward that this approach protects the unity with the eventually applicable law.[591] But it disrespects and neglects Art. 3 (5) in conjunction with Art. 10 (1) Rome I Regulation *per analogiam*. It does not even attempt at giving Art. 3 (5) in conjunction with Art. 10 (1) Rome I Regulation *per analogiam* a proper ambit but immediately reverts to some kind of tie-breaker rule which cannot be found in Art. 3 (5) in conjunction with Art. 10 (1) Rome I Regulation *per analogiam*. A rule remains a relevant rule even if it does not lead to immediate results.

247 Art. 6 (1) (b) Hague Principles on Choice of Law attempts at a partial solution by distinguishing between genuine conflict cases on the one hand and no-conflict cases on the other hand. In non-conflict cases the laws designated by the competing choice of law of clauses happen to coincide as to their material content with regard to consensus issues. A tie-breaker rule is introduced indicating a lack of consensus and thus progressing to the application of the default rule, the objectively applicable law.[592] Yet this should not be taken as a model for interpreting Art. 3 (5) in conjunction with Art. 10 (1) Rome I Regulation.[593] Firstly, it requires a potentially enormous and costly effort to solve the case according to two laws and to compare their respective results.[594] Secondly, it deletes some intermediate steps and holds direct recourse to substantive laws concerned, introducing an own tiebreaker rule out of the blue.[595] Thirdly, neither party can truly rely on its own Standard Terms in the event of conflicting choice of law clauses.[596]

8. Lack of consent under special circumstances, Art. 3 (5) in conjunction with Art. 10 (2) Rome I Regulation *per analogiam*

248 Reverting to the Rome I Regulation in order to complete the regime of Art. 14 for aspects of parties' choice of law not expressly catered for in Art. 14, at least theoretically implies also an analogy to Art. 3 (5) in conjunction with Art. 10 (2) Rome I Regulation.[597] Art. 10 (2) Rome I Regulation (also if applied *per analogiam*) permits a party, in order to establish that it did not consent, to rely upon the law of the country in which it has its habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of its conduct in accordance with the law designated in the choice of law agreement.

249 Yet such analogy to Art. 3 (5) in conjunction with Art. 10 (2) Rome I Regulation will only rarely become relevant in the context of Art. 14, though. (1) (b) established a requirement that an *ex ante* choice of law must be "freely negotiated" even between professionals. It does not enforce *ex ante* choices between professionals and consumer or employees at all. Even in

590 *von Bar*, IPR II para. 475; *von Hoffmann*, in: Soergel, Art. 27 EGBGB Art. 14 Rom II-VO note 10; *von Hein*, in: Rauscher Art. 3 Rom I-VO note 43; *Thorn*, in: Palandt, Art. 3 Rom I-VO note 9.

591 *von Hein*, in: Rauscher Art. 3 Rom I-VO note 43.

592 See *Garcimartín Alférez*, in: Homenaje al Rodrigo Bercovitz (2013), p. 241; *Kadner Graziano*, Yb. PIL 14 (2012/13), 71.

593 *Pfeiffer*, in: FS Ulrich Magnus (2014), p. 501, 508.

594 *Pfeiffer*, in: FS Ulrich Magnus (2014), p. 501, 508.

595 *Martiny*, RabelsZ 79 (2015), 624 (643).

596 *Pfeiffer*, in: FS Ulrich Magnus (2014), p. 501, 508.

597 *Vogeler* pp. 152–153; *Rühl*, in: OGK Art. 14 Rom II-VO notes 105, 110.

so far as the hurdle of "freely negotiated" might be overcome professionals are not easily permitted to rely of the law of their habitual residence (that notion of habitual residence of course being determined by Art. 23[598]). Generally, professionals have to take care of their own business and cannot claim to have been surprised all too regularly. Simple carelessness does not pay off in their favour. If you decided to swim in a shark-infested pool of cross-border B2B relations you cannot claim to be surprised by your counterparty introducing its home law in a choice law clause.

250 As to (1) (a), the underlying *ratio* is that even non-professional parties are deemed to be sufficiently alerted if their counterparty proposes a certain choice of law after the event giving rise to the damage has occurred, in order to allow an *ex post* choice. But that does not exclude an analogy to Art. 3 (5) in conjunction with Art. 10 (2) Rome I Regulation under all and every circumstance. (1) (a) issues some kind of general permit whereas such analogy imposes some degree of residual control in exceptional cases. The former operates on an abstract, the latter on a concrete level of protection. However, even under these ramifications professionals do only stand a small chance to avail themselves of any concrete protection. The case might be different for private parties. Yet even they can hardly be surprised in so far as they have taken legal advice before apparently consenting.[599]

251 In the rare instances where an analogy to Art. 3 (5) in conjunction with Art. 10 (2) Rome I Regulation might become effective, Art. 10 (2) Rome I Regulation is imported into the non-contractual realm without additional modifications. This includes in particular its limited scope which includes only consent as such but not e.g. rights to rescind or to revoke.[600] Furthermore, it must be strictly observed that Art. 10 (2) Rome I Regulation does not extend to material validity (thus not covering e.g. mistake, duress, fraud) and not even to all aspects of consent.[601] Historically so called *kaufmännische Bestätigungsschreiben* (commercial letters of confirmation) have been named as the most legitimate instance and prime case for Art. 10 (2) Rome I Regulation to step in.[602]

V. Rights of third parties

1. General considerations

252 According to (1) subpara. 2, a choice of law shall not prejudice the rights of third parties. Superficially this appears to resemble Art. 3 (2) 2nd sentence Rome I Regulation. But it serves different purposes and relates to different phenomena. Art. 3 (2) 2nd sentence Rome I Regulation only operates in the specific context of a *subsequent* choice of law which might not deprive third parties of the legal position which they have acquired under the former *lex*

598 *Vogeler* p. 158.

599 *Mankowski*, RIW 1996, 382 (384); see *Kaye*, The New Private International Law of the European Community (1993) p. 277.

600 See only BGHZ 135, 124 (137–138); *Mankowski*, RIW 1996, 382 (384–387); *Hausmann*, in: Staudinger Art. 10 Rom I-VO note 50.

601 See only *Baumert*, RIW 1997, 805 (807); *Hausmann*, in: Staudinger Art. 10 Rom I-VO note 52.

602 See only *Sandrock*, RIW 1986, 841 (849); *Mankowski*, RIW 1994, 421 (422); *Kost*, Konsensprobleme im internationalen Schuldvertragsrecht (1995) pp. 97 *et seq.*, 180 *et seq.*; *Hausmann*, in: Staudinger Art. 10 Rom I-VO note 54.

causae of the contract. (1) subpara. 2 contains a general restriction and qualification for every choice of law in the realm of non-contractual obligations, be such choice *ex ante*, *ex post* or subsequent.

253 Third parties should be taken to exclude both the original parties to the agreement and persons succeeding to their rights and obligations with regard to the non-contractual obligation in question.[603] Those who are not parties to the agreement deserve protection (*res inter alios acta non noceat nec nocere posseat*), but that does not extend to persons, particularly successors in title, whose claim is based upon the agreement.[604]

2. Instances covered

254 (1) subpara. 2 formed part of the legislative history from its very beginning.[605] (1) subpara. 2 has been introduced primarily with regard to insurance. In effect, it clarifies and certifies that the choice of law may not lead to the tortfeasor's insurer being liable to pay a sum in excess of that which the insurer would have to pay absent the choice of law.[606] This holds true in particular in so far that a choice of law as between victim and tortfeasor should be ignored in determining the law applicable to the non-contractual obligation for the purposes of a direct action against the tortfeasor's insurer under Art. 18.[607]

255 But conversely, where a victim brings proceedings directly against the insurer pursuant to Art. 18, and the insurer does not obtain the liable person's consent to the selection of the applicable law, the substantive settlement of the claim against the person liable will extinguish the victim's rights against that person whereas the insurer's agreement as to the applicable law will not bind the person liable in relation to any counterclaim that it may bring against the claimant-victim.[608]

256 But insurance is not the only relevant instance.[609] Another instance appears where two or more tortfeasors have acted in concert or jointly:[610] Suppose that the victim and one of the tortfeasors agree on a law which does not entitle the victim to damages. (1) subpara. 2 prevents such agreement from excluding the other tortfeasor(s) from redress against the first tortfeasor. If this can be said to be already catered for by Art. 20, Art. 20 is not applicable in

603 *Dickinson* para. 13.27; *Mankowski*, IPRax 2010, 389 (402).

604 *Plender/Wilderspin* para. 29–024.

605 *von Hein*, in: Calliess, Art. 14 Rome II Regulation note 15 with reference to Art. 8 3rd sentence GEDIP Draft 1998; Art. 6 (1) 2nd sentence Commission Internal Draft 1999; Art. 11 (1) 2nd sentence Commission Draft Proposal 2002; Art. 10 (1) Commission Proposal COM (2003) 427 final; Art. 3 (1) 3rd sentence Parliament's Position 2005; Art. 4 (1) 3rd sentence Revised Commission Proposal COM (2006) 83 final; Art. 14 (1) 2nd sentence Common Position.

606 Commission Proposal COM (2003) 427 final p. 25; *Fricke*, VersR 2005, 726 (738); *von Hein*, VersR 2007, 440 (445); *Leible/Matthias Lehmann*, RIW 2007, 721 (727); *Junker*, in: Münchener Kommentar Art. 14 Rom II-VO note 49; *Gebauer*, in: Nomos Kommentar Art. 14 Rom II-VO note 42; *Picht*, in: Rauscher, Art. 14 Rom II-VO note 43.

607 *Dickinson* para. 13.27.

608 *Plender/Wilderspin* para. 29–025.

609 *Picht*, in: Rauscher, Art. 14 Rom II-VO note 43.

610 *Bach*, in: Peter Huber, Art. 14 Rome II Regulation note 31.

those instances, and only (1) subpara. 2 applies, where the victim and one of the tortfeasors agree on a law which liberates only this tortfeasor, but not the other tortfeasor(s) from liability; in this instance only (1) subpara. 2 grants protection for the other tortfeasor(s) against redress or contribution claims by the first tortfeasor.[611]

257 A more protracted case might arise if the victim and one of the tortfeasors choose a certain law in so far as that choice may not be taken into account in considering whether, in relation to an action brought by the victim against another tortfeasor, there is a manifestly closer connection to the law of the State the law of which has been chosen.[612]

258 Conceivable scenarios also comprise assignors, creditors seizing or freezing assets, or persons who might be considered as "indirect" victims. "Indirect" victims encompass at least the "direct" victim's children or spouse who depend upon obtaining maintenance from the "direct" victim when the latter was killed or became disabled from earning money for such maintenance).[613] Yet one should be rather cautious to extend the circle of relevant third parties and should limit that circle to persons who retain some kind of more or less direct connection with the damage suffered by the first victim.[614] Consequentially, the parties' choice of law exerts effects with respect to other persons outside that circle.[615]

259 Relatives, spouse or partner who get a nervous shock themselves upon receiving the message that the "direct" victim" was hurt or killed, suffer an own damage germane and personal to them. They are not "indirect", but "secondary" victims of another tort than the original one.[616] There are two torts at stake, and the tortfeasor's liability to those "secondary" victims of the "secondary" tort does not arise from nor is influenced by its relationship with the "primary" victim of the "primary" tort.

3. Effects and consequences

260 It does not invalidate the choice of law agreement in its entirety but only limits its effects as they adversely, i.e. detrimentally affect third parties. As between the parties of the agreement that agreement remains perfectly valid with regard to its *inter partes* effects. Hence, only relative invalidity towards every third party affected prevails.[617] But the application of the provision on which the third party relies is not wholly substituting for the conflicting term.[618]

261 Conceptionally and structurally, it is an important question as to whether relative invalidity reigns in relation to every third party or only to such third parties who are *adversely* affected. If the latter the choice of law would remain perfectly valid in relation to such third parties

611 *Dickinson* para. 13.27; *Bach*, in: Peter Huber, Art. 14 Rome II Regulation note 31.

612 *Dickinson* para. 13.27.

613 *Junker*, in: Münchener Kommentar, Art. 14 Rom II-VO note 50; *Picht*, in: Rauscher, Art. 14 Rom II-VO note 43.

614 *Picht*, in: Rauscher, Art. 14 Rom II-VO note 44.

615 *Picht*, in: Rauscher, Art. 14 Rom II-VO note 45.

616 *Mankowski*, JZ 2016, 310 (311).

617 *Vogeler* p. 368 with reference to *Werner Lorenz*, IPRax 1987, 269 (273); *Spickhoff*, in: Bamberger/Roth, Art. 3 Rom I-VO note 27.

618 *Plender/Wilderspin* para. 29–025.

who would benefit from the parties' choice of law. The language employed does not tip the scale either way: prejudice, préjudice, pregiudica, perjudicará, prejudica, berührt, innebära, onverlet, atingere, naruszać, vpliva, sértheti, tippreġudika. There is neither a clear restriction like "adversely affect" nor a proviso like "unless they benefit from such choice".

262 A clean-slate argument might militate in favour of suppressing even choices beneficial to a certain third party for it relives of any necessity to compare the results reached with a choice of law to the ones without a choice of law which can be a tiresome and complicated process.[619] On the other hand, one can not argue that accepting a choice benefitting certain third parties would introduce a split into the agreement contrary to the parties' intention to cater for uniform ground[620] since non permitting such choice would lead to relative invalidity and thus to a split, too, only the other way round.

VI. Choice of law clauses in contract and their scope in the non-contractual realm

1. Generalities

263 In most instances, even B2B parties will not conclude a choice of law agreement in insolation solely in respect of their non-contractual obligations, but in the context of a contractual relationship between them. The ordinary case will see a formally unitary and unified choice of law clause in a contract attempting at covering and embracing both contractual and non-contractual obligations. Whether the parties have employed language wide enough to include non-contractual obligations, too, is a matter of interpretation of their agreement. Regularly, the choice of law clause will be designed for contractual relationships, and the intended extension to the non-contractual realm comes as some kind of annex, at least of second-line thought.

264 Yet prudent parties will consider introducing a proper choice of law agreement covering the non-contractual realm. They can only be strongly advised to making an express choice of their non-contractual obligations, wherever possible and admitted,[621] in order to avoid subsequent irritations or becoming dependent on the viles whether an accessory connection aligns their contractual and non-contractual obligations. Commercial parties are used to take their conflictual fate in their own hands, and should do so also with regard to their non-contractual obligations.

265 If the parties want to choose the law for all obligations "arising out of the relation between the parties" one is bound to distinguish between contractual and non-contractual obligations because "the relation between the parties" is a wider notion, at least wider than "arising out of this contract". There is a broad range of variations particularly so in clauses drafted in English. It displays the full beauty of English prepositions and literal interpretation sticking to the wording of a given clause.[622] "Arising under this contract", "Arising out of this contract", "Arising in any way whatsoever out of this contract", "Arising from this contract", "Arising in connection with this contract", "in relation to this contract", "construction of

619 *Picht*, in: Rauscher, Art. 14 Rom II-VO note 46.

620 As does *Vogeler* pp. 367–368.

621 In particular *Holger Jakobs*, CDT 9 (1) (2017), 153.

622 See *Briggs* para. 5.73.

this contract" and "any disputes" are only the most popular (or notorious) amongst the possible variations.[623] Presumably they are of different width and ambition.[624] The core issues are the inclusion of rectification on the one hand[625] and of precontractual relations on the other hand.[626] Even in England one has turned from a literal interpretation towards a more purposive reading.[627] German-language clauses are not less differing,[628] as are also their French, Spanish etc. counterparts.

In so far as the parties employ a special kind of choice of law clause for their contractual relationship and extend this to the non-contractual realm, a principle of "Follow the leader" applies. The non-contractual choice follows the contractual choice in all regards which are not specifically regulated in another vein by Art. 14. The choice in contracts takes the lead, and the choice in trot etc. follows. If the choice of law in contract is a floating, split, hierarchical or alternative choice of law,[629] the same will apply to the accompanying choice of law in tort etc. unless Art. 14 puts a hindrance in the way of the extension or the parties themselves have indicated otherwise. **266**

2. Proposed specimen clauses

Particularly in B2B relations where Art. 14 (1) (a) allows an *ex ante* choice of the law applicable to non-contractual obligations, it might be advisable to draft a choice of law clause which also covers concurring claims in tort. Such a clause might for example read as follows: **267**

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623 See *Briggs* paras. 5.74–5.91.

624 Vgl. *Heyman v. Darwins* [1942] AC 356, 385, 399 (H.L.); *The "Evje"* [1975] AC 757, 814, 817 (H.L.); *The "Antonis P. Lemos"* [1985] AC 711, 728 (H.L.); *Mackender v. Feldia AG* [1967] 2 QB 50, 598 (C.A., per Lord *Denning* MR), 602 *et seq*. (C.A., per *Diplock* LJ); *The "Makefjell"* [1976] 2 Lloyd's Rep. 29, 33 (C.A., per *Cairns* LJ); *Ashville Investments Ltd. v. Elmer Contractos Ltd.* [1989] QB 488 (C.A.); *Fillite (Runcorn) v. Aqua-Lift* (1989) 26 Construction LR 66 (C.A.); *Pacific Resources Corp. v. Credit Lyonnais Rouse* C.A. 7 October 1994 (per *Hirst* LJ); *Fiona Trust & Holding Corp. v. Privalov* [2007] EWCA Civ 20, [2007] Bus. LR 686 (C.A.), affirmed sub nomine *Premium Nafta Products Ltd. v. Fili Shipping Corp*. [2007] UKHL 40, [2008] 1 Lloyd's Rep. 254, [2007] 4 All ER 951 (H.L.); *Comandate Marine Corp. v. Pan Australia Shipping Pty. Ltd.* (2006) 157 FCR 45 [175] (Fed. C.A. Australia, per *Allsop* J.); *FAI General Insurance Co. Ltd. v. Ocean Marine Mutual Protection and Indemnity Association* [1998] 1 Lloyd's Rep. 24, 31 *et seq*. (NSW High Ct.).

625 *Briggs* para. 5.79, 5.88 with reference to *Pacific Resources Corp. v. Credit Lyonnais Rouse* C.A. 7 October 1994 (per *Hirst* LJ); *Ethiopian Oilseeds and Pulses Export Co. v. Rio del Mar Foods* [1990] 1 Lloyd's Rep. 86 (Q.B.D., *Hirst* J.); *Kathmer Investments Pty. Ltd. v. Woolworts Pty. Ltd.* 1970 (2) SA 498 (App. Div., Sup. Ct. SA); *Roose Industries Ltd. v. Ready Mix Concrete Ltd.* [1974] 2 NZLR 246 (NZ C.A.); *Drennan v. Pickett* [1983] 1 Qd. R. 445 (High Ct. Qd.); *Francis Travel Marketing Pty. Ltd. v. Virgin Atlantic Airways Ltd.* (1996) 39 NSWLR 160 (NSW C.A.); *Comandate Marine Corp. v. Pan Australia Shipping Pty. Ltd.* (2006) 157 FCR 45 (Fed. C.A. Australia).

626 *Mankowski*, in: FS Dieter Martiny (2014), p. 449, 465–466.

627 *Briggs* para. 5.67 with reference to *Fiona Trust & Holding Corp. v. Privalov* [2007] EWCA Civ 20, [2007] Bus. LR 686, affirmed *sub nomine Premium Nafta Products Ltd. v. Fili Shipping Corp.* [2007] UKHL 40, [2008] 1 Lloyd's Rep. 254, [2007] 4 All ER 951 (H.L.).

628 *Mankowski*, in: FS Dieter Martiny (2014), p. 449, 466.

629 On these types of choice of law clauses *Mankowski*, in: Magnus/Mankowski, Art. 3 Rome I Regulation notes 344–373.

"(1) This Agreement is governed by the law of X.

(2) This choice of law applies (to the exclusion of claims based on an act of unfair competition, the restriction of competition of an infringement of an intellectual property right pursuant to Arts. 6 (4) and 8 (3) Rome II Regulation) also with regard to any concurring claims under a tort arising out of, or related to, the performance of this Agreement."[630]

268 The eminent English conflicts scholar *Adrian Briggs* has proposed an elaborate version of a specimen choice of law clause. Making an express choice of law,[631] aiming at being exclusive,[632] it reads:

"This Agreement and the whole of the relationship between the parties to it, is governed by the law of X. The parties agree that all disputes arising out of or in connection with it, or with the negotiation, validity or enforceability of this Agreement, and the relationship between the parties, and whether or not the same shall be regarded as contractual claims, shall be exclusively governed by and determined only in accordance with the law of X."[633]

269 A more condensed form might lead to the following shorter wording considered appropriate by another eminent English conflicts scholar, *Andrew Dickinson*:

"This Agreement and all matters (including, without limitation, any contractual or non-contractual obligation) arising from or connected with it are governed by the law of X."[634]

3. Extension to claims in tort

270 If parties want to extend their choice of law beyond the ambit of the contract as such and want to extend it to concurring or non-concurring claims in tort, delict or quasi-delict, they might be advised to opt for wider formulations and to avoid any express reference to the contract as such, though, for this would be tentatively limiting.[635] Businessmen will generally not only want any dispute arising out of the relationship into which they have entered, whether based in contract or tort or anything else, to be resolved by the same tribunal,[636] but also to be governed by the same applicable law if ever possible. Accordingly, clauses are often couched in terms which are deliberately and on purpose wide enough to cover non- contractual claims which have a connection with the contractual relationship.[637] One stop shopping does not fit only for jurisdictional issues, but has also a great appeal in determining

630 *Ostendorf*, IHR 2012, 177 (180) (opting for the "laws" of X, plural in (1) which would be inconsistent with the point of criticism leveled in Art. 3 Rom I-VO note 52 above).

631 *Briggs* para. 5.18.

632 *Briggs* para. 5.20.

633 *Briggs* para. 5.17.

634 *Dickinson* para. 13.25.

635 *Born*, International Arbitration and Forum Selection Agreements: Drafting and Enforcing (4th ed. 2013) p. 160.

636 *AMT Futures Ltd. v. Marzillier, Dr. Meier & Dr. Guntner Rechtsanwaltsgesellschaft mbH* [2014] EWHC 1085 (Comm), [2015] 2 WLR 187 [41] (Q.B.D., *Popplewell* J.).

637 *Fiona Trust and Holding Corp. v. Privalov* [2007] UKHL 40, [2007] Bus. L.R. 1719, [2008] 1 Lloyd's

the applicable law. Regularly law and jurisdiction clauses are a combined effort and do not distinguish between their single elements in the goal pursued. Ordinarily they call for the *lex fori prorogati* as the law applicable to the merits. Furthermore, an appropriately wide phrased choice of law in a related contract clause might help to reduce uncertainty under Art. 4 (3) 1st sentence[638] and might trigger the application of Art. 4 (3) 2nd sentence.

Tortious conduct by third parties should not be subjected to the choice of law clause in the contract.[639] This might not be an automatism, but should serve as a rule of doubt at least.[640] *Res inter alios acta nec nocet nec prodest* applies as a general maxim (and warning) in PIL, too. **271**

a) Claims in tort concurring with genuinely contractual claims

"Arising out of the contract" ordinarily covers claims in tort, too.[641] The parties may intend to see claims in tort which concur with genuinely contractual claims, governed by the same law as those contractual claims. One stop law shopping is their aim. Accordingly, they opt for a wide wording of their choice of law clause and refrain from phrasing it in a manner that could be read as being limited to contractual claims. But of course this has to conform with the stricter regime established by Art. 14. In the field of concurring claims, the objective determination of the law applicable to the claim in tort should also be observed. It is exactly in this field that the *akzessorische Anknüpfung* via Art. (3) 2nd sentence might become particularly helpful and might allow contractual party autonomy governed by Art. 3 Rome I Regulation in, indirectly[642] by the backdoor.[643] But a direct, express and unambiguous choice of the law applicable to the non-contractual relation possibly at stake would be both the more elegant and the most advisable solution for provident commercial parties, and Art. 14 allows so.[644] **272**

A special question is which law decides whether there are concurring claims in contract and tort or whether a *principe de non cumul* applies.[645] As far as party autonomy reaches the chosen law should be called upon to make such decision.[646] **273**

Rep. 254 (H.L.); *AMT Futures Ltd. v. Marzillier, Dr. Meier & Dr. Guntner Rechtsanwaltsgesellschaft mbH* [2014] EWHC 1085 (Comm), [2015] 2 WLR 187 [41] (Q.B.D., *Popplewell* J.).

638 *Vidmar*, ZfRV 2015, 219, 224.

639 *Briggs*, para. 5.88; *Mankowski*, in: Magnus/Mankowski, Art. 3 Rome I Regulation note 483; but cf. *ET Plus SA v. Welter* [2005] EWHC 2115 (Comm), [2006] 1 Lloyd's Rep. 251 (Q.B.D., *Gross* J.).

640 *Mankowski*, in: Magnus/Mankowski, Art. 3 Rome I Regulation note 483; compare *Credit Suisse First Boston (Europe) Ltd. v. MLC (Bermuda) Ltd.* [1999] 1 All ER (Comm) 237 (Q.B.D.); *Briggs*, para. 5.90.

641 *The "Playa Larga"* [1983] 2 Lloyd's Rep. 171 (C.A.); *Continental Bank NA v. Aeakos Compania Naviera SA* [1994] 1 WLR 588 (C.A.); *Government of Gibraltar v. Kenney* [1956] 2 QB 410, 422 (Q.B.D., *Seilers* J.).

642 See only *Mankowski*, in: von Bar/Mankowski, Internationales Privatrecht I (2nd ed. 2003) § 7 note 73 with further references.

643 See only *Junker*, in: Münchener Kommentar zum BGB, Art. 4 Rom II-VO note 51; *von Hein*, in: Calliess, Art. 4 Rome II Regulation note 59; *Bach*, in: Peter *Huber*, Art. 4 Rome II Regulation note 86.

644 See *Gerhard Wagner*, IPRax 2008, 1 (6); *Ostendorf*, IHR 2012, 177 (180); *Martina Walter*, in: Ostendorf/Kluth (eds.), Internationale Wirtschaftsverträge (2013), § 13 Art. 14 Rom II-VO note 77; *Land*, BB 2013, 2697 (2699); *Holger Jacobs*, IPRax 2015, 293 (297).

645 In detail *Spelsberg-Korspeter*, Anspruchskonkurrenz im internationalen Privatrecht (2009) pp. 110 et passim; see also *Mankowski*, RIW 2011, 420 (422).

646 *Mankowski*, in: FS Dieter Martiny (2014), p. 449, 469.

b) Claims in tort with a cause independent from the contract

274 Claims in tort with a cause independent from the contract might not be the object of an *akzessorische Anknüpfung* (accessory connection) under Art. 4 (3) Rome II Regulation. They are not located in the close vicinity of the contract, but are only rather loosely and accidentally connected with the contract. They are not connected closely enough with the contract to apply the law governing the contract as their proper law, too.[647] Hence, the basic condition for an *akzessorische Anknüpfung* (accessory connection) is lacking.[648] This does not automatically cast the die for the contractual arena. But one could hardly qualify such torts arising independently of the contract as "arising out of this contract". On the other hand, there is still parties' general interest to see all their relations governed by the same law. But this interest must be expressed in terms suitably wide. If parties themselves take their contract as the point of reference they do not opt for the widest possible wording of the clause.[649]

4. Extension to claims in unjust enrichment

275 A further candidate to be covered by clauses for claims "arising out of or in relation with the contract" are claims in unjust enrichment, primarily *condictiones indebiti*. But attention has to be paid to Art. 12 (1) (e): In so far as this rule characterises *condictiones indebiti* as contractual, they are beyond any doubt governed by the contractual regime and will already be covered by the less ambitious clause "arising of this contract". This is generally the case under the auspices of Art. 12 (1) (e).[650] Parties are at liberty to define their own notion of "contract" in order to escape Arts. 10; 12 (1), though.[651] Arts. 10; 12 (1) are only default rules, filling gaps in the contractual frameworks if there are any.[652]

5. Infection of the combined choice of law in tort etc. by an invalid choice of law in contract?

276 Under exceptional circumstances, the basic choice of law in contract might be held invalid. This might occur e.g. by an assumed interference of Directive 93/13/EEC in a consumer contract.[653] Hence, the basic agreement in contract falters. Does this automatically imply an infection of the choice of law agreement for the non-contractual realm, too? Does the failing choice of law in contract automatically tear down the choice of law in tort etc.? It appears reasonable to infer that the parties to the agreement wanted to align the laws applicable to contractual and non-contractual matters by their concurring choice of law on both counts.

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647 *Mankowski*, in: FS Dieter Martiny (2014), p. 449, 469–470.

648 See only *Kreytenberg*, Die individuelle Schwerpunktbestimmung internationaler Schuldverträge nach der Ausweichklausel des Artikel 4 Absatz 5 Satz 2 EVÜ (2007) p. 188.

649 *Mankowski*, in: FS Dieter Martiny (2014), p. 449, 470.

650 See only *Spellenberg*, in: Münchener Kommentar zum BGB, Art. 12 Rom I-VO note 169; *Magnus*, in: Staudinger, Art. 12 Rom I-VO note 76 with further references.

651 *Mankowski*, in: FS Dieter Martiny (2014), p. 449, 468.

652 *Mankowski*, in: FS Dieter Martiny (2014), p. 449, 468.

653 See on this topic *Verein für Konsumenteninformation v. Amazon EU Sàrl* (Case C-191/15), ECLI:EU:C:2016:612 paras. 67 *et seq.*; A-G *Saugmansgaard Øe*, ECLI:EU:C:2016: 388 para. 94 on the one hand and *Mankowski*, NJW 2016, 2705; *Mankowski*, in: Magnus/Mankowski, Art. 3 Rome I Regulation notes 13–20 on the other hand.

This intention cannot succeed anymore once the choice of law in contract has been invalidated.

Hence, via the transmitter of intention the failure on one count becomes infectious for the other count, too, unless it can be proved that the parties intended to uphold their choice of law agreement for non-contractual obligation even if their choice of law in contract failed. Generally, the intention to align the applicable laws could be better served by an (objective) accessory connection under Art. 4 (3) 2nd sentence than by an independent choice of law for non-contractual obligations possibly separating the (chosen) law applicable to the non-contractual obligations from the *lex contractus* the latter being objectively determined once the choice of law in contract does not withstand scrutiny. **277**

The other way round, it is far more likely that a choice of law for non-contractual matters does not conform to the stricter and more restrictive regime of Art. 14. The failure of such choice should general not infect the concurring choice of law in contract which the parties will regularly regard as the pivot and the corner piece of their bargain. **278**

VII. Safeguard against derogation in purely domestic cases, (2)

1. General aspects

In purely domestic cases the parties are not at liberty to escape mandatory provisions by choice. Else they would be permitted to contract out of the internal *ius cogens* of the respective State and would thus render any restrictions to contractual freedom imposed on non-contractual matters by that State nugatory. The escape device for clever drafters would be too readily at hand than it could be possibly permitted. Hence, in purely domestic cases a safeguard is installed by (2): Parties may opt for adopting the law of a certain State but this does not prejudice the application of provisions of the law of the State in which all relevant elements are located, which cannot be derogated from by agreement. **279**

(2) is clearly derived from, and modelled on, then Art. 3 (3) Rome Convention, now Art. 3 (3) Rome I Regulation. Art. 3 (3) Rome I Regulation reduces the alleged choice of law to a mere *materiellrechtliche Verweisung* with the effect of incorporating the provisions of the law chosen into the contract, but only with the rank of mere contract clauses. At first glance one might think that this technique cannot be adopted in non-contractual cases for there is no contract into which to import something. Yet non-contractual matters might also be open to agreement, and different national laws might different stances as to the extent of such openness. Agreements on reducing or extending non-contractual liability are commonplace. **280**

Parties are prevented from escaping national Regulation by a simple contract clause. To call such attempts at evasive approaches fraudulent[654] or *fraus legis*[655] might be a little harsh, though.[656] (2) does not depend upon any showing of evasiveness or bad faith in the choice of **281**

654 COM (2005) 650 final p. 5.

655 As e.g. *Biagioni*, NLCC 2009, 629, 631 states.

656 See *Ostendorf*, SchiedsVZ 2010, 234 (239)-240.

law.[657] Nonetheless, (2) provides an important safeguard calming concerns.[658] Parties cannot construe a cross-border case by consensus where there is none by objective yardsticks.

282 This applies not only to trying to construe a cross-border case by "choosing" a foreign law but also to agreeing on a foreign forum or agreeing on a seat of arbitration abroad. In contrast to Art. 3 (3) Rome Convention, the irrelevance of the choice of forum is not spelt out expressly, but for no substantive change.[659] Parties cannot circumvent (2) by choosing a different forum because it is not the mandatory provisions of the respective *lex fori* that are granted effect, but those of the law of the State which bears the only relevant objective connections and which remains unaffected by any choice of forum.[660] Even a combination of a choice of law with a foreign forum or a foreign seat of arbitration does not fare better in purely domestic cases. Parties might attempt at evading and circumventing this by agreeing on a seat of arbitration outside the EU.[661]

283 If the State at stake comprises several territorial units with contract laws respectively, Art. 22 (1) ought to be applied, and the single territorial unit must be treated as a separate country.[662] E.g., parties might not choose for English law if every relevant element of the contract is located in Scotland.

2. Provisions which cannot be derogated from by agreement

284 (2) gives prevalence to *internally*, domestically mandatory rules of the State concerned which can not be derogated from by virtue of the domestic law of that State. A truly domestic case is treated as any domestic case and cannot claim greater freedom in favour of the parties than they enjoy ordinarily under the law of this State. Attempts to incorporate a definition of internally mandatory rules[663] or, more modestly, to add "internally" before "mandatory"[664] were not successful eventually.

285 It is for the respective State to give an internally mandatory character to the rules it envisages and wishes to have such character.[665] The Italian version of (2) is unambiguous and more clarifying in this regard: "disposizioni alle quali la leggi di tale diverso paese non permetto di derogare convenzionalmente." The English and the German versions unfortunately lack such clarity. In so far they differ from the more precise wording of Art. 14 (2) Rome II Regulation. The parallel with Art. 14 (2) Rome II Regulation is legislatively wanted for and should serve as a maxim, or at least as a mark of orientation for interpretation.[666]

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657 *Briggs*, Private International Law in English Courts (2014) para. 7.116.

658 *Aubrey L. Diamond*, (1979) 33 Current Legal Problems 155, 159–160.

659 *von Hein*, VersR 2007, 440 (445); *von Hein*, in: Calliess Art. 14 Rom II-VO note 41.

660 *Peter Huber*/*Bach*, IPRax 2005, 73 (75); *Sonnentag*, ZvglRWiss 105 (2006), 256, 279; *von Hein*, VersR 2007, 440 (445); *Leible*, RIW 2008, 257 (262); *Bach*, in: Peter Huber Art. 14 Rom II-VO note 36.

661 *Ostendorf*, SchiedsVZ 2010, 234 (237).

662 *Matthias Weller*/*Nordmeier*, in: Spindler/Schuster, Recht der elektronischen Medien (3rd ed. 2015) Art. 3 Rom I-VO note 8.

663 To this avail a Swedish proposal, Council Doc. 13035/06 ADD 11 (27 September 2006).

664 Council Doc. 13035/06 ADD 6 (25 September 2006) (Portugal), ADD 16 (3 October 2006) (the Netherlands).

665 See only *Biagioni*, NLCC 2009, 629, 632.

"Provisions" must not be interpreted strictly as "statutory provisions". The concept employed is more open. It includes, and embraces, also non-statutory rules. In particular, judge-made rules enjoy equal protection against their contractual derogation as statutory norms.[667] It is not even required that such judge-made rules have acquired the status and level of customary law. Else common law rules would be excluded, and balance would be shifted one-sided in favour of civil law concepts relying on codification and statutes. This must not be, and it would never have been even remotely admitted by the common law States participating in negotiating the Rome Convention and the Rome I Regulation. But even in civil law systems, judge made rules play an important and ever-increasing part for they adopt statutory norms introduced ages ago to the changing features of life. Or they specify and exemplify generic statutory norms. (3) must not become a battle-field for applied legal theory and is not about solving any issues of national understandings what constitutes a proper source of law and what does not. "Provisions" thus applies to rules stemming from all possible sources of law. **286**

The restriction is that a mandatory nature is required. Mere soft law does not qualify in this regard. Likewise, default rules as *ius dispositivum* do not qualify. The *lex causae* is at liberty to which rules of law it attributes a mandatory nature. Just like it may introduce dispositive statutory norms, on the contrary it might vest judge-made rules with a mandatory nature. What is required is *ius cogens* not *ius dispositivum* as to be measured by the yardsticks established by the *lex causae*. Courts are charged with the task to identify the rules qualifying which might be the more burdensome the less explicit the respective rules are.[668] **287**

A further requirement is that the generally mandatory rule at stake is truly applicable in the concrete case since (3) is not to attribute a more extensive effect to the mandatory rules of the "objective" applicable law that that law itself would attribute.[669] A rule not calling for its application in the concrete case must not be applied. **288**

3. Location of relevant elements

The reference to "*all* other elements"[670] beyond the party choice should get proper attention for it establishes a very important restriction to (2).[671] The significance of this restriction has been reinforced in the context of Art. 3 (3) Rome I Regulation in so far as the final French version saw the restoration of "*tous* les autres"[672] compared to the French version of Art. 3 (2) Proposal Rome I Regulation where the "tous" was missing.[673] A State to which all the relevant elements lead, might be that of the objectively determined *lex causae*.[674] But the **289**

666 *Biagioni*, NLCC 2009, 629, 632.

667 *Vogeler* p. 378; *Plender/Wilderspin* para. 29–028; *Rühl*, in: OGK Art. 14 Rom II-VO note 131; see also *Ferrari*, in: Ferrari/Kieninger/Mankowski/Karsten Otte/Saenger/Götz Schulze/Staudinger, Art. 3 Rom I-VO note 56; *Ragno*, in: Ferrari, Art. 3 Rom I-VO note 55.

668 *Calliess*, in: Calliess, Art. 3 Rome I Regulation note 55; *Ragno*, in: Ferrari, Art. 3 Rome I Regulation note 55.

669 *Plender/Wilderspin* para. 6–070.

670 Emphasis added.

671 See *McParland* para. 9.163.

672 Emphasis added.

673 *McParland* para. 9.163.

reverse is not true: A State that has significant connections may qualify as the State of the *lex causae* but unless that State has *all* relevant connections, its law may not be invoked to reduce the effects of the parties' agreement as to the chosen law.[675]

290 Every factor suited to serve as connecting factor in a conflict rule as contained in Arts. 4–12 Rome II Regulation certainly constitutes a "connection" in the sense of (2).[676] This comprises even elements possibly relevant in the context of the escape clauses in Arts. 4 (3); 5 (2); 10 (4); 11 (4).[677] A relevant cross-border element does certainly exist where the damage or the event giving rise to the damage occur in another State different from that of the chosen law. If several parts of damage or several events giving rise to the damage are located in different States every single bit of damage or every single event matter. Beyond that, the nationality[678] or the habitual residence[679] (as defined in Art. 23) of either party constitute an international element if it is to be located in another State different from that of the chosen law.

291 At first glance, the place where the choice of law agreement is concluded appears to be a possible candidate, too. Since Art. 14 does not deal with the form of a choice of law agreement the ensuing *lacuna* should be filled having recourse to Art. 3 (5) in conjunction with Art. 11 (1) Rome I Regulation.[680] In Art. 11 (1) Rome I Regulation the place where the contract (read in the present context as: the choice of law agreement) features as a proper connecting factor for the form of such agreement.[681] A connection with a proper cross-border contract as a so called string contract might constitute an international element in itself.[682]

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674 See only *Symeonides*, in: Liber amicorum Kurt Siehr (2010), p. 513, 528.

675 *Symeonides*, in: Liber amicorum Kurt Siehr (2010), p. 513, 528.

676 *Spickhoff*, in: Bamberger/Roth, Art. 14 Rom II-VO note 8; *Kroll-Ludwigs* p. 95; *Junker*, in: Münchener Kommentar zum BGB Art. 14 Rom II-VO note 40; *Jakob*/*Picht*, in: Rauscher, Art. 14 Rom II-VO note 49; *Rühl*, in: OGK Art. 14 Rom II-VO note 127; *Wurmnest*, in: jurisPK Art. 14 Rom II-VO note 25; *Thorn*, in: Palandt, Art. 14 Rom II-VO note 13. See also *Ferrari*, in: Ferrari/Kieninger/Mankowski/Karsten Otte/Saenger/Götz Schulze/Ansgar Staudinger, Art. 3 Rom I-VO note 51; *Ragno*, in: Ferrari, Art. 3 Rome I Regulation note 53; *Mankowski*, in: Magnus/Mankowski, Art. 3 Rome I Regulation note 384.

677 *Spickhoff*, in: Bamberger/Roth, Art. 14 Rom II-VO note 8; *Junker*, in: Münchener Kommentar zum BGB Art. 14 Rom II-VO note 40; *Jakob*/*Picht*, in: Rauscher, Art. 14 Rom II-VO note 49; *Rühl*, in: OGK Art. 14 Rom II-VO note 127.

678 See only *Magnus*, in: Staudinger, Art. 3 Rom I-VO notes 131–132; *Ferrari*, in: Ferrari/Kieninger/Mankowski/Karsten Otte/Saenger/Götz Schulze/Ansgar Staudinger, Art. 3 Rom I-VO note 73; *Martiny*, in: Münchener Kommentar zum BGB Art. 4 Rom I-VO note 292; *Mankowski*, in: Magnus/Mankowski, Art. 3 Rome I Regulation note 384. But sceptical *Siehr*, RHDI 67 (2014), 801, 804.

679 See only *Calliess*, in: Calliess, Art. 3 Rome I Regulation note 53; *Mankowski*, in: Magnus/Mankowski, Art. 3 Rome I Regulation note 384.

680 *Supra* Art. 14 note 167 (*Mankowski*).

681 See BGHZ 135, 124 (130); OLG Celle RIW 1991, 421; LG Stade IPRspr. 1989 Nr. 39; LG Koblenz IPRspr. 1989 Nr. 43; LG Hildesheim IPRax 1993, 173; *Taupitz*, RIW 1990, 642 (648); *Mankowski*, RIW 1993, 453 (454); *Ragno*, in: Ferrari, Art. 3 Rome I Regulation note 53; *von Hein*, in: Rauscher, Art. 3 Rom I-VO note 111; *Magnus*, in: Staudinger, Art. 3 Rom I-VO note 139. *Contra* OLG Frankfurt IPRax 1990, 236 (238); LG Hamburg IPRax 1990, 238 (239); see also BGH NJW 2000, 1487.

682 See *Boschiero*, in: Boschiero (a cura di), La nuova disciplina comunitaria della legge applicabile ai contratti (Roma I) (2009), p. 67, 93–94; *Dicey*/*Morris*/*Collins*/*Morse* para. 32–087; *Martiny*, in: Münchener

It should be Art. 14 Rom II-VO noted that (2) does not refer to elements relevant to the *non-contractual obligation* (and even less to the narrower notion of elements relevant to the mandatory rules of any country) but refers to "elements relevant to the *situation*".[683] **292**

Arguably, the abstract list of connecting factors is made subject to, and dependent on, a second tier-test of relevancy clad in the moulding iron of a so-called weighing circumspection.[684] **293**

The general principle underneath (2) can be stated as follows: A relevant foreign element must be an objective element. A mere consensual element based entirely on the stipulation by the parties is not sufficient. Parties' intentions even if expressed as mutually agreed stipulations, alone do not make a non-contractual obligation international.[685] This is consistent with the requirement of cross-border elements in Art. 1 (1) which in turn must be interpreted in the light of (2).[686] Or to formulate the maxim from another perspective: Factors that would indicate a tacit or implicit choice of law are not constituting internationality and cross-border elements in the context of (2). **294**

Parties must not escape Regulation by agreeing upon a certain clause between them. This relates in particular to the choice of a foreign forum and to an abstract agreement for a foreign place of performance[687]. Just like a choice of law clause is a mere agreement which cannot *per se* and seen in isolation transform a domestic contract into an international one, they cannot accomplish the same feat. Art. 3 (3) Rome Convention expressly mentioned that the choice of a foreign forum did not elevate the contract to an international nature. This express provision has not been retained in the wording of (2), but that does not give rise to an *argumentum e contrario*. On the contrary, in the parallel context of Art. 3 (3) Rome I Regulation Recital (15) 2nd sentence Rome I Regulation does not leave room for doubts. (2) should thus apply whether the choice of law is accompanied by a choice of court or tribunal. This holds even true in the (rather unlikely) event that parties designate the law of A, but agree on a forum in B. **295**

The language of the choice of law agreement is in itself an object of choice between the parties and open to stipulation by the parties. If parties both resident in Greece conclude a choice of law agreement in English should that agreement be regarded a cross-border agreement simply for its language? Can national Regulation really be avoided at such cheap cost? **296**

Kommentar, Art. 3 Rom I-VO note 93; *Mankowski*, in: Magnus/Mankowski, Art. 3 Rome I Regulation Rom I-VO note 384.

683 *Caterpillar Financial Services Corp. v. SNC Passion* [2004] EWHC 569 (Comm) [19], [2004] 2 Lloyd's Rep. 99 (Q.B.D., *Cooke* J.).

684 To this avail *Vogeler* p. 375; *Plender/Wilderspin* para. 29–027; *Rühl*, in: OGK Art. 14 Rom II-VO note 127.

685 See *Magnus*, in: Staudinger, Art. 3 Rom I-VO note 133; *Mankowski*, in: Magnus/Mankowski, Art. 3 Rome I Regulation note 388.

686 See *Magnus*, in: Staudinger, Art. 3 Rom I-VO note 133; *Mankowski*, in: Magnus/Mankowski, Art. 3 Rome I Regulation note 388.

687 *von Hein*, in: Rauscher, Art. 3 Rom I-VO note 115; *Magnus*, in: Staudinger, Art. 3 Rom I-VO note 133.

4. Application of the law initially chosen

297 The law designated by the parties does have effects: At least in so far as the objectively determined *lex causae* allows so the rules as contained in the designated law are the relevant ones for the contractual relationship between the parties. Whether the law initially chosen gains greater importance is a question of interpreting the consequence flowing from (3).

5. Proper choice of law or *materiellrechtliche Verweisung* as consequence?

298 The nature of the consequence flowing from (3) is the matter of discussion: Does it only amount to a so called *materiellrechtliche Verweisung* effectively relegating the content of the chosen law to the rank or dignity of mere contract clauses and thus within the confined limits of the domestically not derogable rules of the law otherwise applicable,[688] or does it constitute a generally proper choice of law (at conflicts law) only restricted by the rules of the law otherwise applicable from which parties could not derogate on the level of substantive law?[689]

299 The former approach ought to be preferred. It conforms better with the wording of (3), the systematic structure of Art. 3 in its entirety and the purpose pursued by (3). The alternative approach obviously tries to limit the effect of (3) as far as possible and to adhere to the principle enshrined in (1) 1st sentence wherever feasible. Incidentally, it tries to permit businesses to insert uniform, unmodified choice of law clauses in all of their contracts, be these contracts objectively international or objectively domestic. Standardisation and cost reduction shall prevail. But these goals are to the same extent served and better explained under the former approach.[690]

6. Relevant point of time

300 The relevant point of time fixing that situation is the time when the event giving rise to the damage occurs. This renders the point of time when the damage occurs irrelevant.

301 The time when the choice of law agreement is concluded is not elevated to become the relevant point of time, either. This generates the risk that the situation might change between an agreement made *ex ante* and the time when the event giving rise to the damage occurs. This carries with it an element of uncertainty for the parties since they cannot be sure that an *ex ante* agreement which is not subject to (2) at the time of its conclusion might afterwards come under (2). Planning might be slightly hampered thus.

VIII. "Intra-EU cases", (3)

1. General aspects

302 (3) is the Rome II pendant to Art. 3 (4) Rome I Regulation. Its basic idea is to extend (2) from

688 To this avail e.g. *Mankowski*, IHR 2008, 133 (134); *Leible/Matthias Lehmann*, RIW 2008, 528 (534); *Maultzsch*, RabelsZ 75 (2011), 60 (67)-70; *Boele-Woelki*, in: FS Ingeborg Schwenzer (Bern 2011), p. 191, 197.

689 To this avail e.g. *Jacquet*, Trav. Com. fr. dr. int. pr. 1993–94, 23; *Heiss*, in: Ferrari/Leible p. 1, 2; *Kondring*, RIW 2010, 181 (185) *et seq.*; *Briggs*, Private International Law in English Courts (2014) para. 7.116.

690 *Carrascosa González* p. 148.

the level of the single Member nation state to the EU as an entity. All third States will very closely and with some degree of mistrust examine it. The basic idea shifts away from the traditional principles and idea of nationality. The EU is treated as if the EU was a State.[691] The close vicinity to (2) is by no means accidental. Conversely, (3) wants to borrow the approach employed by (2). This fits the extension of the consequences, namely protecting all mandatory rules as contained in EU legislation. (3) erects some kind of "Fortress Europe".[692] It inhibits evasion of EU law and ought to be regarded as combating the *fraus legis Europeae*.[693]

303 The parenthesis ("where appropriate") in the wording gives the answer to the else intricate question what should be applied when dealing with Directives. This answer reads: the national rules of the *lex fori* implementing the respective Directives.[694] This holds true irrespective whether the forum State belongs to the Member States connected with elements of the case.[695] To a certain extent, this might entice forum shopping.[696] Choosing for instance Swiss law as a "neutral" law does not liberate from the chains of mandatory EU law. There would have been two alternatives: firstly to apply the law of the Member State to which the case has the closest connections,[697] or secondly, to apply the law which would be objectively applicable absent a choice of law by the parties.[698] Yet EU law regards all Member State laws as equivalent, and for the sake of saving tertiary costs pragmatism prevails over strict observance of intrasystematic coherence.

304 It is not required that the rules at stake are of fundamental importance for EU law as a whole or protect the fundamental freedoms or unrestricted competition in the Internal Market.[699] (3) is not a kind of specific case of public policy (which it would be if the contention was correct), but a parallel to (2). That every case falling under (2) also falls under (3) but that (2) is *lex specialis* in purely domestic cases should only be mentioned in passing.[700]

305 "Mandatory" has to be read as "internally mandatory", "nationally' mandatory" or "domestically mandatory", at the level of substantive law beyond the parties' choice, the mildest kind of mandatory character with the lowest threshold. In the field of non-contractual obligations, mandatory rules in this sense are a rarity in EU law so that (3) might not put all too severe a hindrance in the way of the parties' choice.[701] Different from the approach taken in the field of B2C contracts, i.e. consumer contracts, the EU has rather abstained from harmonising the law of non-contractual obligations. (3) does not collide with Art. 16 effec-

691 See only *Leible*, in: Cashin Ritaine/Bonomi p. 61, 73; *Mankowski*, IHR 2008, 133 (135); *Magnus*, IPRax 2010, 27 (34); *Bratvogel* p. 205 with further references.

692 *Magnus*/*Mankowski*, ZvglRWiss 103 (2004), 131, 132–133; *Carrascosa González* p. 152.

693 *Lagarde*, RCDIP 95 (2006), 331, 337; *Carrascosa González* p. 152.

694 Criticising this *Kieninger*, in: FS Jan Kropholler (2008), p. 499, 513–515.

695 *Mankowski*, IHR 2008, 133 (135).

696 *d'Avout*, D. 2008, 2165, 2167.

697 *Leible*/*Matthias Lehmann*, RIW 2008, 528 (534) tend to this solution.

698 To the affirmative *Leible*, in: Ferrari/Leible p. 41, 51.

699 But see *Clausnitzer*/*Woopen*, BB 2008, 1798 (1799).

700 Raising the question but any the less not giving a conclusive answer *Bogdan*, NIPR 2009, 407, 409.

701 Compare with regard to Art. 3 (4) Rome I Regulation *Mankowski*, IHR 2009, 133 (135); *Ostendorf*, IHR 2012, 177 (179); *Briggs*, Private International Law in English Courts (2014) para. 7.239.

tively. If it did, superiority favouring EU standards for EU cases is claimed over merely national *Eingriffsnormen (lois de police)*.[702]

306 The notion of mandatory provisions also encompasses general rules and verdicts, e.g. based on *boni mores*[703] or regulating Standard Forms and Conditions, in so far as such rules relate to non-contractual obligations. "Provisions" ought not to be taken verbally as comprising only formal legislation, but should rather be understood as "law" thus entailing also case law and judge-made rules.

2. Relevant elements

a) Definition

307 The term "elements" in principle stretches beyond "connections".[704] But every "connection" suited to serve as connecting factor in a conflict rule as contained in the Rome II Regulation certainly constitutes an "element".[705] What else could sensibly be treated as an "element" calls for an answer. But to synchronize "elements" and "connections" keeps (3) in line with (2) on which (3) is modelled, and acknowledges the peculiarities of the surrounding PIL context.

308 Thus, relevant elements could be: the habitual residence of either of the parties; any place where relevant activity or conduct was displayed; any *locus damni*. In the event of multi-state torts every single *locus damni* matters.

b) Location

309 The location of the relevant elements should also follow the yardsticks of locating established under (2),[706] the role model for (3).

3. "Member State"

310 (3) refers to Member States, not to the European Union. That is unfortunate for it raises the Denmark problem. Denmark is a Member State only of the European Union, but not of the Rome II Regulation, pursuant to Art. 1 (4). (3) does not correct this. To include Denmark would be quite logical and consistent since the protected mandatory provisions of EU law are also in force and effective in Denmark.[707] Denmark even is under an obligation by EU law to implement mandatory rules in Directives. Otherwise EU law would miss protection as the prerequisites of the *internal market* clause were not fulfilled, a highly paradoxical result.[708] If all relevant elements were located in other Member States of the EU than Denmark, (3)

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[702] *Valdini*, Der Schutz der schwächeren Vertragspartei im Internationalen Vertriebsrecht (2013) pp. 350–351.

[703] E.g. *Büsser*, in: FS Willi Fischer (2016), p. 97, 101.

[704] *Johannes Hoffmann*, EWS 2009, 254 (255).

[705] *Johannes Hoffmann*, EWS 2009, 254 (255).

[706] *Supra* Art. 14 notes 289–296 (*Mankowski*).

[707] See *Bogdan*, NIPR 2009, 407, 409.

[708] See *Leible*, RIW 2008, 257 (262); *Junker*, in: Münchener Kommentar zum BGB Art. 14 Rom II-VO note 43.

would be applicable whereas (3) would be not applicable where a relevant element was located in the EU Member State Denmark.[709]

The European legislator discovered its mistake and did not repeat it in the Rome I Regulation: Art. 1 (4) 2nd sentence expressly declares Denmark to be a "Member State" for the purposes of Art. 3 (4) Rome I Regulation. But such legislative correction is not to be found in the Rome II Regulation. Only if one was strictly clinging to the seemingly clear wording of Art. 1 (4), Denmark appears to be out of (3).[710] An analogy to Art. 1 (4) 2nd sentence Rome I Regulation appears to be the more elegant and more convincing way out of the otherwise ensuing impasse.[711] Stretching and bending Recital (7) to its limit the goal of a consistent interpretation of the Rome I and II Regulations might be invoked in support.[712] Sometimes Art. 17 is employed for an alternative attempt to sidestep the unfortunate result of Denmark being excluded.[713] **311**

Member States of the EEA (i.e. Iceland, Liechtenstein and Norway) are not included, though,[714] unless they have implemented the respective Directive from the *acquis communataire* when the extension is guaranteed by the EEA Agreement.[715] An analogy to (3)[716] appears to be methodologically both not one-hundred percent perfect and unnecessary. **312**

4. Provisions of EU law

a) General aspects

"Provisions of EU law" includes both Regulations which are directly applicable in all Member States by virtue of Art. 288 (2) TFEU, and Directives which generally require their implementation into national law by the Member States by virtue of Art. 288 (3) TFEU.[717] It is not limited to Directives as such but includes the rules of the national law of the Member States implementing Directives. The only material requirement is that such rules are internally mandatory.[718] EU rules have to establish a minimum standard from which parties cannot derogate contractually.[719] **313**

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709 *Junker*, in: Münchener Kommentar zum BGB Art. 14 Rom II-VO note 43.

710 *Dickinson* para. 13.32; *Junker*, in: Münchener Kommentar zum BGB Art. 14 Rom II-VO note 43.

711 *Garcimartín Alférez*, EuLF 2007, I-77, I-79; *Heiss/Loacker*, JBl 2007, 613, 623; *Leible*, RIW 2008, 257 (263); *Bach*, in: Peter Huber Art. 14 Rom II-VO note 38; *Wurmnest*, in: jurisPK Art. 14 Rom II-VO note 28; *von Hein*, in: Calliess Art. 14 Rom II-VO note 45; *Picht*, in: Rauscher, Art. 14 Rom II-VO note 54; *Thorn*, in: Palandt, Art. 14 Rom II-VO note 15.

712 To this avail *von Hein*, in: Calliess Art. 14 Rom II-VO note 45.

713 *Heiss/Loacker*, JBl 2007, 613, 623.

714 *Junker*, in: Münchener Kommentar zum BGB Art. 14 Rom II-VO note 43; *Wurmnest*, in: jurisPK Art. 14 Rom II-VO note 29.

715 *Calliess*, in: Calliess Art. 3 Rome I Regulation note 56.

716 As advocated for with regard to Art. 1 (4) Rome I Regulation by *Heiss*, in: Ferrari/Leible (eds.), p. 1, 9; *Calliess*, in: Calliess Art. 3 Rome I Regulation note 56.

717 *Carrascosa González* p. 151.

718 *Johannes Hoffmann*, EWS 2009, 254 (256).

719 *Siehr*, RHDI 67 (2014), 801, 809.

314 Whether a national implementation going beyond the requirements of the respective Directive is also covered remains a tricky question.[720] In so far as full harmonisation is the dish of the day the problem might be reduced.[721] But in so far as only minimum harmonisation is required by the respective Directive, Member States are on the other hand entitled to implement better protection. Principle might dictate that only the minimum standard would be recognised as truly European. Yet the consequence expressly called for in (4) is the application of the national version of the Directive as implemented in the forum State. Exceeding elements are not expressly excluded. That should cast the die.[722]

315 A defective or non- compliant implementation of a relevant Directive by the *lex fori* triggers another problem. Directives do not have so called horizontal effect and thus are not directly applicable in the relationship between private parties (including enterprises).[723] The forum State might incur *Francovich* state liability for not correctly implementing the concrete Directive.[724] Yet the *effet utile* of the Directive might justify switching over to applying the implementing legislation of the objectively applicable law (i.e. the law that would be applicable absent parties' choice of law).[725]

316 Provisions of EU law are already touched upon if they deal with either the prerequisites of, or the consequences generated by, a non-contractual obligation. But this holds true only where they are applicable. In so far as they are supplemented (as to be distinguished from: transformed) by national law, (3) is not triggered by a deviation only from that national law.

317 In so far as possibly relevant rules are contained in Regulations it can be argued in the alternative that they apply *ex lege* whenever the scope of application of the respective Regulation is opened, without any necessity to recur on (3).[726]

b) Concrete examples

318 In the field of non-contractual obligations the number of relevant Acts of EU law is scarce and rather limited to torts. The most prominent example for European legislation in this field is the Product Liability Directive[727], in particular taking into account its

720 *Johannes Hoffmann*, EWS 2009, 254 (257); *Schinkels*, in: Michael Stürner (ed.), Vollharmonisierung im Europäischen Verbraucherrecht? (2010), p. 113, 121 *et seq.*

721 *Schinkels*, in: Michael Stürner (ed.), Vollharmonisierung im Europäischen Verbraucherrecht? (2010), p. 113, 127.

722 *Plender/Wilderspin* para. 6–065. *Contra Rühl*, in: OGK Art. 14 Rom II-VO note 146.

723 See only *M. H. Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching)* (Case 152/84), [1986] ECR 1986, 723 para. 48; *Seda Kükükdeveci v. Swedex GmbH & Co. KG* (Case C-555/07), [2010] ECR 365 para. 46; *Maribel Dominguez v. Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre* (Case C-282/10), ECLI:EU:C:2012:33 para. 36; *Association de mediation sociale v. Union local des syndicats CGT* (Case C-176/12), ECLI:EU:C:2014:2 para. 36.

724 *Maribel Dominguez v. Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre* (Case C-282/10), ECLI:EU:C:2012:33 para. 43.

725 *Vogeler* pp. 393–394; *Rühl*, in: OGK Art. 14 Rom II-VO note 147.

726 See *Johannes Hoffmann*, EWS 2009, 254 (256); *Rühl*, in: OGK Art. 14 Rom II-VO note 143.

727 Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ EEC 1985 L 210/29.

Art. 12.[728] The Product Safety Directive[729] is another one. The Unfair Contract Terms Directive[730] is a qualifier in so far as it also regulates clauses on limiting or extending non-contractual liability.[731] Other candidates are the rules on lessening liability as contained in the E-Commerce Directive[732] and the rules on prevention or remedying in the Environmental Liability Directive[733].[734]

Some specialised Directives or Regulations might relate to torts, too. The Prospectus Directive[735] appears to be a feasible candidate. The Air Carrier Liability Regulation[736] (formerly the "Warsaw Convention Regulation", now the "Montreal Convention Regulation") and the "Athens Convention Regulation"[737] certainly are, the Aviation Safety Regulation[738], the Data Protection Directive[739] or the General Data Protection Regulation[740] arguably are.[741] **319**

Every piece of EU legislation exacting Regulation might qualify in so far as it also relates to private law (even if only by reflexive effect) and is not confined to public law concerning **320**

728 *Gerhard Wagner*, IPRax 2008, 1 (14); *Wurmnest*, in: jurisPK Art. 14 Rom II-VO note 30; *Thorn*, in: Palandt, Art. 14 Rom II-VO note 14.

729 Council Directive 92/59/EEC of 29 June 1992 on general product safety, OJ EEC 1992 L 228/24.

730 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ EEC 1993 L 95/29.

731 *Junker*, NJW 2007, 3675 (3676); *Gerhard Wagner*, IPRax 2008, 1 (14); *Spickhoff*, in: Bamberger/Roth, Art. 14 Rom II-VO note 8; *Kroll-Ludwigs*, Die Rolle der Parteiautonomie im europäischen Kollisionsrecht (2013), p. 96; *Rühl*, in: OGK Art. 14 Rom II-VO note 142.

732 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain aspects of information society services, in particular electronic commerce, in the Internal Market, OJ EC 2000 L 178/1.

733 Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, OJ EC 2004 L 143/56.

734 *Rühl*, in: OGK Art. 14 Rom II-VO note 142.

735 Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading, and amending Directive 2001/34/EC, OJ EC 2003 L 345/64, as amended e.g. by Directive 2010/73/EC, OJ EC 2010 L 327/1, and Directive 2014/51/EU, OJ 2014 L 153/1.

736 Council Regulation No 2027/97/EC of 9 October 1997 on air carrier liability in the event of accidents, OJ EC 1997 L 285/1, amended by Regulation (EC) No. 889/2002 of the European Parliament and of the Council of 13 May 2002, OJ EC 2002 L 140/2.

737 Regulation (EC) No. 392/2009 of the European Parliament and of the Council of 23 April 2009 on the liability of carriers of passengers by sea in the event of accidents, OJ EC 2009 L 131/24.

738 Regulation (EC) No. 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency and repealing Council Directive 91/670/EEC, Regulation (EC) No. 1592/2002 and Directive 2004/36/EC, OJ EC 2008 L 79/1.

739 Directive 1995/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ EC 1995 L 281/31.

740 Regulation 2016/679/EU of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and repealing Regulation 1995/46/EC (General Data Protection Regulation), OJ EU 2016 L 119/1.

741 For the first see *Rühl*, in: OGK Art. 14 Rom II-VO note 143.

official bodies or watchdogs. This might bring up for instance the Health Claims Regulation[742]. The law of financial market Regulation might add EMIR,[743] MiFID II,[744] MiFIR,[745] PRIIPs,[746] MAD I,[747] MAD II,[748] MAR,[749] CRR[750] and CRD,[751] Rating Agency Liability Regulation[752] and UCITS IV Directive,[753] in the case of Directives their implementations and transformations in the domestic laws of the Member States. Yet these are examples only, and the list is not complete, in particular as to the areas of law or business regulated. Even the BRRD[754] might be a possible candidate although this is unlikely *in so far* as it has to trespass from the classifactorily separate territory of insolvency law. In so far as official bodies or watchdogs are empowered, not (3), but rather Art. 16 is the systemically correct place to look at for in this event internationally mandatory rules, *Eingriffsnormen* are at stake.[755]

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742 Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods, OJ EC 2006 L 404/9.

743 Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, OJ EU 2012 L 201/1 (European Market Infrastructure Regulation).

744 Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, OJ EU 2014 L 173/349.

745 Regulation (EU) No. 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No. 648/2012, OJ EU 2014 L 173/84.

746 Regulation (EU) No. 1286/2014 of the European Parliament and of the Council of 26 November May 2014 on key information documents markets for packaged retail and insurance-based investment products (PRIIPs), OJ EU 2014 L 352/1.

747 Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), OJ EC 2003 L 96/16.

748 Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (Market Abuse Directive), OJ EU 2014 L 173/179.

749 Regulation (EU) No. 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (Market Abuse Regulation) and repealing Directive 2003/76/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, OJ EU 2014 L 173/1.

750 Regulation (EU) No. 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No. 648/2012, OJ EU 2013 L 176/1.

751 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, OJ EU 2013 L 176/338.

752 Regulation (EU) No. 462/2013 of the European Parliament and of the Council of 21 May 2013 amending Regulation (EC) No. 1060/2009 on credit rating agencies, OJ EU 2013 L 146/1.

753 Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), OJ EC 2009 L 362/62.

754 Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms, OJ EU 2014 L 173/190.

755 See for the general delineation *Mankowski*, FamRZ 1999, 1313 (1314); *Mankowski*, AR-Blattei ES 920 Nr. 7 S. 13, 24 (März 2001); *Mankowski*, in: von Bar/Mankowski, Internationales Privatrecht I: Allgemeine Lehren (2nd ed. 2003) § 4 note 95.

As (3) refers to provisions of Community law, this implies that such European provisions can be found in every kind of legislation which forms part of EU law. This comprises all international Conventions to which the EU is a Contracting Party. Obvious candidates in this category are the Montreal and Athens Conventions.[756] **321**

European legislation directly addressing unjust enrichment, *negotiorum gestio* or *culpa in contrahendo* still needs to be developed and has not yet come to the fore prominently. **322**

5. Choice of the law of a Third State

(3) becomes only operative where the parties have chosen the law of a non-Member State. "Member State" carries the meaning outlined earlier and Denmark is the muddled problematic case.[757] Part of "Member States" are also the so called autonomous areas of Member States for which EU law is in full force and effect pursuant to Arts. 349; 355 TFEU (ex-Art. 299 EC Treaty).[758] If this requirement is not fulfilled as for instance with the Channel Islands Guernsey and Jersey and the Isle of Man by virtue of Art. 355 (5) (c) TFEU (ex-Art. 299 (6) (c) EC Treaty) the choice e.g. of Manx law must be treated as the choice of the law of a third State.[759] The law of an EEA State is a Member State law in so far as the EEA Accession Act provides for an automatic transfer of the respective *acquis* standard but else the law of a non-Member State; again consistency within (3) must be the guideline like with Denmark.[760] **323**

If in an "Intra-EU case" parties choose the law of a Member State (4) is not applicable. Any malign intention to exploit deficits in the chosen law with regard of the implementation of EU Directives does not alter this outcome.[761] Member States remains Member State, and there are other instruments in EU law to call negligent Member States to order,[762] most prominently the *Francovich* type State liability. **324**

6. Relevant point of time

The relevant point of time fixing that situation is the time when the event giving rise to the damage occurs. This renders the point of time when the damage occurs irrelevant. **325**

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756 Montreal Convention for the unification of certain rules for international carriage by air, OJ EC 2001 L 194/39; Council Decision 2001/539/EC of 5 April 2001, OJ EC 2001 L 194/38. Athens Convention relating to the carriage of passengers and their luggage by sea of 13 December 1974; Protocol of 1 November 2002 to the Athens Convention relating to the carriage of passengers and their luggage by sea; Council Decision 2012/22/EU of 12 December 2011, OJ EU 2012 L 8/1.

757 *Supra* Art. 14 note 310–312 (*Mankowski*).

758 *Magnus*, in: Staudinger Art. 3 Rom I-VO note 155.

759 *Magnus*, in: Staudinger Art. 3 Rom I-VO note 155.

760 See *supra* Art. 14 note 313 (*Mankowski*).

761 *Magnus*, in: Staudinger Art. 3 Rom I-VO note 157; *Plender/Wilderspin* para. 6–066. *Contra Schinkels*, in: Michael Stürner (ed.), Vollharmonisierung im Europäischen Verbraucherrecht? (2010), p. 113, 130 *et seq.*

762 *Magnus*, in: Staudinger Art. 3 Rom I-VO note 157.

326 The time when the choice of law agreement is concluded is not elevated to become the relevant point of time, either. This generates the risk that the situation might change between an agreement made *ex ante* and the time when the event giving rise to the damage occurs. This carries with it an element of uncertainty for the parties since they cannot be sure that an *ex ante* agreement which is not subject to (3) at the time of its conclusion might afterwards come under (3). Planning might be slightly hampered thus.

7. Consequences

327 (3) does not render the choice of law invalid. In general, thus the chosen Third State law remains applicable, but is combined in some kind of law mix with the law designated by (4).[763] According to the parenthesis in (3) the *lex fori* shall apply. Against natural expectation[764], it is not for the law of the other Member State which in the absence of a valid choice of law ought to be applied, to apply. The *lex fori* version applies even if the case does not have an objective connection with the forum state and none of the relevant elements is located in the forum state.[765]

328 This approach might produce differences as to the degree to which EU Directives have been implemented. The ensuing potential for forum shopping[766] should not be overestimated generally. On the contrary the preference for the *lex fori* alleviates case handling for lawyers and judges concerned; thus, it reduces tertiary costs.[767]

329 But what in particular if the *lex fori* contains elements going beyond the Directive and leaving even the widest margin of discretion as permitted by the Directive? Should such elements be disregarded[768] or should they be recognised avoiding a split within the applicable law[769]? The goal pursued by (4) is to protect the standard set by EU law against its contractual derogation. Nowhere it is expressed that the goal is to protect national laws of the Member States in their idiosyncrasies and particularities in so far as they go beyond merely implementing and transforming EU law. The case is clear cut in the event that the EU has promulgated a Regulation. A Regulation does need transformation into national law but is directly applicable. Any measure by national legislators even if benevolently extending the standard set by the Regulation to other instances not originally covered by it is beyond the object of protection, namely the EU Regulation. EU Directives should not prompt differences and should be kept to their own aim and goal. Of course, drawing a split within the *lex fori* is sometimes not the easiest task. But who if not judges and lawyers trained in the *lex fori* should be up to this task?

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763 See only *Rühl*, in: FS Jan Kropholler (2008), p. 187, 204; *Rühl*, p. 499; *Bratvogel* p. 206.

764 *Kieninger*, in: FS Jan Kropholler (2008), p. 499, 513 *et seq.*; *Leible*/*Matthias Lehmann*, RIW 2008, 528 (534); *Biagioni*, NLCC 2009, 629, 635; *Ringe*, in: jurisPK Art. 3 Rom I-VO note 52.

765 *Mankowski*, IHR 2008, 133 (135); *von Hein*, in: Calliess Art. 14 Rom II-VO note 46.

766 *Leible*, RIW 2008, 257 (263); *Lagarde*/*Tenenbaum*, RCDIP 97 (2008), 727, 737; *Sendmeyer*, Contratto e impresa/Europa 2009, 792, 799.

767 *Junker*, in: Münchener Kommentar zum BGB not 44; *von Hein*, in: Calliess Art. 14 Rom II-VO note 47.

768 To this avail *Pfeiffer*, EuZW 2008, 622 (625); *Martiny*, in: MK BGB Art. 3 Rom I-VO note 102; *Matthias Weller*/*Nordmeier*, in: Spindler/Schuster, Recht der elektronischen Medien (3rd ed. 2015) Art. 3 Rom I-VO note 9; *Ringe*, in: jurisPK Art. 3 Rom I-VO note 52.

769 To this avail *Kieninger*, in: FS Jan Kropholler (2008), p. 499, 506 *et seq.*; *Bogdan*, NILR 2009, 407, 409.

In any event, deviations from the implementation of the Directive in the Member State to which the closest objective connection exist can not justify the application of (3) as *lex specialis* to the detriment of (4).[770] **330**

8. Overlap with (2)

In rare cases (2) and (3) can overlap.[771] Under the following preconditions both (2) *and* (3) are fulfilled: The parties choose the law of a Third State; all relevant elements are located in a Member State; the internally mandatory rules of that state are based on a Directive. But (2) and (3) differ as to their respective consequences: (2) leads to the application of the law of the state where all relevant elements are located; (3) leads to the application of the *lex fori*, regardless whether any relevant element is located in the forum state. These consequences might concur in a concrete case. Yet if they differ they are irreconcilable and it is impossible to apply (2) and (3) simultaneously. One has to establish a hierarchy one way or the other. (2) might be preferred over (3) for the sake of international harmony since all courts in Member States would apply the same law irrespective of the forum.[772] Conversely, the systematic structure of Art. 14 militates in favour of (3) as a *lex specialis* when it boils down to mandatory provisions of EU law.[773] **331**

IX. Remedies for breach of a choice of law agreement

1. Contractual arena

A choice of law clause is an agreement. In so far by its very nature it establishes a contractual promise. It might be enforced directly but this appears to be a rather theoretical issue, even more so in States which do not acknowledge specific performance as the primary remedy. Yet the question as to whether the breach of a choice of law agreement makes the breaching party liable for damages, might arise.[774] **332**

In the first step any approach relying on damages would have to define or at least to circumscribe what constitutes the breach of a choice of law agreement.[775] Pleading claims on the basis of another law than the one agreed upon appears to be the prime example for such a breach, openly voiding the preceding contractual promise. Filing a writ with a court which would foreseeably apply another law than the chosen one, preferably the *lex fori*, is another example.[776] **333**

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770 *Calliess*, in: Calliess Art. 3 Rom I-VO note 56; *Ringe*, in: jurisPK Art. 3 Rom I-VO note 53.

771 *de Lima Pinheiro*, RDIPP 2008, 5, 14; *von Hein*, ZEuP 2009, 6 (22); *von Hein*, in: Calliess Art. 14 Rom II-VO note 48; *Junker*, in: Münchener Kommentar zum BGB not 45.

772 *von Hein*, ZEuP 2009, 6 (22); *von Hein*, in: Calliess Art. 14 Rom II-VO note 48.

773 *von Hein*, ZEuP 2009, 6 (22); *von Hein*, in: Calliess Art. 14 Rom II-VO note 48; *Gebauer*, in: Nomos Kommentar Art. 14 Rom II-VO note 48. *Contra Picht*, in: Rauscher Art. 14 Rom II-VO note 57.

774 *Ace Insurance Ltd. v. Moose Enterprise Pty Ltd.* [2009] NSWC 724 (NSW High Ct., *Brereton* J.); *Britton*, [2008] Int. Construction L. Rev. 347, 355; *Briggs* paras. 11.46–11.71; *Yeo*, [2010] LMCLQ 194. See on the parallel question for choice of forum agreements *Mankowski*, IPRax 2009, 23.

775 See *Briggs* para. 11.48.

776 See *Briggs* paras. 11.51, 11.54–11.55, 11.62.

334 Generally, as a matter of construction it must be answered whether the concrete choice of law agreement does not only express the parties' common intention but also establishes a contractual promise to implement that very choice of law when disputes are resolved.[777] The choice of the law of X might not only be a positive choice of that very law but also a negative stipulation that no other law shall be applied.[778] A promise not to bring an action in a country which would not give effect to the choice of law clause can make commercial sense to the contracting parties.[779] A choice of law clause as a contractual provision can be framed in a manner as to contain an unambiguous promise to do nothing that might result in some other law becoming applicable.[780] But it might require very clear language to infer such promissory content.[781]

335 This might conflict heavily with a right to access courts in other states as guaranteed particularly by the Brussels I*bis* Regulation, though.[782] In so far as the application of the "wrong" law by a court in a foreign State enjoys the force of *res iudicata* which requires that the reasons on which the judgment is founded, participate from the force of *res iudicata*, as a matter of recognition and enforcement that application might stand.[783] Besides that, a choice of law does not automatically carry a necessary implication of an obligation not to bring an action in a possibly deviating court.[784] There is more than only a little speculative element as to which extent a court might disregard a contractual choice of law, too, the more so where there is a concurring choice of forum clause vesting jurisdiction in another court.

336 Calculating damages and monetary remedies would follow in the next step if one is prepared to go the first step, and problems abound.[785] Should the courts accessed for awarding damages calculate the loss suffered by the allegedly aggrieved party by determining which laws they would have applied if they had been charged with deciding the primary matter and what the outcome would have been?[786] They may themselves not have given unbridled effect to the chosen law, and may have imposed upon it provisions which cannot be derogated from by agreement, of another law by virtue of the Rome I Regulation.[787] The alternative is to consider that the result had the chosen law alone been applied, albeit that there may not obviously be any state with jurisdiction which would have applied that law alone.[788] Both alternatives exert not too much appeal and are cumbersome.[789]

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777 *Briggs* para. 11.53; *Yeo*, [2010] LMCLQ 194, 200.

778 *Briggs* para. 11.30.

779 *Yeo*, [2010] LMCLQ 194, 201.

780 *Ace Insurance Ltd. v. Moose Enterprise Pty Ltd.* [2009] NSWC 724 [47] (NSW High Ct., *Brereton* J.).

781 *Ace Insurance Ltd. v. Moose Enterprise Pty Ltd.* [2009] NSWC 724 [51] (NSW High Ct., *Brereton* J.).

782 *Harris*, [2009] LMCLQ 537, 554.

783 *Briggs* para. 11.57; *Harris*, [2009] LMCLQ 537, 553.

784 *Ace Insurance Ltd. v. Moose Enterprise Pty Ltd.* [2009] NSWC 724 [47] (NSW High Ct., *Brereton* J.).

785 *Harris*, [2009] LMCLQ 537, 554.

786 *Harris*, [2009] LMCLQ 537, 554.

787 *Harris*, [2009] LMCLQ 537, 554.

788 *Harris*, [2009] LMCLQ 537, 554.

789 *Harris*, [2009] LMCLQ 537, 554.

A contractual penalty clause is advocated as some kind of solution as a contractual promise to pay which is conditional might only depend on the precision with which the condition is drafted.[790] **337**

2. State liability for incorrect judicial application of the Rome II Regulation

In the wake of the controversial[791] judgments in *Köbler*[792] and *Traghetti Mediterraneo*[793] which established state liability under EU law for judicial misapprehensions of EU rules by national courts, some provoking thoughts and ruminations might be tentatively ventilated: Member States could possibly be held liable if its courts misapprehended and misapplied the Rome II Regulation by not granting proper force to a choice of law agreement and applying another law than the chosen one. **338**

Yet two restricting conditions must be met: The final judgment must be by a court of last instance whose decisions are not subject to further appeal,[794] and the misapprehension of EU rules must be obvious and evident.[795] **339**

The damage due would be the damage resulting from the ensuing necessity to file application arguing on the basis of the law the court wants to be seen applied or to file such applicable possibly elsewhere[796] (plus the costs of an eventual dismissal of the first case in so far as the parties ought to bear such costs). **340**

Chapter V: **Common Rules**

Article 15: Scope of the law applicable

The law applicable to non-contractual obligations under this Regulation shall govern in particular:
(a) the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them;
(b) the grounds for exemption from liability, any limitation of liability and any division of liability;
(c) the existence, the nature and the assessment of damage or the remedy claimed;

790 *Briggs* para. 5.52.

791 See the lively discussion e.g. by *Obwexer*, EuZW 2003, 726; *Schwarzenegger*, ZfRV 2003, 236; *Breuer*, BayVBl 2003, 586; *Grune*, BayVBl 2003, 673; *Frenz*, DVBl 2003, 1522; *Gundel*, EWS 2004, 8; *Kremer*, NJW 2004, 480; *von Danwitz*, JZ 2004, 301; *Streinz*, Jura 2004, 425; *Wegner/Held*, Jura 2004, 479; *Kluth*, DVBl 2004, 393; *Rademacher*, NVwZ 2004, 1415; *Heike Krieger*, JuS 2004, 855; *Götz Schulze*, ZEuP 2004, 1049; *Machado*, RLJ 2015, 246. Comprehensively *Marten Breuer*, Staatshaftung für judikatives Unrecht (2011) pp. 378–520.

792 *Köbler v. Republik Österreich* (Case C-224/01), [2003] ECR I-10239.

793 *Traghetti del Mediterraneo SpA v. Repubblica Italiana* (Case C-173/03), [2006] ECR I-5177.

794 *Köbler v. Republik Österreich* (Case C-224/01), [2003] ECR I-10239, I-10310 para. 50.

795 *Köbler v. Republik Österreich* (Case C-224/01), [2003] ECR I-10239, I-10312 para. 56, I-10329 para. 120.

796 *Tsikrikas*, ZZP Int. 9 (2004), 123, 132; *Magnus/Mankowski*, in: Magnus/Mankowski, Brussels II*bis* Regulation (2nd ed. 2017) Introduction note 142.

(d) within the limits of powers conferred on the court by its procedural law, the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation;
(e) the question whether a right to claim damages or a remedy may be transferred, including by inheritance;
(f) persons entitled to compensation for damage sustained personally;
(g) liability for the acts of another person;
(h) the manner in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation.

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I. General aspects of the Article

1. Aim

Art. 15 is located at the beginning of Chapter V of Rome II Regulation (common rules), and it refers to the significant and practical question of drawing the line between those issues which will be governed by the law applicable to a non-contractual obligation (the *lex causae*) 1

and those which in principle would fall outside of such scope – and which would normally be covered by the law of the competent court (the *lex fori*). In other words, this provision aims at listing and differentiating the questions which should be considered as substantive – i.e. with the objective of determining the so called vertical material scope of the Rome II Regulation,[1] in order to differentiate the domain of the *lex cause*, form those issues which may be considered to have a different legal character – which may derive in the application of other competing national laws, and particularly those which will enjoy a procedural nature –, with the objective of avoiding problems of characterization.[2]

2 In that respect -and even though this provision cannot be characterized as a conflict-of-law rule,[3] Art. 15 deserves a close analysis due to its practical importance, as long as the determination of the scope of the law applicable to a non-contractual obligation and its distinction form other laws, receives a diverse answer in the different national legal systems of the Member States of the European Union (hereinafter, EU).[4] Besides, it may be affirmed that this question affects not only the effectiveness of the conflict-of-law rules,[5] but also both the coordination function and the harmonizing value of European Private International Law in relation to this specific field of the law of obligations.[6]

Hence, with the enactment of a uniform answer for all Member States, this provision has the goal to prevent *forum shopping* attitudes, which the previous existing legal diversity allowed to parties – not only in relation to the determination of the scope of *lex cause*, but also and more significant to the substantive Regulation to non-contractual obligations within the EU[7] – and, as a result, to avoid uncertainty in the law in relation to international non-contractual obligations.[8]

Therefore, it has been rightly stressed that this provision aims at favoring predictability, legal certainty and the harmony in results within the Member States of the UE, by the enactment of a European uniform rule.[9] Accordingly, as previously stated, Art. 15 pursues to make a sound and clear distinction common to all Member States of the EU, by determining and listing which issues will necessarily be governed by the proper law of the non-contractual obligation and, as a result, which will not be governed by the *lex fori* – not even in a subsidiary manner.[10]

1 *Dickinson*, 569.

2 Hamburg Group for Private International Law, 27.

3 *Junker*, 1019.

4 An European comparative overview of this question can be found at *Kadner Graziano*, 104–108.

5 *Palao Moreno* (Valencia, 1998), 124.

6 *Palao Moreno* (Valencia, 2008), 262 *et seq*.

7 For a detailed comparative analysis, *von Bar*, Vols. I and II.

8 In this respect, the Explanatory Memorandum of the Draft Proposal for a Regulation on the law applicable to non-contractual obligations ("Rome II") of 2003 (COM (2003) 427 final), at p. 23. Also, *Bach*, 343.

9 *Halfmeier*, 554; *Jakob*/*Picht*, 959.

10 *Bach*, 344.

2. Scope

In relation to the questions covered by this provision it must be taken into account, on the one hand, that Art. 15 enjoys a general character as to the European instrument. Therefore, this provision has a comprehensive objective, as long as it applies to all non-contractual obligations covered by the Rome II Regulation in general – regardless of their position within Chapter II or III.[11] Thus and in spite of the wording used in some of its paragraphs, not only torts and delicts, but also unjust enrichment, *negotiorum gestio* and *culpa in contrahendo* situations, are envisaged by this significant and general provision. **3**

Besides, and on the other hand, it also must be underlined that Art. 15 provides a wide but not an exhaustive answer to the question of the scope to the law applicable to non-contractual obligations. In that respect, this Article contains a long enunciative list of issues which should enjoy a substantive nature (hence, aiming at providing predictability of results and legal certainty) and, as a result, that such issues would be governed by the *lex cause* (in its letters (a) to (h)). However this list does not have a comprehensive character, but an explanatory one.[12] As a result, when Art. 15 establishes that "*this Regulation shall govern in particular*", this must be considered as a merely indicative provision, which makes explicit that other questions than those established in it, could also be governed by the law applicable to the non-contractual obligation. Besides and from a negative perspective, those listed issues cannot be governed by the *lex fori* under any circumstance.[13] **4**

In this respect, and although this open approach might create some negative uncertainties in practice, it must be taken into consideration the following. Firstly, that it is highly difficult to consider the possibility of elaborating a definitive exhaustive list, of those issues which should enjoy a substantive nature for the application of this Regulation. Secondly, that it is advisable to leave some room for the interpretation by the European Court of Justice, in order to adapt Art. 15 to the different national legal systems and social changes.

Nevertheless, it should be stressed that the application of this noteworthy provision must be combined with other Articles of the Rome II Regulation -in order to ascertain the effective scope of the law applicable to a non-contractual obligation and the possibility of *dépeçage* –, as long as they can affect the effective scope and practical application of the *lex causae*.[14] **5**

(a) On the one hand, and in relation to this objective, one must also be aware that other provisions of the Rome II Regulation provide for a compulsory application of the *lex fori* under certain circumstances.[15] In this respect, while Art. 16 provides for the application of the mandatory rules of the law of the competent court, Art. 26 establishes the traditional recourse to the public order exception, to avoid the application of foreign law and its replacement by the *lex fori*.[16] Moreover, and although with a much more limited effect,

11 Also *Boskovic*, 183: *Junker*, 1019; *Leible/Engel*, 16; *Plender/Wilderspin*, 437.

12 *Bach*, 344; *Jakob/Picht*, 960–961. Also, Actavis UK Ltd & Ors v. Elo Lilly & Company [2015] EWCA Civ. 555, 143.

13 *Bach*, 344.

14 *Maseda Rodríguez*, 2–4; *Symeonides*, 938–939.

15 *Palao Moreno*, in: Gutiérrez Espada et al, 421–422.

16 See comments on Arts. 16 and 26 in this Book.

Art. 17 should be mentioned, as far as it provides that the rules of safety and conduct in force at the place of the harm should be considered to assess the conduct of the person who was claimed to be liable.[17]

(b) On the other hand, attention should also be paid to those issues which will be directly excluded from the scope of application of Rome II Regulation – a good example of this could be Art. 1 (3) when referring to the exclusion of matters of evidence and procedure[18]-, as well as those other questions which do not fall within its scope but affect the application of the law which governs a non-contractual obligation – i.e. procedural rules related to the application of foreign law[19] or collective actions.[20]

(c) Finally, it should also be stressed that other provisions of the Rome II Regulation, which relate to specific or even substantive questions, will limit the application of Art. 15 – and, as a result, they could affect the extent of the *lex cause*.[21] In relation to this issue, Arts. 18 (direct action against the insurer of the person liable), 19 (subrogation), 20 (multiple liability), 21 (formal validity) as well as 22 (burden of proof), should be taken into careful account.[22]

3. Legal context and precedents

6 As already emphasized, the main objective of Art. 15 is to offer a common and uniform solution to the Member States of the EU, on the practical issue of drawing the line between those issues must fall under the *lex cause* and those aspects which should be considered procedural – and thus which should be subject to the *lex fori*. This is a question of both highly academic and practical importance which – although national systems maintained several similarities –, was not uniformly regulated among national legislators of the Member States beforehand. As a result, such disparities could lead to a negative level of unpredictability and favor *forum shopping*.

A good example of this can be found in the different approach followed by the vast majority of continental Member States, if compared with those countries rooted in the common law system, when it came to the distinction between substantive and procedural issues.[23] In relation to this, it could be noted that common law countries embraced a broader approach towards those questions which should be estimated as procedural and, as a result, they were ruled by the law of the competent court. This affects, for example, issues like the quantification of damages,[24] remedies,[25] or the forms of equitable

17 See comment on Arts. 17 this Book.

18 *Dickinson*, 570; *Halfmeier*, 554.

19 *Bach*, 344. See *Esplugues/Iglesias/Palao*, 3 *et seq.*

20 *Boskovic*, 190.

21 *Palao Moreno*, in: Gutiérrez Espada et al, 421.

22 See comments on Arts. 18 to 22 in this Book.

23 In relation to this, the Explanatory Memorandum of the Draft Proposal of 2003 provided some examples of issues which deserved a different treatment in national legislation prior to the enactment of a uniform rule, referring to questions like limitation periods, the burden of the proof or the measure of damages (COM (2003) 427 final, 23).

24 *Bach*, 348; *Plender/Wilderspin*, 445; *Weintraub*, 564.

25 *Mariottini*, 648.

relief,[26] which are traditionally characterized as procedural in the common law systems. Therefore, Art. 15 of the Regulation Rome II must be welcome, in order to avoid cases of *forum shopping* within the EU, by offering parties a more uniform and predictable scenario.

Moreover, it is also of importance to note that the final wording of this Article is highly influenced by its several normative predecessors, both of a European and International origin – with the inclusion of some improvements by the European legislator. In accordance with this, precedents to this provision can be traced back to different legal instruments designed by both The Hague Conference of Private International Law and the EU legislator. **7**

(a) In this respect, on the one hand and from an International standpoint, Arts. 8 of both The Hague Conventions of 1971, on the Law Applicable to Traffic Accidents, and The Hague Convention of 1973, on the Law Applicable to Products Liability,[27] should be first taken into account.

(b) Moreover, on the other hand and from an EU perspective, Art. 11 of the Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations of 1972,[28] as well as Art. 12 of Rome I Regulation on the Law Applicable to Contractual Obligations – although this instrument was actually published one year later- should be also considered.[29]

Therefore, although Art. 15 might be criticized for its lack of originality, the outcome is an effective uniform provision which offers clear legal solutions, and which has been previously tested by other European and International instruments.

Lastly and from a purely academic perspective, it is also worth mentioning that this relevant question -of the determination of the scope of the law applicable to a non-contractual obligation – had also been previously approached by two significant texts produced by two renowned academic institutions, which should also be taken into account. In relation to this, not only Art. 4 of the Resolution of the *Institut de Droit International* of 1969, on Delictual obligations in Private International Law,[30] but also Art. 8 of the Proposal for a European Convention on the law applicable to non-contractual obligations – drafted in 1998 by the *Groupe européen de droit international privé*[31] – should also be mentioned. **8**

4. Legislative history

When referring to the legislative history of this provision, reference should be made to two decisive moments. A first period which was linked to the Draft Convention on the Law **9**

26 *Plender/Wilderspin*, 454.

27 Available at: https://www.hcch.net/en/home.

28 Text of the Draft Convention and Acts of the Colloquium which led to final instrument in *Lando/von Hoffmann/Siehr*, European Private Law of Obligations (Tübingen, 1975), 220 *et seq*. See *Bourel*, 97, 114–120; *Di Marco*, 399, 410–413; *Foyer*, 639, 649–652; *Iglesias Buhigues*, 1123, 1134–1138.

29 *OJ* L 177, 4.7.2008.

30 Text available at: http://justitiaetpace.org.

31 Text available at: http://www.gedip-egpil.eu. See *Fallon*, 45, 64; *Marín López*, 379, 401.

Applicable to Contractual and Non-Contractual Obligations of 1972 – which concluded with the enactment of the Rome Convention of 1980, thus with abandonment of the idea of a global Convention covering the law of obligations as a whole. As well as to a second and more decisive moment, which started by the publication of the Draft Proposal for a Regulation of 2003 – which, however, was preceded by the production of several draft Conventions, following the example of the mentioned Rome Convention of 1980, from the late nineties.[32]

In relation to the second period, as long as it is the most recent and decisive one, it should be stressed that the wording of Art. 15 of Regulation Rome II has experienced slight but significant changes, in order to reach its current version and position in the structure of the instrument -since its original version at Art. 11 of the Draft Proposal of 2003.[33] In fact, the definitive wording and numbering of this provision in the current instrument can be traced back to the common Position of 2006,[34] while the wording of the provision at the Amended Proposal of 2006 resembles very much the text of Art. 11 of the Draft Proposal for a Regulation of 2003.[35]

10 Additionally, those modifications which Art. 15 has suffered from the Draft Proposal of 2003, have been the result of a long legislative process, and they all had the objective to improve the terms of this key provision. However, they will be mentioned with more detail when the different questions governed by the law applicable to the non-contractual obligation are analyzed in particular.[36]

Nevertheless, and from a more general perspective, it should be mentioned that the current provision follows a broader approach than its precedent, as long as it not only has a shorter title – not making reference to non-contractual obligations, but also it makes reference to all provisions of the Regulation -and not just Arts. 3 to 10 of the instrument-. However, these modifications have no practical consequences and they also influenced the final wording of Art. 12 of Rome I Regulation.

11 A more significant modification, which this provision has experienced, can be envisaged when we get to the particular questions referred in its sections (a) to (h). In relation to this – and apart from the evolution that this paragraphs have experienced, which will be studied in the next part of this comment, it should be underlined that Art. 11 of the Draft Proposal of 2003 included a section (i) which is not present at Art. 15. In this respect, paragraph (i) – which was dropped in the legislative process- referred to "*the matters in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement of a period of prescription or limitation and the interruption and suspension of the period*".

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32 Also *Halfmeier*, 553.

33 COM (2003) 427, 36–37.

34 Common Position (EC) No. 22/2006 adopted by the Council on 25 September 2006, with a view to adopting Regulation (EC) No. …/… of the European Parliament and of the Council of … on the law applicable to non-contractual obligations (Rome II), *OJ* C 289, 28.11.2006.

35 Amended Proposal for a European Parliament and Council Regulation on the law applicable to non-contractual obligations ("Rome II"), COM (2006) 83 final.

36 *Infra* at II.

As a result, it may be concluded form this suppression, that such issues – related to "the loss of a right following failure to exercise it, on the conditions set by the law",[37] will not fall under the scope of the *lex causae* and, as a result, they will be accordingly characterized as procedural.

II. Questions governed by the law applicable to the non-contractual obligation

12 Sections (a) to (h) of Article 15 determine which specific issues will be considered as substantive and, as a result, which ones will be openly governed by the *lex cause* – "*in particular*" – and not by the law of the competent court – the *lex fori*. Behind this long list of issues – which should be governed by the *lex causae* –, the objective of pursuing legal certainty can be established.[38] Moreover, with this classic structure, this provision tends not only to provide predictability of results, and to facilitate its practical application, but also to overcome characterization discussions.[39] Nevertheless, it is important to remember that this is just an illustrative rather than an exhaustive list, as explained in the previous paragraph. Hence, further issues might also be considered to have a substantive nature in the future, via the interpretation of Art. 15 by the European Court of Justice.

1. Basis and extent of liability

13 The first issue which is going to be governed by the law governing the non-contractual obligation, as established in Art. 15 (a), is "*the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them*". The approach which is sustained by this section has been considered as useful, because of the existing intimate link between those elements.[40] However, and in spite of its direct reference to the liability regime – which may lead to think that this provision is applicable just to tortious situations, this provision should also be considered to be appropriate in respect to all non-contractual obligations – thus this paragraph also covers unjust enrichment, *negotiorum gestio* and *culpa in contrahendo* cases.[41]

14 The expression used by this provision slightly differs from the version envisaged by the Draft Proposal for a Regulation of 2003, in relation to two different aspects. Firstly, the 2003 version referred to "*the conditions and extent*", thus using the expression "*conditions*" instead of "*basis*" of liability. Secondly, the precedent proposed provision used a straighter forward expression by mentioning those persons who "*are liable*", instead of those who "*may be held liable*". These two changes may be considered to generate an improvement of the text at the final version of this provision, but do not radically affect its content.[42]

Moreover, it is important to notice that the approach followed by this Article substantially differs from the one present in Art. 12 of Rome I Regulation – in accordance with its Art. 1 (2) (a), in which the European legislator opted for the total exclusion of the question of the

37 COM (2003) 427, 24.

38 *Boskovic*, 184.

39 *Plender/Wilderspin*, 435.

40 See, in relation to The Hague Convention of 1971, *Essen*, 28.

41 *Jakob/Picht*, 961.

42 *Dickinson*, 570; Halfmeier, 554.

capacity of the parties.[43] In this respect, although this inconsistency might be discussed - due to the close connection between these two instruments,[44] such disparity in the legal treatment not only is rooted in a solution followed by the abovementioned International Conventions and by some national precedents of the Rome II Regulation among the Member States of the EU – which also characterize this issue as substantive,[45] but it can also be explained because of the intimate relationship which exists between the law of the non-contractual obligation and the capacity to incur such liability.[46]

15 In accordance with the wording of section (a), on the one hand, the *lex cause* will rule all intrinsic requirements of liability and the prerequisites for a claim, including the character of the liability – whether it may be strict or it is based on fault,[47] the precise conditions to determine and the definition of the fault – also when an omission can constitute fault- and the determination of the casualty link.[48] On the other hand, and in relation to the extent of the liability, it has been criticized not only because of the unclear relationship that this letter keeps with section (b) – when it refers to the limits of the liability, but also for being unnecessary.[49] Nevertheless, the expression used in this section relates to legal limitations determining the maximum extent of liability – a good example of this would be ceiling amounts which could be foreseen for strict liability cases[50] – and it also covers the contribution of each of the several tortfeasors which could be found liable.[51]

Besides, Recital 12 clearly states that this paragraph determines that the law applicable to the non-contractual obligation will also cover the capacity of persons – both natural and legal[52] – to incur liability, as well as significant questions such as the identification of such person and the possible restrictions which such capacity may face.[53] In this respect, when the liability of a legal person is at stake, the relationship between that legal person and the officer of the company who committed the tortious act will be determined by the *lex societatis*.[54] Nevertheless, and also in relation to the liability of legal persons, it must be taken into account that this provision is not affected by Art. 1 (2) (d).[55] Besides, and in relation to cases of multiple tortfeasors, this provision does not refer to the possible claim of any of the liable persons which demands compensation from the other debtors, when this person already satisfied the claim – even if it was partly –, as this question will be determined by Art. 20.[56]

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43 However, Art. 13 of Rome I Regulation.

44 *Halfmeier*, 553.

45 For a comparative analysis of this question, prior to the publication of the Rome I Regulation, *Fach Gómez*, 266–269.

46 Hamburg Group for Private International Law, 27.

47 See Recital 11.

48 COM (2003) 427, 23. See *Bach*, 345; also *Vinaixa Miquel*, 294.

49 *Bach*, 345; *Halfmeier*, 554. Although this expression is also used in both Hague Conventions. *Plender/Wilderspin*, 439.

50 *Garcimartín Alférez*, 14; *Halfmeier*, 554.

51 COM (2003) 427, 23.

52 *Bach*, 345; *Dickinson*, 571.

53 *Halfmeier*, 554.

54 *Plender/Wilderspin*, 439.

55 *Bach*, 345.

56 See comment on Art. 20 in this book.

2. Grounds for exemption, limitation and division of liability

Secondly, letter (b) of this Article states that *lex causae* will govern "*the grounds for exemption from liability, any limitation of liability and any division of liability*", mirroring the same text of the Draft Proposal of Regulation of 2003. This paragraph refers – when dealing with these negative requests of the liability –, to "extrinsic factors of liability" like hardship, *force majeur*, necessity, or contributory negligence, and even the privileges of liability related to specific parties like "the inadmissibility of actions between spouses and the exclusion of the perpetrator's liability in relation to specific categories of persons".[57] **16**

Moreover, this letter could cover the waiver or restriction of liability by limitation clauses contained in an agreement subscribed by the parties – either expressed or implied –, but such agreement will be governed by the *lex contractus* – i.e. Rome I Regulation –, including the non-contractual obligation as stated in Art. 4 (3) II of Rome II Regulation.[58] In connection to this, the consent which may be connected to the harm suffered by a guest passenger should also be included.[59]

Apart from that, when paragraph (b) refers to the division of liability, it is meant to cover the relationship between the injured party and the liable person, but not the legal connection between the different and joint tortfeasors – something which will be determined by Art. 20.[60]

3. Existence, nature and assessment of damage or remedy claimed

Thirdly and according to paragraph (c) of Art. 15, the law ruling the non-contractual obligation will also determine "*the existence, the nature and the assessment of damage or the remedy claimed*". Hence, again no changes can be highlighted from the original text of the Draft Proposal of 2003.[61] Accordingly, the determination of the damage for which compensation may be due will be determined by the *lex causae* – and, as a result, they could not be characterized as procedural –, referring to significant issues like "personal injury, damage to property, moral damage and environmental damage, and financial loss or loss of an opportunity".[62] Besides and in principle, the availability of a remedy should also be governed by the proper law of the non-contractual obligation.[63] **17**

Moreover, this remarkable provision also covers the quantification of damages which, as a result, also enjoys a substantive character and will be governed by the proper law of the non-contractual obligation concerned.[64] Nevertheless, it should be underlined that the *lex causae* could be limited by the recourse to *lex fori*, according to Arts. 16 (mandatory rules) or 26

57 COM (2003) 427, 23. See *Bach*, 346; *Czaplinski*, 137; *Halfmeier*, 555.

58 *Bach*, 347; *Dickinson*, 573; *Halfmeier*, 555. See *Plender/Wilderspin*, 443–445.

59 *Dickinson*, 572; *Plender/Wilderspin*, 441.

60 *Bach*, 347; *Halfmeier*, 555. See comment on Art. 20 in this Book.

61 However, it can be stressed that there are some differences in the language versions between the English language version and others. *Dickinson*, 576; *Plender/Wilderspin*, 446–447.

62 COM (2003) 427, 23.

63 See *Actavis UK Ltd & Ors v Elo Lilly & Company* [2015] EWCA Civ. 555, 119.

64 *Bach*, 348; *Boskovic*, 188; *Calvo/Carrascosa*, 134; *von Hein*, 14; *Weintraub*, 565. Also, *Bacon v Nacional Suiza Cia Seguros y Reaseguros SA* [2010] EWHC 2017 (QB), 37. However *Bogdan*, 42.

(public policy).[65] Besides, it has also been stressed that the court which has been seized will appreciate if damages are compensatory or non-compensatory and, if the second, "exemplary or punitive damages of an excess nature".[66] However, and if Recital 33 of the Rome II Regulation is taken into account when the quantification of damages in relation to traffic accidents is at stake, factual aspects like "all relevant circumstances of the specific victim, including in particular the actual loss and costs of after care medical attention" should be taken into consideration. Nonetheless, this Recital should not be considered as an especial conflict-of-laws rule altering the solution provided by that provision, only having a limited function when liability arising from traffic accidents is at stake[67] – although not clearly stated and with possible negative side effects on the victim.[68]

4. Measures which prevent or terminate injury or damage or ensure compensation

18 Fourthly, Art. 15 (d) of this provisions establishes that "within the limits of powers conferred on the court by its procedural law", "the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation" will also enjoy a substantive character – a wording which improves the terminology used in its version of 2003.[69] This paragraph aims at providing a uniform European approach to this problematic question,[70] by including under the lex cause aspects like, whether the damage can be repaired by payment of damages – either in a lump sum or by instalment –, and the ways of preventing or halting the damage – i.e. interim measures, disclosure and injunctive relief, as well as the existence of interlocutory injunctions.[71] Thus, and in principle, those measures which are going to be governed by the lex causae should be considered, even if they were unknown in the *lex fori*.[72]

However, the law of the competent court will be able to determine the opportunity to take such measures – following a "best fit" approach, which does not imply a change in its legal system,[73] as far as the recourse to the lex cause should be affected by "the limits of powers conferred on the court by its procedural law".[74] Therefore, and according to this paragraph, while the prerequisites and the extent of such measure should be governed by the lex cause, the measure should be granted – even if it is unknown by the procedural law of the competent court- unless it is incompatible with the *lex fori*.[75]

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65 *Halfmeier*, 556; also *Palao Moreno* (Valencia, 1998), 131–132.

66 Recital 32. See *Dickinson*, 578.

67 *Dickinson*, 580; *Halfmeier*, 555; *Jakob*/*Picht*, 963; *von Hein*, 14.

68 *Plender*/*Wilderspin*, 452–453.

69 Hamburg Group for Private International Law, 28.

70 As expressed by the European and Social Committee, "in view of the fact that, in accordance with generally accepted principles, the procedural law will be subject to the *lex fori*". Opinion of the European and Social Committee on the "Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (Rome II), *OJ* C 241, 28.9.2004, 7.4.

71 *Bach*, 348–349; *Dickinson*, 582; *Franzina*, 299, 362; *Plender*/*Wilderspin*, 455.

72 Cfr. COM (2003) 427, 24.

73 *Dickinson*, 582.

74 *Bach*, 348.

75 *Garcimartín Alférez*, 14; *Halfmeier*, 556; *Mariottini*, 666.

5. Transfer of a right to claim damages or a remedy

Section (e) of Art. 15 also considers substantive "*the question whether a right to claim damages or a remedy may be transferred, including by inheritance*". With this wording this provision is clearly improved, if compared with its precedent of 2003. This is so, not only for the broader mention to the rights of the injured party, but also for the use of the more appropriate term of transferred – if compared to the more limited one of "assigned", which however falls within its scope.[76] In this respect, the law applicable to the non-contractual obligation will determine not only whether the claim can be transferred and the relationship between the parties, but also whether the heir of the victim may bring an action in order to ask for compensation for damage caused to the victim.[77] **19**

Nevertheless, the proper law of the non-contractual obligation will not regulate how the transfer of the right took place.[78] In that respect, this a question which will be governed by the law applicable to the legal relationship concerned – i.e. either non-contractual, contractual and determined by the *lex contractus*, or successional and regulated by the *lex sucessionis*.[79] Moreover, the *lex causae* will neither govern the existing legal relationship between those parties – assignor and assignee –,[80] as it would be considered as a preliminary question which will be ruled by the law applicable to the legal relationship in question. Besides, this paragraph does not even relate to questions of subrogation (*cessio legis*), which will be covered by Art. 19.[81]

6. Persons entitled to compensation for damages sustained personally

Besides, and in accordance with section (f) – echoing the solution found at the Draft Proposal of 2003 –, the *lex cause* will govern "*persons entitled to compensation for damage sustained personally*". This paragraph aims at providing both a balance of the rights and obligations of the parties, and the foreseeability of results.[82] Therefore, it covers all those cases when someone which has suffered damages – i.e. non-material damages like financial losses, and even funeral expenses or distress- but is not the victim directly affected – a "secondary victim"- may ask for compensation, when it was that direct victim – the "primary victim" – the one who suffered those damages – examples of these situations of *dommage par ricochet* can be found in cases like the damage suffered by close relatives of a deceased person or by family members after an accident.[83] **20**

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76 *Dickinson*, 584–585; *Plender/Wilderspin*, 455.

77 COM (2003) 427, 24.

78 Also *Junker*, 1023.

79 See *Plender/Wilderspin*, 455–456. In relation to this, when the relationship is characterized as contractual, the Rome I Regulation should de considered, and if it is considered to be succesoral, Regulation (EU) No. 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (*OJ* L 201, 27.7.2012) will be of application.

80 *Bach*, 349; *Halfmeier*, 556–557.

81 See comment on Art. 19 in this Book.

82 *Boskovic*, 186.

83 COM (2003) 427, 24. However, some authors recommend a broad interpretation of this paragraph, thus also covering questions like indirect physical damage. *Bach*, 350.

21 In relation to Art. 15 (f), the *Florin Lazar* case decided by the European Court of Justice should be mentioned.[84] This judgement related to a Romanian national who claimed compensation for material and non-material damage sustained after the death of his wife – also a Romanian national, but living in Italy –, caused in a traffic accident which took place in Italy and by an unidentified vehicle. In this case the Court considered not only that "Article 15 (f) of that Regulation which confers on the applicable law the task of determining which are the persons entitled to claim damages, and which covers the situation, at issue in the main proceedings, of damage sustained by close relatives of the victim", but also that "the designated law also determines the persons entitled to compensation for damage they have sustained personally. That concept covers, in particular, whether a person other than the 'direct victim' may obtain compensation 'by ricochet', following damage sustained by the victim. That damage may be psychological, for example, the suffering caused by the death of a close relative, or financial, sustained for example by the children or spouse of a deceased person".[85]

7. Liability for the acts of another person

22 Also resembling its precedent of 2003, section (g) of Art. 15 refers to "*liability for the acts of another person*" – i.e. the question of vicarious liability in a broad sense[86] – as a question to be ruled by the *lex causae*. It is important to underline that this provision – which is related to vicarious liability, and thus covering situations of "liability of parents for their children and principals for their agents"[87] – complements which has been stated in letter (a), and as a consequence both questions will be governed by the same law applicable to the non-contractual obligation.[88] Nevertheless, the *lex cause* will meet two significant limits which should be stressed.

(a) On the one hand, the determination of the existing relationship and the link between such relationship and the liability which may arise from it must be treated like a preliminary question. Thus this issue should be governed by the law applicable to that specific legal status and not by the proper law of the related non-contractual obligation.[89]

(b) On the other hand, another limit to the solution as provided by para. 15 (g), can be found at Art. 1 (2) (d), when referring to the personal liability of officers and members for the obligations of the company.[90]

As a consequence, and though for the same situation, the liability of the person which may be held liable and questions of vicarious liability may be governed by different national laws in practice, and this diversity is likely to generate some degree of struggle in practice.[91]

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84 *Florin Lazar v. Allianz SpA*, (Case C-350/14) [2015] ECR [ECLI:EU:C:2015:802]).

85 At 24 and 27.

86 *Dickinson*, 587. Hence also including ratification, as underlined by *Plender/Wilderspin*, 457.

87 COM (2003) 427, 24.

88 *Bach*, 345–346; *Halfmeier*, 557; *Plender/Wilderspin*, 457.

89 *Bach*, 351; *Dickinson*, 587; *Halfmeier*, 557; *Jakob/Picht*, 966.

90 See comment on Art. 1 in this Book.

91 *Bach*, 350–351.

8. Extinction, prescription and limitation of liability

Finally, and according to section (h), the law applicable to a non-contractual obligation will also govern "the manner in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation" – hence, improving the wording of the version present in the Draft Proposal of 2003, in which that "period" was twice mentioned –. **23**

Again, Art. 15 (h) pursues to ensure legal certainty and predictability of results in this specific field of the law of obligations.[92] Thus, this provision should receive a broad interpretation in its practical application.[93] Moreover and in accordance with this paragraph, questions related to aspects like the loss of a right which was not used – i.e. limitation periods, satisfaction, forfeiture, release or waiver –, the possible settlement by the parties, or the right to set-off as a form of extinction will also receive a substantive characterization, thus they are deemed to be governed by the *lex causae*.[94]

Article 16: Overriding mandatory provisions

Nothing in this Regulation shall 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 the non-contractual obligation.

I. General outline

Art. 16 provides the possibility for courts and other authorities of Member States to give priority to their own overriding mandatory provisions when applying the law designated by the Regulation to govern a case of cross-border liability. This possibility is conceived as an exception to the open, multilateral nature of the conflict of laws rules included in the Regulation. It should therefore not be interpreted too broadly.[1] Recital 32 of the Regulation **1**

92 *Kadner Graziano* (2009), 68–69; *Plender/Wilderspin*, 459.

93 In relation to The Hague Convention of 1973, *Reese*, 267.

94 COM (2003) 427, 24. *Bach*, 351–352; *Halfmeier*, 558; also *Palao Moreno* (Valencia, 1998), 132.

supports this reading, which refers to the possibility to apply "in exceptional circumstances" overriding mandatory provisions.[2] With this possibility, the door is opened to a mechanism which may limit the harmonization pursued by the Regulation. Art. 16 therefore embodies to a certain extent the freedom for Member States to give priority to the policies they deem crucial.

2 Art. 16 echoes corresponding provisions in other European private international law Regulations, which also make it possible to give priority to the local overriding mandatory provisions.[3] It differs in significant respect from the corresponding provision in the Rome I Regulation: contrary to the later, Art. 16 does not include a definition of the concept of overriding mandatory norms. Further, Art. 16 is silent on the possibility to take into account overriding mandatory norms of another country. These differences, which may not all be explained by the specificities of cross-border liability matters, may be regretted from the perspective of the harmonious development of a coherent European private international law.[4]

3 Internationally mandatory provisions do not seem to have the same weight in cross-border torts than they have in relation to international contracts.[5] Few precedents exist in court practice. This may be explained by the traditional application of the law of the place of the harmful event, which allows a State to control events taking place on its territory. The preference expressed by the Regulation for the application of the law of the place where the damage occurred and the possibility given by Art. 14 to choose the law applicable to a cross-border tort could give more room to corrective mechanisms such as the one embodied in Art. 16. On the other hand, the development of specific conflict of laws rules dealing with special topics such as unfair competition, environmental liability or industrial action could obviate the need to call upon overriding mandatory provisions.

II. Legislative history

4 Art. 16 is a classic piece of private international law legislation. The text follows closely the wording of Art. 9 (2) of the Rome I Regulation. It is even closer to the text of Art. 7 (2) of the 1980 Rome Convention.

5 The text of Art. 16 was originally proposed by the Commission.[6] It has not been substantially

1 The ECJ stressed that Article 9 of the Rome I Regulation "must be interpreted strictly" (*Republik Griechenland v Grigorios Nikiforidis*, Case C-135/15, ECJ, 18 October 2016, § 44).

2 Recital 37 of the Rome I Regulation also refers to "exceptional circumstances".

3 See e.g. Art. 9 Rome I Regulation; Art. 30 Regulation 2016/1103 and Art. 30 Regulation 2015/1104. The Rome III Regulation, nor the Maintenance Regulation include, however, a reference to overriding mandatory provisions. In general on the status of overriding mandatory provisions in European private international law Regulations see *A. Panet*, 104 RCDIP (2015), 837.

4 *Jakob*/*Picht*, in: EuZPR – EuIPR Kommentar, vol. III (4th ed. 2016), Art. 16 Rom II-VO, para. 3.

5 *Knöfel*, in: NK-Kommentar – BGB – Rom-Verordnungen zum internationalen Privatrecht, vol. 6, (2nd ed. 2015), Art. 16 Rom II-VO, p. 517, § 1; *Thorn*, in: Palandt BGB (75th ed. 2016), Art. 16 Rome II, par. 5; *Kadner Graziano*, RabelsZ. 73 (2009), 12, 72; *Jakob*/*Picht* (fn. 4), Art. 16 Rom II-VO, para. 6.

6 Art. 12 (2) Commission Proposal. The French title of the provision has been modified during the dis-

modified during the discussions which led to the adoption of the Regulation, save for the deletion of the paragraph relating to the application of overriding mandatory provisions of third States. This paragraph was deleted by the Council in 2006, limiting Art. 16 to the application of the overriding mandatory provisions of the law of the forum. In order to justify the deletion of the provision on mandatory provisions of third countries which was suggested by the Parliament, the Council merely noted that this provision "did not reflect any particular Community interest".[7] It appears that a number of Member States, among which the United Kingdom,[8] strongly opposed the adoption of any rule in relation to third countries' mandatory provisions.

III. Commentary

1. The concept of 'overriding mandatory provisions'

Art. 16 uses what has become the standard terminology by referring to overriding mandatory provisions. This phrase has been preferred to the concept of 'internationally mandatory rules' which is also used in the literature. The Rome I Regulation also makes use of the same concept.[9] By limiting the scope of Art. 16 to those mandatory provisions which are 'overriding', the Regulation makes it clear that the mandatory provisions it refers to are of a different type than the 'ordinary', 'internally' or 'domestic' mandatory rules. The latter cannot be set aside by agreement: whatever parties agree, they will apply to their relationship. However, such mandatory rules may be set aside if the relationship is governed by a foreign law. Domestic mandatory provisions are safeguarded against a choice of law under Art. 14, § 2. Art. 14 § 3 protects "provisions of Community law […] which cannot be derogated from by agreement". In both cases, the relevant provisions may be mandatory within one legal order. Save in cases where the choice of law is disregarded by operation of Art. 14, they are not, however, protected against the application of provisions of another law.[10] **6**

In contrast with other Regulations which include a provision dealing specifically with overriding mandatory provisions, Art. 16 does not provide a definition of the concept of overriding mandatory provisions. Recital 32 makes a cursory reference to "considerations of public interest" as an element to be taken into account when assessing whether a provision may be characterized as overriding mandatory. **7**

cussions: originally, the provision proposed by the Commission was entitled 'Lois de police'. The final version refers to 'Dispositions impératives dérogatoires', a title which is quite unpalatable for classic French private international lawyers. See *Francq*, in: Actualités de droit international privé (2009), p. 69, 101.

7 Communication concerning the Common position of the Council on the adoption of a Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ('Rome II'), 27 September 2006, COM (2006) 566 final, p. 4.

8 House of Lord, European Union Committee, The Rome II Regulation, HL Paper 66, April 2004, § 146.

9 Note, however, that the French version of the Rome II Regulation refers to the "dispositions impératives dérogatoires", whereas the Rome I Regulation sticks to the classic concept of 'lois de police'. In other language versions, the concepts used in the two Regulations are identical (e.g. in German 'Eingriffsnormen').

10 Recital 37 of the Rome I Regulation makes reference to this distinction.

8 As it has been used in European private international law Regulations, the concept of internationally mandatory rules does not deviate from the classic approach. It therefore points to rules which operate before one has identified which law applies to a cross-border tort. This *ex ante* nature is usually expressed by referring to the fact that internationally mandatory rules must be applied irrespective of the content of the law that would otherwise be applicable. Contrary to what holds for the public policy exception it is therefore not necessary to assess the content of the applicable law before triggering the application of overriding mandatory provisions.

9 Whether or not a rule of domestic law should be deemed to be internationally mandatory should be assessed on a case by case basis, looking at the object and the purpose of the rule and taking into account the policy goals assigned to it. Although examples may be given in the literature, no closed list of such rules exists. When assessing whether a given provision indeed qualifies as internationally mandatory, one may take into account the circumstance that the rule cannot be derogated from by agreement. However, the analysis should mainly focus on whether the public interest pursued by the rule is so essential that it requires that the rule be applicable irrespective of the law otherwise applicable to the liability.

10 Overriding mandatory provisions are based on a unilateral approach to conflict of laws. Indeed the method used consists in determining whether a relationship falls within the scope of application of such rules, without taking care at the same time of the possible application of rules of another legal system.[11] The rules covered by Art. 16 should, however, not be confused with the unilateral conflict of laws rules found in many countries, which may cover issues falling within the scope of application of the Regulation. As soon as it is found that such a unilateral conflicts rule covers an issue falling under the subject matter scope of the Regulation, it should be disregarded, as the Regulation enjoys priority.[12]

11 Member States have primary responsibility in determining which rules may be characterized as overriding. However, it is more than likely that the concept of overriding mandatory rule must be seen as a European law concept and that it should therefore be interpreted autonomously, without taking account the definition which may exist in Member States.[13] True, the Regulation does not offer a definition of the concept. The Preamble offers, however, some guidance on the concept. Further, experience has shown that the Court of Justice resists the application of national law for key concepts, in particular if these concepts open the door for Member States to call into question the application of normal rules of a Regulation.[14] Hence the concept of 'overriding mandatory provision' must be deemed to be an autonomous notion.

12 Since the concept of overriding mandatory provision is a European law notion, the Court of

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11 For a discussion of the relationship between overriding mandatory provisions and the unilateral method, see *S. Francq*, L'applicabilité du droit communautaire dérivé au regard des méthodes du droit international privé (2005), 25–32.

12 *Knöfel*, (fn. 5), p. 519, § 9; *S. Francq* (fn. 6), p. 102.

13 *A. Dickinson*, The Rome II Regulation. The Law Applicable to Non-Contractual Obligations (2008), p. 633, § 15.16.

14 See in relation to the concept of public policy, see *Dieter Krombach v. André Bamberski* (case C-7/98) (2000), ECR 2000-I, 1935, para. 23.

Justice will control the extent to which a Member State imposes the application of its own rule above and beyond the law declared applicable under the Regulation. The control exercised by the ECJ will be inspired by the concern to ensure that the application by Member States of such mandatory rules does not undermine the normal rules of the Regulation.

13 In the *Arblade* case, the ECJ has given a general definition of overriding mandatory provisions. According to the ECJ, these provisions are "national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State".[15] Even though the Court did not intend to lay down a general definition of the concept,[16] this definition was taken over in the Rome I Regulation and quoted in the Proposal made by the Commission.[17] It will certainly serve as a stepping stone for the Court to define the concept of overriding mandatory provisions under Art. 16.[18] This is even more likely since the *Arblade* definition has to a large extent be taken over by the European legislator in Art. 9 § 1 of the Rome I Regulation and, more recently, in other Regulations.[19] Since the Rome I and Rome II Regulations were drafted as a coherent set of rules and the European legislator intended to ensure that the European private international law of obligations was harmonious,[20] inspiration may therefore be found in Art. 9 of the Rome I Regulation.[21]

14 Art. 16 only extends to provisions which are mandatory. In contractual matters, it is therefore said that overriding mandatory provisions constitute a sub-set of the more general category of mandatory rules[22] If this line is followed, the first verification which should be carried out relates to the question whether the provision may be derogated from by contract. If this is the case, there is no reason to enquire further whether the rule is internationally mandatory. It is submitted that this reasoning may not fully apply in cross-border liability. Indeed, the law of liability is not build around the opposition between dispositive and mandatory rules. Further, it is not that frequent that parties in a situation of liability conclude an agreement. While the fact that a certain rule pertaining to the liability can be excluded or derogated from by contract, may therefore provide useful guidance on its status and its potential characterization as overriding mandatory, it should not automatically direct the characterization process. Rather, the examination of whether the rule is crucial for the safeguard of a given public interest is central to the analysis.

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15 *Criminal proceedings pending against Jean-Claude Arblade, Arblade & Fils SARL and Bernard Leloup, Serge Leloup, Sofrage SARL* (joined Cases C-363/96 and C-376/96) [1999] ECR I-8453, par. 30.

16 As noted by *A. Bonomi*, in: Magnus/Mankowski (ed.), ECPIL Commentary. Rome I Regulation (2017), Article 9, para. 55.

17 Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ('Rome II'), 22 July 2003, COM(2003) 427 final, p. 24.

18 On the 'indirect' function of the definition appearing in Article 9(1) of the Rome I Regulation, see *A. Bonomi* (fn. 16), para. 21.

19 See Art. 30 (2) of Regulations 2016/1103 and 2016/1104.

20 Recital 7 of the Regulation.

21 *A. Fuchs*, in: P. Huber (ed.), Rome II Regulation. Pocket Commentary (1st ed., 2011), Art. 16 Rome II, p. 354–355, § 6; *Thorn* (fn. 5), par. 4.

22 *A. Bonomi* (fn. 16), para. 57.

15 Overriding mandatory provisions are the expression of a certain policy pursued by a State. Recital 32 underlines that these rules are based on "considerations of public interest". Under the Rome I Regulation, a lively discussion has arisen on the question whether this should only cover norms pursuing public goals or also be extended to norms protecting individual interests.[23] The same discussion could arise in relation to Art. 16. Indeed in the field of cross-border liability, one could find examples of legal provisions aimed at protecting the collective interests of a country. This could be the case for provisions dealing with the safeguards to be taken when handling toxic or nuclear waste. Many other rules which could potentially qualify as being overriding mandatory, aim, at least taken at face value, to protect private interests. This may be the case when a State adopts a provision which tends to safeguard the interests of a category of injured persons, by shifting the burden of proof or providing a minimum level of compensation.

16 Provisions of the latter kind may in the first place aim to restore the balance between the competing interests of private parties. Indirectly at least, they will also contribute to protect the social and economic organization of the State, as they will reduce the burden of accidents on public means.[24] The line between the protection of collective interests and that of certain categories of individuals or of individuals is therefore not always crisp and clear.[25] Given the blurred line between the two categories, one should therefore not exclude *a priori* that Art. 16 may be used to impose the application of rules aimed at protecting individual or private interests. Rather the analysis should encompass all rules in order to verify whether they pursue a clear regulatory interest and whether the safeguard of that interest is crucial for the country concerned.[26] If a rule aims *prima facie* to protect the sole interests of a category of persons, it should therefore be verified whether on a second analysis, the rule cannot also be said to aim at safeguarding the general interests of the State.[27] Likewise, a rule aimed at protecting a public interest is not *ipso facto* so important that its application should always override the law normally applicable. In both cases, the analysis should verify whether there is a paramount need to protect the interest at stake. Although this has not yet been applied in court practice, this suggests that the analysis should encompass a proportionality test, in order to verify whether the application of the law designated by other rules of the Regulation can afford a sufficient protection to the interest at stake.[28]

17 Whether a mandatory provision indeed possesses an overriding nature, must be assessed taking into account "all the circumstances in which the law was adopted".[29] One should

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23 See *A. Bonomi* (fn. 16), p. 620–626; *Francq*/*Jault-Seseke*, in: Corneloup/Joubert (eds.), Le Règlement communautaire 'Rome I' et le choix de loi dans les contrats internationaux (2011), pp. 360–371 and *Remien*, in: Festschrift für Bernd von Hoffmann (2011), p. 335–337.

24 In *Ingmar*, the duality was of a different type, as the ECJ stressed that the relevant provisions of the Agency Directive aimed to promote the freedom of establishment and the further integration of the internal market on the one hand, and also to afford some protection to the agents (*IngmarGB Ltd. v. Eaton Leonard Technologies Inc*., (case C-381–98) (2000), ECR, 2000-I, 9305, para. 21, 23 and 24).

25 On the blurred line between strictly public and private interests, *S. Francq* (fn. 6), p. 101.

26 In the same sense for Article 9 of the Rome I Regulation, *A. Bonomi* (fn. 16), para. 82.

27 On this dual purpose test, see *O. Remien* (fn. 23), p. 336–337; *Jakob*/*Picht* (fn. 4), Art. 16 Rom II-VO, para. 4.

28 See for this suggestion, *A. Bonomi* (fn. 16), p. 626, § 85.

29 *United Antwerp Maritime Agencies (Unamar) NV v. Navigation Maritime Bulgare*, (Case C-184/12) ECLI:EU:C:2013:663, para. 50.

therefore look at the exact terms of the law but also at its general structure. One key indicator may be the fact that the non-observance of the provision gives rise to criminal sanctions. However, this is as such not decisive. Another indication may be found in the fact that the legislator has expressly identified the scope of application of the rule, for example by selecting personal or territorial elements to limit the application of the provision. More often than not, the legislator will not have given any express indication on the nature of the rule it adopts.

18 Drawing on the experience gained using national rules of private international law, it is possible to tentatively identify certain rules which could qualify as overriding mandatory provisions under Art. 16. This could be the case with a provision which limits the extent to which contracts of employment may exclude liability for personal injury[30] or limits the liability of the employee vis-à-vis third parties in contracts of employment.[31] In the same sphere, a rule which creates or removes a defence of common employment in a delictual action by an injured worker could be classified as an overriding mandatory rule, as it clearly embodies a public policy.[32] Other provisions which could qualify as internationally mandatory are rules dealing with the existence or not of inter-spousal immunity from liability claim. A rule granting such immunity could be considered to qualify as overriding. The absence of such rule would therefore justify the application of the mandatory provision. A rule which provides that a claim by a person who has suffered damage may not be defeated by reason of the fact that the injured party has also contributed to the damage by his fault may be characterized as internationally mandatory.[33]

19 Rules adopted by Member States whereby a public mechanism is put in place to guarantee that certain damage will be compensated may also qualify as overriding mandatory, as they are based on the idea that the indemnification of certain damage cannot be entirely left to the working of private law. This could apply to rules allowing victims of criminal offence or of medical harm to draw compensation from a publicly set or publicly administered fund.[34] It could also apply to the rules setting up a public fund whose mission is to compensate victims of traffic accidents in case no compensation may be obtained from the tortfeasor or its insurer.[35] The same is not necessarily true for rules adopted by a State in relation to the liability of its civil servants. Those rules aim to protect civil servants from the consequences of their acts. It remains disputed whether they could qualify as internationally mandatory.[36] Some rules relating to the exercise of industrial action or the legal status of trade unions or other representative organisations of workers could also qualify as being overriding man-

30 *A. Dickinson* (fn. 13), p. 632, § 15.16, note 41.

31 *Knöfel*, (fn. 5), p. 520, § 12.

32 *Carruthers/Crawford*, 9 Edin. L. Rev. (2005), p. 65, 93–94.

33 In English law, see the Law Reform (Contributory Negligence) Act 1945.

34 See in Belgium the Act of 1 August 1985 regarding the indemnification of intentional violent acts and the Act of 15 May 2007 regarding the indemnification of medical damage. For a characterization of these rules as internationally mandatory, see *R. Jafferali*, RGAR (2008), 14399/10 and *Francq*, (fn. 6), p. 102. See in French court practice, Cour de Cassation (France), 25 January 2007, 134 JDI (2007), p. 943, with comments by *Legier*.

35 See in France in relation to the Act setting up a public fund (CIVI) compensating victims of traffic accidents, Cass. (2nd Civ.), 3 June 2004, RCDIP 9 (2004), 750, 751, with comments by *D. Bureau*.

36 *K. Thorn* (fn. 5), par. 5.

datory.[37] This could be the case for a rule which impose mandatory minimum service obligations on certain employees in case of strikes or for rules in relation to the compensation which may be paid to employees on strike.[38] Likewise, rules prescribing minimum standards of compensation in case of harm done by certain products or during certain activities may also be covered by Art. 16.[39] A rule imposing a strict liability standard for certain activities does not as such qualify for application under Art. 16.[40]

20 Overriding mandatory provisions could also be found in the antidiscrimination legislation adopted in all Member States following the various EU directives. If a claim arising from an antidiscriminatory behavior is deemed to fall under the Regulation, the application of the national provisions giving effect to the European directives may be justified in light of Art. 16. Attention should, however, be paid to the additional threshold which must be met when a Member State intends to rely on its own implementation of a European directive as being mandatory.[41]

21 It is disputed whether rules relating to the liability arising out of the use of a prospectus in financial matters qualify as internationally mandatory. These rules certainly serve a public interest, as they guarantee that investors are entitled to relevant information on the financial instruments. It remains, however, to be seen whether these rules have an overriding nature.[42]

22 In relation to environmental damages, special rules limiting the liability for maritime claims may qualify as international mandatory. This could be the case for rules limiting the liability under the Oil Spill Convention.[43] The question has also been raised whether the provisions of Directive 2004/35 on environmental liability could qualify as overriding mandatory and hence receive application under Art. 16.[44]

23 In the past, it has been suggested that rules relating to the protection of personality rights could be considered internationally mandatory.[45] This would comport with the constitutional nature of the protection of personality rights and the fact that these rights are pro-

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37 Recital 28. *von Hein*, in: G.-P Calliess (ed.), Rome Regulations – Commentary on the European Rules of the Conflict of Laws (1st ed., 2011), Art. 16 Rome II, p. 567, § 17; *Jakob*/*Picht* (fn. 4), Art. 16 Rom II-VO, para. 6. See in general *O. Knöpfel*, 'Internationales Arbeitskampfrecht nach der Rom II-Verordnung', EuZA 1 (2008) 228 ff.

38 *Knöfel*, (fn. 5), p. 520, § 12; *Thorn* (fn. 5), par. 5.

39 See e.g. Section 84 of the German *Arzneimittelgesetz* (characterized as an overriding mandatory provision in the literature: *Knöfel*, (fn. 5), p. 520, § 14; *Thorn* (fn. 5), par. 5; *Jakob*/*Picht* (fn. 4), Art. 16 Rom II-VO, para. 6) and in general *Spickhoff*, in : Die richtige Ordnung. FS für Jan Kropholler, 671, 673.

40 *von Hein*, (fn. 37), Art. 16 Rome II, p. 566, § 13.

41 *United Antwerp Maritime Agencies (Unamar) NV v. Navigation Maritime Bulgare*, (Case C-184/12) ECLI:EU:C:2013:663, § 45-52.

42 See in general *J. von Hein*, in: H. Baum et al. (eds.), Perspektiven des Wirtschaftsrechts – Beiträge für Klaus J. Hopt aus Anlass seiner Emeritierung, (2008), p. 371–396, 387–389.

43 International Convention on Civil Liability for Oil Pollution Damage, 29 Nov. 1969.

44 See *Fallon*/*Fauvarque-Cosson*/*Francq*, in: Viney/Dubuisson (eds.), Les responsabilités environnementales dans l'espace européen (2006), 547, 599–600.

45 *Bourel*, in: Collected Courses Hague Academy 214 (1989), 318–321, § 64–67.

tected both in the relationships between individuals and vis-à-vis the State. This suggestion has, however, not been followed in practice. The development of specific conflict of laws rules dealing with the violation of personality rights may explain why it has not been deemed necessary to use the vehicle of mandatory provisions.[46]

Another field where Art. 16 could possibly play a role is that of corporate social responsibility. It has indeed been argued that some fundamental rights could qualify as overriding mandatory provisions under Art. 16. The same could be said of provisions imposing statutory duties on a corporation with regard to extraterritorial compliance with human rights standards.[47]This suggestion ties in with the corporate human rights liability pursued in US courts under the ATCA statute. This suggestion has yet to be confirmed in court. **24**

2. The relationship with other rules of the Regulation

Art. 16 has a corrective function. It aims to preserve the overriding interests of a Member State. As such, it may be applied whatever provision of the Regulation has been used to designate the applicable law. Art. 16 may be used in particular when the law applicable is designated by the general rule (Art. 4) or by specific rules (Arts. 5 to 9). Overriding mandatory provisions prevail over any provisions belonging to the law designated by these provisions, even if that law is designated under a rule pursuing a specific objective such as the protection of the environment (Art. 7) or the safeguarding of free competition (Art. 6). The concurrent application of Art. 16 together with one of the special conflict of laws rule is important because the operation of the rules of jurisdiction could mean that a cross-border tort is submitted to a court of another Member State than the one whose law is declared applicable under the special conflict of laws rule. If this is the case, the court's overriding mandatory provisions will prevail over the law declared applicable under the specific rules. **25**

The application of Art. 16 is not restricted to cross-border torts and delicts falling under Chapter II of the Regulation. It is also fully relevant to the special situations falling under Chapter III, i.e. unjust enrichment, *negotiorum gestio* and *culpa in contrahendo*. **26**

The application of overriding mandatory provisions may be more in order when the law applicable to a cross-border tort has been chosen by parties further to Art. 14. Nevertheless, there is no reason to exclude the application of Art. 16 in those domains where the Regulation restricts or excludes the possibility to choose the applicable law, i.e. in competition matters (Art. 6 (4)) and in relation to infringement of intellectual property rights (Art. 8 (3)).[48] **27**

When parties have chosen the law applicable to a tort in accordance with Art. 14 even though the situation only has connection within one State, the effects of the law chosen may be limited both by the special mechanism laid out in Art. 14 (2) and by the application of the overriding mandatory provisions under Art. 16. As the situation is only connected **28**

46 On overriding mandatory provisions in unfair competition cases see *A. Heinemann*, in: Mélanges Dutoit (2002), 115–136.

47 *Van Den Eeckhout*, Contemporary Readings in Law and Social Justice 4 (2012), 178, 201; *van Hoek*, in: Satyanarayana Prasad (ed.), Human rights: corporate violations (2010), 35, 53.

48 *von Hein*, (fn. 37), Art. 16 Rome II, p. 563, § 10.

with one State, it is very likely that the courts of that State will be called upon to decide the case. Hence, both Art. 14 (2) and 16 will lead to the application of the rules of the same country. There is therefore no need from a practical point of view to give priority to one or the other mechanism.[49] In the unlikely case that the situation is deferred to the courts of another country, Art. 16 should be applied together with Art. 14 (2). Art. 16 could also be combined with Art. 14 (3). The latter provision makes it possible to disregard the law chosen by parties to give effect to mandatory provisions of "Community law". Art. 16 could in addition justify the application of overriding mandatory provisions of the Member State whose court have jurisdiction.[50] Further, Art. 16 could also be relevant to allow the application of overriding mandatory provisions of European law if the situation is not purely intra-European.

29 Certain provisions of the Rome II Regulation refer to contracts and more specifically to the law applicable to a contract. This is the case in Art. 12 (1) which defers to the law applicable to the contract.[51] The question has been raised whether such reference should be taken to mean that any question regarding the possible application of overriding mandatory provisions should be decided using Art. 9 of the Rome I Regulation. It is submitted that if the overriding mandatory provision has an effect on the non-contractual obligation, the preference should be given to Art. 16.[52] The question may be relevant given that the Rome I Regulation makes it possible to take into account overriding mandatory provisions of another law than the *lex fori*.

30 Art. 16 permits a court to disregard the law normally applicable to a situation of cross-border liability in order to give priority to domestic provisions deemed to be of crucial importance. This mechanism should not be confused with the possibility allowed under Art. 17 to take into account rules of safety and conduct of the place where the even giving rise to the liability took place. The latter provision does not lead to side-stepping the law applicable to the cross-border liability. Rules of safety and conduct are merely ingredients in the legal reasoning which is developed exclusively under that law. Further, Art. 17 is not limited to those rules in force in the State whose courts are seized. It may also serve to give effect to rules of another State, if the court seized is not that of the place where the even giving rise to the liability took place. Nevertheless, some conduct regulating rules may also qualify as internationally mandatory, provided they meet the requirements of Art. 16.[53] If this is the case, they deserve to be applied if they are part of the legal order of the court seized.

31 Overriding mandatory provisions embody certain regulatory interests pursued by States. As such, the mechanism may pursue the same goals as those embodied by the public policy exception (Art. 26). However, if they are functionally similar, the two mechanisms differ considerably in their practical operation. The public policy defense operates as a shield and

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49 For a conceptual reason to give priority to under the Rome I Regulation, see *Renner*, in: G.-P Calliess (ed.), Rome Regulations – Commentary on the European Rules of the Conflict of Laws (1st ed., 2011), Art. 9 Rome I, p. 196, § 3.

50 Again, in this situation it does not seem to be necessary from a practical point of view to determine whether Article 16 prevails over Ar. 15 (3).

51 See also Art. 4 (3), 10 (1) and 11 (1).

52 *Bonomi* (fn. 16), p. 609, § 22.

53 *von Hein*, (fn. 37), Art. 16 Rome II, p. 562, § 6.

allows to refuse the application of foreign law, while the effect of Art. 16 is to justify the application of rules of the forum. Further, the operation of Art. 16 does not require that the content of the law which is normally applicable to a cross-border tort, is first scrutinized.

3. The various categories of 'overriding mandatory provisions'

a) National overriding mandatory rules

Art. 16 may in the first place be used to give effect to overriding mandatory rules of a national legal system. Those rules may be found in statutory instruments. They may also be derived from court practice. In any case, they should be part of the law of the forum. **32**

A question arises when the relevant overriding mandatory rules are part of the law applicable under the Regulation ('*lex causae*'). Should these rules apply as such, as part of the law declared applicable by the Regulation? Or should one consider that these rules may not be applied because they come with their own applicability criteria, which may depart from the result reached under the Regulation – the so-called *Sonderanknüpfung*-theory? This question has given rise to a lively debate under the Rome I Regulation.[54] The text of Art. 16 is not conclusive in this respect, as it only makes allowance for the application of the mandatory provisions of the law of the forum. The absence of any indication on this question while the problem was well known suggests that the drafters of the Regulation did not intend to limit the scope of the law declared applicable to those rules which are not overriding mandatory. Another reading which would exclude taking into account the mandatory rules of the *lex causae* would lead to important difficulties, as the court seized would have to distinguish within the law declared applicable those rules which are internationally mandatory from the other. Such an analysis may be very difficult to carry out. In addition, the exclusion of the overriding mandatory provisions of the *lex causae* could lead to a situation where the answer to a question is difficult to determine, as the *lex causae* may not provide an alternative solution to that included in the overriding mandatory rule. **33**

It is therefore submitted that the overriding provisions of the *lex causae* should be applied without taking into consideration Art. 16.[55] It should not make any difference in that respect whether that law has been declared applicable following a choice by parties (Art. 14) or otherwise.[56] Incidentally, the obligation to give effect to the overriding mandatory provisions of the law declared applicable by the Regulation constitutes the only possibility to give effect to the mandatory rules of another State than the one whose courts have jurisdiction. In contrast with the position under Art. 9 (3) of the Rome I Regulation, the court will give in this hypothesis full effect to the overriding mandatory provisions of the *lex causae*, without limiting itself a mere taking into consideration of these rules. **34**

In case of conflict between the mandatory provisions of the applicable law and those of the forum, the latter should prevail in accordance with Art. 16. The priority enjoyed by the overriding mandatory provisions of the forum applies whether the law declared applicable under the Regulation is that of a Member State or not. **35**

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54 See in general, *A. Bonomi* (fn. 16), p. 632–633, § 108–116.

55 *Dickinson*, (fn. 13), 636, § 15.22; *Remien*, (fn. 23), p. 342 (the solution is "unbedenklich"); *Jakob*/*Picht* (fn. 4), Art. 16 Rom II-VO, para. 10.

56 In the same sense in relation to the Rome I Regulation, *A. Bonomi* (fn. 16), p. 634–635, § 117.

b) Overriding mandatory provisions of European law

36 Art. 16 does not make any express reference to the possibility to apply mandatory rules of European law.[57] This does not, however, prevent the application of such rules.[58] The fact that Art. 16 only refers to those overriding mandatory rules of the "law of the forum" cannot be understood to bar such application. European law is indeed part and parcel of the law of each Member State. This will be obvious for those provisions which were adopted by way of directives and have been duly implemented in the law of the relevant Member State. The duty also extends to mandatory provisions included in primary EU law. The fact that Art. 14 (3) of the Regulation already safeguards the application of "provisions of Community law" is not sufficient to exclude the recourse to Art. 16 in order to give effect to overriding mandatory provisions of European law. Art. 14 (3) indeed is restricted to the situation in which parties have made a choice in favor of the law of a non Member State.

37 In case a substantial difference exists between the implementation of the relevant European rule in the forum and in the country whose law is declared applicable, it is submitted that in accordance with the *Unamar* ruling of the ECJ,[59] the forum may give priority to its own transposition provided it demonstrates that the national implementation rules can be qualified as overriding mandatory provisions. This requires showing that it is essential for the national transposition rules to go beyond the protection afforded by the EU instrument.

38 If the law declared applicable under the Regulation is that of a third State, it may be asked whether the courts of a Member State should give application to provisions of secondary European legislation. This question could arise in relation to the provisions of the Products Liability Directive[60] and of other EU instruments.[61] The question whether the rules included in this Directive may be regarded as internationally mandatory is not settled in the literature.[62] Following the *Ingmar* decision of the ECJ,[63] it is submitted that if one finds that EU directives and other instruments include mandatory rules, they should apply provided one demonstrates that those rules are crucial in order to safeguard overriding interests pursued by the relevant EU instrument. Reference should then be made to the relevant provisions of European law as they have been implemented in the forum.

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57 The same applies to Article 9 of the Rome I Regulation.

58 *Dickinson*, (fn. 13), 634, § 15.19; *Knöfel*, (fn. 5), p. 517–518, § 5; 371 and *Remien* (fn. 23), p. 338. Likewise under Article 9(2) of the Rome I Regulation, *A. Bonomi* (fn. 16), p. 631, § 107.

59 *United Antwerp Maritime Agencies (Unamar) NV v. Navigation Maritime Bulgare*, (Case C-184/12) ECLI:EU:C:2013:663.

60 Council Directive 85/374/EEC of 25 July 1985.

61 Such as the Prospectus Directive (Directive 2003/71), the Transparency Directive (Directive No. 2004/109) or the Regulation on air carrier liability (Regulation No. 2027/97). See further, A. *Dickinson* (fn. 13), p. 635, § 15.20. See also in relation to the Directive 2004/35 on environmental liability *Fallon*, *Fauvarque-Cosson* and *Francq* (fn. 44), p. 547, 599–600.

62 Comp. e.g. *M. Fallon*, in: J. Basedow/H. Baum/Y. Nishitani (ed.), Japanese and European private international law in comparative perspective (2008), p. 261, 295 (in favor) and *von Hein*, (fn. 37), Art. 16 Rome II, p. 563, § 8 (rejects any attempt to consider the Directive as internationally mandatory). Comp. *Plender/Wilderspin*, European Private International Law of Obligations (2014), p. 591–592, § 19–131–19–132 (nuanced).

63 ECJ, Case C-381/98, *Ingmar GB Ltd. v Eaton Leonard Technologies Inc.*

Art. 27 of the Regulation offers another possibility to give effect to the mandatory provisions of European instruments such as directives. This requires, however, that one finds a conflict of laws rule in the relevant Directive. While many EU directives dealing with consumer law indeed comprise conflict rules,[64] this does not appear to be the case for those instruments addressing issues of liability. However, it is not excluded that such instruments include an implicit or implied conflict rule. Such rule should also enjoy the benefit of Art. 27. **39**

It has been suggested that European rules could be applied on their own, without the need to refer to Art. 16.[65] This would obviate the need to determine whether a rule of EU law is intended to be internationally mandatory. If the law declared applicable to the cross-border obligation resulting from liability is not that of a Member State, it is submitted that the mere fact that a mandatory provision has been adopted at the EU level is not sufficient to guarantee its application. Indeed, the application of the law of a third state is mandated by the Regulation. Hence, it is necessary to call upon Art. 16 to justify the application of the EU law rules.[66] **40**

c) Mandatory provisions of international law

Although court practice in this respect is scarce, it is not excluded that overriding mandatory provisions find their source in international law. One may refer in this respect to international treaties, rules of customary international law and even acts adopted by international organizations. One question which will arise in this respect is whether these rules have direct effect. **41**

d) Mandatory provisions of a third country

Art. 16 refers exclusively to the provisions "of the law of the forum". In its initial proposal, the Commission had suggested to make it possible for a court to give effect to the mandatory rules of another country.[67] The Commission draft followed closely the model of Art. 7 (1) of the 1980 Rome Convention: it required that the situation at hand present a "close connection" with another country. It also referred to the "nature and purpose" of these rules and the consequences of their application as element to be taken into consideration when deciding whether or not to give effect to them. Strangely enough, the draft put forward by the Commission limited the possibility to give effect to mandatory rules to the situation in which the law of a third country was applicable by virtue of the Regulation.[68] **42**

This suggestion did not survive the opposition of a number of Member States, even though some Member States strongly advocated keeping a possibility to give effect to internationally mandatory rules of third countries.[69] Italy noted that the provision would cause "confu- **43**

64 See *P. Mankowski*, in: Magnus/Mankowski (ed.), ECPIL Commentary. Rome I Regulation (2017), Article 23, p. 847–850.

65 See *Remien* (fn. 23), p. 334, 338.

66 For a similar reasoning under Article 9 Rome I Regulation, *Bonomi* (fn. 16), p. 616, § 51.

67 Art. 12 (1) Proposal Commission.

68 This aspect was criticized by Sweden: Comments by the Swedish Delegation, Council Document, 14193/94 ADD 1, 4 November 2004, at p. 6.

69 See e.g. the arguments put forward by the Swedish delegation, in particular in relation to the possibility to take into account constitutional provisions relating to the freedom of press : Comments by the Swedish Delegation, Council Document, 14193/94 ADD 1, 4 November 2004, at p. 6.

sion".[70] The UK explained that there was "no sufficient justification for this rule which would create uncertainty in its operation"[71] and Germany advocated that it be deleted.[72]

44 Notwithstanding the clear signal given by the deletion of the Commission's proposal, it has been argued that Art. 16 does not prohibit that a court takes into account the mandatory provision of a third State.[73] This suggestion, which considers the absence of any provision dealing expressly with third country mandatory rules as a gap in the Regulation, cannot be followed. The history of Art. 16 clearly shows that Member States did not want to leave any room under the Rome II Regulation to apply, give effect or otherwise take into account the mandatory rules of another State than the forum.[74] Accordingly, Art. 16 does not make it possible for a court to apply, or even take into account the mandatory rules of another country, be it a Member State bound by the Regulation or a third State.[75] A Member State may in particular not call upon its national rules of private international law or tradition to give effect to the overriding mandatory rules of a third country.[76] Any such attempt would ruin the efforts to harmonize the conflict of laws rules dealing with cross-border liability.[77] No difference may be made in this respect between the mandatory rules of another Member State and those of a third State not bound by the Regulation. Likewise, an attempt to bypass the limited nature of the obligation imposed by Art. 16 by calling upon the duty of "sincere cooperation" and the overarching obligation of mutual respect imposed by Art. 4 (3) TUE[78] must be rejected, as it would disregard the fact that Art. 16 is limited to the overriding mandatory provisions of the forum.[79] It does not appear that courts have yet taken position on this issue.[80]

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70 Comments by the Italian Delegation, Council Document, 9009/04 ADD 17, 2 June 2004, at p. 6. Some Member States were more radical and noted that there was no need at for a provision dealing with overriding mandatory provisions (see the comments by the Irish Delegation, Council Document, 9009/04 ADD 13, 24 May 2004, at p. 6).

71 Comments by the UK Delegation, Council Document, 9009/04 ADD 15, 26 May 2004, at p. 10. The UK argued that the provision should be either deleted or provision should be made to allow Member States to enter a reservation in respect of it.

72 Comments by the German Delegation, Council Document, 9009/04 ADD 11, 24 May 2004, at p. 14. Spain also advocated that the provision be deleted as it was "difficult to see how it could be of relevance in non-contractual matters" (Comments by the Spanish Delegation, Council Document, 9009/04 ADD 10, 18 May 2004, at p. 7).

73 See *e.g. Remien* (fn. 23), p. 334, 345–346; *Kadner Graziano*, RabelsZ. 73 (2009) 11, 72; *Kadner Graziano*, RCDIP 97 (2008) 445, 508; *Thorn* (fn. 5), par. 3; *von Hein*, ZEuP (2009), p. 6, 24.

74 *Fuchs*, (fn. 21), p. 365, § 30; *Mayer*/*Heuzé*, Droit international privé (2014), p. 512, § 724; *Brière*, 135 JDI (2008) 31, 66; A. *Dickinson* (fn. 13), para. 15.25; S. *Francq*, EJCL (3/2007–2008), p. 319, 340; *de Lima Pinheiro*, Riv. dir. int. priv. Proc. 44 (2008), p. 5, 32.

75 In any case experience with the Rome I Regulation has shown that decisions giving effect to foreign overriding mandatory provisions are extremely rare.

76 *Knöfel*, (fn. 5), p. 518, § 7.

77 *Jakob*/*Picht* (fn. 4), Art. 16 Rom II-VO, para. 9. In *Republik Griechenland*, the ECJ underlined that "the list, in Article 9 of the Rome I Regulation, of the overriding mandatory provisions to which the court of the forum may give effect is exhaustive" (*Republik Griechenland v Grigorios Nikiforidis*, Case C-135/15, ECJ, 18 October 2016, § 49). There is no reason to think that Article 16 would call for another interpretation.

78 As advocated by a number of authors, see the references in *Remien* (fn. 23), p. 340.

79 As noted by the ECJ in relation to Article 9 of the Rome I Regulation: *Republik Griechenland v Grigorios*

The limitation of Art. 16 to the mandatory rules of the forum does not exclude the possibility for a court to take into account the overriding mandatory rules of a State when this is provided by a substantive rule of the law that is applicable to the cross-border liability under the Regulation.[81] In that case, the overriding mandatory rules of another country do not displace the law normally applicable to the cross-border liability. This indirect application of foreign mandatory rules does not constitute a circumvention of Art. 16, as the foreign rules are only regarded as a matter of fact. The consequences of the application or disregard for these rules must therefore be analyzed under the law declared applicable by the Regulation. The ECJ has approved this indirect approach to foreign mandatory rules in relation to the Rome I Regulation.[82] There does not seem to be a good reason to come to another conclusion under the Rome II Regulation. **45**

To a certain extent, Art. 17 of the Regulation could be used to give effect to overriding mandatory provisions of another country. This provision makes it possible to take into account rules of conduct and safety which were in force at the place of the event giving rise to the liability. As Art. 17 does not make any distinction as to the nature of the rule, it could indeed be used when a certain conduct is prescribed by a mandatory provision.[83] The ECJ has made a suggestion in this sense in relation to the Rome I Regulation, holding that Art. 9 of that Regulation did not preclude a court from taking into account "as a matter of fact" other overriding mandatory provisions than those designated by this provision.[84] **46**

However, this will only be possible provided the relevant rule prescribes a specific conduct or has a direct link with safety. In other words, Art. 17 does not open the door to take into account any overriding mandatory provision. Only those provisions which pursue a goal consonant with those mentioned in Art. 17 may be taken into account. Further, only those overriding mandatory provisions of the country where the event giving rise to the liability may be taken into account. Finally, one should pay attention to the fact that under Art. 17, the court is entitled to take into account relevant rules of safety and conduct. There is no possibility to disapply the law applicable to the tort as such: tortious issues will remain governed by the law applicable under the Regulation. It is only within the framework of that law that account may be taken of overriding mandatory provisions of a third State.[85] In **47**

Nikiforidis, Case C-135/15, ECJ, 18 October 2016, § 54. See already *H. Muir Watt*, in: Corneloup/Joubert, Le Règlement communautaire 'Rome II' sur la loi applicable aux obligations non contractuelles (2008), p. 138, § 14.

80 On foreign overriding mandatory provisions in general see *D. Schramm*, Ausländische Eingriffsnormen im Deliktsrecht (2005).

81 *Garcimartín Alférez*, EuLF 7 (2007), p. 77, 90.

82 In *Republik Griechenland*, the ECJ explained that: "Article 9 of the Rome I Regulation does not preclude overriding mandatory provisions of a State other than the State of the forum or the State where the obligations arising out of the contract have to be or have been performed from being taken into account as a matter of fact, in so far as this is provided for by a substantive rule of the law that is applicable to the contract pursuant to the regulation" (*Republik Griechenland v Grigorios Nikiforidis*, Case C-135/15, ECJ, 18 October 2016, § 51).

83 See, however, *Knöfel*, (fn. 5), p. 520, § 10 (mandatory rules cannot be deemed to be rules of safety and conduct).

84 *Republik Griechenland v Grigorios Nikiforidis*, Case C-135/15, ECJ, 18 October 2016, § 51.

85 As the Rome I Regulation does not include a provision similar to Article 17 of the Rome II Regulation, the

practice, the fine line between the application and the mere taking into consideration of foreign rules as local data is, however, easily crossed.

4. Conditions for the application of overriding mandatory provisions

48 Art. 16 does not make reference to any further condition which would need to be fulfilled in order for the court to give application to its mandatory rules. In particular no mention is made of the need to demonstrate that the situation at hand presents a substantial connection with the forum, a connection which would justify the application of the forum's mandatory rules.[86] This is a classic requirement in many European jurisdictions.[87]

49 The silence of Art. 16 on this issue should not be taken to mean that overriding mandatory rules may be applied without taking into account the requirement of a substantial connection. Internationally mandatory rules embody a strong policy objective of States. Their application sets aside the normal conflict of laws rules. It is therefore legitimate to verify first whether such application is warranted in light of the connection between the situation and the forum (so-called '*Inlandsbeziehung*').[88] It has even been argued that the requirement that the situation at hand be connected to the State whose mandatory provisions could apply, may be derived from international law, and more specifically from the limitation of a State's jurisdiction to situations having a genuine connection with that State.[89] As a consequence, it may be that the court of a country refuses to apply a local mandatory provision, if it finds that the required connection is missing. This may be the case if the event giving rise to the damage occurred in another country and the injured party only has a very recent connection in the country whose courts are seized.

50 Before resorting to the overriding mandatory provision, a court should in principle not examine to what result the application of the law designated by the Regulation would lead. Such an examination is an essential part of the operation of the public policy clause (Art. 26). It is unnecessary when dealing with overriding mandatory provisions, as they claim application without any consideration of the content of the law which would normally govern the relationship. This was recognized by the Commission in an early draft of the Regulation, in which it was underlined that what is specific about overriding mandatory provisions is that the courts do not "evaluate in practical terms whether its content would be repugnant to the values of the forum".[90]

51 In practice, however, it is not uncommon that a court will take into account the practical

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ECJ held that account may be taken of overriding mandatory provisions only in so far as this is provided for by a substantive rule of the law applicable to the contract pursuant to the Regulation (*Republik Griechenland v Grigorios Nikiforidis*, Case C-135/15, ECJ, 18 October 2016, § 51).

86 This requirement is not mentioned either in Article 9 Rome I Regulation, even though it was expressly included in Article 7(1) 1980 Rome Convention, which referred to "mandatory rules of the law of another country with which the situation has a close connection ..."

87 On this theme, *P. Kinsch*, RCDIP (2003), p. 403, para. 14.

88 *Jakob*/*Picht* (fn. 4), Art. 16 Rom II-VO, para. 7; *Jafferali* (fn. 34), para. 48. In a similar sense under Article 9 of the Rome I Regulation, *A. Bonomi* (fn. 16), p. 629, § 96.

89 *A. Bonomi* (fn. 16), p. 629, § 96.

90 Commission Proposal, Explanatory Memorandum, COM (2003) 427 final, pp. 24–25.

consequences of applying the foreign law designated by the conflict of laws rule of the Regulation before making a decision on Art. 16. This will especially be the case when the court entertains some doubts as to the proper characterization of a specific legal rule. However unorthodox this may be, investigating what would be the consequences of the application of the law normally applicable may help take a decision on whether a given rule indeed qualifies as being overriding mandatory.

Further, it has been suggested that before resorting to a domestic rule because it is considered to be internationally mandatory, the court should use a proportionality test.[91] Applying such a test would be needed to verify whether the application of the rule deemed to be internationally mandatory is crucial to safeguard the public interests at stake. As in other contexts, such verification would require assessing whether other means may be used to achieve the same result, with less disturbance of the normal operation of the conflict of laws rules. Hence the application of mandatory rules could only be contemplated after having taken into account the content and effects of the law normally applicable. While this approach is more in line with the current thinking in contemporary international law, it has not yet gained much attraction in practice. **52**

Overriding mandatory rules have a radical effect: they set aside the law normally applicable to a cross-border tort without taking into account the normal working of the conflict of laws rules included in the Regulation. From a general European perspective, these special rules remain, however, part of national law. As such their application should comply with general principles of European law as they are not immune for the working of the internal market.[92] The fact that overriding mandatory provisions aim at protecting policy interests which are deemed to be crucial for the State which adopted them, does not shield them from the operation of EU Treaty provisions and other fundamental principles of EU law. This applies in particular if the effects of a mandatory provision limit the benefit of one of the fundamental freedoms guaranteed by the Treaty such as the free provision of services or the free movement of good. Since the Rome II Regulation only applies to cross-border situations, all instances in which Art. 16 applies are likely to trigger the application of European law. From this perspective, the application of a mandatory provision of the law of the forum cannot be contemplated without a test of proportionality being carried out. **53**

5. Effect

Art. 16 provides that "nothing … shall restrict the application" of overriding mandatory rules of the forum. This is in clear contrast with Art. 9, para. 3 of the Rome I Regulation, which refers to the possibility to "give effect" to overriding mandatory provisions. Accordingly, a court may apply to the fullest extent the relevant overriding mandatory rules, without taking into account the content of the law which has been designated by the Regulation. **54**

According to Art. 16, the Regulation does not restrict the application of overriding mandatory provisions. This language suggests that there is no obligation from a European perspective to apply such rules. Rather, Art. 16 clarifies that the Regulation does not stand **55**

91 *A. Bonomi*, Yearbook Private Intl L 1 (1999), 215, 233–235.

92 *Jean-Claude Arblade, Arblade* & *Fils SARL and Bernard Leloup, Serge Leloup et Sofrage SARL* (cases C-369/96 and C-376/96) (1999) ECR 1999-1, p. 8453, para. 30.

in the way to such application.[93] It remains that the application of overriding mandatory rules will most likely constitute an obligation from the perspective of the legal order to which they belong. It is up to that legal order to determine whether the court enjoys any discretion in deciding whether or not to apply an overriding mandatory provision and, if yes, which factors may be taken into consideration when exercising this discretion.

56 When resorting to Art. 16, a court will set aside some of the rules of the law designated by the Regulation to give priority to provisions of local law. As a consequence, a situation of cross-border liability will not be governed by a single law. Rather, the situation will be governed by the rules of the normally applicable law, supplemented by the local mandatory provision. This situation of *dépeçage* is the unavoidable consequence of the application of overriding mandatory provision.

Article 17: Rules of safety and conduct

In assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability.

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I. General outline

1 Art. 17 requires that account be taken of the rules of safety and conduct of the place where the event giving rise to the liability occurred. This rule aims to mitigate the consequences of the preference given under Art. 4 and other provisions of the Regulation, to the law of another place than the place where the harmful event was committed. In doing so, Art. 17 attempts to

[93] *Comp*. with the language used in Article 8(1) of Regulation 2015/848 of 20 May 2015 on insolvency proceedings (recast) in relation to rights *in rem*: the opening of insolvency proceedings is said "not [to] affect" such rights.

accommodate the need for predictability and foreseeability, in particular for the benefit of the person claimed to be liable, and, as indicated in Recital 34, to "strike a reasonable balance between the parties". Art. 17 should, however, not be conceived as exclusively aimed at creating a safe harbour for the person alleged to be liable. This provision 17, which has been described as "somewhat enigmatic",[1] may indeed also be understood as a mechanism intended to serve the interests of the States, by ensuring that the rules of conduct they edict are duly taken into account. These two goals may give rise to conflicting interpretations of the provision.

2 The mechanism embodied in Art. 17 is not unprecedented in private international law. Similar rules may be found in international conventions[2] and national codifications of private international law.[3] National courts have also made some room to take into account conduct rules of the country where the relevant facts take place, as a corrective to the application of another law than the law of the place of the underlying event.[4] The concept of 'taking into consideration' a rule of law, as distinct from the application of a rule of law, has also been explored in the literature.[5] To some extent, the issue addressed by Art. 17 also arises in other fields. One may refer to the question whether the safety standards of the country of the seller may be taken into account when assessing the conformity of the goods under Art. 35 of the 1980 Vienna Sales Convention.[6]

3 Art. 17 makes it possible to take into account the rules of safety and conduct of another law than the law governing the cross-border liability. As with other mechanisms aimed at bringing some correction to the general rules, the operation of Art. 17 may undermine the operation of the main conflict of laws rules incorporated in the Regulation and in particular the *lex loci damni*. This tension should be resolved by a careful investigation of the proper interpretation to be given to Art. 17.

4 Given the limited role played by rules of safety and conduct and the fact that common sense could justify taking into consideration of rules of safety and conduct of the place of the event,[7] it has been argued that Art. 17 could have been dispensed with.[8] It is true that in some

1 *Symeonides*, Am. J. Comp. L. 56 (2008), 173, 211.

2 See already Article 12 of the 1972 EEC Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations.

3 See e.g. Article 142(2) Swiss Private International Law Act, Article 3543 of the Louisiana Civil Code, Article 102 Belgian Code of Private International Law and the now defunct Article 8 of the Dutch Act on Private International Law of Tort.

4 E.g. BGH VI ZR 291/94, IPRspr. 1996 N° 29, § 10 (traffic accident in Austria, application of German law to the liability of the alleged tortfeasor as both the victim and the tortfeasor were German nationals and residing in Germany but the court takes into account the Austrian traffic rules in order to decide on the issue of negligence).

5 *P. Kinsch*, Le fait du prince étranger (1994) and *E. Fohrer-Dedeurwaerder*, La prise en considération des normes étrangères (2008).

6 See BGH, 8 March 1995, VIII ZR 159/94.

7 *Boskovic*, in: Lagarde/Carreau/Synvet (eds.) Répertoire de droit international (2010), p. 126, § 121 (a solution "de bon sens"); *von Hein*, in: G.-P Calliess (ed.), Rome Regulations – Commentary on the European Rules of the Conflict of Laws (2015), Art. 17 Rome II, p. 742, § 1 ('a solution that would have been dictated by common sense anyway').

8 *Mills*, in: Ahern/Binchy (eds.), The Rome II Regulation on the Law Applicable to Non-Contractual

jurisdictions, courts have naturally been inclined to investigate which standards of safety existed at the place of the harmful event, even though another law applied to the cross-border liability. The existence of Art. 17 ensures, however, that courts in all Member States will be aware of the possibility to venture beyond the *lex causae* to take into account legal rules of another system. Art. 17 further guarantees that when giving effect to such rules of safety and conduct, courts in Members States will play the same game.

II. Legislative history

5 Art. 17 was included in the original Proposal published by the Commission in 2003. Art. 13 of the Proposal read as follows :

"Whatever may be the applicable law, in determining liability account shall be taken of the rules of safety and conduct which were in force at the place and time of the event giving rise to the damage."

6 The text was slightly amended during discussions in the Parliament, to make clear that rules of safety and conduct should only be taken into account "as a matter of fact, and in so far as is appropriate".[9] Another change took place with the common position adopted in 2006 by the Council.[10] The wording of the provision was adapted to make clear that reference should be made to the rules of safety and conduct of the place of the event giving rise to the "liability" and no longer "to the damage". Discussions on whether or not to exclude the application of Art. 17 in respect of cases of unfair competition did not lead to any modification of the text.

III. Commentary

1. The concept of 'rules of safety and conduct'

7 Art. 17 does not provide any definition of the concept of rules of safety and conduct. Recital 34 offers only limited guidance. It explains that the term 'rules of safety and conduct' should be interpreted 'as referring to all Regulations having any relation to safety and conduct'. This vague description does not add much to the concept itself.

8 Art. 17 takes over a concept which has already been used in private international law. Two conventions adopted under the aegis of the Hague Conference already included provisions specifically aimed at such rules. Art. 9 of the 1973 Hague Convention on the Law Applicable to Products Liability makes it possible to take into consideration the "rules of conduct and safety".[11] Art. 7 of the 1971 Convention on the Law Applicable to Traffic Accidents provides

Obligations (2009), p. 15. Loquin has also suggested that Article 16 could have offered a sufficient basis to take into account rules of safety and conduct: *E. Loquin*, in: Corneloup/Joubert (eds.), Le Règlement communautaire 'Rome II' sur la loi applicable aux obligations non contractuelles (2008), p. 35, 43 (Loquin refers to the possibility to apply rules of safety and conduct as overriding mandatory provisions).

9 European Parliament (Committee on Legal Affairs), Report on the proposal for a regulation, 27 June 2005, Final A6–0211/2005, Amendment 45.

10 Common Position adopted by the Council on 25 Sept. 2006, C6-0317/2006, 2003/0168(COD).

11 In French: '*règles de sécurité* '.

that account should be taken of the "rules relating to the control and safety of traffic".[12] Some national private international law rules also include reference to this concept.[13] It may therefore be useful, to a certain extent, to refer to these precedents to shed more light on the concept, although account must also be taken of the specific nature of the Regulation. It has been noted that the terms used in Art. 17 suggest a broader category than the one used in the Hague Conventions.[14] This may be true in some language versions, in particular in the French version. It may doubted, however, that much significance must be attached to this issue.

The rules of safety and conduct referred to in Art. 17 are in the first place Regulations adopted by competent public bodies which have force of law in the country where the event giving rise to the liability took place. This includes statutory enactments and other rules adopted by legislative bodies such as decrees. As Art. 17 covers rules of safety and conduct, it may be that the relevant legislation is adopted at a sub-state level. Municipal ordinances, regional or state rules are therefore also included in the category. The name given to the rule does not matter. **9**

Rules of safety and conduct could also be adopted by executive agencies in order to carry out laws and other legislative enactments,[15] as was suggested in relation to the two Hague Conventions.[16] This includes administrative decrees and executive orders. Again, such Regulations could be adopted at all level of government, be it central or federal, or at a lower level. In many countries, conduct and safety rules could be adopted by lower governmental institutions. It is difficult to see why Art. 17 should not embrace such lower level Regulations. **10**

Another question is whether Art. 17 could also apply to rules derived from court decisions. A distinction may be made between a court decision affecting a single individual in a given case, because the court's ruling is limited to the mere application of existing rules to a given fact pattern, and a ruling from a court which may serve as precedent. While it is difficult to see how the first type could be taken into account under Art. 17, the latter certainly qualifies as the holding of the court could apply in other factual situations.[17] **11**

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12 In French: '*règles de circulation et de sécurité* '.

13 E.g. Article 8 of the Dutch Conflict of Laws Tort Act of 11 April 2001 dealing with cross-border torts (which has been repealed) referred to "verkeers- en veiligheidsvoorschriften" (which may be translated as "rules of traffic and safety"). On the difference between Article 17 and the relevant provision of German private international law, see *I. Bach*, in: P. Huber (ed.), Rome II Regulation. Pocket Commentary (2011), Art. 17 Rome II, p. 367, § 4.

14 *H. Muir Watt*, in: Corneloup/Joubert (eds.), Le Règlement communautaire 'Rome II' sur la loi applicable aux obligations non contractuelles (2008), p. 129, 139, § 16.

15 *A. Dickinson*, The Rome II Regulation. The Law Applicable to Non-Contractual Obligations (2008), p. 640, § 15.31; *Plender/Wilderspin*, European Private International Law of Obligations (2014), p. 593, § 19–135.

16 *E. Essen*, Explanatory Report – Convention on the law applicable to traffic accidents in: Acts & Documents of the Eleventh Session (1968), III, p. 26, Art. 7, § 4 and *W. L. M. Reese*, Explanatory Report – Convention on the law applicable to products liability in: Acts & Documents of the Twelfth Session (1972), III, p. 269.

17 *Dickinson* (fn. 15) p. 640, § 15.32; *von Hein* (fn. 7), p. 752, § 19; *Thorn*, in: Palandt BGB (75th ed. 2016),

12 Whether Art. 17 could also be used to give effect to unwritten rules, depends on the effects given to such rules. A general standard of behavior which has not been codified in statutory law but has been repeatedly upheld by courts could be taken into consideration under Art. 17.

13 Rules regulating the conduct in order to avoid damage may take many different forms. In many cases, the rule will not result from a decision by a public authority. This is the case for professional standards or conventional rules. Private standards of conduct could indeed prescribe certain behavior in order to limit the occurrence of damage. Since Art. 17 is based on the assumption that the person at the origin of the damage "must abide by the rules of safety and conduct in force in the country in which he operates",[18] there is no reason to exclude such rules from the scope of this provision.[19] Hence, Art. 17 also includes private standards of conduct prescribing certain behavior such as the rules of the International Ski Federation (FIS).[20] The same could be said of quality standards put forward by private, non-governmental organizations such as the ISO or a national standard body.

14 Another question is whether the scope of Art. 17 may also be extended to decisions affecting a single individual. One could think of a company which has obtained an administrative authorization to operate a plant or exercise a given activity. As the permit or authorization constitutes an important element to be taken into consideration when assessing the conduct of the alleged tortfeasor, it is submitted that nothing prevents taking such rules into consideration when applying Art. 17.[21]

15 Art. 17 does not make any distinction depending on the nature of the rule. Nothing prevents therefore using Art. 17 to give effect to overriding mandatory provisions of the place of the event giving rise to the liability.[22]

16 Art. 17 is intended to apply to Regulations having a relation to safety and conduct. Whether this Regulation translates in a prohibition to act, an obligation to do something or a mere authorization is not relevant.[23] The mechanism embodied in Art. 17 could apply in all these cases.[24] Although most rules of safety and conduct will have been conceived to operate on a strict territorial basis, Art. 17 could be used to give effect to rules whose scope of application is broader. Likewise, the operation of Art. 17 is not strictly limited to those rules having a

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Art. 17 Rome II, par. 1; *Eckert*, GPR (2015), 303, 306 (relying on 'Vertrauensschutzgesichtspunkten' to conclude that case law should be included in the definition).

18 Commission Proposal, Explanatory Memorandum, p. 25.

19 *Dickinson*, at p. 640, § 15.32; *Thorn* (fn. 17), par. 2.

20 *von Hein* (fn. 7), p. 752, § 19; *Bach*, (fn. 13), p. 371, § 13. Compare *Eckert*, GPR (2015), 303, 306–308 (critical analysis of the FIS rules in light of the concept of rules of safety and conduct to conclude that private rules cannot, as such, be brought under Article 17). In court practice, see OLG Hamm, 17 May 2001, *NJW-RR*, 2001, 1537; OLG Brandenburg, 16 April 2008, Unalex Case DE-2842.

21 *von Hein* (fn. 7), p. 752, § 20.

22 On the possibility to use Article 16 to give effect to conduct rules which are qualified as overriding mandatory, cf. note 30 *infra*.

23 In this sense, OGH (AT) 9 October 2014, Unalex Case AT-962.

24 *Jakob*/*Picht*, in: Rauscher (ed.), EuZPR – EuIPR Kommentar, vol. III (4th ed. 2016), Art. 17 Rom II-VO, p. 975, para. 4.

public, regulatory function, although most rules falling under the mechanism will belong to this category.

Rules of safety and conduct may be found in different fields in which the issue of liability arises. **17**
Obvious examples are road safety rules, as indicated in Recital 34, which may be relevant in case of a traffic accident.[25] Among those safety rules, one may also note the technical requirements applying to the vehicle and the rules limiting the driver's working hours.[26] In relation to products liability, one may refer to Regulations concerning the manufacture, inspection and repair of the product.[27] Rules relating to the labelling and packaging of goods could also contribute to the safety and hence be part of the category aimed by Art. 17.[28] Building Regulations may also be included in this category, such as a Regulation prescribing the use of fire door.[29] It may be doubted, however, whether rules relating to the working conditions of the employees manufacturing the goods qualify as rules relating to the safety and conduct.

A distinction could be made among rules of conduct between those which are bound to the **18**
territory where the conduct takes place and those which affect more directly the persons concerned. The distinction is in particular possible when one looks at traffic Regulations : while a rule prohibiting driving above a certain speed is clearly linked to a specific territory, the outlook could be different when one examines rules prohibiting the driving of vehicles while under the influence of alcohol or rules making the use of a seat belt mandatory. In German court practice, the latter rules have been subject to a different treatment. Courts have indeed refrained from looking at the Regulations in force at the place of the accident and have rather taken into account the rules of the common habitual residence of tortfeasor and person injured.[30] It has been argued that such practice should continue under the Regulation, in particular in relation to issues of contributory negligence, in order to safeguard the legitimate expectations of parties.[31] It is submitted that there is no room under the Regulation for such distinction. Allowing a differentiation between strictly territorial conduct rules and those which may enjoy a wider application may indeed undermine the delicate balance achieved by the Regulation. Further, any differentiation may lead to endless questions on the nature of the relevant rules.[32] The discretion enjoyed by court under Art. 17 could, however, be used to reserve another treatment to a given category of conduct rules.

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25 See the various court decisions adopted under German private international law quoted in *Jakob*/*Picht* (fn. 23) p. 975, para. 6.

26 *E. Essen* (fn. 16), p. 26, Art. 7, § 5.

27 *W. L. M. Reese* (fn. 16), p. 269.

28 A parallel could be drawn with the distinction under EU law between rules laying down requirements to be met by goods coming from other Member States (such as rules relating to designation, form, size, weight, composition, presentation, labeling and packaging) and those rules restricting or prohibiting certain selling arrangements (*Criminal Proceedings against Keckand Mithouard*, (Cases C-267/91 and C-268/91) [1993] ECR I-6097). While the latter will in general not qualify as safety rules under Article 17, the former could more easily fit in the category contemplated by Article 17.

29 In this sense under Swiss private international law, *Dutoit*, in: Droit international privé suisse. Commentaire de la loi fédérale du 18 décembre 1987 (2016), Art. 142, par. 3.

30 See the references in *von Hein* (fn. 7), p. 750, § 17.

31 *Thorn* (fn. 17), par. 5.

32 See for further arguments *von Hein* (fn. 7), p. 751, § 18.

19 Although the concept used in Art. 17 includes a reference to the 'safety', Art. 17 could apply in domains where consideration of safety are absent. This could be the case in antitrust matters. Market rules may indeed qualify as rules of safety and conduct, even though they are as such not directly related to safety concerns. Indeed, they prohibit certain conducts and could therefore be very relevant when passing a judgment on certain business strategies.[33] When compensation is sought for the damage resulting from an industrial action, the rules prescribing the various steps which must be followed by workers or an organization representing their interests before a strike is declared may also be counted as rules of safety and conduct. Rules prescribing which conduct a creditor may adopt when his debtor fails to satisfy a debt, could also qualify as market regulating rules and hence, be taken into account under Art. 17.[34]

20 Since rules of safety and conduct could take many forms, a question which arises is whether such rules fall under the procedural treatment of foreign law. This question is in particular relevant when looking at principles and mechanisms existing in Member States to discover the content and apply foreign law. Say that the courts of country A are required under the Regulation to apply the law of country A, but come to the conclusion that account should be taken of the standards of conduct in force of country B where the event giving rise to liability occurred. Is the court entitled to rely on the regular rules dealing with the procedural treatment of foreign law, if it finds out that those standards have been adopted by a private body? There is no conclusive answer to that question in court practice yet.[35]

2. Which 'rules of safety and conduct'?

21 Art. 17 directs that account be taken of the rules of safety and conduct "which were in force at the place and time of the event giving rise to the liability". This language differs from the wording used in other provisions of the Regulation. Art. 7 for example refers to the country "in which the event giving rise to the damage occurred". It also departs from the wording of Art. 7, para. 2 of the Brussels I*bis* Regulation, which refers to the "place where the harmful event occurred or may occur". Given the specific role played by Art. 17 in the operation of the Regulation, it is submitted that no attempt should be made to streamline the interpretation of the language with that used by the Brussels I*bis* Regulation. Accordingly, Art. 17 should not be extended to cover those rules of safety and conduct in force at the place where the damage occurred. The fact that those rules of safety and conduct provide for a higher standard of safety than those of the law applicable to the liability, does not change the perspective.[36]

22 In order to understand the scope of Art. 17, a distinction may be made between various scenarios. Whatever the situation, there is no guarantee that the relevant rules of safety and

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33 *Francq/Wurmnest*, in: Basedow/Francq/Idot (eds.), International Antitrust Litigation, p. 91, 117.

34 See OGH (AT) 9 October 2014, Unalex Case AT-962.

35 In a case where the Regulation did not apply, a Dutch Court of Appeal resorted to traditional rules regarding the status of foreign law in order to discover the content of Austrian law, after it found that it was required to apply Dutch law, as the law of the common residence of the two parties, to assess the consequences of a ski accident which took place in Austria. The Court directed that account be taken of Austrian law in order to find out whether the behavior of the alleged tortfeasor could be deemed to be that of a prudent, cautious skier. The question was not discussed by the Supreme Court (Hoge Raad, 23 November 2001, nr. C00/144HR, NJ 2002, 281).

36 *Symeonides* (fn. 1), 173, 223.

conduct are those of the court seized, as the dispute could be settled by another court than the court of the place where the underlying event took place.

23 In a first hypothesis, the law applicable to the liability is that of the place where the event giving rise to the damage occurred. This is not the situation contemplated by the general principle enshrined by Art. 4. Rather, it will occur if parties have made a choice in favor of that law (Art. 14), or in respect of environmental damages, if the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred (art. 7). In this hypothesis, there will be a coincidence between the law applicable to the liability and the rules of safety and conduct. Hence, it is not necessary to refer to Art. 17 to guarantee that account will duly be taken of the local safety rules These rules will apply as part of the *lex causae*.[37] As Art. 17 is not triggered, the rules of safety and conduct will not merely be taken into account, but rather fully applied as part of the *lex causae*.

24 If the Regulation leads to the application of another law than that of the place where the event giving rise to the damage occurred, Art. 17 could be triggered. In that case, the attention should focus on the place where the underlying event took place or, as the preamble holds it, the place "in which the harmful act was committed" (Recital 34). As the *lex causae* has been determined using a different rule, the court may not yet have identified the place where the underlying event took place. In order to identify this place, one should pay close attention to the context and all relevant factual circumstances. The concept of the place in which the event giving rise to the damage occurred, is also used in other provisions of the Regulation, such as Art. 7, Art. 10 (2), Art. 11 (2) or Art. 12 (2). It is submitted that an attempt should be made to apply the concept uniformly throughout the whole Regulation.

25 An obvious and easy example is that of a traffic accident occurring in Germany: if the driver and the victim are both habitually resident in France, a court in Germany shall in accordance with Art. 4, para. 2, apply French law.[38] Art. 17 directs that account be taken of the German traffic Regulations. These Regulations are relevant in order to determine whether the driver has acted with reasonable care.

26 The wording of Art. 17 may prove difficult to apply in other contexts. When the underlying problem is one of product liability, account may be taken of the rules prevailing in the State where the product was introduced in the market.[39] Art. 17 is, however, not limited to those rules. The place where the goods were manufactured could also be relevant as the event giving rise to the liability may be an alleged fault during the process of manufacturing the product.[40] If the damage was caused by the cumulative effect of several acts taking place in different countries, Art. 17 could be understood as referring to the local safety rules of each of the countries in which a part of the harmful event is located.[41]

27 The reference in Art. 17 to the place of the event 'giving rise to the liability' may be insuffi-

37 *Jakob/Picht* (fn. 23), p. 974, para. 3.

38 Germany is not bound by the 1971 Hague Traffic Accident Convention.

39 As directed by Article 9 of the 1973 Hague Convention.

40 *Plender/Wilderspin* (fn. 15), p. 540, § 18.112.

41 In this sense under Swiss private international law, *Umbricht/Zeller*, in: Basler Kommentar – Internationales Privatrecht (2nd ed. 2007), Art. 142 PILA, par. 12.

ciently precise in certain contexts. This may be the case where the damage has been caused by immaterial action or where the events occurred at a place which is further unconnected with the liability. If the damage results for example from the conclusion by several companies of an anti-competitive agreement, it may well be that the agreement has been concluded over the course of online discussions. Further, if the agreement was indeed physically concluded at a given place, it may be that that place has no substantial connection with the dispute, because the agreement will have no effect in that place.[42] As with other conflict of laws rules, the application of Art. 17 may prove perilous in an on line environment.[43]

28 Another context in which the operation of Art. 17 may give rise to difficulties is that of the vicarious liability : if the liability of a superior established in country A is called into question on account of an act or omission of a subordinate operating in another country, it may be asked whether the focus of Art. 17 should be on the country where the superior is established or rather on the place where the subordinate operates. This is in particular difficult in case the relevant law provides for a presumption that the superior is liable, as no evidence will be required that the superior acted negligently. A similar question arises where the liability of a person is sought for an act or omission of an independent contractor. National courts have struggled with this question before the Regulation came into force, in particular in relation to damage suffered by customers who had bought a travel package from a European travel organizer and were injured in the country where they spent their holiday.[44] Under Art. 4, the law applicable to the liability of the travel package organizer will usually be that of the common habitual residence of the traveller and the organizer. If under that law, the latter may be held liable for the lack of proper supervision of the local independent contractor rendering the services, Art. 17 could be used by the travel organizer to resist liability. It may indeed be that the local contractor complied fully with local safety standards. The event giving rise to the liability will indeed be the absence of proper monitoring by the travel organized of the activities offered and facilities used by the independent contractor. The court has, however, the possibility to disregard the local safety standards as Art. 17 endows it with a large discretionary power.

29 The question has arisen whether it may be possible under Art. 17 to take into account other rules than those of the place where the event giving rise to the liability took place. Assume a car accident took place in country A. Art. 17 makes it possible for the court to take into account all standards of care and safety applicable in country A. If the driver and all passengers of the car involved in the accident habitually reside in country B, it has been asked whether the court could also take into account rules of safety and conduct of country B. This may be relevant if the rules in force in country B prescribe a different behavior, such as fastening the seat belt. This question has been a vexed one under the 1971 Hague Traffic Accident Convention.[45] Although the opposite view has been suggested,[46] the wording and rationale of Art. 17 does not make it possible to take into account those rules in force in another country than that where the relevant conduct took place.[47]

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42 For further details, *Francq/Wurmnest* (fn. 32), p. 91, 118.

43 Under Swiss private international law, it has been suggested to look at the place where the data have been uploaded online, *Dutoit* (fn. 28), Art. 142, par. 5.

44 See the case law referred to by *von Hein* (fn. 7), p. 753–755, § 22–23.

45 See the reference to case law in *von Hein* (fn. 7), p. 750, § 17.

46 *Thorn* (fn. 17), par. 5.

This may be frustrating as the place of the accident may be fortuitous and transitory. Other instruments should be resorted to in order to safeguard the legitimate expectations of parties.

Art. 17 differs from other private international law rules addressing cross-border liability issues, in that it specifically indicates that account should only be taken of those conduct rules in force "at the … time of the event giving rise to the liability". Other conflict of laws rules included in the Regulation do not include similar language. This is understandable given that under general principles of private international law, the applicable law should be assessed as it exists when the court decides the issue. No account should be taken of an earlier version of that law, which was in force when the damage occurred. Art. 17 aims on the other hand to provide some comfort to the person allegedly at the origin of the damage by making it possible to assess its behavior in the light of those rules in force when the litigious conduct occurred. It is therefore relevant to refer to the rules of conduct as they existed at that time. **30**

In order to determine at what time the event giving rise to the liability has occurred, attention should be paid to the particular nature of the liability. If the liability arose out of a single event, no difficulty should arise. If a remedy is sought under the form of an injunction against damage which is about to happen, the focus should be on the moment the litigious event is likely to take place.[48] In case the applicable rules impose a strict liability standard, the relevant moment in time is when the behavior materializes. **31**

3. Scope of application

Art. 17 may be used both in relation to the conflict of laws rules included in Chapter II ('Torts/delicts' – Art. 4 to 9)[49] as well as in relation to the conflict of laws rules included in Chapter III dealing with unjust enrichment, *negotiorum gestio* and *culpa in contrahendo* (art. 10 to 13).[50] This is evident from the fact that Art. 17 is to be found in chapter V, dealing with 'common rules'. Further, the wording used in Art. 17 refers to the event giving rise to the liability and not to the even giving rise to the damage, which would have excluded the application of Art. 17 in situations where no damage arises.[51] When the rules of Chapter II or III lead to the application of the law of the country of the event giving rise to the liability, as could for example be the case under Art. 7 or 9, the mechanism put in place by Art. 17 loses much of its relevance. **32**

It has been discussed whether Art. 17 may find application when the relevant conflict of laws rules already provides a foreseeability test. This is in particular the case for Art. 5, first paragraph, last sentence. As this provision already protects the manufacturer in case he could not have reasonably foreseen that the product would be marketed in a certain country, it has been argued that Art. 17 has no role to play because its rationale would already be taken care of by the special rule put in place in Art. 5.[52] This reading is unconvincing. If Art. 17 indeed attempts to **33**

47 For the position under Swiss private international law, see *Dutoit* (fn. 28), Art. 142, par. 6.

48 For further arguments see *von Hein* (fn. 7), p. 757, § 26.

49 *von Hein* (fn. 7), p. 745, § 8.

50 *von Hein* (fn. 7), p. 747, § 13.

51 *Plender/Wilderspin* (fn. 15), at p. 539.

protect the legitimate expectations of the person alleged to be at the origin of the damage, it also aims to safeguard the interests of States whose rules of conduct could be displaced by the application of the normal conflict of laws rules of the Regulation. In that sense, the foreseeability rule enshrined in Art. 5, para. 1 is not a mere substitute for Art. 17.[53]

34 The joint application of Art. 5, para. 1 and Art. 17 may, however, give rise to some difficulties. If one accepts that the event giving rise to the liability as understood under Art. 17 is the introduction of a product into a market and not the actual manufacturing, the two provisions will point in the same direction. Hence, there will be no need to call upon Art. 17. The same coincidence will not be achieved if the manufacturer demonstrates that he could not reasonably have foreseen that the product would be marketed in a given country. In that case, Art. 5 refers to the law of the country in which the person claimed to be liable is habitually resident. Yet, Art. 17 directs that account be taken of the rules of safety and conduct in force in the country in which the event giving rise to the liability occurred, i.e. the country in which the product was marketed. If the rules of safety and conduct in force in the two countries differ significantly, the application of Art. 17 could either prove beneficial for the manufacturer or require him to abide by much stricter standards. Either way, the application of Art. 17 may affect the delicate balance which is achieved by the special rules of Art. 5.[54] A possible way out lies in the fact that Art. 17 grants the court some discretion in assessing whether or not to give effect to the rules of safety and conduct.

35 During the discussions which led to the adoption of the Regulation, it was suggested to exclude the application of Art. 17 to cases of unfair competition. This suggestion was put forward by the Parliament, apparently based on a precedent in Swiss law.[55] According to the Parliament, it is "often difficult" in the area of unfair competition "to establish which local rules of conduct should be taken into account".[56] This proposal echoed an observation made by the Hamburg Group on an earlier draft.[57]

36 This amendment was not taken over in the final version of the Regulation. The Council indicated that there was "no justification for making an exception" for cases of unfair competition.[58] It may therefore be concluded that there is no obstacle to the application of Art. 17 in relation to anticompetitive matters.[59] This does not mean that the application of Art. 17 will not lead to any difficulty in competition matters. As has rightly been observed, the law governing the liability for unfair competition "has a predominantly conduct-regulating character in itself".[60] Allowing the court to take into account the conduct rules of the

52 *G. Wagner*, IPRax 2008, p. 1, 5.

53 For further arguments, see *von Hein* (fn. 7), p. 745–746, § 9–10.

54 For further examples, see *von Hein* (fn. 7), p. 746–747, § 10–11.

55 Report on the proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations, 7 July 2005, A6-0211/2005, Amendment 14, p. 11 and Amendment 45, p. 31.

56 Report on the proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations, 7 July 2005, A6-0211/2005, Amendment 14.

57 Hamburg Group for Private International Law, RabelsZ. 67 (2003), 1, 43.

58 Common Position, Statement of the Council's Reasons, OJ C-298E/78.

59 *Francq/Wurmnest* (fn. 32), p. 118.

60 *von Hein* (fn. 7), p. 747, § 12.

country in which the event giving rise to the liability took place, could therefore undermine the application of the law of the country where the competitive relations are affected, as directed under Art. 6 (1). As with Art. 5, the issue of the interaction between Art. 6 and Art. 17 could be solved using the discretion granted to courts by the latter provision. It is submitted that this discretion should be used to safeguard the objectives pursued by Art. 6.

37 The Regulation covers both the situation of damage already suffered as a consequence of an act or omission and the situation of damage likely to occur as a consequence of future events (Art. 2 (2)). Although it may be more difficult to apply Art. 17 in relation to the latter, as the facts have not yet occurred and it may be hence more difficult to identify the relevant place, there is no reason to exclude that a court would take into consideration rules of safety and conduct in relation to a non-contractual obligation which is likely to arise.

38 Art. 17 may be used to give effect to rules in force in the country in which the event giving rise to the liability took place. Some of these rules may qualify as overriding mandatory provisions under Art. 16.[61] Hence the latter provision could also be used to give effect to conduct rules. In this sense, Art. 17 does not have the monopoly when it comes to taking into account local conduct rules. This does not limit the usefulness of Art. 17, which does not require the court to enquire whether the rules of conduct indeed qualify as overriding mandatory provisions of the law of the forum and is therefore broader than the possibility offered by Art. 16. Using Art. 16 to give effect to such rules may, however, allow to overcome some of the limitations imposed by Art. 17. Further, the consequences of the two provisions are different, as Art. 16 makes it possible to give full effect to the conduct rules and not merely take them into account.

39 The possibility to take into account local rules of safety and conduct could allow a court to give effect to the overriding mandatory rules of another country than the one whose court is seized. In this sense, Art. 17 could extend the possibility offered by Art. 16, which is limited to local mandatory rules. There does not seem, however, to be much room for conflict between the two provisions: Art. 17 will primarily operate when the *lex causae* is not the law of the country where the event giving rise to the liability occurred, whereas Art. 16 is relevant when a court is required to apply a foreign *lex causae*. It is therefore not useful to think of Art. 17 as a *lex specialis* in respect of Art. 16 or to decide whether to give Art. 17 precedence over Art. 16.[62]

40 Art. 14 of the Regulation makes it possible under certain circumstances for parties to agree on the law applicable to the consequences of a tort. As this provision is included in Chapter IV of the Regulation, it is subject to the 'Common Rules' to be found in Chapter V. Hence a court called to decide on a cross-border tort case should take into account the mechanism provided by Art. 17 even if parties have made a choice of law.[63] It has been argued that this limitation on the party autonomy is justified by the public interest in the general control and safety of the conduct of citizens.[64] Whether a choice of law is made *ex ante* or *ex post*, the law chosen does not, however, cover rules of safety and conduct since Art. 17 aims precisely to give effect to those

61 See *Eckert*, GPR (2015), 303, 310 in relation to the possibility to use Article 16 to give effect to rules adopted by the international ski federation.

62 Comp. *E. Eckert* GPR (2015), 303, 305.

63 In this sense for liability arising out of ski accidents, *Eckert*, GPR (2015), 303, 310.

64 *von Hein* (fn. 7), p. 744–745, § 6.

rules above and beyond the law normally applicable to the cross-border liability. Hence, there is no risk that the party autonomy would dictate the relevant rules of conduct.

4. The operation of Art. 17

a) A possibility

41 The wording of Art. 17 suggests that the court is under an obligation to take into account the relevant rules of safety and conduct. The language used ('… account shall be taken ...') is indeed peremptory. However, Art. 17 also indicates that effect must only be given to such rules "in so far as appropriate". Although there remains some uncertainty about the exact meaning of this phrase, it appears that it leaves the court some discretion in assessing whether or not to take into account the rules of safety and conduct.[65] This may also be inferred from the change brought to the wording of Art. 17 during the negotiation. Initially, the proposal by the Commission did not include any allusion to a possible discretion by the court ('Whatever may be the applicable law, in determining liability account shall be taken of the rules of safety and conduct ...'). In its Explanatory memorandum, the Commission made this clear by adding that the provision "requires the court to take account of the rules of safety and conduct".[66] An amendment proposed by the Parliament was accepted by the Council which noted that the new language suggested by the Parliament aims "to add emphasis to the discretion of the court".[67] By making it clear that rules of conduct should only be taken into account "in so far as appropriate", the final text relieves the pressure on the court seized and grants it a measure of discretion. This is important, as an automatic and unconditional taking into consideration of local safety rules could encourage economic actors to move potentially dangerous activities to safe havens where Regulations are less onerous and less protective.

42 Art. 17 does not provide any guidance on how a court may use its discretion in taking account or not of the rules of safety and conduct. It seems obvious that the use of the discretion will in the first place be shaped by all relevant factual circumstances. In particular, a court may be sensitive to all relevant elements which could have played a role in drawing the alleged tortfeasor's attention to the local standards of conduct. Art. 17 indeed aims to protect the tortfeasor's legitimate expectations that his conduct will be judged according to those standards.[68] Hence, a court may take into account the strength of the connection between the alleged damage and the place where the event giving rise to the liability took place. If the latter place is rather fortuitous and only bears a lose connection with the event, less weight may be given to local rules of safety and conduct, as it is less certain that the alleged tortfeasor adjusted his behavior on this basis.

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65 *Plender/Wilderspin* (fn. 15), p. 539, § 18.110 and 595, § 19–145; *Dickinson* (fn. 15), p. 640, § 15.33; *von Hein* (fn. 7), p. 751, § 18 ('… a wide margin of discretion ...'); *Francq/Wurmnest* (fn. 32), p. 117 ('… a certain margin of appreciation'); *Boskovic* (fn. 7), p. 26, § 121; *de Lima Pinheiro*, Riv. Dir. Int. Priv. Proc. 44 (2008), 5, 33; *Symeonides* (fn. 1), 173, 212 ("… entirely discretionary ...").

66 Explanatory Memorandum accompanying the Proposal by the Commission of 22 July 2003, COM(2003) 427 final, 25.

67 Common Position, Statement of the Council's Reasons, OJ C-298E/78.

68 This is evident from the Explanatory Report which referred to the situation of the "perpetrator [who] must abide by the rules of safety and conduct in force in the country in which he operates" (Commission Proposal, Explanatory Memorandum, p. 25).

When deciding whether or not to use its discretion to take into account rules of safety and conduct, a court could also refer to the question whether the alleged perpetrator could have foreseen that his conduct in one state could lead to damage in another one. If the existence of such damage was reasonably to be foreseen, it has been argued that the court should decide against allowing the tortfeasor the possibility to rely on the rules of safety and conduct of the place where the allegedly noxious conduct took place, at least if those rules are less strict than those in force in the country where the damage occurred.[69] There is certainly room under Art. 17 to take into account what the tortfeasor could reasonably foresee when assessing whether or not to grant any role to the rules of safety and conduct.[70] The foreseeability or lack thereof of the damage is not, however, a condition precedent which should limit the overall application of Art. 17.[71] The same can be said of the possible comparison between the rules of safety and conduct in force at the place where the damage occurred and in the place of the harmful event. While the results of such a comparison may be taken into account by the court in deciding whether or not to apply Art. 17, that provision is not limited to those cases in which the latter rules are stricter than the former. **43**

b) The role of rules of safety and conduct under Art. 17

Art. 17 does not purport to displace the law applicable to the cross-border tort or delict. Rather, Art. 17 directs the court to take into account the relevant rules of safety and conduct. This has been explained in various ways. It has been said that the rules of safety and conduct "provide part of the context within which the conduct of the person liable must be judged".[72] It has also been said that those rules are "part of the background factual matrix to a dispute"[73] and that Art. 17 is a "mere evidentiary instruction about which facts are relevant in determining the degree of the defendant's culpability".[74] The exact meaning of this provision needs to be further elucidated.[75] **44**

First, Art. 17 does not prescribe the application of the rules of safety and conduct. Rather, it requires the court to "take into account" such rules. The wording of Art. 9 of the 1973 Convention was even more tentative, as this provision indicated that the application of the normal rules did "not preclude consideration being given to" the rules of conduct and safety. As explained by the Commission, "Taking into account of foreign law is not the same thing as applying it : the court will apply only the law that is applicable under the conflict rule, but must take into account of another law as a point of fact, for example when assessing the seriousness of the fault or the author's good or bad faith for the purposes of the measure of damages".[76] It is clear that Art. 17 may not be used to simply give priority to the law of the place of the harmful event or to serve as a true choice of law correction to the rules of the **45**

69 *Thorn* (fn. 17), par. 3 ("… nicht schutzwürdig ..."); *I. Bach*, (fn. 13), p. 370, § 11.

70 *von Hein* (fn. 7), p. 757, § 27.

71 Compare with Article 3543(2) of the Louisiana Civil Code.

72 *Dickinson* (fn. 15), p. 641, § 15.33.

73 *A. Mills* (fn. 8), p. 150.

74 *Symeonides* (fn. 1), 173, 212.

75 According to *Pfeiffer*, Article 17 is an "unfertige Kollisionsnorm" (*Pfeiffer*, in: FS Schurig (2012), p. 229, 236).

76 Explanatory Memorandum accompanying the Proposal by the Commission of 22 July 2003, COM (2003) 427 final, p. 25.

Regulation.[77] This would bring about the demise of the principle under Art. 4, which subjects cross-border liability to the law of the place of the damage.

46 Second, Art. 17 only requires that account be taken of the rules of safety and conduct "as a matter of fact". This element did not feature in the various international conventions which have served as model to Art. 17, nor in the initial proposal put forward by the Commission. The wording of Art. 17 suggests that the rules of safety and conduct should not be viewed as and treated as legal rules, but rather as facts. This does not mean, however, that the court should ignore the legal nature of the relevant rules. Rather the language used in Art. 17 indicates that the rules of safety and conduct should not be placed on equal footing with the relevant rules of the law applicable to the cross-border tort or delict. Art. 17 does not therefore require the court to combine two sets of legal rules, nor is Art. 17 a distributive conflict of laws rule.[78] The only relevant legal rules remain those of the law applicable to the cross-border tort or delict. Hence, Art. 17 "does not provide for the application of multiple applicable laws to the substance of the dispute",[79] nor does it lead to a "bifurcated choice-of-law approach that would technically split the applicable law between issues of conduct Regulation on the one hand, and issues of loss allocation, on the other".[80]

47 If the rules of safety and conduct do not play the same role as the law declared applicable under the Regulation, their role may be explained by the so-called 'datum theory'.[81] Under this doctrine, which goes back to learned writings of American scholars,[82] a particular set of legal rules belonging to a particular law is consulted with a view to aid a court in resolving a dispute under another law.[83] The role played by the foreign rules is different from that assigned to the law normally applicable : whereas the latter offers the actual recipe to be followed to reach a decision, the latter only constitutes an ingredient to be taken into account. As such, the rules of safety and conduct play a role which could be situated somewhere between the actual law and the facts of the case.[84] The difference between the role played by the rules of safety and conduct and the law actually applicable to the liability is that only the latter determines the role and the consequences played by the first. It does not fall upon the rules of safety and conduct to determine the role they play in the legal reasoning, nor the consequences attached to their violation.[85] If the law applicable to the liability requires that a negligent behavior be qualified as

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77 This is only reluctantly accepted by *Symeonides* (fn. 1), 173, 212–213.

78 *Loquin* (fn. 8), p. 43.

79 *A. Mills* (fn. 8), p. 151.

80 *von Hein* (fn. 7), p. 743, § 3. See, however, the opposite opinion under German private international law, *Kegel/Schurig*, Internationales Privatrecht (2004), p. 59.

81 In this sense, *Plender/Wilderspin* (fn. 15), p. 540, § 18–110; *I. Bach* (fn. 13) p. 368, § 6; *von Hein* (fn. 7), p. 743, § 3. More hesitant on the theoretical foundations of Article 17 : *Pfeiffer*, in : FS Schurig (2012), p. 229, 230.

82 See *B. Currie*, Selected Essays in the Conflict of Laws (1963), 70–71; *A. E. Ehrenzweig*, Private International Law (1967), 83–85. On the role of foreign law as datum in Currie's analysis, see *H. Hill Kay*, 'A Defense of Currie's Governmental Interest Analysis', Collected Courses (1989, vol. 215), 48–50. On the role of narrative norms as datum, see *E. Jayme*, 'Narrative Norms in Private International Law – The Example of Art. Law', Collected Courses (2014 vol. 375), 25–28.

83 On the different roles foreign law could play as 'datum', see *E. Fohrer-Dedeurwaerder*, (fn. 5), pp. 57–64.

84 Eckert refers to Article 17 as a 'Hilfsnorm' (*Eckert*, GPR (2015), 303, 305).

'gross', the safety rules may be taken into account to substantiate the standard of 'grossness'. This is sometimes called 'indirect application' ('*materiellrechtliche Berücksichtigung*') of a legal rule which is regarded only as a matter of fact.[86]

48 The role played by those rules also differs from that played by the law applicable to an incidental question. When such a question arises, it may be that it is governed by another law than the one applicable to the main issue. Nevertheless, when applying the law governing the incidental question, the court does give legal effect to its rules. The effect given to rules of safety and conduct also differs from the 'effect' given to overriding mandatory provisions of the law of another country, as contemplated under Art. 9, para. 3 of the Rome I Regulation. Under this provision, the overriding mandatory provisions may indeed be given effect as legal rules, i.e. replacing and displacing the rules otherwise applicable, albeit for a limited scope (i.e. only for the question whether the performance of the contract is unlawful). However, Art. 9, para. 3 of the Rome I Regulation could also be understood as allowing a court to consider the foreign overriding provision as a simple fact, which must be taken into account when applying the law designated by the Regulation.[87] In that reading, the foreign mandatory rule receives the same treatment as the rule of safety and conduct. Finally, the possibility offered by Art. 17 to take into account rules of safety and conduct differs from the reference made by Recital 33 to the obligation of the court to "take into account all relevant actual circumstances of the specific victim" when quantifying damages for personal injury. This reference indeed only covers factual circumstances, such as the actual losses suffered, the costs of after-care and medical treatment. It does not purport to cover legal rules.[88]

49 Even if there is a clear distinction from a methodological perspective between the application of a legal rule and the mere taking into account of that rule, it may not always be easy in practice to draw the line between the two.[89] In order to illustrate the practical application of Art. 17, one may refer to the following example. If the driver and the victim of a traffic accident which occurred in France, are involved in litigation in Germany regarding the consequences of the accident, the court in Germany will apply German law in accordance with Art. 4, para. 2 if the driver and the victim are both habitually resident in Germany. Art. 17 makes it possible in that case that account be taken of the French traffic Regulations. The interrelationship between German rules and French law may be explained as follows: German law determines which standard of care the driver should have followed. If under German law, the driver should have acted with reasonable care, one must take account of the French rules to find out what reasonable care means in practice. It is of no relevance that under French law, a standard of strict liability is applicable in case of traffic accident. Nor should it be enquired how the standard of negligence should be interpreted under French

85 *Jakob/Picht* (fn. 23), p. 977, 10.

86 *P. Hauser*, Eingriffsnormen in der Rom I-Verordnung (2012), 115–116.

87 *Thorn*, in: Rauscher (ed.), EuZPR – EuIPR Kommentar, vol. III (4th ed. 2016), Art. 9 Rom I-Vo, p. 466, para. 81; *Bonomi*, in: Magnus/Mankowski (eds.), ECPIL – Rome I Regulation, (2017), Art. 9 Rome I, p. 651, § 182.

88 *von Hein* (fn. 7), p. 757, § 25. For a further analysis of the differences between Article 17 and Recital 33, see *Pfeiffer*, in: FS Schurig (2012), p. 229, 231.

89 Pfeiffer has argued that Article 17 leaves room to consider different ways in which account may be taken of the rules of safety and conduct (*Pfeiffer*, in: FS Schurig (2012), p. 229, 235–236).

law. Issues relating to the standard of liability are exclusively governed by the law applicable to the liability, i.e. German law.

50 The rules of safety and conduct may be taken into account when deciding on any issue related to the liability.[90] Those rules may be relevant when determining the existence of a negligence, when assessing the seriousness of a fault, when assessing the existence of causation, the nature of damage which may be taken into consideration or the extent to which damages must be granted. The rules of safety and conduct may also play a role when assessing whether the author was acting in good or bad faith and the consequences to be inferred in respect of damages.[91] Those rules are relevant when deciding on the objective fault of the alleged tortfeasor, the possible subjective culpability.

51 That rules of safety and conduct may be taken into consideration 'as a matter of fact' may have an impact on several important questions. It may be asked first whether the rules relating to the status of foreign law are relevant when ascertaining the content of the rules of conduct. If the court seized is bound under its own private international law to determine the content of foreign law by its own means, does this also apply to the rules of safety and conduct?[92] It is submitted that the application of general rules of conflict of laws dealing with foreign law should be contemplated by analogy.[93] Further, as the rules of safety and conduct are not considered part of the primary rule to be applied by the court, it must be accepted that parties are not free to deviate from those rules by submitting their relationship to another law as allowed by Art. 14.[94] Another question in this respect is whether the public policy exception could be used to reject the taking into consideration of the rules of safety and conduct.[95]

52 According to Art. 17, rules of safety and conduct may be taken into account in order to assess the conduct "of the person claimed to be liable". In the explanatory memorandum which was published together with its Proposal, the Commission explained that Art. 17 was based on the fact that "the perpetrator must abide by the rules of safety and conduct in force in the country in which he operates".[96] This suggests that rules of safety may only be taken into account when assessing the conduct of the person allegedly liable and not the conduct of the person who alleges to have sustained damage. Such a reading would, however, make it impossible to take into account the local rules of conduct to assess an issue of contributory negligence. It may be for example that the person alleged to have suffered damage following a traffic accident was found not to have buckled up its seat belt or to have used its mobile phone at the time of the accident. If the law applicable to the liability makes it possible to raise a defence of contributory negligence, account may be taken of the local safety rules when applying this defence.[97]

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90 *Jakob*/*Picht* (fn. 23), p. 976, par. 8.

91 Commission explanatory memorandum, p. 25.

92 For a positive answer, see *von Hein* (fn. 7), p. 748, § 14. For a negative answer, see *I. Bach* (fn. 13), p. 369, § 7.

93 *Thorn* (fn. 17), Art. 17 Rome II, par. 2.

94 *Bach* (fn. 13), p. 369, § 7.

95 In general on this theme, *E. Fohrer-Dedeurwaerder* (fn. 5), pp. 403–454.

96 Explanatory Memorandum accompanying the Proposal by the Commission of 22 July 2003, COM (2003) 427 final, p. 25.

Taking into account the rules of safety and conduct of the place where the event occurred may play out in favor of the person allegedly liable for the damage. This will be the case when the person demonstrates that its actions were in full compliance with the safety standards in force where he operates. The mechanism foreseen by Art. 17 could even exclude any liability if under the relevant safety rules the action of the alleged tortfeasor cannot be deemed to be negligent.[98] There is no reason to exclude that Art. 17 could be used not only to mitigate the liability of the alleged tortfeasor, but also to exclude it altogether.[99] **53**

Art. 17 makes it possible to take into account rules of safety and conduct in assessing the conduct of the person claimed to be liable. The purpose of this provision is to protect the legitimate expectations of those who have aligned their conduct on the local rules prescribing certain behavior. This could be taken to exclude the application of Art. 17 when the local rules of conduct lead to an aggravation of the situation of the person whose liability is at stake, because they hold the person to a higher standard of behavior than the law applicable to the cross-border tort. Such a restriction is not warranted on the basis of the wording of Art. 17. Rules of safety and conduct may be taken into account whether they are more or less stringent than those in force in the country whose law applies to the liability.[100] In other words, Art. 17 does not require the court to engage in a substantive analysis of the rules of conduct in order to retain only those rules more lenient for the alleged tortfeasor. **54**

c) Rules of safety and conduct outside Art. 17

Art. 17 grants courts the possibility to take into account rules of safety and conduct which were in force at the place of the event giving rise to the liability. It has been suggested that this provision does not prevent a court from giving effect to rules of safety and conduct in other circumstances.[101] A court could under this reading take into account rules of safety and conduct of other places than that of the event, for example of the country where the harmful event produced some indirect consequences. There is certainly no obligation under the Regulation to take into account rules of safety and conduct outside the limitations set out by Art. 17. A court could take into account such rules in these circumstances, if it finds that this is appropriate for the proper application of the *lex causae*. This should, however, not undermine the application of the law designated by the Regulation. The same caveat applies to the possibility to apply Art. 17 by analogy to rules of safety which do not qualify as rules of safety and conduct.[102] **55**

97 *Dickinson* (fn. 15), p. 641, § 15.34; *von Hein* (fn. 7), p. 758, § 29; *Bach* (fn. 13), p. 368, § 5; *Eckert*, GPR (2015), 303, 309.

98 Compare with *de Lima Pinheiro*, Riv. Dir. Int. Priv. Proc. 44 (2008), 5, 33.

99 *von Hein* (fn. 7), p. 759, § 30.

100 *von Hein* (fn. 7), p. 758, § 28; *Muir Watt* (fn. 14), p. 140, § 17. Symeonides points out that this is a "classic 'false conflict'" (*Symeonides* [fn. 1], 173, 214).

101 *von Hein* (fn. 7), p. 756–757, § 25.

102 See in relation to rules adopted by the International Ski Federation *Eckert*, GPR (2015), 303, 308–310.

Article 18: Direct action against the insurer of the person liable

The person having suffered damage may bring his or her claim directly against the insurer of the person liable to provide compensation if the law applicable to the non-contractual obligation or the law applicable to the insurance contract so provides.

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I. Right to direct action

1. Direct claims: an exception to the principle of separation of the liability claim and the insurance claim

An injured party's non-contractual claim for damages must generally be distinguished from the contractual right of the person liable to claim indemnity from a third party liability insurer ("**principle of separation**").[1] In principle, the injured party has a right to bring an action against the person liable, but not against the respective third party liability insurer. This distinction between the liability claim of the injured party and the insurance claim of the person liable is disrupted where the law grants injured parties a **direct claim** against the third party liability insurer.[2] In such cases, an injured party can directly enforce his liability claim against the insurer of the person liable. **1**

1 See e.g. *Heiss/Loacker*, ZEuP 2011, 684, 690 *et seq*. with further references.

2 See e.g. *Heiss/Lakhan*, in Liber Amicorum Rokas, p. 144 *et seq*.; as to the protective purposes of the direct claim, see *Micha*, p. 9 *et seq*.

2. Procedural effect

2 In terms of procedure, the direct claim leads to the situation where the **two separate claims** are determined during the course of **one set of proceedings**. The duration of the proceedings is thereby shortened and the legal costs are reduced. This is specifically spelled out in Recital 30 of Directive 2009/103/EC[3] in respect of direct claims in the area of motor vehicle liability insurance: "The right to invoke the insurance contract and to claim against the insurance undertaking directly is of great importance for the protection of victims of motor vehicle accidents. In order to facilitate an efficient and speedy settlement of claims and to avoid as far as possible costly legal proceedings, a right of direct action against the insurance undertaking covering the person responsible against civil liability should be provided for victims of any motor vehicle accident."[4]

3. Protection against a policyholder's insolvency

3 In substantive terms, the direct claim benefits the injured party in a number of ways, of which the protection provided against a policyholder's **insolvency** is paramount.[5] As the direct claim is brought against the third party liability insurer, the policyholder's (tortfeasor's) insolvency does not affect it.[6]

4. Protection against dispositions made by the policyholder

4 The right to direct action represents a separate claim afforded to the injured party, which means that the insured person liable may not dispose over it. Specifically, the insured person liable may not waive or assign the right to indemnity to the detriment of the injured party.

5. Further benefits of direct claims for the injured party

5 National laws commonly reinforce the protection provided to injured parties. For instance, the insured person liable may be under a duty to provide the injured party with information regarding the existence and content of the insurance cover.[7] More importantly, in respect of compulsory insurance in particular, a third party liability insurer is sometimes liable towards an injured party even where the insurer is not or only partially liable towards the policyholder under the insurance contract ("exclusion of defences" vis-à-vis the injured party).[8] This may be

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3 Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability (codified version), OJL 263, 7.10.2009, p. 11–31.

4 See also *Nordmeier*, in: Nomos Kommentar BGB, Art. 18 Rom II-VO note 4; *Thorn*, in: Palandt, Art. 18 Rom II-VO note 2; *Bisping*, in: BeckOGK, Art. 18 Rom II-VO note 3.

5 See Art. 15:101(1)(b) PEICL granting a direct claim specifically in case the policyholder or insured is insolvent; in respect of compulsory insurances, see also s. 115 of the German Insurance Contract Act.

6 As a consequence, *Micha*, p. 86, defines the term "direct claim" as any legal position of the injured party as against the liability insurer which will remain unaffected by the policyholder's insolvency. See also *Loacker*, EuZW 2015, 795, 798.

7 See the proposal in Art. 15:102(1) PEICL.

8 See *Micha*, p. 85 *et seq.*

the case, for example, where the insurer is under no obligation to pay insurance money due to delayed payment of the premium by the policyholder or breach of other duties or warranties.

6. Duties imposed on the injured party with a direct claim

6 The direct claim provides the injured party with a legal status which resembles that of an insured person and even exceeds it in some specific aspects, for instance where defences may be raised by the insurer vis-à-vis the insured but not the injured party. At the same time, this sometimes leads to duties which would normally only be imposed on an insured occasionally also being imposed on the injured party. For example, under Austrian and German law, the injured party with the right to a direct claim is under a duty to notify the insurer of an insured event and to provide the information requested by the insurer for the purposes of investigating the claim.[9] If these duties are not fulfilled, the injured party may lose his right to the direct claim entirely or partially.[10]

7. Types of direct claims

7 The most common example of a direct claim can be found in motor vehicle liability insurance.[11] This claim is guaranteed in the European Union and the EEA by virtue of Art. 18 of Directive 2009/103/EC.[12] Such a guarantee was previously provided under the European Convention on Compulsory Insurance against Civil Liability in respect of Motor Vehicles from 1959, which entered into force in 1969.[13]

8 A number of jurisdictions also grant a direct claim in respect of other types of third party liability insurance.[14] Some countries permit injured parties to make direct claims in relation to all types of compulsory insurance,[15] others even extend it to certain types of voluntary third party liability insurance,[16] and others yet afford it in respect of all types of third party liability insurance.[17] The picture of direct claims in Europe is therefore very colourful and, upon detailed inspection, significantly more colourful than presented here. As a model for

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9 See s. 119 of the German Insurance Contract Act; s. 29(1), (2) of the Austrian Law on Motor Vehicle Liability Insurance (KHVG).

10 See s. 120 of the German Insurance Contract Act as well as s. 29(3), (4) of the Austrian Law on Motor Vehicle Liability Insurance (KHVG).

11 *Heiss/Loacker*, JBl 2007, 613, 637.

12 Art. 18 of Directive 2009/103/EC reads: "Member States shall ensure that any party injured as a result of an accident caused by a vehicle covered by insurance as referred to in Article 3 enjoys a direct right of action against the insurance undertaking covering the person responsible against civil liability."

13 Art. 6 (1) of Annex I to the European Convention on Compulsory Insurance against Civil Liability in respect of Motor Vehicles 1959.

14 A comparative overview is presented by *Rubin*, 385, 410 *et seq*.; *Basedow/Fock*, 1, 108 *et seq*.; see also *Bisping*, in: BeckOGK, Art. 18 Rom II-VO note 19 *et seq*.

15 Art. 26 (1) of the Greek Insurance Contract Act; see also s. 115 of the German Insurance Contract Act, under which a direct claim is granted in relation to compulsory insurance in specific cases only.

16 Art. 7:954 of the Dutch Civil Code; s. 67 of the Finnish Insurance Contract Act; ss. 7 and 8 of Chapter 9 of the Swedish Insurance Contract Act.

17 Art. L 124–3 of the French Insurance Code; Art. 76 of the Spanish Insurance Contract Law; Art. 150 of the Belgian Insurance Act.

Europe, the Principles of European Insurance Contract Law (PEICL) consequently contain a compromise, which grants a direct claim in any cases involving compulsory insurance and also in respect of voluntary third party liability insurance in certain situations.[18]

8. Other rights to the liable person's insurance claim

9 In cases where there is no direct claim, the law applicable may afford the injured party at least limited rights to the liable person's insurance claim. This is the case, for instance, where the law affords a lien or another type of priority in enforcement against the insurance claim of the person liable.[19] In the event of the liable person's insolvency, such claims give the injured party priority over other creditors of the insolvent person liable.[20] In addition, the person liable is frequently prohibited from disposing over the insurance claim to the detriment of the injured party.[21] In effect, these limited rights are therefore very similar to a direct claim.

II. Connection of the direct claim

1. Relevance of the applicable law

10 The colourfulness of the picture of direct action in Europe bestows special importance to the question of which law governs the direct claim. The determination of the law governing the direct claim is, however, not only relevant in order to decide on the subject matter of the dispute. To the contrary, it must be determined at an earlier stage in the course of determining the international jurisdiction for the direct action pursuant to Brussels I*bis* Regulation. In accordance with the ECJ's case law, the injured party is granted home jurisdiction for a direct action under Art. 13 (2) together with Art. 11 (1)(b) of Brussels I*bis* Regulation, so that the courts at the place where the injured party is domiciled have jurisdiction.[22] However, such jurisdiction is only granted under Art. 13 (2) of the Regulation "where such direct actions are permitted". According to prevailing opinion, the question of whether a direct action is permitted must be determined pursuant to the law applicable to the direct claim, i.e. the law applicable as determined under Art. 18.[23] The question concerning the existence of a direct claim must therefore be answered incidentally during the review of jurisdiction.[24]

2. Art. 18 – a special conflict rule

11 A special conflict rule for the conflict-of-law treatment of the direct claim is provided in Art. 18. Substantively, the rule favours the injured party, because it recognises a direct claim

18 Specifically Art. 15:101 PEICL; for further references, see *Heiss*, note 20 *et seq*.

19 See e.g. s. 110 of the German Insurance Contract Act; s. 157 of the Austrian Insurance Contract Act; Art. 60 (1) of the Swiss Insurance Contract Act; for a fuller discussion, see *Micha*, p. 81 *et seq*.

20 For further information, see *Rubin*, 385, 408 *et seq*.

21 See e.g. s. 108 (1) of the German Insurance Contract Act; s. 156(1) of the Austrian Insurance Contract Act; in a similar manner Art. 60 (2) of the Swiss Insurance Contract Act.

22 ECJ in Case C-463/06 *FBTO Schadeverzekeringen NV v. Jack Odenbreit* [2007] ECR I-11321. Reviewed by *Micha*, ZVersWiss 2010, 579–601.

23 See (with references) *Heiss*, in: Magnus/Mankowsi, Art. 13 Brussels Ibis Regulation note 6; *Kropholler/von Hein*, Art. 11 para. 4.

24 *Jakob*/*Picht*, in: Rauscher, Art. 18 Rom II-VO note 2.

by means of an alternative connection if either the law governing liability or the law applicable to the insurance contract provide for a direct claim.[25] In using this alternative connection, Art. 18 is based on the Swiss model set out in Art. 141 of the Swiss Act on International Private Law, which has previously also served as a model for the German conflict rule in Art. 40 (4) of the Introductory Law to the German Civil Code (EGBGB).[26]

By providing a special conflict rule for direct claims the European legislature has relieved the need to resolve a complex classification problem. Classifying "direct claims" in the context of conflict of laws is a complex matter, because the direct claim has elements of both tort law and insurance contract law.[27] Consequently, it cannot be unequivocally assigned to international tort law or international contract law. The problem is, however, defused to a significant degree by Art. 18.[28] **12**

3. Art. 18 contrasted with Art. 9 Hague Convention of 4 May 1971

The technique of an alternative connection as used in Art. 18 deviates from Art. 9 of the Hague Convention of 4 May 1971 on the law applicable to traffic accidents (HTAC):[29] In Art. 9 HTAC, there is a reference to the governing law of tort which must be determined in accordance with Arts. 3 to 5 HTAC (Art. 9 (1) HTAC). Recourse to the law where the accident occurred will only be made if the governing law of tort does not provide a right of direct action (Art. 9 (2) HTAC). Where the law at the place of the accident also does not provide for direct claims, recourse may in turn be made to the law governing the insurance contract (Art. 9 (3) HTAC).[30] The Hague Convention therefore does not use an alternative connection, but a connection ladder.[31] **13**

III. Scope of application

1. Material scope

a) Direct claims and limited rights to the insurance claim

According to its heading, Art. 18 governs "direct action" and, as the wording of the provision itself strongly indicates, "direct claims" even before they are brought in court. Due to the protective purpose of the rule in Art. 18, it is limited to direct claims granted by law.[32] **14**

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25 *Heiss/Loacker*, JBl, 613, 638; *Altenkirch*, in: Huber, Art. 18 Rome II Regulation note 1; *Micha*, p. 83; see *Jakob/Picht*, in: Rauscher, Art. 18 Rom II-VO note 1; *Staudinger*, in: Gebauer/Wiedmann, Art. 18 Rom II-VO note 89; *Buonaiuti*, 155; *Martiny*, in: FS Magnus, 483, 498; *Jimenez Blanco*, AEDIPr 2007, 287, 288; *Bisping*, in: BeckOGK, Art. 18 Rom II-VO note 28; *Schacherreiter*, 13; *Hellner*, para. 16.1.2; *Junker*, NJW 2007, 3675, 3681.

26 Cf. *Jakob/Picht*, in: Rauscher, Art. 18 Rom II-VO note 1; *von Hein*, in: Ahern/Binchy, 153, 172 *et seq*.

27 See e.g. *Roth*, p. 643 *et seq*.; *Jimenez Blanco*, AEDIPr 2007, 287, 289.

28 Critical *Papettas*, (2012) 8 JPrIL 297, 308 *et seq*.

29 See e.g. OGH 18. September 1991 – Case 2 Ob 24/91; as well as OGH 26. June 1991 – Case 2 Ob25/91.

30 See *Calvo Caravaca/Carrascosa González* p. 177–178.

31 With regard to this connection ladder, see OGH 18 September 1991 – Case 2 Ob 24/91; as well as OGH 26 June 1991 – 2 Ob 25/91; see also *Heiss/Loacker*, JBl 2007, 638; *Plender/Wilderspin*, para. 28–019; cf. *Jakob/Picht*, in: Rauscher, Art. 18 Rom II-VO note 1; *Staudinger*, in: FS Jan Kropholler (2008), 691, 698.

32 See *Franck*, 32.

15 A right to direct action may, however, also be afforded to the injured party by virtue of a contractual agreement or an assignment of the claim to cover by the insured person. Contractual agreements to this effect are sometimes made in D&O policies where the company taking out the policy will often also be the injured party or among the injured parties. In legal literature, there has even been discussion about the extent to which the "principle of separation"[33] should not be followed at all in the context of D&O insurance and, thus, the company taking out the policy should have a direct claim against the insurer.[34] In other classes of liability insurance, a direct claim could be created whenever the liable person assigns his rights under the liability insurance policy to the injured party. Such assignment is, however, often excluded by the policy terms (clauses of non-assignability). However, such clauses are prohibited by law, at least in Germany, and an assignment may therefore be made at any time.[35] The same approach is taken in Art. 14:105 PEICL.[36] Nevertheless, such "contractual" direct claims are not subject to Art. 18 since the protective purpose of this provision does not apply in such cases.[37] Thus, the contract or assignment concerned will be subject to its own law. There is no reason for favouring the injured party further by providing an alternative connection under Art. 18.

16 In contrast, there are good reasons to favour the injured party by virtue of the alternative connection in Art. 18 even where no direct claim, but instead a limited right to the insurance claim is granted. This is, for example, the case where either the law governing the liability or the law governing the insurance contract afford a lien or another type of priority in enforcement against the insurance claim of the person liable.[38]

b) Direct action for non-contractual claims

17 In accordance with the scope of Rome II Regulation, Art. 18 applies to direct claims in relation to non-contractual obligations.[39] The provision belongs to Chapter V (Common Rules) of the Regulation and is therefore applicable to all of the non-contractual obligations governed in it. Thus, the provision applies both to claims for damages in tort and to compensation claims arising from *culpa in contrahendo*, *negotiorum gestio* and unjust enrichment.[40]

c) Direct action for contractual claims?

18 By contrast, Art. 18 does not apply directly to contractual claims for damages.[41] The Rome I Regulation concerning contractual obligations lacks a special conflict rule governing direct claims. It leads to the result that a special conflict rule exists to determine

33 As to this principle, see *supra* para. 1.

34 See for Germany *Baumann*, in: Bruck/Möller, para. 10 AVB-AVG 2011/2013 notes 8 *et seq*.

35 See s. 108(2) of the German Insurance Contract Act.

36 See *Heiss*, note 26.

37 *Nordmeier*, in: Nomos Kommentar BGB, Art. 18 Rom II-VO note 8; *Micha*, p. 83.

38 See e.g. s. 110 of the German Insurance Contract Act; s. 157 of the Austrian Insurance Contract Act; Art. 60 (1) of the Swiss Insurance Contract Act; for a fuller discussion, see *Micha*, p. 81 *et seq*.

39 *Jakob*/*Picht*, in: Rauscher, Art. 18 Rom II-VO note 2a.

40 Art. 2 of the Rome II Regulation.

41 See *Gruber*, in: Calliess, Art. 18 Rome II Regulation note 21; *Junker*, in: Münchener Kommentar, Art. 18 Rom II-VO note 8; *Nordmeier*, in: Nomos Kommentar BGB, Art. 18 Rom II-VO note 4; *Jakob*/*Picht*, in: Rauscher, Art. 18 Rom II-VO note 2a; *Martiny*, in: FS Magnus, 483, 498.

the law applicable to a direct claim for quasicontractual claims, especially those arising from *negotiorum gestio* and *culpa in contrahendo*, but not for contractual claims. This outcome is unpersuasive for a number of reasons.[42] It is unclear why the conflict-of-law treatment of a direct claim arising due to a breach of a pre-contractual information duty should imitate Art. 18, while there is, in contrast, no special conflict rule for a breach of information duties following contract conclusion and the injured party will therefore not benefit from the alternative connection set out in Art. 18. It is unpersuasive that Art. 18 will apply where a person performs a *negotiorum gestor*'s tasks without authorisation, but not when such tasks are performed with authorisation. It is also unpersuasive that, in cases where a claim can be based on contract law as well as tort law, the tortious claim will be subject to Art. 18 but the claim in contract will not. This is all the more so because the rule in Art. 4 (3) of the Rome II Regulation attempts to equate the conflict-of-law treatment of claims arising in tort with that of claims arising in contract, where such claims are closely connected, and therefore subjects claims arising in tort to the law applicable to the contract. With regard to direct claims, it is unclear why claims in contract should be treated differently. On the whole, the lack of a special conflict rule for claims arising in contract is likely to represent an undesired gap in European conflicts of law.[43] In my opinion, there is convincing reason to favour also applying Art. 18 to claims for damages arising in contract by analogy.[44]

It is not clear, however, that the ECJ will accept this view. In Case C-240/14,[45] the ECJ placed **19** emphasis on the fact "that in certain circumstances, liability for the damage caused by an aircraft crash may be within the category of **non-contractual obligations** referred to in Article 2 of Regulation No. 864/2007." The ECJ obviously wanted to make clear that Art. 18 may apply to liability for the damage caused by an aircraft crash. This does not necessarily mean that the ECJ is excluding an application of Art.18 by analogy to cases where an injured party brings an action for damages based on a breach of contract. The statement may, however, be read this way.

d) Exceptions (Art. 1 (2))

Important non-contractual claims are excluded from the scope of the Rome II Regulation **20** from the outset under Art. 1 (2). This applies to claims arising out of nuclear damage (Art. 1 (2)(f)) and claims arising out of violations of privacy and rights relating to personality (Art. 1 (2)(g)). These are therefore also not covered by the rule in Art. 18.[46]

Liability for nuclear damage is governed by public international law, namely the Convention of **21** 29 July 1960 on Third Party Liability in the Field of Nuclear Energy (Paris Convention) and the Vienna Convention on Civil Liability for Nuclear Damage 1963 (Vienna Convention).[47]

42 A different view is presented e.g. by *Bisping*, in: BeckOGK, Art. 18 Rom II-VO note 16.

43 See *Gruber*, in: Calliess, Art. 18 Rome II Regulation note 22 *et seq*.

44 See also *Gruber*, in: Calliess, Art. 18 Rome II Regulation note 23.; *Micha*, p. 96 *et seq*.; cf. *Martiny*, FS Magnus, 483, 499 *et seq*.; dissenting *Nordmeier*, in: Nomos Kommentar BGB, Art. 18 Rom II-VO note 7; *Bisping*, in: BeckOGK, Art. 18 Rom II-VO note 16.

45 ECJ in Case C-240/14 *Eleonore Prüller-Frey v. Norbert Brodnig, Axa Versicherung AG* [2015] ECLI:EU:C:2015:567, para. 38.

46 *Bisping*, in: BeckOGK, Art. 18 Rom II-VO note 4, who also considers direct claims against D&O insurers to fall outside of the Regulation's scope under Art. 1 (2)(d).

Art. 6 (a) of the Paris Convention refers to national law for a potential direct claim. This is interpreted as a reference to a national law in its totality,[48] which means that the Paris Convention also leaves the issue of the law applicable to be solved by national conflicts of law. The same is true of the Vienna Convention in Civil Liability for Nuclear Damage 1963 (Vienna Convention), both in its original version and in the consolidated version following the protocol from 1997. Under Art. II(7) of the Vienna Convention, there is a right to a direct action "if the law of the competent court so provides". Pursuant to the definition of the term "law of the competent court" in Art. I(1)(e), this law also encompasses the rules of conflict of laws.

2. Territorial scope

22 The Rome II Regulation applies in all the EU Member States with the exception of Denmark. It does not apply in the EEA Signatory States of Iceland, Liechtenstein and Norway. The same is therefore also true of the conflicts of law determination concerning direct claims pursuant to Art. 18. While a duty is placed on these States by virtue of Art. 178 of Directive 2009/138/EC to determine the law applicable to insurance contracts in line with Art. 7 of Rome I Regulation,[49] Art. 178 of Directive 2009/138/EC does not refer to Rome II Regulation nor especially to Art. 18 thereof.

IV. Overriding conflict rule: Art. 9 HTAC

23 Art. 9 HTAC contains a special conflict rule governing direct claims.[50] However, this Convention only relates to non-contractual liability arising from traffic accidents. Thus Art. 9 thereof, in essence, governs direct claims in motor third party liability insurance.[51] Numerous Member States party to the Rome II Regulation are also signatories to the Convention: Austria, Belgium, Croatia, the Czech Republic, France, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Portugal and Slovakia. In these countries Art. 9 HTAC will take priority in accordance with Art. 28.

V. Connection of the direct claim in detail

1. Alternative connection pursuant to Art. 18

a) Direct claim pursuant to the law governing the obligation or the law governing the insurance contract

24 An injured party can assert a claim for compensation against the liable person's liability insurer directly if the law applicable to the non-contractual obligation or the law applicable to the insurance contract so provides.[52] The law governing the obligation and the

47 With regard to the particular situation in Austria, see *Heiss*/*Loacker*, JBl 2007, 613, 621 *et seq*.; cf. *Calvo Caravaca*/*Carrascosa González*, 207 *et seq*.

48 *Bisping*, in: BeckOGK, Art. 18 Rom II-VO note 4.

49 In respect of this duty, see *Heiss*, in: Magnus/Mankowsi, Art. 7 Rome I Regulation note 40 *et seq*. (Denmark) and 42 *et seq*. (EEA Contracting States).

50 On this point, see para. 13 above.

51 See also *Jakob*/*Picht*, in: Rauscher, Art. 18 Rom II-VO note 1.

52 *Jakob*/*Picht*, in: Rauscher, Art. 18 Rom II-VO note 1; *Thorn*, in: Palandt, Art. 18 Rom II-VO note 1; see *Leible*/*Lehmann*, RIW 2007, 721, 724 *et seq*.; *Junker*, NJW 2007, 3675, 3681.

law governing the insurance contract represent equivalent **alternatives**.[53] This was expressed, for instance, by Advocate General *Szpunar*: "It is also apparent from the wording of Art. 18 of the Rome II Regulation that it is a connecting rule structured as an alternative…"[54]. In contrast to the situation under Art. 9 HTAC, neither of these laws takes precedence under Art. 18.

The law applicable to the non-contractual obligation and the law applicable to the insurance contract must be determined in accordance with the respective conflict rules. For the commonly relevant claims arising out of a **tort**, the law applicable is determined in accordance with Arts. 4 *et seq*.[55] Contractual claims arising out of **third party liability insurance** are determined in accordance with Art. 7 of the Rome I Regulation or, where this conflict rule is not applicable, in accordance with the general rules in Arts. 3 *et seq*. of the Rome I Regulation.[56] In determining the law applicable to the insurance contract, it should be noted that *dépeçage* is possible. Pursuant to Art. 7 (5) in connection with the third subparagraph Art. 7 (3) and Art. 7 (4) of the Rome I Regulation, this is the case for insurance contracts covering risks situated in several Member States. This is specifically also the case for compulsory insurance for the purposes of Art. 7 (4) of the Rome I Regulation. According to Recital 33 of the Rome I Regulation, *dépeçage* should also be the result where an insurance contract covers risks situated in both Member States and third countries. In all of these cases, there is a fiction that there are several insurance contracts for each of which the law applicable is determined separately. For the purposes of Art. 18, the law applicable to the contract relevant in each individual case must be used. **25**

b) Principle of favourability

Art. 18 allows the injured party to profit from the more favourable law providing him with a direct action. Thus, the alternative connection for direct claims establishes a **principle of favourability** for the injured person.[57] In the words of Advocate General *Szpunar*: "… Art. 18 of the Rome II Regulation lays down a provision that protects the interests of the injured party, granting that party the **benefit of the most favourable rules** …"[58] Therefore, in cases **26**

53 *Heiss*/*Loacker*, JBl 2007, 613, 638; *Altenkirch*, in: Huber, Art. 18 Rome II Regulation note 8; *Jakob*/*Picht*, in: Rauscher, Art. 18 Rom II-VO note 1; *Staudinger*, in: Gebauer/Wiedmann, Art. 18 Rom II-VO note 89; *Thorn*, in: Palandt, Art. 18 Rom II-VO note 1; *Junker*, NJW 2007, 3675, 3681; dissenting *Dickinson*, para. 14.87 who argues that, despite the wording of Art. 18 of the Rome II Regulation, "the law applicable is subject to the right of the person who has suffered damage to base his claim on the law applicable to the insurance contract".

54 Opinion of Advocate General *Szpunar* in Case C-240/14 *Eleonore Prüller-Frey v. Norbert Brodnig, Axa Versicherung AG* [2015] ECLI:EU:C:2015:325, para. 78.

55 *Gruber*, in: Calliess, Art. 18 Rome II Regulation note 7; *Junker*, in: Münchener Kommentar, Art. 18 Rom II-VO note 10; *Altenkirch*, in: Huber, Art. 18 Rome II Regulation note 2; *Bisping*, in: BeckOGK, Art. 18 Rom II-VO note 29 *et seq*.; *Micha*, p. 106 *et seq*.; *Nordmeier*, in: Nomos Kommentar BGB, Art. 18 Rom II-VO note 16; *Hellner*, para. 16.1.1.

56 *Hellner*, para. 16.1.1; with regard to the demarcation of the scope of Art. 7 of Rome I Regulation, see *Heiss*, in: Magnus/Mankowsi, Art. 7 Rome I Regulation note 24 *et seq*.

57 *Junker*, in: Münchener Kommentar, Art. 18 Rom II-VO note 1, 12; *Junker*, NJW 2007, 3675, 3681; see also *Dickinson*, para. 14.89; *Leible*/*Lehmann*, RIW 2007, 721, 734; *Spickhoff*, in: Bamberger/Roth/Poseck, Art. 18 Rom II-VO note 1; *Thorn*, in: Palandt, Art. 18 Rom II-VO note 1, 3; *Micha*, p. 92; *Gruber*, in: Calliess, Art. 18 Rome II Regulation note 17; *Plender*/*Wilderspin*, para. 28–010.

concerning a direct claim both applicable laws must be examined in respect of their favourability.[59]

27 A separate issue is whether the competent court must conduct the comparison of favourability *ex officio* or whether the injured party must invoke the more favourable law and provide evidence of its applicability.[60] This issue must be distinguished from the other question of whether a conflict rule grants the injured party an option, as was the case in the Commission's proposal of a Rome II Regulation,[61] or an alternative connection, as is the case under Art. 18.[62]

28 These issues have not been harmonised under the Rome II Regulation or other European legislation on conflicts law and have consequently been left to national law.[63] In respect of German conflicts law (Art. 40 (4) of the Introductory Law to the German Civil Code (EGBGB)), the German Federal Supreme Court (*Bundesgerichtshof*) presumes a duty on the part of the courts to conduct a comparison of favourability *ex officio*.[64] Similarly, the Austrian Law on private international law (IPRG) provides for an *ex officio* application of conflict rules and an *ex officio* determination of foreign law. In accordance with principles of primary EU law, in particular the principle of equivalency, German and Austrian courts must therefore also apply Art. 18 *ex officio* and determine both the relevant insurance contract law and the liability law *ex officio*.[65]

29 The ECJ has held that "it is for the referring court to ascertain whether the law applicable to the non-contractual obligation in issue in the main proceedings, determined in accordance with Art. 4 of Regulation No. 864/2007, or the law applicable to the insurance contract entered into between [the parties], permits such a claim to be brought".[66] However, this case was essentially concerned with whether an alternative connection under Art. 18 was excluded by the choice of law agreed upon in the insurance contract. The ECJ dismissed this argument and highlighted that, irrespective of the choice of law, both alternative applicable laws must be taken into consideration by the competent court. It is therefore unlikely that the ECJ was considering the *ex officio* application of Art. 18 and the *ex officio* determination of a foreign law. Thus, at least in my view, the ECJ has not yet adjudicated on this question.[67]

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58 Advocate General *Szpunar* ECLI:EU:C:2015:325, para. 85 (emphasis added).

59 Cf. *Jakob*/*Picht*, in: Rauscher, Art. 18 Rom II-VO notes 3 and 5; cf. *Staudinger*, in: Gebauer/Wiedmann, Art. 18 Rom II-VO note 89.

60 See *Gruber*, in: Calliess, Art. 18 Rome II Regulation note 18; *Nordmeier*, in: Nomos Kommentar BGB, Art. 18 Rom II-VO note 26; *Loacker*, EuZW 2015, 797, 795.

61 See the proposed Art. 14 in COM(2003) 427 final, 37. Regarding the optional version see *Malatesta* 60 *et seq.*

62 Cf. *Papettas*, (2012) 8 JPrivIL 297, 308–309.

63 See *Kieninger*, in: Leible, p. 357, 362 *et seq.*; *Basedow*, in: Liber Amicorum Rokas (2017), p. 1, 16; *von Hein*, in: Ahern/Binchy, p. 153, 173; *Altenkirch*, in: Huber, Art. 18 Rome II Regulation note 9; *Plender*/*Wilderspin*, para. 28–017.

64 BGH v. 1.3.2016 VI ZR 437/14; cf. *Thorn*, in: Palandt, Art. 18 Rom II-VO note 2.

65 See *Trautmann*, Europäisches Kollisionsrecht und ausländisches Recht im nationalen Zivilverfahren (2011).

66 *Eleonore Prüller-Frey v Norbert Brodnig and Axa Versicherung AG* (Case C-240/14), ECLI:EU:C:2015:567, para. 43.

2. Choice of law

a) Indirect choice of law?

It should be noted that both the law applicable to the liability and the law governing the insurance contract may to a certain extent be influenced by a choice of law by the respective parties. In this respect, it can be questioned whether the parties to the third party liability and the parties to the insurance contract may influence the law applicable in a manner which affects third parties. For example, can the person liable and the injured party subject the liability claim to a law which permits direct claims by means of a choice of law and if so, would such a choice of law be effective against the third party liability insurer? Conversely, can the third party liability insurer and the policyholder subject the contract to a law which does not provide for direct claims and if so, would such a choice of law also be effective against the injured party? **30**

Pursuant to the second sentence of Art. 14 (1), a choice of law concerning a non-contractual obligation may not affect the rights of third parties from the outset. A choice of law made between the injured party and the person liable therefore cannot prejudice the insurer's position and cannot establish a right to direct action, which would not exist without the choice of law, nor can it reinforce an existing direct claim.[68] Where the parties to the liability relationship benefit the insurer by means of their choice of law, there is, in my opinion, no reason to prevent the insurer from invoking such a choice of law.[69] If the person liable and the injured party choose a law applicable in tort which does not recognise direct claims, the insurer may, in my opinion, invoke this choice of law which is more favourable to it.[70] **31**

In respect of insurance covering large risks, the law applicable to the insurance contract may be chosen freely by the parties.[71] Where insurance contracts covering mass risks are concerned, the extent of the freedom to choose a law depends on whether or not the insured risks are situated in a Member State.[72] A choice of law agreed upon between the insured person liable and the insurer must definitely be made within these boundaries. Where a binding choice of law has been agreed upon, its effect upon third parties is determined on the basis of the second sentence of Art. 3 (2) of the Rome I Regulation. According to this **32**

67 With regard to this problem see also *Loacker*, EuZW 2015, 797, 798, stating that the effect of the ECJ judgment in countries where ascertaining foreign law is not done *ex officio* would be "doubtful".

68 See *Loacker* EuZW 2015, 797, 798; also *Gruber*, in: Calliess, Art. 18 Rome II Regulation note 11; *Junker*, in: Münchener Kommentar, Art. 18 Rom II-VO note 10; *Altenkirch*, in: Huber, Art. 18 Rome II Regulation note 10; *Thorn*, in: Palandt, Art. 18 Rom II-VO note 4; *Junker*, JZ 2008, 169, 173; *Jimenez Blanco*, AEDIPr 2007, 287, 294; *Bisping*, in: BeckOGK, Art. 18 Rom II-VO note 33; *Spickhoff*, in: Bamberger/Roth/Poseck, Art. 18 Rom II-VO note 3; *Micha*, p. 138 *et seq*.; *Leible*, RIW 2008, 257, 262; *Leible*/*Lehmann*, RIW 2007, 721, 727; *Calvo Caravaca*/*Carrascosa González*, 93; *Hellner*, para. 16.1.5.

69 Cf. *Heiss*/*Loacker*, JBl. 2007, 613, 623; similarly *Altenkirch*, in: Huber, Art. 18 Rome II Regulation note 11; *Bisping*, in: BeckOGK, Art. 18 Rom II-VO note 33; dissenting *Jakob*/*Picht*, in: Rauscher, Art. 18 Rom II-VO note 4; for a choice of law pursuant to Art. 14 (1) in general, see *von Hein*, in: Calliess, Art. 14 Rome II Regulation note 36 with further references.

70 See *Staudinger*, in: Gebauer/Wiedmann, Art. 18 Rom II-VO note 90.

71 See Art. 7 (2) of the Rome I Regulation.

72 For a detailed analysis, see *Heiss*, in: Magnus/Mankowski, Art. 13 Rome I Regulation notes 126 *et seq*. and 205 *et seq*.

provision, a subsequent choice of law cannot adversely affect the rights of third parties. Therefore, the person liable and his insurer cannot exclude an existing direct claim by making a subsequent choice of law. However, at least in principle, there is nothing to prevent them from choosing a law without direct claims to apply to their insurance contract when concluding the contract and, thus, before the direct claim comes into existence. In this case, the situation should, in my opinion, not be compared to a choice of forum clause to the detriment of the injured party. While Art. 13 (2) of the Brussels I*bis* Regulation, as interpreted in EU case law, affords the injured party a legislatively guaranteed home jurisdiction which cannot be deviated from without his consent,[73] Art. 18 does not grant a direct claim; it only determines the law applicable to the question of whether such a claim exists in accordance with the law applicable to the liability and the law applicable to the insurance contract. The parties to the insurance contract thus have a free choice of law. Furthermore, there is no reason to prevent the injured party's legal position against the insurer from being strengthened if the person liable and his insurer make an initial or subsequent choice of law, i.e. choose a law which benefits the injured party.

33 At the same time, however, it should also be pointed out that direct claims are afforded to injured parties particularly frequently in relation to compulsory insurance. In these cases, the mandatory conflict-of-law rules set out in Art. 7 (4) of the Rome I Regulation must be observed. In general, they will preclude a choice of law leading to an exclusion of a direct claim provided under the law imposing the duty to take out liability insurance.

b) Direct choice of law under Art. 14?

34 Another question is whether the law applicable to the direct claim may be determined by virtue of a choice of law agreement between the injured party and the insurer.[74] The European legislature has not made such possibility explicit, at least within the chapter on common rules to which Art. 18 belongs. However, it is readily conceivable that the European legislature merely did not consider including a choice of law in the provisions under the common rules, without meaning to exclude such a choice.[75] Moreover, the exclusion of a choice of law would have to apply to all of the provisions under the common rules, but would not make sense for all of them. Considering Art. 20 (multiple liability), which governs a paying debtor's right to recourse against other debtors, it is difficult to understand why the debtors should not be able to autonomously choose the law applicable to the compensation of the paying debtor. Thus, in my opinion, Art. 14 does not exclude a choice of law for direct claims due to the fact that it precedes the common rules in which Art. 18 can be found.[76]

35 In comparison, it is more difficult to resolve the issue of whether a choice of law agreement between the injured party and the liability insurer must comply with the rule in Art. 14, the rule in Art. 7 in connection with Art. 3 of the Rome I Regulation or both. As the connection for direct claims is governed by the Rome II Regulation, the *prima facie* evidence favours the application of Art. 14. It is however doubtful whether a direct claim

73 Assens Havn v. Navigators Management (Case C-368/16), ECLI:EU:C:2017:576, para. 40, 42.

74 See *Jimenez Blanco*, AEDIPr 2007, 287, 295.

75 See also *Nordmeier*, in: Nomos Kommentar BGB, Art. 18 Rom II-VO, note 8; see *Jimenez Blanco*, AEDIPr 2007, 287, 296, expressing scepticism about the practical benefit.

76 See *Gruber*, in: Calliess, Art. 18 Rome II Regulation note 20; cf. *Jakob*/*Picht*, in: Rauscher, Art. 18 Rom II-VO note 4; *Staudinger*, in: Gebauer/Wiedmann, Art. 18 Rom II-VO note 90.

should be treated exclusively as a non-contractual claim simply because of the placement of Art. 18 in the Rome II Regulation. There is a reference in Art. 18 to the underlying non-contractual claim, which would also explain why the provision was included in the Rome II Regulation. In contrast, the alternative connections provided in Art. 18 make clear that the legislature itself certainly did recognise the hybrid nature of direct claims. This situation provides a compelling case to take into consideration the choice of law rules in both Regulations if a choice of law agreement is intended to replace both of the alternative laws applicable. This is supported by the protective purpose of Art. 18 and the choice of law provisions in both Regulations. The purpose of Art. 18 is to favour the injured party, without removing any protection which the injured party would enjoy without this provision. This would, however, be the case if a broader choice of law were permitted in relation to direct claims than is permissible under Art. 7 of the Rome I Regulation, especially para. 4 (compulsory insurance) thereof. As a result, a choice of law in relation to the direct claim would have to comply with both Art. 14 of the Rome II Regulation and Art. 7 of the Rome I Regulation, where applicable.

The practical importance of a choice of law may, as a general rule, be doubted. However, such a choice of law may have practical relevance where so-called directors' and officers' liability insurance (D&O) is concerned. Such insurance is frequently concluded by a parent company for the benefit of its own directors and officers as well as those in its subsidiaries. In the event of loss, the parent company or a subsidiary are typically among the injured parties or may even be the sole injured party. The D&O insurance concluded therefore functions not just as third party liability insurance in protecting the assets of the directors and officers but similarly to first party indemnity insurance in protecting the assets of the group of companies concerned. In this situation, it would be possible and potentially make sense for the parent company and the liability insurer to choose the law applicable. By this means, not only the insurance contract, but also any direct claim on the part of the entire group of companies can be subject to one uniform law applicable. **36**

VI. Scope of the law applicable to direct claims

The law applicable to direct claims pursuant to Art. 18 determines the **existence** of a direct claim.[77] **37**

The existence of a direct claim may depend on **which person** is making the claim. This may be the **victim** himself but also another person, such as the **employer**[78] or a **social insurer** – first party private insurer indemnifying the victim.[79] The question of whether the claimant is entitled to bring the direct claim is determined by the law that governs the direct claim and will, thus, be subject to the alternative connection under Art. 18. In particular, it is up to the law governing the direct claim to determine whether a particular claimant, such as a victim's **38**

77 *Gruber*, in: Calliess, Art. 18 Rome II Regulation note 24; *Altenkirch*, in: Huber, Art. 18 Rome II Regulation note 4; *Jakob/Picht*, in: Rauscher, Art. 18 Rom II-VO note 1; *Thorn*, in: Palandt, Art. 18 Rom II-VO note 1; *Junker*, JZ 2008, 169, 177; *Junker*, NJW 2007, 3675, 3681; see *Hellner*, para. 16.1.3.

78 See the facts of the case in ECJ's decision in Case C-340/16 *Landeskrankenanstalten-Betriebsgesellschaft – KABEG v. Mutuelles du Mans assurances – MMA IARD SA* [2017] ECLI:EU:C:2017:576, where, however, Art. 18 was not an issue.

79 See *Altenkirch*, in: Huber, Art. 18 Rome II Regulation note 8.

employer, social insurer or private insurer is worthy of the protection afforded by a direct claim. Art. 18 only determines the law(s) governing this question; it does not exclude particular claimants *a priori*.

39 Insofar, Art. 18 is different to Arts. 10–16 of the Brussels I*bis* Regulation on jurisdiction in matters relating to insurance.[80] Under ECJ case law, the latter only protect "weaker" parties, a term which does not include reinsurers,[81] first party insurers[82] and social insurers.[83] In contrast, Art. 18 does not by itself determine who might be entitled to bring a direct claim. There is also no reason to assume that the alternative connection provided in Art. 18 is restricted to direct claims brought by the victim itself, thereby excluding the victim's employers or insurers and, at the same time, leaves the question of which law governs in such situations undecided with a view to all other persons bringing a claim directly. The term "person having suffered damage" in Art. 18 is sufficiently flexible. Moreover, the ECJ has decided that, at least, an employer qualifies as an injured party even within the meaning of Art. 13 (2) of the Brussels I*bis* Regulation.[84] Equally, the ECJ has held that "[i]t should also be recalled that the Court has held that the purpose of the reference in Art. 11 (2) Brussels I Regulation is to add injured parties to the list of plaintiffs contained in Art. 9 (1)(b) of that Regulation, **without restricting the category of persons having suffered damage to those suffering it directly**."[85] Thus, in my opinion, the question is left to the law applicable in accordance with Art. 18.[86]

40 The alternative connection under Art. 18 also applies to any defences available to the insurer against the **direct claim itself**.[87] If, for instance, the law governing the insurance contract provides that the direct claim of the injured party is partially or fully forfeited due to the injured party's failure to notify the insurer of relevant circumstances concerning the claim,[88] whereas the law governing liability provides for full indemnification of the injured party in spite of his failure to notify the insurer, the more favourable law, i.e. the law governing

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80 A differing view is presented by *Bisping*, in: BeckOGK, Art. 18 Rom II-VO note 23.

81 ECJ in Case C-412/98 *Group Josi Reinsurance Company SA v Universal General Insurance Company (UGIC)* [2000] ECLI:EU:C:2000:399 paras. 73 and 76.

82 ECJ in Case C-77/04 *Groupement d'intérêt économique (GIE) Réunion européenne and Others v Zurich España and Société pyrénéenne de transit d'automobiles (Soptrans)* [2005] ECLI:EU:C:2005:327, para. 20 *et seq*.

83 ECJ in Case C--347/08 *Vorarlberger Gebietskrankenkasse* [2009] ECLI:EU:C:2009:561, para. 47.

84 ECJ in Case C-360/14 *Landeskrankenanstalten-Betriebsgesellschaft – KABEG v. Mutuelles du Mans assurances – MMA IARD SA* [2017] ECLI:EU:C:2017:576, para. 37.

85 ECJ in Case C-360/14 *Landeskrankenanstalten-Betriebsgesellschaft – KABEG v. Mutuelles du Mans assurances – MMA IARD SA* [2017] ECLI:EU:C:2017:576, para. 33, with references to the judgments of 13 December 2007, FBTO Schadeverzekeringen, C-463/06, EU:C:2007:792, paragraph 26, and of 17 September 2009, Vorarlberger Gebietskrankenkasse, C-347/08, EU:C:2009:561, paragraph 27 (emphasis added).

86 See *Nordmeier*, in: Nomos Kommentar BGB, Art. 18 Rom II-VO notes 11 *et seq*.

87 Cf. Opinion of *Advocate General Szpunar* in Case C-240/14 *Eleonore Prüller-Frey v. Norbert Brodnig, Axa Versicherung AG* [2015] ECLI:EU:C:2015:325, para. 82: "… including possible limits on the exercise of that right …"

88 With regard to the injured's duties in this respect see para. 6 above; see the forfeiture rules in s. 120 of the German Insurance Contract Act; as well as in s. 29(3) and (4) of the Austrian Law on Motor Vehicle Liability Insurance (KHVG).

liability, will prevail pursuant to Art. 18. The same is likely to apply to issues of **prescription** concerning the direct claim.[89]

41 However, as far as the duties of the insurer under the insurance contract are concerned, the ECJ has clearly stated that "Art. 18 of Regulation No. 864/2007 does not constitute a conflict-of-laws rule with regard to the substantive law applicable to the **determination of the liability of the insurer** or the person insured **under an insurance contract**".[90] It follows, as has been stated by Advocate General *Szpunar*, that "[t]he sole aim of this Article is to determine which law applies to the question as to whether the victim can bring a claim directly against the insurer", and that Art. 18 "does not concern the extent of the insurer or the liable party's obligations."[91] This is also confirmed by the Commission's explanatory comment in its proposal for a Rome II Regulation, which reads: "At all events, the scope of the insurer's obligations is determined by the law governing the insurance contract."[92] As a consequence, the scope of cover (definition of the risk insured, exclusions, etc.) as well as the amount of cover (insured sum, etc.) are governed by the law applicable to the insurance contract only. Inversely, the existence and extent of liability of the person liable are determined by the law governing liability only.[93]

42 The fact that a motor vehicle liability insurer must "guarantee, on the basis of that single premium, in each Member State, the cover required by its law or the cover required by the law of the Member State where the vehicle is normally based when that cover is higher" under Art. 14 (b) of Directive 2009/103/EC (Motor Vehicle Liability Insurance Directive) does not represent an exception.[94] The provision must be transposed by all the Member States and, thus, the law governing the insurance contract will include such rule. As a result, it will be the law governing the insurance contract which holds the insurer liable in accordance with the minimum sums and conditions imposed by other Member States.[95] There is no need for an alternative connection under Art. 18.

43 The situation is less clear when it comes to provisions of national law prohibiting an insurer who provides liability insurance from asserting against the injured party certain defences which the insurer is otherwise afforded against the insured person liable ("exclusion of the defences" vis-à-vis the injured party).[96] By virtue of such provisions, the injured party's legal position vis-à-vis the insurer is independent of the legal position of the insured person liable and the injured party is thus afforded separate rights. Where the injured party and the liability insurer are concerned, the injured person's claim is therefore immunised against

89 In more detail *Micha*, p. 199 *et seq*. Cf. also *Roth*, p. 647.

90 ECJ in Case C-240/14 *Eleonore Prüller-Frey v Norbert Brodnig and Axa Versicherung AG* [2015] ECLI:EU:C:2015:567, para. 40 (emphasis added).

91 Opinion of *Advocate General Szpunar* in Case C-240/14 *Eleonore Prüller-Frey v. Norbert Brodnig, Axa Versicherung AG* [2015] ECLI:EU:C:2015:325, para. 75.

92 See COM(2003) 427 final, 25 *et seq*.

93 See *Gruber*, in: Calliess, Art. 18 Rome II Regulation note 28; *Nordmeier*, in: Nomos Kommentar BGB, Art. 18 Rom II-VO note 21; *Bisping*, in: BeckOGK, Art. 18 Rom II-VO note 37.

94 The case is, however, sometimes viewed as forming an exception, see *Micha*, p. 181 *et seq*.; *Bisping*, in: BeckOGK, Art. 18 Rom II-VO note 37.1.

95 See *Nordmeier*, in: Nomos Kommentar BGB, Art. 18 Rom II-VO note 24.

96 See *Gruber*, in: Calliess, Art. 18 Rome II Regulation note 30.

certain cover exemptions and actions on the part of the insured person liable. This privilege is afforded directly and only to the injured party, not to the insured person liable. Thus, legally, the "cover issue" is not affected by such rules since the insurer will have recourse against the insured person liable. Technically, this privilege benefitting the injured party only concerns the direct claim and not the underlying cover. However, economically at least, the risk borne by the insurer increases, because an action against the insured may fail due to the latter's lack of resources. Some legal commentators argue in favour of applying the alternative connection set out in Art. 18 in such cases.[97] This appears convincing because such rules only concern the direct claim. However, it remains to be seen which position will be taken by the ECJ on this matter. In any event, the question concerning the existence of a defence itself is not subject to Art. 18 but governed by the proper law of the insurance contract.[98] The issue of whether the insurer is released from the duty to pay the insured, for instance, where the latter causes the insured event intentionally, is therefore determined exclusively pursuant to the law applicable to the insurance contract.[99] Art. 18 only governs the separate issue of whether the insurer may also raise such defences against the injured party.

VII. Excursus: some peculiarities of motor vehicle liability insurance

1. Introduction

44 In respect of certain situations in motor vehicle liability insurance, the Motor Insurance Directive and the so-called Green Card System protect the injured party by granting claims against compensation bodies other than the liability insurer of the person liable. In such cases, a right to direct action in a broader sense is concerned, but this direct claim does not arise from the insurance contract nor the tortious claim to compensation. Instead, the direct claim represents a claim in its own right, which exists in addition to the direct claim against the liability insurer. The special claims of the injured party discussed here also do not influence the conflict-of-law rules governing the latter mentioned direct claim.[100] Considering the fact that these claims are of most practical importance where cross-border traffic accidents are concerned,[101] they will be discussed below as part of this excursus.

2. Green Card System: regulation of "domestic accidents"

45 The Green Card System[102] has recently been explained by Advocate General Bobek: "The

97 See e.g. *Gruber*, in: Calliess, Art. 18 Rome II Regulation note 30; *Altenkirch*, in: Huber, Art. 18 Rome II Regulation note 17; distinguishing between voluntary and compulsory insurance *Micha*, p. 172 *et seq.*; cf. *Jimenez Blanco*, AEDIPr 2007, 287, 307; critical of this stance, *Plender/Wilderspin*, para. 28–014; *Junker*, in: Münchener Kommentar Art. 18 Rom II-VO note 37.2.

98 Cf. *Roth* p. 645, 647.

99 See *Gruber*, in: Calliess, Art. 18 Rome II Regulation note 30; *Thorn*, in: Palandt, Art. 18 Rom II-VO note 1.

100 See more generally Joined Cases C-359/14 and C-475/14 *"ERGO Insurance" SE v. "If P & C Insurance" AS* and *"Gjensidige Baltic" AAS v. "PZU Lietuva" UAB DK* [2016] ECLI:EU:C:2016:40, holding that e.g. Art. 14 (b) of the Motor Insurance Directive "does not contain any specific conflict-of-law rule intended to determine the law applicable to the action for indemnity between insurers in circumstances such as those at issue in the main proceedings."

101 *Junker*, in: Münchener Kommentar, Art. 18 Rom II-VO note 4.

difficulties relating to travelling abroad and insurance were addressed in an agreement signed on 17 December 1953 under the auspices of the United Nations Economic Commission for Europe. This is known as the 'Inter-Bureaux Standard Agreement' ('the 1953 Agreement'). The 1953 Agreement gave birth to a system of 'Green Cards' ('Green Card system'). The Green Card is an international certificate attesting that the driver is insured against civil liability for any incident that may occur in the 'host country'. It also certifies that the obligations arising out of that liability will be met by the 'home country' insurer or by the respective motor insurers' bureau. There have been subsequent replacements of the 1953 Agreement, the most recent of which is the Internal Regulations. Currently, the national insurers' bureaux of 48 countries (including all the EU Member States) participate in the Green Card system."[103]

Furthermore, Advocate General Bobek stated that "[t]he Internal Regulations were adopted and are administered by the Council of Bureaux ('CoB'), an international non-profit association established under Belgian law. The Internal Regulations lay down the obligation for the respective national insurers' bureaux (members of the CoB) to provide compensation for accidents that occurred on their territory, and which were caused by vehicles normally based in another state. They also made it an obligation for the bureau of the registration of such vehicles to guarantee the reimbursement of the amounts paid by the bureau situated in the country where the accident occurred."[104] Thus, the Green Gard System is intended to protect the injured party in situations in which he is injured by a foreign vehicle in his country of residence.[105] Recital 33 of the Motor Insurance Directive also establishes this clearly: "The green card bureau system ensures the ready settlement of claims in the injured party's country of residence even where the other party comes from a different European country." Therefore, the cases concerned are those viewed as "domestic accidents" by the victims of traffic accidents.[106] In such cases, it is the aim of the Internal Regulations to guarantee that injured parties are compensated in line with the law at the place of the accident on the one hand, but also to guarantee that the handling bureau will be compensated by the liability insurer responsible for the damages paid on the other.[107] Consequently, there are no special rules governing such cases in the Motor Insurance Directive,[108] which only contains additional provisions based on[109] the Green Card System.[110] **46**

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102 Cf. also *Junker*, in: Münchener Kommentar, Art. 18 Rom II-VO note 15 *et seq*, *Franck*, 70 *et seq*.

103 Opinion of Advocate General *Bobek* in Case C-587/15 *Lietuvos Respublikos transporto priemonių draudikų biuras v. Gintaras Dockevičius and Jurgita Dockevičienė* [2017] ECLI:EU:C:2017:234, para. 33-35.

104 Opinion of Advocate General *Bobek* in Case C-587/15 *Lietuvos Respublikos transporto priemonių draudikų biuras v Gintaras Dockevičius and Jurgita Dockevičienė* [2017] ECLI:EU:C:2017:234, para. 36–37.

105 *Heiss*, in: Magnus/Mankowski, Art. 7 Rome I Regulation note 64; See *Junker*, in: Münchener Kommentar, Art. 18 Rom II-VO note 15.

106 *Heiss*, in: Magnus/Mankowski, Art, 7 Rome I Regulation note 64.

107 See para. (c) of the Preamble to the Internal Regulations.

108 In respect of the interplay between the Motor Insurance Directive and the Green Card System, see Opinion of Advocate General *Bobek* in Case C-587/15 *Lietuvos Respublikos transporto priemonių draudikų biuras v. Gintaras Dockevičius and Jurgita Dockevičienė* [2017] ECLI:EU:C:2017:234, para. 40: "In order to carry out that aim, the EU relied on, and in some aspects expanded, the Green Card system. It is clear that both systems developed in parallel, building upon each other, and referring to each other."

109 See Art. 2 (a) of the Motor Insurance Directive: the relevant provision will only apply, if an agreement between the so-called "national insurers' bureaux" (see definition in Art. 1 (3) Motor Insurance Directive) exists

47 In accordance with the Internal Regulations, a person who is injured or harmed by a foreign vehicle in his country of residence ("domestic accident") may demand compensation from the "handling bureau" in his country of residence.[111] Compensation will be paid pursuant to the rule applicable locally and to an amount corresponding to at least the locally applicable minimum insurance sum limits.[112] The handling bureau may demand reimbursement of the claims expenses from the liability insurer responsible in a process described separately.[113]

3. Motor Insurance Directive: regulation of "accidents abroad"

48 The Green Card System, as discussed above, does not extend to cases where a person is injured abroad. In such cases, the special provisions set out in the Motor Insurance Directive apply.[114] Where a person is injured outside of his country of residence ("accident abroad") by a motor vehicle which is insured and normally based in another Member State,[115] the Motor Insurance Directive grants injured parties the opportunity to present their claims to the claims representative[116] of the motor liability insurer responsible in their own country of residence. The claims representative must provide the injured party with a reasoned decision on the claim within three months of its presentation.[117] However, an injured party does not have an enforceable claim against the claims representative.[118]

49 In case the claims representative does not comply with the duty to provide the injured party with a reasoned decision within three months, the injured party may turn to a "compensation body" in accordance with Art. 24 (1) of the Motor Insurance Directive. This compensation body is "responsible for providing compensation to injured parties".[119] However, the compensation body "shall terminate its action if the insurance undertaking, or its claims representative, subsequently makes a reasoned reply to the claim".[120]

"under the terms of which each national bureau guarantees the settlement, in accordance with the provisions of national law on compulsory insurance, of claims in respect of accidents occurring in its territory, caused by vehicles normally based in the territory of another Member State, whether or not such vehicles are insured."

110 Of major importance is Art. 4 of the Motor Insurance Directive according to which "Member States shall refrain from making checks on insurance against civil liability in respect of vehicles normally based in the territory of another Member State …"

111 See Opinion of Advocate General *Bobek* in Case C-587/15 *Lietuvos Respublikos transporto priemonių draudikų biuras v. Gintaras Dockevičius and Jurgita Dockevičienė* [2017] ECLI:EU:C:2017:234, para. 37; the obligation is explicitly stated, for example, in Austrian law, see s. 62 of the Austrian Motor Vehicles Act (KFG); *Heiss*, in: Magnus/Mankowski, Art. 7 Rome I Regulation note 64; cf. *Hellner*, para. 16.1.6.

112 See Art. 3 (4) of the Internal Regulations; discussed in detail by, e.g., the Austrian Supreme Court in OGH 21.10.2015, 2 Ob 35/15h; *Heiss*, in: Magnus/Mankowski, Art. 7 Rome I Regulation note 64.

113 Arts. 5 *et seq.* of the Internal Regulations.

114 *Heiss*, in: Magnus/Mankowski, Art. 7 Rome I Regulation note 65.

115 First subparagraph of Art. 20 (1) of the Motor Insurance Directive (2009/103/EC); situations involving third countries are also governed in part, see the second subparagraph of the same provision.

116 In respect of insurers' duty to "[…] appoint a claims representative in each Member State other than that in which they have received their official authorisation", see Art. 21 (1) of the Motor Insurance Directive.

117 See Art. 22 of the Motor Insurance Directive.

118 *Heiss*, in: Magnus/Mankowski, Art. 7 Rome I Regulation note 66.

119 Art. 24 (1) of the Motor Insurance Directive.

4. Motor Insurance Directive: compensation for accidents caused by unidentified or uninsured vehicles

For situations where an accident is caused by a vehicle which cannot be identified or is not insured, Member States are obliged to set up a body responsible for compensation, which must provide compensation "up to the limits of the insurance obligation".[121] Pursuant to Art. 10 (4) of the Motor Insurance Directive, each Member State "shall apply its laws, regulations and administrative provisions to the payment of compensation by the body, without prejudice to any other practice which is more favourable to the victim".[122] **50**

Where an accident occurs abroad, Art. 25 of the Motor Insurance Directive establishes a parallel right against a compensation body if either the vehicle or the insurer cannot be identified. In such cases, the provision grants a right to indemnification against the compensation body in the Member State where the vehicle is normally based if the insurer is unidentifiable, or against the compensation body of the Member State where the accident occurs if the vehicle is unidentifiable or a third country vehicle.[123] The mode of compensation follows the principles set out in Art. 10 of the Motor Insurance Directive.[124] **51**

Article 19: Subrogation

Where a person (the creditor) has a non-contractual claim upon another (the debtor), and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether, and the extent to which, the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship.

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120 Sixth subparagraph of Art. 24 (1) of the Motor Insurance Directive.
121 Art. 10 (1) of the Motor Insurance Directive.
122 *Heiss*, in: Magnus/Mankowski, Art. 7 Rome I Regulation note 68.
123 Art. 25 (1) (a)–(c) of the Motor Insurance Directive.
124 Art. 25 (1) of the Motor Insurance Directive.

Mäsch, Abtretung und Legalzession im Europäischen Kollisionsrecht, in: Leible (ed.), Das Grünbuch zum Internatíonalen Vertragsrecht (2004), p. 193

Mari, La subrogación en el Reglamento (CE) n. 864/2007: aspectos prácticos, AEDIPr 2007, 267.

I. Introduction

1 Art. 19 follows, with the necessary and inevitable changes, the wording of Art. 15 Rome I Regulation. Art. 15 Rome I Regulation takes in turn the solution provided by Art. 13 of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations[1]. All roads lead, therefore, to the Rome Convention, the origin of European private international law, the true cradle of current European conflict rules[2].

2 Art. 19 takes into account the issues of applicable law in cases of legal subrogation. The legal provision starts from the existence of a previous non-contractual obligation between a creditor (C) and a debtor (D). That being said, legal subrogation occurs when a person T (third party) pays person C (creditor), so that the third party (T) becomes now the creditor of the original debtor (D).

3 Even if it may appear as clear as mud, legal subrogation covered by art. 19 occurs in two senses. Firstly, the third party T replaces the debtor D in a non-contractual obligation. This happens because the third party T has a legal obligation to replace the debtor D or because, in fact, the third party T has paid the original creditor C. From this point of view, there is a subrogation in the position of the debtor. The original debtor D has been replaced by a new debtor, the third party T. Secondly, the third party T, who has paid or must pay the creditor C, now becomes the new creditor of the debtor D. Therefore, this is not but a subrogation in the position of the creditor C.

4 Most often the third party T does not pay the extra-contractual debt that D has in favour of C out of pure generosity. Most commonly, the third party T pays such debt arising from an extra-contractual obligation, because T has a legal duty to do so. For example, because the third party T is an insurance company that has signed an insurance policy with the debtor D and that policy covers the non-contractual obligations of which D may be liable. Or when an insurance company has signed a contract with the creditor C: in case C sustains extra-contractual damage, the insurance company, which is the third party T, must pay damages to C. According to the law, the third party T has a legal obligation to cover such extra-contractual debts.

II. Issue covered by Art. 19. Law applicable to the "*action subrogatoire*"

5 Art. 19 Rome II Regulation only determines the law applicable to the so-called "*action subrogatoire*". This is to say the law applicable to the claim that the third party T may direct against the debtor D after having paid the extra-contractual obligation that D had with C. Several requirements must be verified for the application of Art. 19 Rome II Regulation.

1 *Garcimartín Alférez*, in: Magnus/Mankowski, Rome I Regulation (2017), 767.

2 *Ballarino*, CDT 1 (1) (2009), 5–18.

Firstly, Art. 19 Rome II Regulation may only be used to determine the Law applicable to "legal subrogation" (*cessio legis* / *Legalzession*). In other words, Art. 19 Rome II Regulation only applies when the Law provides the right of the third party T to claim to the debtor D what he (T) has paid to the creditor C. Voluntary assignment, that is, the transmission of a non-contractual debt under a contract, is governed by the Law determined by Art. 14 Rome I Regulation ("voluntary assignment and contractual subrogation"). **6**

Secondly, Art. 19 Rome II Regulation does not apply when the third party has the faculty but not the duty to pay the creditor. The wording of this legal provision is more than clear: "a third person has a *duty* to satisfy the creditor"[3]. **7**

Thirdly, Art. 19 Rome II Regulation applies when the duty to pay the creditor arises from an agreement between a third party and the creditor as well as from an agreement between the third party and the debtor. It also applies to the legal subrogation of non-contractual claims by the Social Security or other public entities. **8**

Fourthly, Art. 19 Rome II Regulation is not applicable in case of co-responsibility of several persons at the same time. In such case, Art. 20 Rome II Regulation must be taken into account[4]. In the event of several debtors if one of them pays the creditor, the Law applicable to the action that the paying debtor has against the other debtors, is determined according to Art. 20 Rome II Regulation. **9**

III. Solution provided by Art. 19 Rome II Regulation. Law regulating the "*action subrogatoire*"

In the event that the Law that governs the non-contractual obligations between the creditor and the debtor and the Law applicable to the obligation of payment by a third party are the same, Art. 19 Rome II Regulation is not applicable. In such case, the Law that regulates the "*action subrogatoire*" is, precisely, that Law. Even though it may seem tautological and circular, Art. 19 Rome II Regulation successfully bites the bullet from an economic perspective. **10**

In the event that the Law regulating the non-contractual obligations between the creditor and the debtor is Law X and the Law applicable to the obligation of payment by a third party is another different Law Z, then Art. 19 Rome II Regulation applies. In such a case, the solution considered by this legal provision is this: the "*action subrogatoire*" must be governed by the Law that applies to the obligation of the third party to pay the original creditor ("*Zessionsgrundstatut*"). This Law shall determine whether and to what extent the third party may exercise the creditor's rights against the debtor "*under the law governing their relationship*". Thus, the Law regulating the insurance, bond or other similar contract signed by the third person with the original creditor or debtor is applicable to the issue. Such Law might be different from the Law that governs the non-contractual obligation between the original creditor and the debtor ("*Forderungsstatut*")[5]. **11**

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3 *Althammer/Kühle*, in: Ferrari, Rome I Regulation (2014), Art. 15 Rome I Regulation paras. 1–10.

4 *Calvo Caravaca/Carrascosa González*, in: Calvo Caravaca/Carrascosa González (eds.), Derecho internacional privado, vol. II (16th ed. 2016) p. 1343.

5 *Berends*, WPNR 6824 (2009), 1038; *Einsele*, ZvglRWiss 90 (1991), 1.

12 The law designated pursuant to Art. 19 Rome II Regulation, *i.e.*, the Law that applies to the obligation of the third party to pay the original creditor ("*Zessionsgrundstatut*") establishes whether and to what extent – in its entirety or only in a limited quantity – the third person has a right of subrogation ("*action subrogatoire*"). This solution is of French origin, since it was first used by the French *Cour de cassation* (Cour de Cassation France Civ. 1 March 17, 1970, "*Reyes*")[6]. This answer may be regarded as fit for a king as it leads to the unity of the applicable law. In fact, the law governing the third person's duty to satisfy the creditor is the same law that governs the subrogatory action that the third person has, if appropriate, against the debtor[7]. For instance, when the third person is an insurance company that pays the creditor, the Law that regulates the insurance contract under which this payment has been made, is the Law that will also apply to the action that the insurance company has, as the case may be, against the debtor ("*action subrogatoire*"). This solution was considered by ECJ January 21, 2016, C-359/14 and C-475/14, *ERGO Insurance SE v. If P & C Insurance / Gjensidige Baltic AAS vs. PZU Lietuva*, number 58: "*Thus, the insurer's obligation to cover the civil liability of the insured party with respect to the victim resulting from the contract of insurance concluded with the insured party and the conditions under which the insurer may exercise the rights the victim of the accident has against the persons responsible for the accident depend upon the national law governing that insurance contract, which are determined in accordance with Article 7 of the Rome I Regulation*". Thus, as the same judgment states in number 62, "*... in accordance with Article 7 of the Rome I Regulation, the law applicable to the insurance contract concluded between the insurers (...) and the respective insured parties must be determined, in order to ascertain whether and, if so, to what extent those insurers may, by subrogation, exercise the victim's rights against the insurer of the trailer*".

13 The law governing the non-contractual obligation between the original creditor and the original debtor, determined in accordance with the general rules of the Rome II Regulation, governs the legal position of the original debtor. This Law will govern issues such as the limitation of the debtor's liability, set-off, or the maximum limits of payment by the debtor. Likewise, the law applicable to the determination of the persons that can be declared as "liable", as well as a possible distribution of liability between them and their insurers remains subject, in accordance with Art. 19, to the general rules of the Rome II Regulation.[8]

Article 20: Multiple liability

If a creditor has a claim against several debtors who are liable for the same claim, and one of the debtors has already satisfied the claim in whole or in part, the question of that debtor's right to demand compensation from the other debtors shall be governed by the law applicable to that debtor's non-contractual obligation towards the creditor.

6 Cass. RCDIP 59 (1970), 688 note *Lagarde*.

7 *Lagarde*, RCDIP 80 (1991), 287.

8 *ERGO Insurance SE v. If P & C Insurance and Gjensidige Baltic AAS vs. PZU Lietuva* (Joint Cases C-359/14 and C-475/14), ECLI:EU:C:2016:40 para. 59.

I. Applicable law to legal actions among co-debtors

Art. 20 Rome II Regulation deals with "multiple responsibility" deriving from non-contractual obligations. In short, the provision determines the Law applicable to the legal action of the debtor who already paid the creditor against the other co-debtors that still have not paid the creditor or victim of the tort. In accordance with Art. 20 Rome II Regulation, this legal action is governed by the Law applicable to the debtor's non-contractual obligation towards the creditor.[1] **1**

II. Basis of Art. 20 Rome II Regulation. Different responsibilities of several persons towards one victim when governed by different laws

To correctly understand Art. 20 Rome II Regulation, one should start at the very beginning. In some occasions, there can exist different persons who are all responsible for the same tort with regard to the same victim: hell is empty and all the devils are here. For that reason, civil liability of each one of such persons may be governed by different Laws. **2**

Imagine the following example: a Spanish individual with habitual residence in Paris (A) invites some English friends (B, C and D) to his apartment in Paris to watch a soccer game on TV. After the game, A, B, C and D cause damage to the neighbour's apartment, who is an Englishman (E) with habitual residence in London. The damage reaches 5,000 euros. The following week A pays his English neighbour (E) 5,000 euros to avoid a case. The non-contractual obligations among the Englishmen B, C and D towards E should be governed by English Law, since the victim (E) and the aggressors have their common habitual residence in England (Art. 4.2 Rome II Regulation). However, the non-contractual obligations arising between the Spanish aggressor (A) and the English victim (E) are governed by French Law (*Lex Loci Damni*) because the damage has been caused in France (Art. 4.1 Rome II Regulation). Since the Spanish aggressor (A) has already paid the whole debt to his English neighbour, the question of determining if the Spanish payer (A) has a right to demand compensation from the other debtors (B, C, and D), is governed by the French Law. French Law is the Law applicable to the non-contractual obligations between the Spanish debtor (A) and the English victim. **3**

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[1] This provision has been explained in depth by *Dickinson*, paras. 14.115–14.120; Hamburg Group for Private International Law, RabelsZ (2003), 1, 49–51; *Leible/Matthias Lehmann*, RIW 2007, 721 (734). Different views on this issue can be found in: *Ahern/Binchy*, The Rome II Regulation on the Law Applicable to Non-Contractual Obligations (2009); *Brière*, Clunet 135 (2008), 31–74; *Rolf Wagner*, IPRax 2008, 314. See also the literature quoted in the commentary on Art. 19 Rome II Regulation.

4 Art. 20 Rome II Regulation will find application in cases where these cumulative requirements converge: (a) Several persons are responsible for the same damage; (b) The damage is caused to the same victim; (b) Only one of the debtors paid the victim or creditor in full or in part. The rule contained in Art. Rome II Regulation can be useful, especially in case where there are joint debtors.[2]

III. Scope of the law applicable to multiple liability

5 Pursuant to Art. 20 Rome II Regulation, the law governing the liability of the first paying debtor governs two groups of issues: (a) The right of the first paying debtor to claim compensation from the other debtors; (b) The exceptions that the other debtors may bring against the debtor who has paid first, such as "justifications", "disclaimers", "limitation of rights", etc.

IV. The unity of the applicable law as a benefit for the first paying debtor

6 Art. 20 welcomes the concept of "*vis attractiva*" of the law applicable to the responsibility of the first paying debtor. Indeed, the law applicable to the debtor's right to demand compensation from the other debtors is the law governing the liability of the debtor who paid the victim first. The law governing the non-contractual obligation of the first payer applies.

7 Art. 20 undoubtedly benefits the debtor who paid first. Clearly enough, the fact that the law governing the debt of the person who has paid first and the law governing the debtor's right to demand compensation from the other debtors are the same, favours the first paying debtor. This "unity of the applicable law" reduces information costs for the debtor who paid first. There are two legal relationships but only one applicable law to both of them.

8 The solution contained in Art. 20 Rome II Regulation is based on a clear financial argument. Art. 20 Rome II Regulation encourages and promotes speedy payment. Therefore, it also favours the victim who has suffered the tort. Art. 20 Rome II Regulation rewards the first paying debtor with the "complete unity of the applicable law". Art. 20 Rome II Regulation promotes a "debtors race" because they all know that the first payer is granted the right to demand compensation from the other debtors in accordance with the law applicable to his non-contractual obligation towards the creditor. Thus, the "winner" of the "race" receives a "prize" consisting in the application of the same law to both his debt and his right to demand compensation from the other debtors.

V. Policies underlying Art. 20 Rome II Regulation

9 Different aspects of Art. 20 Rome II Regulation must be analyzed in order to understand the reasons underlying the solution adopted by this provision.

10 Firstly, a purely economic argument related to conflict of laws should be considered. In fact, the solution adopted by this provision does not depend on the contents of the applicable substantial law. The first "award" that the first paying debtor receives is the reduction of costs related to conflict of laws. In fact, the first payer needs to be informed only on a single

2 *Dickinson* para. 14.116.

applicable law: the law governing his liability for his claim to the creditor / victim. The first payer does not need to be informed about the content of the law governing the non-contractual obligations of the rest of the debtors to the creditor / victim. The content of the applicable law is totally irrelevant.

Let us provide an example. Mr C asks Mr A and Mr B to restore a painting dating from the eighteenth century. Both A and B apply a chemical treatment which damages the painting very seriously. A and C have their habitual residence in the same state (France) while B is habitually resident in another State (Germany). Moreover, Germany is also the State where the damage to the painting has taken place. Hence, liability of A is governed by the law of France (= common habitual residence of A and C) while liability of B is governed by German law (= law of the country in which the damage occurred: art. 4.1 Rome II Regulation). As stated in Art. 20, if A pays for all the damage done to C, it is clear that A may demand compensation from the other debtors (B) according to the law applicable to A's non-contractual obligation towards the creditor (C), that is, according to French law. In order to avoid a payment to A (first payer), B cannot bring the exceptions as contemplated in German law, such as limitation of responsibility. **11**

Secondly, Art. 20 cannot prevent the creditor from starting legal actions against one of the co-debtors for the full claim. At that point, the co-debtor may choose if he prefers to pay only for "his share of liability" or for the whole debt under a specific law. In the latter case, the first payer may bring legal proceedings against the other co-debtors under the same law and not under the Laws governing the liability of the other co-debtors towards the creditor. **12**

VI. Differences between Art. 20 Rome II Regulation and other provisions governing the rights of the "first payer"

In relation to the same matter (several debtors' liability), Art. 20 Rome II Regulation offers a different solution compared to Art. 16 Rome I Regulation (law applicable to contractual obligations). Indeed, as it has been pointed out, Art. 20 Rome II Regulation states that the law applicable to the liability of the first debtor to pay covers two groups of issues: (a) The possibility for the debtor who pays first to demand compensation from the other debtors. (b) The exceptions that can be brought by the rest of the debtors against the debtor who has paid first. On the contrary, Art. 16 Rome I Regulation (law applicable to contractual obligations) indicates that the law governing liability of the first paying debtor regulates exclusively the question of whether this debtor may demand compensation from the other debtors. However, according to Art. 16 Rome I Regulation, the exceptions that may be brought by the other debtors against the first paying debtor are governed by the law applicable to contractual obligations between these debtors and the creditor. **13**

Article 16 Rome I Regulation states that if a creditor has a claim against several debtors who are liable for the same claim and one of the debtors has already satisfied the claim in whole or in part, the law governing the debtor's obligation towards the creditor also governs the debtor's right to demand compensation from the other debtors. Up to this point, the solution remains the same both in Art. 16 Rome I Regulation and Art. 20 Rome II Regulation. But, in addition to that, Art. 16 Rome I Regulation indicates that the other debtors may rely on the defences they had against the creditor to the extent allowed by the law governing their obligations towards the creditor. On the other hand, as we have seen above, Art. 20 Rome II **14**

Regulation remains silent on this issue. Therefore, in the field of non-contractual obligations, the other debtors may not rely on the defences they had against the creditor to the extent allowed by the law governing their obligations towards the creditor. The defences the other debtors have against the first payer are governed by the law applicable to the first payer/debtor's non-contractual obligation towards the creditor.

VII. Determination of the "place of damage" in the event of several debtors who are liable for the same claim

15 It is necessary to specify the place where the damage occurred in cases in which it has been produced by several debtors in the context of Arts. 5 (3) Brussels I Regulation/2007 Lugano Convention; 7 (2) Brussels I*bis* Regulation.[3] Please note that existing ECJ statements refer to the interpretation of the words "*harmful event*", as used by Arts. 5 (3) Brussels I Regulation/2007 Lugano Convention; 7 (2) Brussels I*bis* Regulation, and not of the term "*damage*" which is used by Art. 4 (1) Rome II Regulation. Thus only with the necessary filtering precautions taken and *mutatis mutandis, Melzer vs. MF Global UK Ltd.*[4] in particular might be transferred into the realm of the Rome II Regulation.

16 For the purposes of a correct interpretation of Art. 20, C-387/12, *Hi Hotel HCF SARL vs. Uwe Spoering*[5] is also interesting. Mr Spoering is a photographer who in February 2003, on behalf of Hi Hotel, took 25 transparencies of interior views of various rooms in the hotel run by that company in Nice. Mr Spoering granted Hi Hotel the right to use the photographs in advertising brochures and on its website. Hi Hotel paid an invoice in the amount of EUR 2,500 for the photographs, which contained a note reading 'include the rights – only for Hi Hotel'. In 2008, in a bookshop in Cologne, Mr Spoering noticed an illustrated book titled 'Innenarchitektur weltweit' ('Interior Architecture Worldwide'), published by Phaidon-Verlag of Berlin (Germany), containing reproductions of nine of the photographs he had taken of the interior of the Hi Hotel in Nice. Since he considered that Hi Hotel had infringed his copyright on the photographs by transferring them on to a third party, namely Phaidon-Verlag, Mr Spoering brought proceedings against Hi Hotel in Cologne. He sought, inter alia, an order that Hi Hotel should cease reproducing or causing to be reproduced, distributing or causing to be distributed, or exhibiting or causing to be exhibited within the Federal Republic of Germany, without his prior consent, the above mentioned photographs (claim for a prohibitory order) and should pay compensation for all damage which he had sustained or would sustain as a result of the conduct of Hi Hotel.

17 In this case, the causal event (= illegal transfer of photographs to third parties) occurred in France. Therefore, the German courts have no jurisdiction to hear the dispute under the forum of the place of the "causal event" as employed by Arts. 5 (3) Brussels I Regulation/2007 Lugano Convention; 7 (2) Brussels I*bis* Regulation.

18 There is no doubt that in this case, the damage (= unlawful publication of the photographs) has occurred in Germany. Therefore, the German courts are competent to hear the dispute

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3 *Melzer vs. MF Global UK Ltd.* (Case C-228/11), ECLI:EU:C:2013:305 para. 41.

4 *Melzer vs. MF Global UK Ltd.* (Case C-228/11), ECLI:EU:C:2013:305 para. 41.

5 *Hi Hotel HCF SARL vs. Uwe Spoering* (Case C-387/12), ECLI:EU:C:2014:215.

under the ground of jurisdiction "place of the damage" as employed by Arts. 5 (3) Brussels I Regulation/2007 Lugano Convention; 7 (2) Brussels I*bis* Regulation. The German courts are competent to hear only with respect to the damage occurred in Germany, not with respect to the damage produced in France or elsewhere.

When several individuals have been involved in the same action, which gives rise to non-contractual obligations, but legal actions start exclusively against one of those individuals, it is irrelevant where the rest of the individuals who took part in the wrongful act have acted. If, with regard to the same harmful event, different persons (A, B and C) operated in Germany (place of damage) and D operated only in France (place of the event causing the damage), the German courts do not have jurisdiction under the forum of the place of the "causal event" as employed by Arts. 5 (3) Brussels I Regulation/2007 Lugano Convention; 7 (2) Brussels I*bis* Regulation to hear the claim against D. Since the damage itself occurred in German territory, the German courts are competent to hear the claim against D in relation to the damage produced in Germany. **19**

Article 21: Formal validity

A unilateral act intended to have legal effect and relating to a non-contractual obligation shall be formally valid if it satisfies the formal requirements of the law governing the non-contractual obligation in question or the law of the country in which the act is performed.

I. Introductory remarks

Art. 21 of the Rome II Regulation determines the conflict of laws rule for the formal validity of unilateral acts relating to a non-contractual obligation. **1**

The provision at hand has to be read in conjunction with Art. 1 (3) Rome II Regulation,[1] according to which the Regulation does not apply to evidence and procedure, this being without prejudice to Art. 21 and Art. 22. **2**

Art. 21 Rome II Regulation is inspired by Art. 9 of the Rome Convention of 1980 and reflects almost literally the current Art. 11 (3) Rome I Regulation,[2] which governs the formal validity **3**

1 Cf. Art. 1 (*Mankowski*).

2 Cf. *ex multis*, *Heiss*/*Loacker*, JBL 129 (2007), p. 613, 646; *Junker*, in: Münchener Kommentar zum BGB,

of unilateral acts relating to a contract. However, Art. 11 (3) Rome I Regulation also refers to the law of the country of habitual residence of the person by whom the unilateral act was done. The same criterion does not exist in the context of Art. 21 Rome II Regulation.

4 It should preliminary be recalled that the issue of the formal validity of unilateral acts is a different matter from the issue of substantial validity of such acts,[3] which is governed by the law of the non-contractual obligation to which the unilateral act relates.[4] In particular, issues of formal validity are connected to the formal requirements to externalize the will of the subject,[5] while issues of existence and substantial validity are rather connected with the different issue of determining the minimum requirements to qualify the act as "existing".

II. Unilateral acts relating to a non-contractual obligation

1. The notion of unilateral act

5 For the purposes of the application of Art. 21 Rome II Regulation, the definition of "unilateral act" has to be autonomously interpreted.[6] This is a common feature of the European rules of private international law: to ensure uniform application of European Union law throughout all the Member States (bound by the act), unless clear reference is made by the Regulation to domestic law, the definitions which are relevant for its application are subject to an autonomous interpretation.[7]

6 This leads to the known consequence that under the Rome II Regulation an act might be considered "unilateral" even if it might be considered otherwise under the law of a Member State.[8]

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vol. X (6th ed. 2015) Rom II-VO Art. 21, p. 1059 note 1, and *Picht*, in: Rauscher (ed.), Europäisches Zivilprozessrecht und Kollisionsrecht – Rom I-VO, Rom II-VO (4th ed. 2016), p. 997, note 1.

3 On this point cf. *del Prato*, in: Bianca/Giardina (eds.), Convenzione sulla legge applicabile alle obbligazioni contrattuali (Roma, 19 giugno 1980), in: (1995) Nuove Leggi Civ. Comm., p. 1023.

4 In this sense *Halfmeier*, in: Calliess (ed.), Rome Regulations – Commentary on the European Rules of the Conflict of Laws (2nd ed. 2015) Article 21 Rome II Regulation, note 6.

5 With reference to the 1980 Rome Convention, see Report on the Convention on the law applicable to contractual obligations by Mario Giuliano, Professor, University of Milan, and Paul Lagarde, Professor, University of Paris I, OJ 1980 C 282/1, Art. 9 para. I.A.2.

6 *Junker* (fn. 2) Art. 22 Rom II-VO note 2, and *Picht* (fn. 2), Art. 21 Rom II-VO note 5.

7 In the legal literature, cf. *ex multis Magnus*, in: Magnus/Mankowski (eds.), European Commentaries on Private International Law, Volume I: Brussels Ibis Regulation (2016), p. 7, p. 38 ff.; *Carbone, Tuo*, Il nuovo spazio giudiziario europeo in materia civile e commerciale: Il regolamento UE n. 1215/2012 (7th ed. 2016) p. 66 ff.; *Hausmann*, in: Pocar, Viarengo, Villata (eds.), Recasting Brussels I (2012), p. 3, p. 4 f.; *Hill/Ní Shúilleabháin*, Clarksson & Hill's Conflict of Laws (5th ed. 2016), p. 60 f.; *Salerno*, Giurisdizione ed efficacia delle decisioni straniere nel regolamento (UE) n.1215/2012 (rifusione). Evoluzione e continuità del "Sistema Bruxelles-I" nel quadro della cooperazione giudiziaria europea in materia civile (4th ed., 2015), p. 36 ff.; *Beaumont/McEleavy*, Private International Law (3rd ed. 2011) p. 86, note 3.43 f.; *Dickinson*, The Rome II Regulation. The Law Applicable to Non-Contractual Obligations (1st ed. 2008) p. 120, note 3.05 ff., and *Unberath/Cziupka*, in Rauscher (fn. 2), p. 634, 641, note 18 ff.

8 In this sense *Altenkirch*, in: Huber, Rome II Regulation (1st ed. 2011), p. 403, 404, note 3.

Furthermore, also the definition of the "non-contractual obligations" is subject to autonomous interpretation under European Union law,[9] hence again leading to the possibility that a unilateral act might be deemed to be contractual in nature under domestic law, but non-contractual in nature under the European rules of private and procedural international law. **7**

In this sense, it has been noted that a recognition[10] or remission[11] of a debt stemming out of a non-contractual obligation (and thus in no way connected to a contractual obligation) would qualify as unilateral act falling within the scope of application of the provision at hand, regardless of domestic qualifications. Nonetheless, if such a recognition of debt at the place of accident is followed by an *agreement* between the parties, as might often be the case in car-accidents, this provision should not be applicable, but rather the Rome I Regulation should find application.[12] **8**

2. Unilateral acts and non-contractual obligations: the limited scope of application of Art. 21 Rome II Regulation

Art. 21 Rome II Regulation applies to unilateral acts which create, change, transfer or extinguish a non-contractual obligation. Several Authors have deemed that the rule at hand is of little practical relevance,[13] because of the general concept for which an obligation voluntarily created through a unilateral act would give rise, in the majority of cases, to a contractual obligation, falling within the material scope of application of the Rome I Regulation.[14] **9**

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9 Cf. *Fonderie Officine Meccaniche Tacconi SpA* v. *Heinrich WagnerSinto Maschinenfabrik GmbH (HWS)*, (Case C-334/00) [2002] ECR I 7357. For a study on the definition on non-contractual obligation in the context of the Rome II Regulation, see *Scott*, in: Ahern/Binchy (eds.), The Rome II Regulation on the Law Applicable to Non-Contractual Obligations. A New International Litigation Regime (1st ed. 2009), p. 57.

10 Cf. Giuliano & Lagarde Report (fn. 3) Article 9, para. I.A.1; *Dornis*, in: Ferrari, Rome I Regulation (1st ed. 2015) Article 11, p. 389, 393, note 5; *Junker* (fn. 2) Art. 22 Rom II-VO note 4 ff.; *Heiss/Loacker* (fn. 2), p. 646; *Picht* (fn. 2), Art. 21 Rom II-VO note 4; *Altenkirch* (fn. 8), Art. 21 Rome II note 3, and *Halfmeier* (fn. 4) Article 21 Formal Validity note 5.

11 *Altenkirch* (fn. 8), Art. 21 Rome II note 3, and *Picht* (fn. 2), Art. 21 Rom II-VO note 4.

12 *Deutscher Rat für Internationales Privatrecht*, Stellungnahme der 2. Kommission des Deutschen Rates für Internationales Privatrecht zum Vorentwurf eines Vorschlags der Europäischen Kommission für eine Verordnung des Rates über das auf außervertragliche Schuldverhältnisse anzuwendende Recht (2002, available at http://ec.europa.eu/justice/news/consulting_public/rome_ii/contributions/deutscher_rat_internat_privatrecht_de.pdf) 51 f. See in the same terms, *Picht* (fn. 2), Art. 21 Rom II-VO note 3, and cf. *Halfmeier* (fn. 4) note 5, critical on the possibility to subsume in the first place a recognition of debt in case of car accident under the scope of application of the Rome II Regulation.

13 *Beaumont/McEleavy* (fn. 7) note 14.285 f.; *Dickinson* (fn. 7) note 14.80; *Junker* (fn. 2) Art. 22 Rom II-VO note 1; *Halfmeier* (fn. 4) note 5; *Altenkirch* (fn. 8), Art. 21 Rome II note 3, and *Picht* (fn. 2), Art. 21 Rom II-VO note 3. The Commission also, in relation to Art. 16 of the Proposal, believed that the provision would have played a minor role: see Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("ROME II") COM/2003/0427 final, p. 26. Cf. *Dickinson* (fn. 7) note 14.78.

14 In these terms, *Picht* (fn. 2), Art. 21 Rom II-VO note 3. See in particular Art. 11 (3) Rome I Regulation. Nevertheless, as pointed out by Recital no. 11, "non-contractual obligation should be understood as an autonomous concept". Noting however how sometimes – and in spite of different believes at first – the

10 If, on the one side, unilateral acts are unlikely to *create* a non-contractual relationship, it remains, on the other, that they might *discharge* or *modify* non-contractual obligations that are already existing. In other words, the rule seems more likely to find application in case of modification or extinction of non-contractual obligations, *e.g.* by means of a declaration of waiving of rights, as well as set-off or release from a debt stemming from tort liability.

11 Determining the applicability of Art. 21 Rome II Regulation, or rather of the corresponding provision of the Rome I Regulation (Art. 11 (3)), bears significant consequences, and thus makes the correct individuation of the (limited) scope of application of the former of paramount importance for the purposes of addressing the formal validity of an unilateral act: the Rome I Regulation entails indeed in its conflict of laws rules an additional connecting factor (the law of the country of habitual residence of the person making the unilateral declaration)[15], if compared with the Rome II Regulation.

12 Art. 21 Rome II Regulation on the formal validity is also strictly connected to its subsequent provision, Art. 22 on burden of proof.[16] According to this latter provision, acts intended to have legal effects may be proved by any mode of proof recognized both by the law of the forum, and by any of the laws under Art. 21 Rome II Regulation (since here a number of connecting factors can be found), provided that such proof can be administrated by the forum. A liberalism that is contained, since modes of proof completely unacceptable (from a domestic civil procedure perspective) are not imposed on the court, and since the administration of modes of proof itself is still subject to the *lex fori*.[17]

III. Alternative connecting factors

1. General: alternative connecting factors and *favor validitatis*

13 Art. 21 Rome II Regulation provides that the formal validity of an unilateral act is subject to the law identified on the basis of an alternative conflict of laws rule: the act is deemed to be formally valid if it either fulfils the requirements of the law governing the non-contractual obligation (as determined under the Regulations itself), or of the law of the country in which the act is performed.

14 As known, recourse to alternative connective factors for the purposes of the identification of the applicable law are the result of policy choices: by offering alternative connecting factors, both of which can identify the applicable law, the lawmaker delegates courts and magistrates in the identification of the law that better suits a given purpose.[18] In the case of the provision at hand, the material consideration[19] that has been taken into account by the European lawgiver was the *favor validitatis*.[20] The intention of the European lawgiver to offer an

categorization between contractual and non-contractual liability might not turn out as simple and as plain as expected, see Basedow, The Law of Open Societies (2015) p. 170 ff.

15 *Junker* (fn. 2) Art. 22 Rom II-VO note 7, and *Altenkirch* (fn. 8), Art. 21 Rome II note 2.

16 *Dickinson* (fn. 7) note 14.79 ff.

17 *Dickinson* (fn. 7) note 14.86, and Giuliano & Lagarde Report (fn. 3) Article 14, B.

18 *Mosconi/Campiglio*, Diritto internazionale privato e processuale, Vol. I (VII ed. 2015) p. 209.

19 On the method of "considerazioni materiali", see *Picone*, RDI (1997), p. 277; *Kegel/Schurig*, Internationales Privatrecht (9th ed. 2004), p. 319 ff., and *Garcimartín Alférez*, EuLF 7 (2007), p. 77, p. 91.

alternative connecting factor that should be employed by courts to ensure to the maximum possible extent that unilateral acts are formally valid clearly stems by the use of the word "*or*", which, without any further conditions, gives the possibility to conclude for the formal validity of the act if this is deemed valid by one of the two applicable laws.[21]

Whilst alternative connecting factors to ensure the formal validity are commonly employed, in particular where the document cannot be re-written or the act re-done – such as in succession matters, and even though part of the scholarship accepted the current wording and choice of Art. 21 Rome II Regulation,[22] some wonder whether the *favor validitatis* should bear the same relevance as in contractual matters.[23] **15**

What surely remains is that the alternative connecting factor in favour of the formal validity of the act might – in those limited number of cases in which it may find application – lead to a questionable situation: as noted during the consultations, if two parties have the same habitual residence and a non-contractual obligation is created, or changed in another state by an unilateral act, concluding for the formal validity (to be in theory rejected under the law of common habitual residence) of the unilateral act under the law of the country where the act was performed might be a "surprise" to the declaring party, and an " unexpected gift" for his counterpart.[24] Of course, in such a scenario one should wonder, in particular for the case where a party unilaterally assumes a non-contractual obligation towards another party, if the first is protection-worthy and should be granted the possibility to easily free himself for mere reasons of form.[25] It appears that the *ratio* of the provision at hand, which is promoting the formal validity of unilateral acts, being sufficient that at least one of the referred laws considers it as such, should guide the interpreter in the choice and application of the relevant alternative laws, even in those circumstances in which the formal validity of the unilateral act might come as a surprise to both parties. **16**

2. The law of the country in which the act is performed

Art. 21 Rome II Regulation, consistently with the universal scope of application of the instrument, does not limit its applicability to laws of Member Members. This is particularly clear from the possibility to apply the law of the "country" (and not of the Member State) where the act was performed. **17**

The question thus becomes what has to be understood as the country where the unilateral act has been performed. As opposed to other provisions, Art. 21 Rome II Regulation leaves little doubts as to what the place in question should be. As known, rules of international civil procedure in non-contractual matters use as head of jurisdiction the place where the harmful **18**

20 *Junker* (fn. 2) Art. 22 Rom II-VO note 1; *Halfmeier* (fn. 4) note 3, and *Picht* (fn. 2), Art. 21 Rom II-VO note 2.

21 *Junker* (fn. 2) Art. 22 Rom II-VO note 7; *Heiss/Loacker* (fn. 2) 646; *Picht* (fn. 2), Art. 21 Rom II-VO note 2.

22 *Hambourg Group for Private International Law*, RabelsZ 67 (2003, p. 1, 51, not proposing amendments to the text of the Commission's Proposal).

23 *Picht* (fn. 2), Art. 21 Rom II-VO note 2.

24 In these terms, Deutscher Rat Für Internationales Privatrecht (fn. 12) p. 52 f.

25 *Caravaca/Gonzáles*, Las obligaciones extracontractuales en derecho internacional privado. El Reglamento Roma II (2008), p. 139.

event occurred or may occur.[26] This rule has been interpreted by the ECJ as covering both the place of act and the place of injury.[27] This interpretation is not mirrored in the general conflict of laws rules of the Rome II Regulation,[28] which only favours the place of injury. On its side, Art. 21 Rome II Regulation takes a further different approach, in as much not the place of the "country in which the event giving rise to the damage" (Rome II Regulation, Art. 4 (1) – since in this case the obligation would be created by law, and not by the unilateral will of the party), and not "the place where the harmful event occurred" (Brussels Ia Regulation, Art. 7 (2) – since again here liability would be created by law) are of relevance, but only the country in which the (unilateral) act is performed.[29] This is thus to be understood as the place where the party making the declaration is, regardless of where the other party might be (since usually this would be an issue connected to the effects of the declaration, rather than to the formal requirements).

3. Party autonomy

19 Another question that concerns the law governing the formal validity of unilateral acts is whether or not party autonomy plays any role, *i.e.* if the party making the unilateral act has a right to choose a law to govern the formal requirements of an unilateral act.[30] Art. 21 Rome II Regulation wishes to ensure the formal validity of the unilateral act by way of application of two alternative substantive rules, rather than granting party autonomy at the private international law level. This being said, party autonomy under Art. 21 Rome II Regulation might acquire an indirect relevance where the *lex causae* is chosen according to Art. 14 Rome II Regulation.[31] With the specification that an unilateral act, which would be formally invalid under the chosen law, could always be considered valid under any of the other laws recalled by Art. 21. In this sense, the choice of law made by the parties should not have the effect to exclude the alternative application of the other connecting factor.

Article 22: Burden of proof

1. The law governing a non-contractual obligation under this Regulation shall apply to the extent that, in matters of non-contractual obligations, it contains rules which raise presumptions of law or determine the burden of proof.

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26 See now Brussels Ia Regulation, art. 7(2).

27 Already under the 1968 Brussels Convention, *Handelskwekerij G. J. Bier BV* v. *Mines de potasse d'Alsace SA* (Case 21–76) [1976] ECR 1735. More recently, see *Florin Lazar v. Allianz S.p.A.* (Case 350-14) [2015].

28 In these terms, *von Hein*, in: Calliess (ed.), Rome Regulations – Commentary on the European Rules of the Conflict of Laws (2nd ed. 2015) Article 4 Rome II Regulation, note 7.

29 *Picht* (fn. 2), Art. 21 Rom II-VO note 8. Cf. Art. 11 (3) Rome I Regulation, where the different expression "where the act was done" is however to be interpreted in the same way. See *Dornis* (fn. 10) note 21; *Spellenberg* in Münchener Kommentar zum BGB, vol. X (6th ed. 2015), Art. 11 Rome I-VO note 24; *Schulze*, in: Ferrari/Kieninger/Mankowski/Otte/Saenger/Schulze/Staudinger, Internationales Vertragsrecht (2nd ed. 2012) Art. 11 Rome I, note 26.

30 Specifically on party autonomy in the context of Art. 21 Rome II Regulation, see *Picht* (fn. 2), Art. 21 Rom II-VO note 10 f.

31 Cf. Art. 14 (*Ferrari*). For a general overview on the role of party autonomy in private international law of torts, see *Basedow* (fn. 9) p. 179 ff.; *Junker*, in: Münchener Kommentar zum BGB, vol. X (6th ed. 2015) Rom II-VO Art. 14, p. 1002; *Dickinson* (fn. 7) note 13.01.

2. Acts intended to have legal effect may be proved by any mode of proof recognised by the law of the forum or by any of the laws referred to in Article 21 under which that act is formally valid, provided that such mode of proof can be administered by the forum.

I. Introduction

As a matter of general principle, one the one side, the scope of application of the law governing the non-contractual obligation is set by Art. 15 Rome II Regulation,[1] and, on the other, the Regulation does not find application to matters of evidence and procedure (Art. 1 (3) Rome I Regulation).[2] Art. 22 Rome II Regulation must be read in light of both those provisions.[3] **1**

The rule at hand contributes to define the scope of application of the foreign law called to govern the non-contractual obligation. Art. 22 Rome II Regulation provides a small exception to the traditional idea that evidentiary and procedural matters are to be governed only by the *lex fori*. Under Art. 1 (3) Rome II Regulation, the applicability of the *lex fori* to procedure and proofs is without prejudice to Art. 21 and Art. 22.[4] **2**

The idea that the law governing the non-contractual obligation should as well govern presumptions of law, and to some extent the distribution of the burden of proof, lies in the fact that sometimes such rules are a matter of substantive law, and not a matter of evidence.[5] As **3**

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1 Other that the comments in this Volume, see also *ex multis Carruthers*, in: Ahern/Binchy (eds.), The Rome II Regulation on the Law Applicable to Non-Contractual Obligations. A New International Litigation Regime (1st ed. 2009), p. 25, 35 ff.; *Bach*, in: Huber, Rome II Regulation (1st ed. 2011), p. 342; *Halfmeier*, in: Calliess (ed.), Rome Regulations – Commentary on the European Rules of the Conflict of Laws (2nd ed. 2015) Article 21 Rome II Regulation, and *Junker*, in: Münchener Kommentar zum BGB, vol. X (6th ed. 2015) Rom II-VO Art. 15, p. 1017.

2 See *Junker*, in: Münchener Kommentar zum BGB, vol. X (6th ed. 2015) Rom II-VO Art. 1, note 45, arguing that para. 3 of Art. 1 Rome II Regulation is an "alien body" (*Fremdkörper*) of the provision, since the scope of application of the law governing the non-contractual obligation is set by Art. 15 Rome II Regulation.

3 Cf. *ex multis*, *Picht*, in: Rauscher (ed.), Europäisches Zivilprozessrecht und Kollisionsrecht – Rom I-VO, Rom II-VO (4th ed. 2016), p. 1001, note 1.

4 For a comment, see Art. 1 (*Mankowski*). In general, on the notion of procedure in the context of the Rome II Regulation, see *Beaumont/McEleavy* (eds.), Private International Law (2011) p. 697 ff.; *Plender/Wilderspin*, The European Private International Law of Obligations (2009) note 17.60 ff.

5 In general, see *Klöhn*, in: Calliess (ed.), Rome Regulations – Commentary on the European Rules of the

noted in the scholarship, legal presumptions and rules on the burden of proof are established for material reasons and are co-balanced by other elements of the material regulation, thus justifying their characterization as material law.[6]

4 But for some terminological differences (contractual obligation/non contractual obligation), Art. 22 Rome II Regulation mirrors Art. 14 of the 1980 Rome Convention on the law applicable to contractual obligations, and now Art. 18 Rome I Regulation. This makes it possible to interpret Art. 22 Rome II Regulation in light of its mirrored counterparts.[7]

5 The provision at hand only finds application to non-contractual obligations. Whilst this clearly stems from the wording of Art. 22 (1) Rome II Regulation, para. (2) does not specify that the rule applies to acts intended to have legal effects "in non-contractual matters". In spite of the different wording of the two paras. of the provision, it does not seem possible to argue that the rules provided for acts intended to have legal effects might extend beyond such acts in non-contractual matters: para. (2) indeed makes a *renvoi* to Art. 21 Rome II Regulation, which is clearly only applicable to unilateral acts in non-contractual matters.[8]

Conflict of Laws (2nd ed. 2015) Article 22 Rome II Regulation, note 2 f.; *Dickinson*, The Rome II Regulation. The Law Applicable to Non-Contractual Obligations (1st ed. 2008) n. 14.83; *Bach* (fn. 1) note 60 f.; *Altenkirch*, in: P. Huber, Rome II Regulation (1st ed. 2011) Article 22, p. 403, note 2; *Picht* (fn. 3) note 4, and, with reference to the 1980 Rome Convention, see Report on the Convention on the law applicable to contractual obligations by Mario Giuliano, Professor, University of Milan, and Paul Lagarde, Professor, University of Paris I, OJ 1980 C 282/1, Art. 14 note I.A.1.

6 In these very terms, *Garcimartín Alférez*, EuLF 7 (2007), 77, 91. Cf. *Klöhn* (fn. 5), note 2, and *Bach* (fn. 1) note 60 f. In the case law, see AG Geldern NJW 2011, 686 (687) (where it can be read that "Durch den autonom auszulegenden Art. 22 Abs. 1 Rom-II-VO sind Beweislastregeln als materiell-rechtliche Vorschrift anzusehen, auch wenn deren Rechtsnatur im nationalen Recht als prozessrechtlich angesehen wird. Gemäß Art. 22 Abs. 1 Fall 2 Rom-II-VO hat das erkennende Gericht nicht nur die gesetzlich festgeschriebenen Beweislastregeln des ausländischen Rechts anzuwenden, sondern auch die in der dortigen Rechtspraxis aufgestellten tatsächlichen Vermutungen, auf die die Rechtsprechung aufgrund der Lebenserfahrung einen Anscheinsbeweis gründet"; more recently BGH, 8.9.2016 – III ZR 7/15, in ZIP 2016, 2060, arguing that "Die allgemeinen Beweislastregeln sind materiell-rechtlich zu qualifizieren und daher der lex causae zu entnehmen").

7 *Picht* (fn. 3) note 3; *Junker*, in: Münchener Kommentar zum BGB, vol. X (6th ed. 2015) Rom II-VO Art. 21, p. 1061, note 1; *Klöhn* (fn. 5), note 1, and *Garcimartín Alférez* (fn. 6), 91. Cf. Commission Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("ROME II") COM/2003/0427 final, p. 26; Giuliano & Lagarde Report (fn. 5) Article 14; *C. Althammer/S. Makris*, in: F. Ferrari, Rome I Regulation (1st ed. 2015) Article 18; *Thorn*, in: Palandt (72nd ed. 2013) Art. 18 Rome I; *Spellenberg* in Münchener Kommentar zum BGB, vol. X (6th ed. 2015), Art. 18 Rome I-VO, p. 812, and *Klöhn*, in: Calliess (ed.), Rome Regulations – Commentary on the European Rules of the Conflict of Laws (2nd ed. 2015) Article 18 Rome I Regulation, p. 374.

8 *Junker* (fn. 1), note 2, and *Klöhn* (fn. 5), note 3.

II. Rules which raise presumptions of law or determine the burden of proof (Art. 22 (1) Rome II Regulation)

1. Applicable rules of the *lex causae*

As mentioned, Art. 22 (1) Rome II Regulation extends the scope of application of the *lex causae* to issues that are not directly taken into consideration by Art. 15,[9] *i.e.* presumptions of laws and burden of proof. These elements, since considered being part of substantive law rather that of rules of evidence and procedures, are governed by the law governing the non-contractual obligations, regardless of whether this has been determined – in accordance to the Regulation – by way of choice of the parties, or by way of application of objective connecting factors under Artt. 4 ff. of the Rome II Regulation.[10] This necessary unity between the law governing the obligation and the law governing the rules at hand is consistent with the recalled idea that the latter, being established for material reasons, are co-balanced by other elements of said law. Splitting the law applicable to the obligation and the law applicable to presumptions of laws and burden of proof would prejudice such a balance. The uniform provision in Art. 22 (1) Rome II Regulation ensures such a coordination, even in those cases presumptions of law and rules on the burden of proof are considered – under a purely domestic perspective – rules procedural in nature. **6**

This being said, it is also true that Art. 22 (1) Rome II Regulation does not allow for a general application of all rules related to presumptions of law and burden of proof of the *lex causae*. **7**

In the first place, only those rules of the *lex causae* related to presumptions of law and burden of proof that are part of the substantive law can be applied under Art. 22 (1) Rome II Regulation. This means that general rules of civil procedure or evidence in force in the jurisdiction of the applicable law do not fall within the scope of application of the provision at hand, and must thus not be applied by the seized court.[11] In this sense, issues on weighing of evidence by the judge; rules which state that the claim of a party is deemed to be substantiated if the other party fails to appear,[12] or rules which allow the court to infer evidences from the procedural behaviour of the parties[13], are deemed to be excluded from the scope of application of Art. 22 (1) Rome II Regulation. The same holds true for the matter of suppression of evidence, even if it determines a shifting or a reversal of the burden of proof.[14] This is because such rules are procedural rather than substantive in nature: these rules are not part of the material regulation of an specific obligation. **8**

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9 *Junker* (fn. 1), note 3.

10 *Junker* (fn. 1), note 3.

11 *Dickinson* (fn. 5) note 14.83; *Junker* (fn. 1), note 6, and *Klöhn* (fn. 5), note 3.

12 *Klöhn* (fn. 5) note 4.

13 *Picht* (fn. 3) note 12. Cf. Art. 116 of the Italian Code of Civil Procedure, for which: "The judge can infer elements of evidence … in general, from the conduct of the parties in the procedure". Similarly, see §138 (3) ZPO and Art. 11.4 of the UNIDROIT Principles of Civil Procedure, which introduce a rule presuming an admission of facts by one party to a civil action in case where such facts are not contested. On this point *Altenkirch* (fn. 5) note 7.

14 *Altenkirch* (fn. 5) note 7; referring to *Thole*, IPRax (2010), p. 285, p. 288.

9 In the second place, Art. 22 (1) Rome II Regulation is limited to material rules on presumptions of law and burden of proof in non-contractual matters.

2. Presumptions of law (Art. 22 (1), first alternative, Rome II Regulation)

a) Definition

10 In matters related to non-contractual obligations, the interpreter has to apply the presumptions of law eventually established by the *lex causae*.

In determining whether the *lex causae* provides presumptions of law falling within the scope of application of Art. 22 (1), first alternative, Rome II Regulation, the interpreter must address the nature of the presumption following an autonomous interpretation.

11 As said, the presumption must be substantive in nature, and not procedural. To determine the substantive nature of the presumption, reference should be made to its nature and effect rather than to domestic concepts[15] Under the definition at hand, all the rules of the *lex causae* that establish a given legal consequence following specific acts or circumstances, and thus which liberates one party from the further need to offer proofs to the court, should be considered "presumptions of law" for the purposes of Art. 22 (1), first alternative, Rome II Regulation.[16]

12 For the purposes of application of Art. 22 (1), first alternative, Rome II Regulation, whose wording makes a general reference to "presumptions", both rebuttable and conclusive presumptions of the *lex causae* should be applied by the seized court.[17] This, with the further important specification that whether or not a rebuttable presumption has indeed been rebutted by one party is a matter which has to be decided on the basis of the *lex fori*,[18] because this is a matter of weighing of evidence by the judge, that is a procedural issue. An example for a rebuttable presumption of law relating to torts is, in the Italian system, Art. 2054 C.C: in case of road-traffic accident, it is presumed that each of the drivers has contributed in equal part in causing the damage to the vehicles (and thus that both parties share the same non-contractual liability), unless otherwise proven.

13 The reconstruction of presumptions of law of the *lex causae* might however – in some cases – prove to be difficult. Since Art. 22 (1), first alternative, Rome II Regulation makes a general reference to presumptions of law, not only statutory presumptions of the *lex causae* must be applied by the seized court, but those developed by the case law fall within the scope of

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15 AG Geldern NJW 2011, 686 (687). In the scholarship, see *Picht* (fn. 3) note 5; *Klöhn* (fn. 5) note 4. See also *Dickinson* (fn. 5) note 14.83, which gives the example of the UK Misrepresentation Act of 1967, for which the fraudulent behaviour of the tortfeasor is presumed, until the latter can prove that he had reasonable ground to believe that the represented facts were true.

16 *Giuliano/Lagarde* Report (fn. 5) Article 14 para. A; *Picht* (fn. 3) note 6, and *Junker* (fn. 2), note 5.

17 *Klöhn* (fn. 5) note 7; *Altenkirch* (fn. 5) note 5; *Junker*, in: Münchener Kommentar (fn. 1) Art. 22 Rome II-VO note 5; *Spickhoff*, in: Bamberger/Roth, Anh. zu Art. 42 EBGB note 131. The same as regards Art. 18 Rome I Regulation: see *Thorn*, in: Palandt (fn. 7) note 3.

18 *Altenkirch* (fn. 5) note 5. A different issue concerns the modalities through which a presumption of law can be rebutted: as correctly pointed out by *Althammer/Makris* (fn. 7) note 5, it is determined by the law applicable to the non-contractual obligation.

application of Art. 22 (1), first alternative, Rome II Regulation as well.[19] As noted by some Authors,[20] whilst this solution is self-evident for common law countries, the same conclusion might not be so immediate for other Member States (the Italian version of the Regulation speaks of "*legge*", and the German version of "*gesetzliche Vermutungen*", and not directly of "*richterrechtlich fixierte Vermutungen*"). Nonetheless, it does not appear that that any other solution could be admitted, since the local practice has to be taken into consideration as well.[21]

b) Presumptions of law only

As seen, the reference of Art. 22 (1), first alternative, Rome II Regulation to presumptions of law allows to some extent for an extensive interpretation,[22] since not only absolute presumptions are admitted, but rebuttable presumptions fall within the scope of application of the provision as well. Furthermore, presumptions developed by the case law are also encompassed by Art. 22 (1), first alternative, Rome II Regulation. Nonetheless, the reference to presumptions of law cannot be extensively interpreted so as to cover a number of elements of the *lex causae*. **14**

The wording of Art. 22 (1), first alternative, Rome II Regulation seems to exclude presumptions of facts, which thus are entirely governed by the *lex fori*. As known, as opposed to presumptions of law where the legal consequences of an act or a circumstance are set directly by the lawmaker, domestic systems often allow courts – in particular in the field of non-contractual obligations[23] – to infer legal consequences from acts or facts by way of a deductive legal reasoning, with the same outcome that one party might be relieved from the necessity to offer punctual proof of his allegations. The rules concerning factual presumptions, and thus the limits for courts to make use of such a possibility,[24] do fall outside the scope of application of Art. 22 (1), first alternative, Rome II Regulation, and are thus entirely subject to the *lex fori* of the seized court. **15**

There is a specific type of presumption that has to be taken into further consideration: *prima facie* evidences. When presumptions are not to be inferred from the law, but rather from common statistical probabilities or knowledge, if not contested, these can have the consequence of lowering the *onus* of the plaintiff, even though not providing for a reversal of such an *onus*.[25] Not all domestic systems know such kind of *prima facie* evidence.[26] It is **16**

19 *Altenkirch* (fn. 5) note 5; *Picht* (fn. 3) note 7; *Klöhn* (fn. 5), note 7, and *Junker* (fn. 1), note 6. Cf. in the case law AG Geldern NJW 2011, 686 (687).

20 *Junker* (fn. 1), note 6.

21 AG Geldern NJW 2011, 686 (687).

22 On the extensive interpretation of the Rome II Regulation, cf, in the specific context of Art. 22, *Staudinger*, NJW 64 (2011), 650, 651.

23 *Junker* (fn. 1), note 7.

24 In the Italian legal system, see Arts. 2727 and 2729 of the Civil Code. In particular, the judge may only accept presumptions that are "clear, precise and consistent" (Art. 2729 c.c.).

25 *Staudinger* (fn. 22), note 651; *Junker* (fn. 1), note 8, and *Klöhn* (fn. 5) note 8.

26 In Germany, the prevalent opinion is that the institute has to be assimilated to a presumption of fact: in the case law, see Bundesgerichtshof 4 October 1984 – I ZR 112/82, NJW 1985, 554 (554); *Altenkirch* (fn. 3) note 9; *Thole* (fn. 10) 287; *Schack*, Internationales Zivilverfahrensrecht (2010) note 746; *von Bar*, Internationales Privatrecht V. II (1991) note 552; *Leible*, in: Anwaltskommentar BGB, Art. 32 EBGB

questioned whether[27] *prima facie* evidences fall outside or within the scope of application of Art. 22 (1), first alternative, Rome II Regulation, being these based on presumptions of facts.[28] It has also been noted that the applicability of the *lex causae* to *prima facie* evidences is in any case subject to Art. 17 Rome II Regulation, according to which courts, when assessing the conduct of the alleged tortfeasor, shall take into account as a matter of fact (and so far this is appropriate) rules of safety and conduct in force at the place and time of the event.[29]

3. Burden of proof (Art. 22 (1), second alternative, Rome II Regulation)

17 Also in relation to the burden of proof, Art. 22 (1), second alternative, Rome II Regulation, applies the rules of the *lex causae* only when these rules are part of the substantive law of non-contractual obligations of that system, as distinct from its procedural rules.

18 In this context, it is necessary to consider not only the rules allocating or shifting the burden of proof, but also the provisions that determine the legal consequences that arise when the burden of proof is not fulfilled, because the party has failed to provide sufficient evidence, which consists in the allocation of the non-provability of a fact.[30] On the other hand, the appraisal of evidence is a different issue and pertains to the *lex fori*.

III. Modes of proof of acts intended to have legal effects

1. Scope of the provision

19 Art. 22 (2) Rome II Regulation concerns (non-contractual) "acts intended to have legal effects" and provides that their evidence can be given by any mode of proof admissible both by the *lex fori* (which was the traditional principle followed before harmonization and unification of private international law at the European level[31]) and by any of the laws referred to in Art. 21 Rome II Regulation. Reference is thus also made to unilateral acts relating to non-contractual obligations regulated by Art. 21 Rome II Regulation, imposing a conjunct reading of the linked provisions.[32]

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note 53. More generally, *O. Rommè*, Der Anscheinsbeweis im Gefüge von Beweiswürdigung, Beweismass und Beweislast (1989). In Sweden, according to the *Överviktprincip*, the judge has to take a decision based on facts, regardless of the determination of the burden of proof, every time that the existence of a fact is considered probable. In Italy, the prevalent legal scholarship is of the opinion that a similar institute does not exist in the national legal system (*G.A. Micheli*, L'onere della prova (1966) p. 204 ff.; *S. Patti*, Riv. Dir. Proc. 1985, 481 ff.; *M. Taruffo*, La prova dei fatti giuridici. Nozioni generali (1992) p. 475 ff.; *E. Benigni*, Presunzioni giurisprudenziali e riparto dell'onere probatorio (2014) p.198).

27 Noting that the question is debated, *Martin Gebauer*, Grenzüberschreitende Direktklagen gegen den Versicherer bei deutsch-italienischen Verkehrsunfällen, in: Martina Benecke/Rainer Hausmann/Karl-Nikolaus Pfeifer/Martin Gebauer (eds), Arbeitsrecht, Erbrecht, Urheberrecht. 50 Jahre deutsch-italienische Juristenvereinigung, Heidelberg, 2015, 57, 69.

28 See in the legal literature *Staudinger* (fn. 22), note 651; *Junker* (fn. 1), note 8, and *Picht* (fn. 3) note 8.

29 *Staudinger* (fn. 22), note 651 f., *Jakob*/*Picht* (fn. 3) note 8, and *Junker* (fn. 1), note 9.

30 *Junker* (fn. 1), note 10 f.; *Altenkirch* (fn. 5) note 5; *Klöhn* (fn. 5) note 6, and *Picht* (fn. 3) note 9 ff. With reference to Art. 18 Rome I Regulation *Althammer*/*Makris* (fn. 6) note 5.

31 *Klöhn* (fn. 5) note 10.

Art. 22 (2) Rome II Regulation provides for an extension of the range of possible modes of proof,[33] admitting also the ones provided for by the law governing the formal validity of the legal act,[34] namely: (i) the law governing the non-contractual obligation in question (*lex causae*) and (ii) the law of the country in which the act is performed (*lex loci actus*). **20**

The possibility for acts intended to have legal effect to be proved by any mode of proof recognized also by the laws referred to in Art. 21 Rome II Regulation has its limit: under Art. 22 (2) Rome II Regulation, seized courts are not obliged to admit modes of proof that they are not able to administer according to their own procedural law.[35] Such an "impossibility to administrate" can be determined from the fact that the mode of proof in question is either unknown or even incompatible with the procedural law of the forum.[36] This issue has to be verified on the basis of the latter.[37] The reasons for this limitation derive from the fact that the administration of modes of proof continues to be subject to the *lex fori*.[38] **21**

In addition, the seized court may disregard a mode of proof which is generally allowed by its procedural law, but is not admitted in that specific procedure before the court.[39] **22**

It remains that the exception at hand should not be invoked where there is a mere difference in the foreign law and the *lex fori*; courts should at least try to make an adjustment to the national procedural law, when the mode of proof whose admissibility is in question is similar to another institute provided by the *lex fori*.[40] **23**

In any case, the evidentiary value will be determined by the *lex fori*.[41] **24**

2. The act has to be formally valid

Since Art. 22 (2) Rome II Regulation aims to protect the legitimate expectation that an unilateral act can be proved according to the law under which it is formally valid,[42] a **25**

32 As specified by the Commission in relation to the Proposal (fn. 3) p. 26.

33 *Altenkirch* (fn. 3) note 12; *Klöhn* (fn. 3) note 10; *Dickinson* (fn. 3) note 14.84 ff.

34 With reference to Art. 14 of the 1980 Rome Convention, the Giuliano & Lagarde Report (fn. 3) note B emphasized that the rule aimed at protecting the legitimate expectations of the parties that a contract or an act can be proven according to the law under which it is formally valid. Moreover, "This liberal solution favouring proof of the act is already recognized in France and in the Benelux countries".

35 *Klöhn* (fn. 5) note 14, and *Picht* (fn. 3) note 22 ff.

36 *Altenkirch* (fn. 3) note 13; *Klöhn* (fn. 3) note 14 f.; *Dickinson* (fn. 3) note 14.86; referring to public policy reasons *Spickhoff*, in: Bamberger/Roth, Anh. zu Art. 42 EGBGB note 133.

37 *P. Franzina*, Nuove Leggi Civ. Comm. 5 (2008) p. 1036.

38 Giuliano & Lagarde Report (fn. 3) note B.

39 *Klöhn* (fn. 3) note 15.

40 *Klöhn* (fn. 3) note 15.

41 *Klöhn* (fn. 3) note 15, and *Picht* (fn. 3) note 17 ff. In the case law, see BGH, 08.09.2016 – III ZR 7/15 (fn. 6), ("Von der Frage der Verteilung der Darlegungs- und Beweislast zu trennen ist allerdings die subjektive Obliegenheit der Beweisführung. Diese ist ebenso wie der Beweisantritt und die Fragen der Beweiswürdigung prozessualer Natur und daher nach der *lex fori* zu beurteilen").

prerequisite for the application of the rule is that the act in question is indeed formally valid according to this law.[43]

26 It may happen that an act is formally valid under one of the laws recalled, but invalid in relation to the others: in this case, the only modes of proof admissible are the one's of the law which establish the validity of the act.[44]

3. Acts and facts

27 The Commission stated that Art. 22 (2) Rome II Regulation does not concern the evidence of "legal facts", which are covered only by the *lex fori*.[45]

28 It has been suggested that the term "legal facts" referred, in general, to the proof of legally relevant facts, as opposed to acts intended to have legal effects in matters of non-contractual obligations.[46]

42 *Klöhn* (fn. 3) note 15, and *Picht* (fn. 3) note 17 ff.

43 On the contrary, the question of the substantive validity of the act is immaterial: *Klöhn* (fn. 5) note 12. Cf. with reference to Art. 18 Rome I Regulation, which also applies to contracts, *Spellenberg* (fn. 7) note 30; *Thorn* (fn. 7) note 5; *Althammer/Makris* (fn. 7) note 10.

44 *Klöhn* (fn. 5) note 12.

45 Commission Proposal (fn. 3) p. 26. Cf. *Picht* (fn. 3) note 16.

46 *Dickinson* (fn. 5) note 14.85, which gives the example of a unilateral release from a tort liability. As regards the notion of "unilateral act" for the purposes of the Rome II Regulation, see Art. 21 note 5 *supra*.

Chapter VI: **Other Provisions**

Article 23: Habitual residence

1. For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration.
Where the event giving rise to the damage occurs, or the damage arises, in the course of operation of a branch, agency or any other establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence.
2. For the purposes of this Regulation, the habitual residence of a natural person acting in the course of his or her business activity shall be his or her principal place of business.

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Marc-Philippe Weller/Rentsch, "Habitual Residence": A Plea for "Settled Intention", in: Leible (ed.), General Principles of European Private International Law (2016), p. 171.

I. References to habitual residence in the Rome II Regulation

1 Various provisions of the Rome II Regulation refer to the habitual residence of one or more of the parties to a non-contractual relationship. One such provision is Art. 4 (2). It provides that, "where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country", the tort is governed by the law of that country, rather than the law of the country in which the damage occurred, as it would normally be under Art. 4 (1). Habitual residence is also referred to in Art. 5 (1) (on product liability), Art. 10 (2) (on unjust enrichment), Art. 11 (2) (on *negotiorum gestio*), and Art. 12 (2)(c) (on pre-contractual liability). A reference to habitual residence – albeit not as a connecting factor – also appears in Recital 33, concerning the assessment of damages for personal injuries resulting from traffic accidents "in a State other than that of the habitual residence of the victim".

2 The purpose of Art. 23 is to clarify how the concept of habitual residence should be understood in the framework of the Regulation. In fact, like Art. 19 of the Rome I Regulation (which performs the same function concerning the law applicable to contractual obligations), Art. 23 fails to provide a comprehensive definition of habitual residence. It merely addresses the case where the person whose habitual residence is at issue is either an organisation (namely a "company" or another body "corporate or unincorporated") or a "natural person acting in the course of his or her business activity".

3 Outside these scenarios, that is, where the person whose habitual residence is at issue is a natural person acting outside of his or her business activity, the expression "habitual residence" should in principle be deemed to possess, under the Regulation, the same meaning as under other EU legislative measures in the field of judicial cooperation in civil matters.[1]

[1] In a more nuanced way, *Dickinson*, p. 142, notes that the case law of Member State courts and the Court of Justice concerning the notion of habitual residence in other EU instruments "will be influential in determining the meaning to be given to the concept in the Rome II Regulation where it is not defined".

II. The general notion of habitual residence in EU private international law

1. A widely-used formula …

Most of the measures enacted by the European Union in the field of private international law refer to habitual residence. The trend builds on the widespread use of the formula in multilateral conventions elaborated, *inter alia*, in the framework of The Hague Conference on Private International Law, the Council of Europe and the International Commission on Civil Status, and is part of a wider movement that is gradually resulting in the marginalisation of other personal connecting factors, namely nationality and domicile.[2] **4**

Under the Brussels II*bis* Regulation, for example, the habitual residence of the spouses, like that of the child, serves as the main ground of jurisdiction in proceedings relating, respectively, to divorce, legal separation and marriage annulment (Art. 3), and in proceedings concerning parental responsibility (Art. 8). Regulation No. 4/2009 similarly refers to habitual residence (along with other factors) to identify the courts that possess jurisdiction over claims for family maintenance (Art. 3), while, under Regulation No. 650/2012, the last habitual residence of the deceased indicates, as a rule, the courts with jurisdiction and the applicable law in matters of succession (Art. 4 and Art. 21, respectively). Habitual residence equally plays a key role in the Rome III Regulation on the law applicable to divorce and legal separation (both in respect of choice-of-law agreements pursuant to Art. 5 and, under Art. 8, where the spouses have failed to enter into such an agreement), and in Regulations 2016/1103 and 2016/1104 on matrimonial property regimes and the property consequences of registered partnerships (as witnessed by Articles 5, 6, 22 and 26, among others). **5**

For its part, the Brussels I*bis* Regulation, though primarily concerned with the domicile of the litigants rather than their habitual residence, includes provisions that exceptionally give weight, for specific purposes, to the habitual residence of the parties. For example, according to Art. 19(3), the protective jurisdictional rules laid down in the Regulation concerning disputes over consumer contracts may be departed from by agreement if the parties choose to confer jurisdiction on the courts of the Member State where both the consumer and the professional habitually reside. **6**

2. … lacking an explicit legislative definition

None of the legislative measures above, and none of the international instruments that use the expression, explicitly defines what habitual residence stands for. Besides, no definition can be found, outside the area of judicial cooperation in civil matters, in the EU legislative measures that similarly make use of the notion, such as the General Data Protection Regulation,[3] the Union Customs Code,[4] or the Qualification Directive.[5] **7**

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2 On the historical development of habitual residence, see recently, and for further references, *Dutta*, IPRax 2017, pp. 140 *et seq*.

3 Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ L 119 of 4 May 2016.

4 Regulation (EU) No. 952/2013 of 9 October 2013 laying down the Union Customs Code, OJ L 269 of 10 October 2013.

5 Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals

8 The Court of Justice has on several occasions been called upon to clarify the meaning of habitual residence and the standards against which the habitual residence of a person should be assessed.[6]

9 In *Magdalena Fernández*, the Court examined the notion of habitual residence in a case regarding the expatriation allowance due to the officials of the Community, specifically in the event of posting. It asserted that officials habitually reside where they have "established, with the intention that it should be of a lasting character, the permanent or habitual centre of [their] interests".[7] In *Swaddling*, a case concerning the rules on social security for migrant workers, the Court held that the habitual residence of a person is in the centre of that person's interests. To identify such place, account should be taken of the "family situation" of the individual in question, "the reasons which have led him to move" to a certain place, "the length and continuity of his residence" there, the fact for him to be in a "stable employment", and "his intention as it appears from all the circumstances".[8]

10 The Court relied on the above precedents to clarify the meaning of habitual residence as employed in EU rules dealing with jurisdiction and applicable law, although it warned that its case law relating to other areas of EU law should not be directly transposed to the field of private international law. Caution, the Court noted, is specifically required when the above general standards apply to cases relating to the protection of children.

11 The Court held in *A*, a case decided in 2009, that the notion of habitual residence is an autonomous notion of EU law (that is, one independent from national legislations), whose scope and meaning must be construed in the light of the context and the objective of the relevant EU rules.[9] Thus, when it comes to parental responsibility cases – where the paramount concern is for the interests of the child – the habitual residence of a child cannot be determined solely by reference to his or her physical presence in a given State. Other factors must be considered "which are capable of showing that that presence is not in any way temporary or intermittent". Habitual residence, the Court explained, presupposes in fact "some degree of integration in a social and family environment", as it may result from "the duration, regularity, conditions and reasons for the stay on the territory of a … State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration".

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or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L 337 of 20 December 2011.

6 On the notion of habitual residence in EU Private International Law, see generally, also for further references to earlier literature, *Lurger*, in: von Hein/Rühl (eds): Kohärenz im internationalen Privat- und Verfahrensrecht der Europäischen Union (2016), p. 202.

7 Court of Justice, Judgment of 15 September 1994, *Pedro Magdalena Fernández* v. *Commission of the European Communities*, ECLI:EU:C:1994:332, para. 29.

8 Court of Justice, judgment of 25 February 1999, *Robin Swaddling* v. *Adjudication Officer*, Case C-90/97, ECLI:EU:C:1999:96, para. 29.

9 Court of Justice, judgment of 2 April 2009, *A.*, Case C-523/07, ECLI:EU:C:2009:225, para. 35. On the instrumentality of habitual residence, that is, the ability of this notion to adapt to the policies underlying the different provisions that refer to that concept, see, albeit in a different context, *McEleavy*, pp. 140 *et seq.*

The idea that the habitual residence might vary, to some extent, depending on the policies underlying the rules that refer to that notion also appears in Regulation No. 650/2012 on succession upon death. As stated in Recital 23 of the latter Regulation, the authority dealing with a succession case, when asked to determine the last habitual residence of the deceased, should make an "overall assessment" of the circumstances relating to the life of the *de cujus*, "taking account of all relevant factual elements, in particular the duration and regularity of the deceased's presence in the State concerned and the conditions and reasons for that presence". **12**

3. The general (and common) indicators of habitual residence …

The elements considered so far suggest that the autonomous EU notion of habitual residence results from a combination of general indicators, common to all areas of law, and sectoral variations. **13**

The common indicators, that is, the basic components of the concept of habitual residence, turn around the "qualified" presence of the individual in question in a specific social environment. Three inter-related remarks can be made in this respect. **14**

Firstly, mere physical presence is, as such, insufficient. The presence of a person at a certain place is only relevant to the extent to which it reflects the existence of some durable ties between him or her and a social environment including that place.[10] A person's durable ties with a social environment do not cease to exist just because his or her presence there is discontinuous. A certain degree of stability is required, but this does not imply that the person's presence at a given place cannot be occasionally or periodically interrupted. **15**

Secondly, habitual residence calls for a global assessment of a range of different elements, and this global assessment must be carried out on a case-by-case basis. Several indicators, often of uneven relevance, may need to be considered, and weighed one against the other. The aim of the inquiry is ultimately to determine the centre of a person's interests, and the interests to be considered (the person's family interests, financial interests, cultural interests, etc.) will often be numerous, and may well point to different places. For this reason, formal elements, such as the fact that the individual in question has a legal entitlement to dwell on the territory of a certain State, or is listed in the civil status registries as living in a given municipality, cannot be regarded as decisive. **16**

The focus should rather be on the facts that witness the social life of the individual concerned and his or her integration in a community. Accordingly, the following places are often likely to bear a significant weight on the assessment of a person's habitual residence: the place where the person ordinarily carries out his or her work, the place where the other members of his or her family live, the place where the individual concerned performs any socially meaningful activity (such as taking part in the endeavours of a non-profit organisation, **17**

[10] According to Rule 9 of Resolution (72)1, adopted by the Committee of Ministers of the Council of Europe on 18 January 1972, regarding the standardization of the legal concepts of "domicile" and "residence", available at http://coe.int, in determining whether a residence is habitual, "account is to be taken of the duration and the continuity of the residence as well as of other facts of a personal or professional nature which point to durable ties between a person and his residence".

attending a course of yoga on a weekly basis, being involved in the management of a local football team's supporters club, etc.).

18 By the same token, where the person in question has ties with different countries, the fact that one of these countries is also the country of his or her nationality should not, as such, be treated as conclusive. It is true that the interests that are relevant to the assessment of habitual residence include cultural and political interests which are often expressed in the nationality of the person concerned. Yet nationality is but one of a wide range of possibly relevant factors, and should not be given, as such, any special weight.

19 Thirdly, the intention of the person concerned plays a crucial role in the weighing of the pertinent factors.[11] The short duration of a person's presence at a given place may be of little importance if the person in question has decided to make precisely that place the centre of his or her interests, just like, conversely, a relatively long stay might well prove insufficient, if the person's interests remain located elsewhere.[12]

20 The word "intention" should not be understood to refer to the unexpressed desires or aspirations of an individual. The intentional element, it is argued, has rather to do with the social significance of that person's conduct. Otherwise stated, in assessing whether the presence of the person at a given place underlies that person's intention to fix the centre of his or her interests there, regard should be had to the meaning that others in the community would normally attach to the behaviour of the person in question. Thus, if a person moves to a country and immediately buys a flat there, rather than renting it, this choice can socially be regarded as conveying the person's intention to establish durable ties with the new country. The same may be said of a person who opens a bank account in the country where he or she has just settled, and transfers there all the savings that were previously deposited in a bank account in a different country.

21 On a different note, the intention of a person must in principle be regarded as relevant to the assessment of that person's habitual residence regardless of whether the person in question enjoys full legal capacity, or not. Truly enough, the localisation of the interests of a child, or those of an adult who is unable to protect his or her interests due to an impairment or insufficiency of personal faculties, will frequently depend, as a matter of fact, on the localisation of the interests of those who take care of that child or adult. This does not mean, however, that the preferences, views and feelings of the child or adult in question should be regarded as irrelevant, and that the habitual residence of that child or adult can be determined by automatic implication based on the residence of their parents or guardians.[13]

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11 See, generally, on this aspect, *Weller/Rentsch*, p. 171.

12 See, for an illustration, the judgment of 7 January 2008 of the OLG Stuttgart (5 U 161/07), available through the *openJur* database at http://openjur.de. The case, which predates the adoption of the Rome II Regulation and was decided under German domestic conflict-of-law rules, concerned a car accident in South Africa. The accident involved two young doctors, both of German nationality, who were carrying out a three-month training period there. The Court held that the parties, who had been living in Germany prior to their trip to South Africa, should be deemed to have retained their habitual residence in Germany and concluded on this basis that German law was applicable.

13 According to Rule 11 of Resolution (72)1 of the Council of Europe, mentioned above, a person's habitual

4. … and their possible declinations reflecting teleological and systematic considerations

As noticed earlier, the above general notion of habitual residence may need to be reconsidered, and adjusted, in the light of the specific rules for the purposes of which the need arises of determining a person's habitual residence. **22**

When the general notion is employed in a private international law scenario (rather than in relation with rules belonging to other areas of law, such as social security or the economic treatment of civil servants), account should be taken of the general features of private international law rules and of the policies, be they general or specific, that those rules are intended to advance.

One such policy, actually a general one, is proximity. Most conflict-of-law rules seek in fact to ensure the application of the law of a country with which the legal relationship concerned features a strong and meaningful connection. Thus, where habitual residence serves as a connecting factor, and the conflict-of-law rule for which it performs that function is based on the principle of proximity, the assessment of habitual residence, too, must be guided by a concern for real and substantial connections. In other words, the issue of habitual residence should be dealt with in such a way that the relevant conflict-of-law rules result in the designation of a country with which the situation is in fact significantly connected, considering the characteristics of the situation itself and the goals of the legislator. Recital 23 of Regulation 650/2012 on succession is explicit in this respect. It asserts that the last habitual residence of the deceased should ultimately reveal "a close and stable connection" between the succession and the State whose courts have jurisdiction, and whose law applies to the substance of the matter.[14] **23**

Proximity occupies a key position among the concerns that the conflict-of-law provisions in the Rome II Regulation are meant to address. This holds true, in particular, of the general rule on tort in Art. 4. This rule reflects, in fact, a concern for proximity and predictability, as well as the need for a "reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage", as stated in Recital 16. The principle is that the law applicable to a tort should be determined on the basis of where the damage occurs. Only as "an exception to this general principle", to put it with Recital 18, is a special connection contemplated in Art. 4 (2) with the country where both the person claimed to be liable and the victim of the tort habitually reside.[15] **24**

The relevance of the above findings on the assessment of habitual residence for the purposes of Art. 4 (2) is, arguably, two-fold. First, the court seised of the matter should examine with the same care and attention the situation of the two parties, and should **25**

residence "does not depend upon that of another person". By contrast, the rules on domicile follow in some countries a different pattern, and provide for a "domicile of dependence".

14 See, in the same vein, Recital 35 of Regulation 2016/1103 on matrimonial property regimes, stating that the connecting factors referred to in that Regulation to deal with jurisdiction, "starting with the habitual residence of the spouses", have been set "in view of the increasing mobility of citizens and in order to ensure that a genuine connecting factor exists between the spouses and the Member State in which jurisdiction is exercised".

15 On the exceptionalism of Art. 4 (2), and its rationale, see, among others, *Loquin*, pp. 44 *et seq*.

conclude that their habitual residence is in one and the same country only if that rests on indicia that the parties themselves would reasonably regard as strong and pertinent: the concern for the equal treatment of the parties and for the predictability of the applicable law would otherwise be frustrated. Secondly, given the exceptional character of Art. 4 (2), the conclusion can be reached that the person claimed to be liable and the victim of the tort habitually reside in the same country only if the indicators that support such a finding appear almost unambiguous: since the general principle in Art. 4 (1) should not be departed from lightly, appropriate evidence, it is submitted, must be provided to justify recourse to Art. 4 (2).

26 The guiding principles of the Rome II Regulation, as outlined above, may help deciding other possible questions relating to habitual residence. One such question is whether the notion of habitual residence ought to be construed in a peculiar and possibly more lenient way, whenever the individual concerned is a refugee or an internationally displaced person (IDP).[16] Truly enough, some uniform texts of private international law make room for similar inflections. For instance, The Hague Convention of 19 October 1996 on the protection of children and The Hague Convention of 13 January 2000 on the protection of adults include a provision whereby the mere presence of a refugee or an IDP on the territory of a contracting State enables the authorities of that State to assert their jurisdiction to adopt protective measures in respect of that person, despite the fact that, normally, a similar assertion would rather require the concerned person's habitual residence in that State.

27 It is contended that adopting a similar approach (through analogy or otherwise) in the framework of the Rome II Regulation would be inconsistent with the policies of the Regulation itself. The Hague Conventions mentioned above are essentially concerned with the protection of children and vulnerable adults. It is for this reason that the two instruments are ready to give weight to less stringent connections, such as physical presence instead of habitual residence, to attract specific cases in the orbit of a contracting State's authorities (and under that State's substantive rules). Nothing similar, however, occurs with the Rome II Regulation, whose key concerns – as seen – are ensuring proximity, preserving predictability and striking a reasonable balance between the interests of the parties. In the end, when it comes to the law applicable to torts and other non-contracting obligations, no distinction should be made in the assessment of the habitual residence of a person depending on the latter's status as a refugee or an IDP.

5. The relevant point in time for determining a person's habitual residence

28 The habitual residence of a person may change over time. Thus, the question arises of which point in time should be regarded as relevant for the purposes of determining the habitual residence of that person.

29 The question does not find an explicit answer in Art. 23, whereas the corresponding provision of the Rome I Regulation, Art. 19, specifically addresses the matter. According to Art. 19

[16] See, in general, on the habitual residence of refugees and persons fleeing their country of origin, *Baetge*, StAZ 2016, pp. 289 *et seq*.

(3), the relevant point in time, for the purposes of assessing the habitual residence of a person, is "the time of the conclusion of the contract".

In reality, a similar approach, *mutatis mutandis*, must be followed under the Rome II Regulation. In assessing habitual residence, regard should be had to the situation existing at the time when the tort was committed, or the relevant non-contractual obligation arose. **30**

This is confirmed, and further specified, by the Regulation's provisions that refer to the common habitual residence of the parties. Art. 4 (2) provides for the application of the law of the country where the person claimed to be liable and the person sustaining damage have their habitual residence "at the time when the damage occurs". The same standards, it is submitted, should apply in product liability cases to determine the habitual residence of the person sustaining the damage, for the purposes of Art. 5 (1)(a). **31**

For its part, Article 10 (2) refers to the common habitual residence of the parties when "the event giving rise" to unjust enrichment occurred. Articles 11 (2) and 12 (2)(b) do the same concerning *negotiorum gestio* and *culpa in contrahendo*, respectively **32**

6. Assessing habitual residence: a few examples from case law

So far, only few national judgments have been published that specifically discuss the issue of habitual residence in matters governed by the Rome II Regulation. **33**

The ruling rendered by the High Court of England and Wales, in 2014, in the case of *Winrow* v *Hemphill*,[17] provides an interesting illustration of the way in which the habitual residence of a person may need to be assessed in practice. **34**

The case concerned a road traffic accident occurred in Germany in 2009. A woman, a rear seat passenger in the car involved in the accident, suffered serious injuries as a result of the crash. She was a British national and she had moved to Germany after her husband was posted there by the British army. When the accident occurred, the couple had been living in a military base in Germany for more than eight years. The couple's children attended an army-run school, and the claimant herself worked for a UK Government Agency in one such school. The claimant and her husband had planned to return to England at some time in 2012. **35**

Proceedings in relation with the accident were brought against the driver of the car – a UK national whose husband had been posted to Germany, like the claimant – as well as against the motor insurer of the latter. At the time of the accident, the first defendant had lived in Germany for nearly two years. **36**

The claimant submitted that the tort fell under English law pursuant to Art. 4 (2), rather than German law. Both the driver and herself, she argued, had been habitually resident in England at the time of the accident. Clearly, the claimant attached considerable weight to the subjective ties that the defendant and herself had with England, as evidenced, in particular, **37**

17 [2014] EWHC 3164 (QB).

by the fact that the stay of the two women in Germany was meant, from the outset, to be of a temporary character.

The High Court held, to the contrary, that the claimant could not be regarded as being habitually resident in England. It noted, among other elements, that the claimant's residence in Germany had been established for a long period, that she was in full-time employment there, that the couple's children attended school in Germany, and that there was no evidence that the claimant had a house in England during her time in Germany. The claimant's intention to eventually return to England with her husband was not sufficient to overturn the finding that her habitual residence at the time of the accident was in fact in Germany.[18]

38 The issue of habitual residence has also been discussed at some length in a judgment given by the *Cour d'Appel* of Pau in 2012.[19] This case, too, concerned a road traffic accident. The accident had occurred in Spain. The injured passenger had sued the driver before the Tribunal of Bayonne. That Tribunal had awarded damages to the passenger on the basis of French law, but the applicability of French law was later challenged on appeal. The Cour d'Appel confirmed that French law applied to the case, rather than Spanish law, in accordance with Art. 4 (2). The Court noted that it was undisputed that the driver, a French national, had her habitual residence in France, and added that the passenger too, a British citizen with strong ties with South Africa, should be regarded as being habitually resident in France in 2010, at the time of the accident. It relied, for this, on the following findings: the passenger had purchased a mobile phone, in 2009, and had indicated an address in Biarritz for the delivery of the phone; the same address appeared as the passenger's address in the invoice issued by a French doctor in relation with a visit which the passenger had undergone in 2009; the passenger had rented an apartment in Biarritz, at a different address, in 2010, and had applied for a fixed telephone line to be installed there; he had also applied for a social security number in France, as a self-employed.

7. Hard cases

39 In some instances, determining the habitual residence of a person may prove particularly difficult. This typically occurs where the individual whose habitual residence is at stake leads a peripatetic life, moving frequently from one country to another, or where his or her interests are evenly distributed in two or more States.

40 One might be tempted to say that in these rather exceptional scenarios, the person in question should be considered to have no such thing as a habitual residence, or to have several habitual residences at the same time. The Rome II Regulation, it is submitted, does not make room for either of these findings. Everybody is habitually resident some-

18 For further remarks on the reasoning of the High Court, see *van Calster*, pp. 254 *et seq*.

19 Judgment of 29 November 2012 (12/1384), available through http://www.dalloz.fr. The ruling has ultimately been quashed by the *Cour de Cassation* by a judgment of 30.4.2014 (13-11.932), available at http://legifrance.gouv.fr, on the ground that the case ought to be decided in accordance with The Hague Convention of 1971 on the law applicable to traffic accidents, rather than the Rome II Regulation. The way in which the *Cour d'Appel* has approached the assessment of habitual residence remains however of interest.

where,[20] although his or her ties with the place concerned may not be particularly strong in the absolute (but only stronger than his or her ties with other places), and no one can be deemed to be habitually resident in more than one place at one time, for the purposes of the Regulation.[21]

41 Where a hard case arises, the issue of habitual residence will often need to be decided upon elements which, taken in isolation, may well appear to be of limited significance. In practice, the assessment of a person's habitual residence could merely reflect the fact that his or her ties are just slightly more intense with one place rather than others. The pertinent conflict-of-law rule may lead, in this scenario, to the application of the law of a country which fails to address, to the extent desired, the Regulation's concern for proximity and predictability.

42 In principle, three strategies can be put in place to avert the latter risk, depending on the specific conflict-of-law rule considered and the circumstances of the case. Firstly, where the rule represents an exception to a general rule – as is the case of Art. 4 (2) vis-à-vis the general rule in Art. 4 (1) – the seised court should assess whether, in the circumstances, the displacement of the general rule is in fact justified. Recital 18 implicitly calls for caution, and this may require disregarding the reference to the common habitual residence of the person claimed to be liable and the victim of the tort whenever the indicia of their habitual residence are so weak that proximity and predictability risk being frustrated. The case would then need to be addressed in accordance with the general rule alone.

43 Secondly, if the conflict-of-law rule in question is equipped of an escape clause – as the one in Art. 4 (3) or in Art. 5 (2) – the authority seised of the matter should consider whether the situation is manifestly more closely connected with a country other than the country of (weakly substantiated) habitual residence of the person(s) concerned, and, in the affirmative, apply the law of such other country.

44 Thirdly, if habitual residence is just one of the several connecting factors set out by the relevant conflict-of-law rule, and these factors are arranged in such way as to form a cascade, as in Art. 5 (1), the authority dealing with the matter might consider, like in the first scenario, whether the indicia of habitual residence are sufficiently strong in the circumstances to ensure that proximity and predictability are served. Should habitual residence be disregarded on these exceptional grounds, regard should be had to the subsequent connecting factor in the ladder (the place where the defective product has been purchased).[22]

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20 See, however, *Lima Pinheiro*, p. 804, according to whom the case may arise, albeit rarely, of a person lacking in fact any habitual residence. See also, on this topic, *Plender/Wilderspin*, p. 89.

21 See, in a case relating to the Brussels II*bis* Regulation, the judgment of the English Court in *M* v. *M* [2007] EWHC 2047 (Fam), para. 40 *et seq*. See also *Dickinson*, p. 143.

22 Some might object that, in the situation considered in the third scenario, the court should rather resort directly to the escape clause in Art. 5 (2). This is, admittedly, a sensible objection. Its shortcoming, however, is that this would result in Art. 5 (1) being displaced *in its entirety*, just because *one* of the connecting factors therein does not lead, in the circumstances, to a result consistent with the principles of proximity and foreseeability. By contrast, the solution proposed above seeks to exploit the potential of Art. 5 (1) in full (connecting factor after connecting factor, down the ladder), before the escape clause is triggered.

III. Companies and other bodies

45 Art. 23 (1) deals with the habitual residence of companies and other bodies (hereinafter, globally, "organisations"). The provision consists of two subparagraphs. The first subparagraph lays down a general rule, stating that, in principle, the habitual residence of an organisation is in the place of its "central administration". The second subparagraph provides for a specification of the general rule, which applies where the event giving rise to the damage occurs, or the damage arises, in the course of operation of a branch, agency or any other establishment of an organisation. In this case, the habitual residence of the organisation in question is to be found where the relevant branch, agency or establishment is located.

1. The place of central administration

46 According to the first subparagraph of Art. 23 (1), the habitual residence of an organisation "shall be" its place of central administration. This language indicates that Art. 23 (1) does not set out a mere presumption, or a guideline for interpretation. It is a legislative definition, that courts and other authorities in the Member States are required to employ each time the habitual residence of an organisation is relevant to deciding a case governed by the Regulation, no matter whether the interests of the organisation may in fact be predominantly located in another country.[23]

47 The definition in Art. 23 (1) applies to "companies and other bodies, corporate or unincorporated". The German version refers, somehow more narrowly, to "Gesellschaften, Vereinen und juristischen Personen", and the French text, closely followed by the Italian and the Spanish versions, speaks of the habitual residence of a "société, association ou personne morale". The different expressions employed in each of the above versions, and their combination, suggest that the provision has a broad scope of application.[24] This includes all kinds of organisations and partnerships, provided – it is submitted – that they enjoy some degree of capacity to engage into legal transactions. Thus, for example, where the issue arises of the habitual residence of a trade union, namely for the purposes of Art. 9, regard should be had to the union's central administration, regardless of the legal form under which the union has been set up and operates, and no matter whether the latter has been registered, or otherwise officially acknowledged for some purposes, in the country in question.

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[23] The approach followed in the Rome II Regulation differs from the approach underlying other legislative measures, equally concerned with the localisation of entities other than natural persons. Regulation 2015/848 on insolvency proceedings, for example, refers to "the centre of the debtor's main interests" to determine, in particular, the courts possessing jurisdiction to open insolvency proceedings. According to the Regulation, this is "the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties", and in the case of a company, the place in question is presumed to coincide with the registered office of the company itself, "in the absence of proof to the contrary". Recital 30 of Regulation 2015/848 clarifies that this and other similar presumptions are rebuttable, and that "the relevant court of a Member State should carefully assess whether the centre of the debtor's main interests is genuinely located in that Member State".

[24] *Baetge*, in: Calliess, p. 787. See also, with respect to Art. 19 of the Rome I Regulation, *McParland* pp. 162 *et seq*.

The first subparagraph of Art. 23 (1), like the first subparagraph of Art. 19 (1) Rome I Regulation, which bears the same wording, does not include a definition of central administration ("Hauptverwaltung", "administration centrale"). Art. 4 (2) Rome Convention on the law applicable to contractual obligations (which served as a source of inspiration for both the above provisions) similarly failed to state precisely what the expression "central administration" stands for. **48**

The formula appears, together with "registered office" and "principal place of business", in Art. 54 TFEU (formerly Art. 48 TEC), regarding the right of establishment of "companies or firms formed in accordance with the law of a Member State". The case law of the Court of Justice relating to the latter provision, however, is of limited guidance as rgeards the Rome I and Rome II Regulations.[25] **49**

References to the central administration of companies and similar entities are featured in other EU legislative measures in the field of private international law, namely in the Brussels I*bis* Regulation. The relevant provisions should arguably be given a consistent interpretation across the various instruments. **50**

Specifically, Art. 63 Brussels I*bis* Regulation states that, for the purposes of that Regulation, "a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: (a) statutory seat; (b) central administration; or (c) principal place of business". **51**

Read in the light of the latter provision, the reference to central administration in the first subparagraph of Art. 23 (1) should be understood to mean nothing more than the organisation's central administration, in its narrow meaning. In other words, the statutory seat of the organisation in question ("satzungsmäßiger Sitz", "siège statutaire") and its principal place of business ("Hauptniederlassung", "principal établissement"), while relevant to the Brussels I*bis* Regulation, have no bearing, as such, on the determination of the habitual residence of a company or similar body for the purposes of the Rome I and Rome II Regulations.[26] **52**

The central administration of an organisation is, for the purposes of both the Brussels I*bis* and the Rome Regulations, the place where the organisation is managed and controlled. The question has been raised, with respect to the Brussels I and the Brussels I*bis* Regulation, of whether the "central administration" of an organization is to be located by looking upward to the place of ultimate policymaking, or down to the place of day-to-day management, direction and control.[27] According to the preferred view, endorsed by the case law of the Court of Appeal of England and Wales[28] and the Federal Supreme Court of **53**

25 See, however, the opinion of AG Colomer of 4 December 2001 in *Überseering BV* v. *Nordic Construction Company Baumanagement GmbH*, case C-208/00, ECLI:EU:C:2001:655, para. 2 (in the footnotes), submitting that the expressions "actual head office", "actual centre of administration" and "centre of management" should be understood as referring "to the place where the running of the company takes place and where it concludes a substantial proportion of its dealings with third parties".

26 *Baetge*, in: Calliess, pp. 787 *et seq*.

27 *Briggs*, p. 201.

28 *Young* v. *Anglo American South Africa Limited* [2014] EWCA Civ 1130.

Germany,[29] the relevant place is the place where the organs take the decisions which are essential to the operations of the entity in question.[30] Where the organisation concerned is part of a corporate group and the taking of its decisions is little more than the implementation of instructions handed down from above, its central administration must nevertheless be deemed to coincide with the place where the entity concerned takes its own decisions.[31]

54 The above indicators must form the object of a purely factual assessment.[32] The fictions and legal presumptions which domestic rules may establish for the localisation of companies and other entities have no role to play for the purposes of Art. 23 (1).

The facts to be ascertained are internal facts of the organisation in question. For an "outsider", establishing the place of central administration may accordingly prove a rather difficult task.[33] The general concern of the Regulation for predictability and the need for a fair balance between the interests of the parties, highlighted in Recital 16, suggests that, in determining the central administration of an organisation under Art. 23 (1), the indicia that can be easily identified from outside the organisation should be given special consideration, whereas the relevance of less visible factors should be kept to a minimum, if not disregarded altogether.

2. The place where the relevant business unit is located

55 The second subparagraph of Art. 23 (1) refers to the case where "the event giving rise to the damage occurs, or the damage arises, in the course of operation of a branch, agency or any other establishment". Where this occurs, "the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence". A largely similar provision, with the necessary adaptations, can be found in the second subparagraph of Art. 19 (1) of the Rome I Regulation (which is, in turn, a re-elaboration of the second sentence of Art. 4 (2) of the Rome Convention).

56 The purpose of this specification is two-fold. The rule is meant to serve the goal of proximity and to address a concern for the foreseeability of the applicable law. Where a complex organisation is involved, the place of its central administration is not always and not necessarily a place with which the tort or the other non-contractual obligation in question has a significant connection. Rather, a close connection will plausibly exist with the specific branch or agency in the operation of which the tort or the event giving rise to the obligation occurred.

57 Furthermore, a reference to the specific branch involved in the matter, rather than the central administration of the organisation as a whole, is consistent with the reasonable

29 BGH XII ZB 114/06 of 27 June 2007.

30 See further *McParland*, pp. 168 *et seq*.

31 *Briggs*, p. 201.

32 *Baetge*, in: Calliess, p. 788.

33 This shortcoming is highlighted, *inter alia*, in the explanatory report by Fausto Pocar to the Lugano Convention of 30 October 2007, OJ C 319 of 23 December 2009, para. 29. See further *Ringe*, pp. 930 *et seq*., and *McParland*, pp. 162 *et seq*.

expectations of the parties, and should accordingly result in the designation of the law of a country which the parties themselves can easily predict, as illustrated in the following example. The issue arises of determining the law applicable to a non-contractual obligation arising out of dealings prior to the conclusion of a contract, in a situation where Art. 12 (1) is inapplicable. The negotiations have been carried out for some time between the sole administrator of a small family-run business established in Italy and the chief officer of the Italian branch of a French corporation. The ties of the negotiations with Italy are likely to be clear for the parties, and both the small Italian business and the corporation – based on the dealings – can reasonably forecast the application of Italian law, Italy being the country of their common habitual residence, pursuant to the combined operation of Art. 12 (2)(b) and the second subparagraph of Art. 23 (1).

58 The meaning of the words "branch, agency or any other establishment" is left undefined in the Regulation. The obvious reference for the purpose of understanding the three expressions is Art. 7 (5) Brussels I*bis* Regulation, and the case law of the Court of Justice regarding the predecessors of that provision, namely Art. 5 (5) Brussels Convention of 27 September 1968. Art. 7 (5) Brussels I*bis* Regulation institutes a special head of jurisdiction for disputes "arising out of the operations of a branch, agency or other establishment". For the purposes of Art. 7 (5) Brussels I*bis* Regulation, the terms "branch", "agency" and "establishment" refer to places of business which have the appearance of permanency, have a management, and are materially equipped to negotiate business.[34] They are entities capable of acting as the primary, or even exclusive, interlocutor for those who get in touch with the larger organisation to which the establishment itself belongs.[35] Branches and establishments, as understood by Art. 7 (5) Brussels I*bis* Regulation, must be unities of the organisation concerned: they must enjoy some autonomy, but they cannot take part in the situation concerned as formally separate legal entities. This means that, save for exceptional circumstances, an independent company cannot be regarded as a branch or agency of another company for the purposes of Art. 7 (5) Brussels I*bis* Regulation,[36] and an independent commercial agent cannot be considered as an establishment of its principal.[37]

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34 Court of Justice, judgment of 22 November 1978, *Somafer SA* v. *Saar-Ferngas AG*, Case 33/78, ECLI:EU:C:1978:205, para. 12.

35 *Mankowski*, in: Magnus/Mankowski (eds), Brussels I*bis* Regulation, Article 7 (2016), p. 351.

36 The referred exceptional circumstances may occur in a scenario such as the one considered by the Court of Justice in its judgment of 9 December 1987, *SAR Schotte GmbH* v. *Parfums Rothschild SARL*, Case 218/86, ECLI:EU:C:1987:536, for the purposes of Art. 5 (5) of the 1968 Brussels Convention. The case concerned two companies bearing the same name and placed under common management, one of which entered into transactions on behalf of the other and thus acted as its extension in business relations. The acting company not only took part in the negotiations and in the conclusion of contracts for the other, but was also responsible, during the performance of the contract, for ensuring that the deliveries contracted for were made and that invoices were paid. Moreover, the correspondence addressed to the other contracting party indicated that the acting company was in fact acting as a place of business of its sister company. The Court of Justice concluded that the other contracting party should be able to rely on the appearance thus created and regard that establishment as an establishment of the other company even if, from the point of view of company law, the two companies were independent of each other.

37 *Cf.* Court of Justice, judgment of 18 March 1981, *Blanckaert & Willems PVBA* v. *Luise Trost*, case 139/80, ECLI:EU:C:1981:70.

59 The same findings, it is submitted, apply to the expressions in the second subparagraph of Art. 23 (1).

60 The place where a branch, agency or any other establishment is located only takes precedence over the place of central administration under Art. 23 (1) if the event giving rise to the damage occurs, or the damage itself arises, "in the course of operation" ("aus dem Betrieb", "dans le cadre de l'exploitation") of that particular branch, agency or other establishment. A genuine, and objectively identifiable, link must exist between the tort or the other non-contractual obligation in question and the dealings, or scope of action, of the business unit concerned.[38] The nexus may relate either to the "event giving rise to the damage" or to the "damage".

61 Thus, for example, where the tort at issue results from acts of unfair competition affecting exclusively the interests of a specific competitor, and both the person claimed to be liable and the person who has sustained damages are complex organisations, consisting of several business units, the habitual residence of the parties will plausibly have to be determined as follows. As regards the tortfeasor, reference will be made to the branch or agency whose managers and staff have conceived and put in place the acts of unfair competition that are being complained of. For the victim, regard should be had to the establishment whose business activity specifically suffered from such acts.

62 The factual and legal inquiry that must be carried out to ascertain whether a sufficient nexus exists between the tort, or other non-contractual obligation, and a branch of one of the parties, varies depending on the circumstances of the case. There is arguably no single, all-embracing, test which guides the assessment. A careful and possibly complex inquiry may be required if the case is one involving *prima facie* two or more branches of the same organisation, so that the need arises to compare the contribution (or the prejudice suffered) by each branch.[39] Should the situation relate to the operation of several branches, in a way that the role of each branch cannot be singled out with sufficient clarity, the second subparagraph of Art. 23 (1), it is contended, should be disregarded altogether to the benefit of the general rule in the first subparagraph.

IV. Natural persons acting in the course of a business activity

1. The function of Art. 23 (2)

63 Art. 23 (2) stipulates that the habitual residence of a natural person "acting in the course of his or her business activity" is in that person's "principal place of business". The rule clarifies the way in which the general notion of habitual residence should be dealt with in a specific scenario, that of a tort or other non-contractual obligation relating to a person's business activity. It has already been observed that the habitual residence of an individual must be assessed in light of the object and context of the particular provisions for the purposes of which the assessment is made, and in a manner consistent with the principles underlying those provisions. Proximity and predictability, as seen above, are among the key concerns

38 See, also for further references, *Baetge*, in: Calliess, p. 789.

39 *Cf.* the judgment of the English Court of Appeal in *Anton Durbeck GmbH* v. *Den Norske Bank Asa* [2003] 2 WLR 1296.

that guide the interpretation of the Regulation and, consequently, the assessment of habitual residence. Now, where a tort is at issue which relates to the business activity of a natural person, the centre of that person's interests – i.e., his or her habitual residence – must be determined by reference to the interests that specifically concern the business activity in question. If the personal and family interests of the individual in question were also considered, or even regarded as decisive, the relevant conflict-of-law rules, if affected by the habitual residence of the individual concerned, might well prompt the application of the law of a country with which the situation is not significantly connected, and one that the parties would not easily predict.

64 The function performed by Art. 23 (2) is, thus, to a certain extent, pedagogic. The rule endorses a reading that a well-advised interpreter would plausibly reach anyway, based on a contextual and teleological construction of the general notion of habitual residence. This does not mean that Art. 23 (2) is devoid of a practical *raison d'être*. The clarification in Art. 23 (2) paves the way to a swift and secure assessment of the habitual residence of the person concerned. As with Art. 23 (1), the authorities of Member States have no option but to abide to the above clarification, and disregard the peculiar circumstances of the case, which might point, in principle, to a place other than the principal place of business of the person in question.

2. The scope of the provision

65 The scope of Art. 23 (2) is limited to the situation where the natural person whose habitual residence is at stake is somebody "acting in the course of his or her business activity" ("die im Rahmen der Ausübung ihrer beruflichen Tätigkeit handelt", "agissant dans l'exercice de son activité professionnelle"). This implies that Art. 23 (2) only calls for consideration where a nexus exists between the business activity of the person concerned – which may be any activity with an economic or commercial purpose, regardless of its classification for the purposes of domestic law[40] – and the tort or other non-contractual obligation considered. Thus, Art. 23 (2) will need to be considered, to make a few examples: where a company running a clinic complains of the unfair competition carried out by a plastic surgeon in his private practice; where damages are sought from an expert assessor heard in the framework of arbitration proceedings, on the ground that his expertise was tainted by fraud or corruption; where a self-employed trader claims that another self-employed trader ought to pay back a certain amount of money which the latter has wrongly received from the former, etc.

3. The principal place of business

66 The principal place of business is, factually, the place where the person concerned primarily conducts his or her professional activity. If the activity is carried out in several places, the authority seised of the matter will need to carry out an overall assessment of the relevant circumstances, aimed at determining which of those places occupies a prominent position.[41] The primacy of a particular place may be evidenced, for example, by the fact that the key collaborators of the person in question all work in that place, or that special investments

40 *McParland* p. 170.

41 See further on the matter *Plender/Wilderspin* p. 86.

have been made in relation with that place, instead of others.[42] It is submitted that if a given place has been consistently indicated by the person in question as his or her principal place of business, and the place indicated is in fact a place where the person conducts some of his or her activities, any person wishing to rely on that appearance should be able to do so, unless very strong evidence is provided to substantiate a different finding.[43]

67 On a different note, the principality of a certain place should not depend on whether the tort or the other non-contractual obligation in question has ties with that place. The wording of Art. 23 (2) suggests that, for the sake of legal certainty, a person acting in the course of his or her business activity can only have one principal place of business at a time, serving as the person's single habitual residence for the whole of his or her activity.

V. Cases falling under a special international convention pursuant to Art. 28

68 Art. 23, taken in its different branches, is set to come into play whenever the habitual residence of a person must be determined "for the purposes" of the Rome II Regulation. Where a conflict-of-law issue is raised with respect to a non-contractual obligation, but the Regulation does not apply (or does not apply with its own provisions, leaving the matter to other sources), the provision has in principle no role to play.

69 This occurs, *inter alia*, where the subject matter of the obligation in question comes with the scope of an international convention laying down uniform conflict-of-law rules, which is in force for the Member State of the forum in its relations with one or more third countries. Pursuant to Art. 28, the international convention concerned prevails over (the conflicting provisions of) the Regulation.

70 If the applicable international convention refers to the habitual residence of one or more persons, the notion of habitual residence and the standards to be used in the assessment thereof will have to be construed in conformity with the convention itself.

No particular difficulties seem to arise in this respect where the Rome II Regulation makes room to the special conflict-of-law rules in The Hague Conventions of 1971 and 1973 concerning, respectively, the law applicable to traffic accidents and product liability. Both instruments make use of the concept of habitual residence. The Hague Convention of 1971 only refers, in fact, to the habitual residence of natural persons, and implicitly relies on a general notion of habitual residence that, plausibly, does not differ from the general notion outlined above. The Hague Convention of 1973, for its part, is concerned with the localisation of both natural persons and organisations (or natural persons acting in the course of

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42 In the view of *Altenkirch*, p. 415, the pertinent indicia include "the number of employees employed, the level of material expenses and the turnover generated in a specific country".

43 *Cf.* Trib. Bruxelles 23 November 2005, 05/3.601/B, available through the *unalex* database at http://www.unalex.eu. The Tribunal held, for the purposes of Art. 60 Brussels I Regulation (corresponding to Art. 63 Brussels I*bis* Regulation), that a company with registered offices in Belgium could not be deemed to have its principal place of business in France merely because the letterhead used by the company included a reference to a postal address in Paris. This is especially so since the contract concluded between the company and the other litigant failed to mention the address in Paris and in fact only referred to the company's statutory seat.

their business activity). In the former case, reference is made, implicitly, to the general notion of habitual residence, whereas in the latter scenario the Convention avoids at the outset to use that expression and speaks, instead, of the "principal place of business" (in Arts. 4, 5 and 6).

Article 24: Exclusion of renvoi

The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law.

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I. The doctrine of *renvoi*: general remarks

1. *Renvoi* defined

1 The word *renvoi* is used in private international law to designate a particular kind of reference, namely the reference made to a certain law under the conflict-of-law provisions of the legal order specified by the conflict-of-law provisions of the forum.[1] The issue with *renvoi* is basically whether that particular reference should be taken into account, or not. In other words, whether the operation of the conflict-of-law rules of the forum should be reconsidered whenever the legal order specified under such rules is unwilling to apply its own substantive law and rather refers either to the law of the forum ("remission", *Rückverweisung*, *renvoi au premier degré*) or to the law of a different country ("transmission", *Weiterverweisung*, *renvoi au deuxième degré*).

2. Scholarly views on *renvoi*

2 Views are divided as to whether the goals of private international law are better served by taking *renvoi* into account rather than disregarding it.[2] The issue has been among the most debated theoretical problems relating to the conflicts of laws for a long time, and keeps causing controversy to these days.[3]

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1 A vast literature exists concerning *renvoi*. Recent contributions in the form of monographs include: *Davì*, Rec. des Cours 2010 (vol. 352), p. 9; *Agostini*, RCDIP 2013, p. 545; *Kassir*, Rec. des Cours (2015, vol. 377), p. 9; and *Romano*, Le dilemme du renvoi en droit international privé (2015).

2 For a synthetic illustration of the main positions on the pros and cons of *renvoi*, see *von Hein*, in: Leible, General Principles of European Private International Law (2016), p. 229 *et seq*.

3 An illustration of the passionate discussion that the topic can still trigger is provided by an exchange of sharply opposing views between two leading Italian scholars, which took the form of a series of articles: *Picone*, Riv. dir. int. 2013, p. 1192, *Davì*, Riv. dir. int. 2014, p. 1032 and again *Picone*, Riv. dir. int. 2015, p. 135.

The authors who advocate the relevance of *renvoi* contend that, once properly regulated, *renvoi* enhances the efficiency of the conflict-of-law process.[4] The single advantage most frequently associated with *renvoi* is international harmony of solutions.[5] By taking into account the point of view of the designated legal order (i.e., the instructions it provides to identify the applicable law), the legal order of the forum effectively follows the solution that a court sitting in the specified country would reach, if it were seised of the matter. *Renvoi* is thus credited with ensuring uniformity in the treatment of cross-border situations, regardless of the diversity of the conflict-of-law provisions in force in the various States where the situation may need to be considered. Legal security, some argue, would be improved, since the rights and obligations of the individuals concerned would ultimately enjoy, through *renvoi*, a high degree of continuity across borders. **3**

While the actual ability of *renvoi* to meet those goals is disputed, the critics observe, among other things, that the stated relevance of *renvoi* significantly increases the complexity of the conflictual reasoning. Where the rules of the forum provide that *renvoi* be taken into account, the seised courts and the litigants may need to devote time and efforts to acquire information on the content and actual operation of the relevant foreign conflict-of-law rules, including, as the case may be, the foreign rules on *renvoi* itself.[6] **4**

3. *Renvoi* in national systems of private international law and uniform texts

The treatment of *renvoi* varies greatly from one country to another.[7] It is observed that, in general, *renvoi* is losing much of its practical relevance. The goals it serves are increasingly implemented through functional equivalents, and international harmony is not necessarily the overarching concern of domestic and international lawmakers as regards conflicts of laws.[8] **5**

In some countries, courts are instructed to disregard *renvoi* altogether. That is, e.g., the default solution in Art. 16 of the Belgian Code of Private International Law of 2004 and in Art. 5 of Book 10 of the Dutch Civil Code, enacted in 2011. The domestic rules of other countries provide in principle that *renvoi* be considered, but in fact they limit the relevance of *renvoi* in various ways. For instance, Art. 12 (2) of the Spanish Civil Code merely allows for remission to Spanish law. Furthermore, according to Spanish case law, remission itself can be ruled out if the seised court finds, *inter alia*, that it would frustrate, in the circumstances, the purpose of the pertinent conflict-of-law provisions.[9] On a different note, some of the domestic systems of private international law that permit *renvoi* as a matter of principle, specify that *renvoi* has no **6**

4 See, among others, *Briggs*, ICLQ 1998, p. 877.

5 See, among various authors, *Derruppé*, Travaux du Comité français de droit international privé 1964–1966, p. 181, and *Picone*, Rec. des Cours (1999, vol. 276), p. 44 *et seq*.

6 *Hughes*, Journal of Private Int. Law 2010, p. 195.

7 See, for an overview regarding specifically non-contractual obligations, *Kadner Graziano*, La responsabilité délictuelle en droit international privé européen (2004), p. 115 *et seq*.

8 *Corneloup*, IPRax 2017, p. 147.

9 *Calvo Caravaca/Carrascosa González*, Derecho internacional privado (16th ed., 2016), p. 514 *et seq*. The solution echoes Art. 4 (1) of the Introductory Act to the German Civil Code, according to which *renvoi* is excluded where it would defeat the purpose of the designation ("Sinn der Verweisung") under the applicable conflict-of-law rule.

role to play in specific areas of law. One such exception regards torts and other non-contractual obligations. Actually, no relevance whatsoever is accorded to *renvoi* in the field of torts under the national rules of private international law of Italy, Bulgaria and Poland,[10] although, domestically, none of these countries oppose, in general, to the use of *renvoi*.

7 Taking *renvoi* into account is likely to alter significantly the articulation and outcome of the conflict-of-law process. Accordingly, the legal instruments that lay down uniform conflict-of-law rules almost invariably include one provision stating whether *renvoi* ought to be considered in matters governed by the legal instrument in question. Some of these uniform provisions are examined below.[11] If the issue were left to the private international law rules of the forum, the ability of the instruments concerned to provide for uniform and predictable solutions would in fact be undermined.

II. The exclusion of *renvoi* under the Rome II Regulation

1. The rule in a nutshell and its predecessors

8 Where law applicable to a non-contractual obligation is to be determined in accordance with the Rome II Regulation, *renvoi* has simply no role to play, regardless of whether it would result in the application of the law of the forum or in the application of the law of a different State.[12] Art. 24 clarifies that whenever the conflict-of-law rules of the Regulation prescribes the application of the law of a certain country, they actually refer to the "rules of law in force" in that country "other than its rules of private international law". The rules of private international must thus be singled out from the "rules of law" of the designated legal order, so as to have no bearing on the reasoning leading to the identification of the applicable law.

9 The remaining "rules of law" are essentially the rules that govern the substance of the matter according to the legal order of the country in question (namely, according to the provisions that regulate the relationship between the various norms of that legal order, the provisions on the succession of norms over time, etc.). The nature of the rules of law thus identified (i.e., whether they are legislative or regulatory, written or non-written, etc.) is immaterial. The only relevant factor is whether the specified legal order provides for their application in a factual setting like the one at issue. If the designated legal order includes substantive rules that have been specifically conceived for cross-border cases (i.e., rules especially concerning foreign-related, as opposed to purely domestic, legal relationships), the relevance of these rules normally depends on whether the pertinent conditions of applicability are met in the circumstances, i.e., whether the case at hand is regarded by the rule in question as one falling within its own scope.[13]

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10 See, respectively, Art. 13 (2)(c) of the Italian Statute on Private International Law of 1995, Art. 40 (2)(6) of the Bulgarian Code of Private International Law of 2005 and Art. 5 (2)(3) of the Polish Statute on Private International Law of 2011.

11 See § B.IV.

12 The irrelevance of both forms of *renvoi* is stated in particularly clear terms, if need be, in the German version of the Regulation, where the heading of Art. 24 reads "Ausschluss der Rück- und Weiterverweisung".

13 *Cf.*, with reference to contracts, *Carrascosa González*, La ley aplicable a los contratos internacionales: el Reglamento Roma I (2009), p. 83.

The "rules in force" in the designated country include, in addition to rules enacted by the legislative bodies of that State, the relevant rules deriving from such other norm-production processes as may be contemplated by the relevant constitutional rules. This applies, *inter alia*, to international conventions laying down uniform rules of substantive law, to the extent to which the convention in question is internationally in force for the designated State and has been implemented in that State's legal order or has otherwise acquired the force of law there. The same holds true for the rules adopted in a Member State to implement an EU directive. Thus, if the claim relates to a kind of non-contractual obligation for which the Union has enacted one or more measures aimed at the "approximation of the provisions laid down by law, regulation or administrative action", under Article 114 TFEU or its predecessors (as in the case of Directive 85/374/EEC on liability for defective products, for example), it is for the Rome II Regulation (including its Art. 27, as the case may be) to determine whether the claim must be decided in accordance with the implementing rules enacted in Member State X rather Member State Y, or under the (non-harmonised) law of a third country. **10**

The solution adopted by the Rome II Regulation regarding *renvoi* corresponds to that followed by the Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations (Art. 15). Art. 20 of the Rome I Regulation on the law applicable to contractual obligations features an almost identical wording, although it adds that, in contractual matters, the exclusion of *renvoi* is not absolute in nature ("unless provided otherwise in this Regulation"). Situations may accordingly arise, under the Rome I Regulation, where the conflict-of-law provisions of the designated legal order still have a role to play in the identification of the applicable law.[14] Art. 24 of the Rome II Regulation fails to include a similar proviso. This absence indicates that, in the field of non-contractual obligations, the exclusion of *renvoi* does not suffer from exceptions of any kind. **11**

2. Situations where the rule on *renvoi* is relevant in practice

The rule on *renvoi* is only practically relevant where the conflict-of-law provisions of the Rome II Regulation point to the law of a country whose conflict-of-law provisions are different – in their practical result – from those laid down in the Regulation. This basically occurs in two scenarios. **12**

The first scenario arises when the law specified by the Regulation is the law of a State which is not itself bound by the Regulation (an occurrence contemplated in Art. 2). This may be either because the State in question is not a Member of the European Union or because, despite being a Member State, it enjoys – as in the case of Denmark – a special status with respect to judicial cooperation in civil matters. **13**

The second scenario appears when the State whose law is specified under the Regulation is a Member State for which an international convention laying down special conflict-of-law rules on non-contractual obligations is in force. Pursuant to Art. 28, the law applicable to a non-contractual obligation may in fact need to be determined, in that State, in accordance with conflict-of-law provisions that deviate from the corresponding provision of the Regulation.[15] Practice shows that this is not an infrequent occurrence, due in particular to the **14**

[14] See further *Franzina*, Article 20, in: Magnus/Mankowski, Rome I Regulation (2017), p. 818 *et seq.*

[15] An analogous deviation could result from the adoption, by a Member State, of a bilateral agreement with

number of Member States that are also a party to The Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents[16] or The Hague Convention of 2 October 1973 on the Law Applicable to Products Liability.[17] In some circumstances, the latter instruments lead to practical results that differ significantly from those under the Rome II Regulation. Suppose, for instance, that a German court is seised of a dispute relating to a traffic accident occurred in Austria, and suppose that the accident was caused by a person living in Austria, driving a vehicle registered in Spain, which resulted in injuries to a passenger in the same car, residing in Spain. The German court will apply the law specified under Article 4 of the Rome II Regulation (Austrian law, in the circumstances), whereas an Austrian court, hypothetically seised of the matter, would rather conclude, based on Article 4 of the Convention of 1971, that the liability towards the passenger should be assessed in accordance with the law of the State of registration (i.e., Spanish law). Pursuant to Art. 24, the German court should still apply Austrian law, regardless of the different conclusions that Austrian courts would reach, were they seised of the matter.[18]

3. Issues outside the scope of the rule on *renvoi*

15 Art. 24 only applies where the governing law is to be determined *in accordance with the Rome II Regulation*. Issues relating to a tort or another non-contractual obligation that fall outside the scope of the Regulation will be subject – also as regards *renvoi* – to the relevant provisions of the forum (or the applicable international convention, as the case may be). Thus, for example, where the issue arises of the law governing the non-contractual obligations arising out of the violation of rights relating to personality – a matter excluded from the scope of the Rome II Regulation pursuant to Art. 1 (2) (g) – it will be for the domestic rules of the forum to determine whether, and subject to which qualifications, one will have to consider the conflict-of-law provisions of the designated legal order and apply the law designated under such provisions.

16 The same line of reasoning will need to be followed to identify the law applicable to an incidental question falling outside the scope of the Regulation, the decision of which is set to have an impact on a "main" issue within the purview of the Regulation.[19] This may occur, for example, where, in connection with a traffic accident, the victim relies on the provisions of the *lex delicti* to assert the objective liability of the car owner (as distinct from the driver's), and the issue arises of who, exactly, was the owner of the car when the accident took place.

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a third country laying down conflict-of-law rules in matters relating to a particular category of non-contractual obligations, as envisaged in Regulation (EC) No. 662/2009 of 13 July 2009 establishing a procedure for the negotiation and conclusion of this kind of agreements concerning the law applicable to contractual and non-contractual obligations (OJ L 200 of 31 July 2009, 25).

16 Austria, Belgium, Croatia, Czech Republic, France, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Slovakia, Slovenia and Spain.

17 Croatia, Finland, France, Luxembourg, the Netherlands, Slovenia and Spain.

18 The outcome, some argue, is overly rigid. The argument has been put forward by some authors that international harmony of decisions ought to be among the concerns that courts should consider when assessing the possibility of escaping from Art. 4 (1) of the Rome II Regulation under the safeguard clause in Article 4(1). See further *von Hein*, in: Leible, General principles of European Private International Law (2016), p. 245 *et seq*.

19 *Rödl*, in: Calliess, Rome Regulations – Commentary (2nd ed., 2015), p. 795.

According to the preferred view, the Rome II Regulation is not concerned with questions that do not come, as such, with its scope, even though the outcome of a non-contractual case strictly depends on the way in which those issues are to be decided. The law applicable to an incidental question should rather be determined in accordance with the conflict-of-law provisions that would apply, in the circumstances, if such a question arose as a main question, i.e., in isolation (in the example above, this would result in the application of the conflict-of-law rules relating to property and the transfer thereof, e.g., by contract or in the framework of a succession).[20] *Renvoi* will consequently be relevant to the identification of the law governing an incidental question whenever the conflict-of-law provisions to which the latter is submitted so provide.[21]

4. The treatment of *renvoi* under other uniform texts

By excluding the relevance of *renvoi*, the Rome II Regulation follows a rather common trend. **17**
The legal instruments enacted so far by the European Union to deal with conflicts of law, generally stipulate that, in determining the law governing a cross-border relationship, no regard should be had of the rules of private international law in force in the specified legal order.[22] Apart from Art. 20 of the Rome I Regulation, which has been mentioned above, explicit exclusions of *renvoi* may be found in the Rome III Regulation on the law applicable to divorce and legal separation (Art. 11) and in Regulations 2016/1103 and 2016/1103 on matrimonial property regimes and the property consequences of registered partnerships (Art. 32 of both texts). By contrast, Regulation No 650/2012, on succession upon death, deviates from this scheme. It prescribes that *renvoi* be taken into consideration (save for a few exceptions) whenever the conflict-of-law rules of the specified legal order refer to the law of a Member State or to the law of a third State which, in the circumstances, would apply its own law (Art. 34).

For their part, too, international conventions mostly take the view that the rules of private **18**
international law of the designated legal order should have no bearing on the process leading to the identification of the applicable law.[23] The conventions elaborated within the Hague Conference on Private International Law generally follow this pattern,[24] although some conventions – often the older among them – do not include an explicit provision to this effect.[25] *Renvoi*

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20 See generally, on incidental questions in the private international law of the European Union, *Goessl*, Journal of Private International Law 2012, 63.

21 For example, in light of the exclusion under Art. 1 (2)(g), one may think of the issue of whether the contract that company A seeks to enforce against company B has been concluded by a duly authorized representative of the former.

22 For a systematic analysis of the issue of *renvoi* in the private international law of the European Union, see *von Hein*, in: Leible/Unberath, Brauchen wir eine Rom 0-Verordnung? (2013), p. 341; see also *Solomon*, in: Michaels/Solomon, Liber amicorum Klaus Schurig zum 70. Geburtstag (2012), p. 237.

23 See generally *Migliorino*, RDIPP 1996, p. 499 *et seq.*; *Kropholler*, in: Gottwald et al., FS für Dieter Henrich 2000, p. 393 *et seq.*, and *Chen*, Rück- und Weiterverweisung (Renvoi) in staatsvertraglichen Kollisionsnormen (2004).

24 For an exception, see Article 4 of the Convention of 1 August 1989 on the law applicable to succession to the estates of deceased persons.

25 This is the case, *inter alia*, of the abovementioned convention on the law applicable to traffic accidents and on the law applicable to products liability. In prescribing the application of the "internal law" of a

is likewise excluded, although seldom explicitly, by conventions negotiated within other institutional contexts to the extent to which they set forth uniform conflict-of-law rules.[26]

5. The reasons for excluding the relevance of *renvoi* in the Rome II Regulation

19 Common as it may be, the exclusion of *renvoi* must still be justified. Actually, international harmony of decisions is among the concerns that the Regulation is supposed to address.[27] It has already been shown that the introduction of a set of uniform conflict-of-law rules is not necessarily enough to achieve this goal, since the operation of uniform rules may be excluded, *inter alia*, by competing international conventions in force for the forum State. Now, *renvoi*, as mentioned above, pursues precisely the goal of enhancing international harmony. Why, then, the prospect of exploiting the alleged potential of this technique has been ruled out altogether?

20 Apart from the widespread disagreement as to the capability of *renvoi* to produce harmony, three policy considerations seem to underlie the option taken by the European legislature.

21 To begin with, the stated irrelevance of the conflict-of-law provisions of the specified legal order corroborates the general goal of predictability pursued by the Regulation.[28] Thanks to Art. 24, the Rome II Regulation presents itself as the legal instrument laying down the *single* set of rules that a court sitting in a Member State will need to resort to for the purposes of determining the law applicable to a non-contractual obligation. Once emancipated from the possible interference of rules other than those of the Regulation itself, the process of identifying the law governing a non-contractual obligation should prove more simple and more likely to lead to foreseeable results. There is, in fact, a possible tension between two goals broadly associated with the idea of legal certainty: the quest for harmony of decisions, on the one hand, and the quest for private international law rules that are straightforward and easy to apply, on the other. Apparently, the European legislator has decided to pursue, through the unification of conflict-of-law rules, a high degree (as opposed to the maximum possible degree) of international harmony of decisions, on the assumption that more harmony could only be achieved at the price of a more complex conflictual reasoning .[29]

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given country, these and other instruments elaborated within the Conference are in fact understood to refer to the rules in force in the legal order of the designated country, other than its rules of private international law: see, among others, the explanatory report by *Reese* of The Hague Convention on the Law Applicable to Products Liability, available at http://hcch.net, sub Art. 6.

26 See, e.g., the Vienna Convention on civil liability for nuclear damage of 21 May 1963, which refers, *inter alia*, to the "legislation" of the "installation State", i.e., the contracting State within whose territory the nuclear installation concerned is situated.

27 According to Recital 6, the "proper functioning of the internal market creates a need … for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought".

28 As stated in Recital 6, the "proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought".

29 Both the Rome I and the Rome II Regulation underlie a taste for hard-and-fast conflict-of-law rules. Escape clauses exist, but their operation is ostensibly presented as exceptional.

Secondly, the exclusion of *renvoi* removes for both the seised court and the litigants the need to inquire into the conflict-of-law provisions of the specified legal order. The determination of the applicable law should accordingly become swifter and imply a lower amount of transaction costs.[30] This reflects a general concern of the European legislator for the efficiency of court proceedings with a cross-border element. Policy documents adopted in the field of judicial cooperation in civil matters regularly stress the importance of reducing the obstacles, including the costs, that businesses and individuals might need to face to take full advantage of the opportunities offered by an integrated regional market without internal borders.[31] **22**

Thirdly, and probably most importantly, *renvoi* is likely to frustrate the substantive policies underlying the individual conflict-of-law provisions of the Regulation, or to alter the particular balance between competing values that the European legislator has strived to establish in those provisions.[32] One example will clarify this point. **23**

These rules, too, embody strong substantive or conflict-of-law policies, such as proximity and the protection of weaker parties. The policies in question would run the risk of being frustrated if provisions alien to the Regulation were allowed to interfere with its rules. For instance, Art. 6 (1), which submits liability for unfair competition to "the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected", reflects the assumption – stated in Recital 21 – that the application of that law satisfies the Regulation's objective to "protect competitors, consumers and the general public and ensure that the market economy functions properly". If *renvoi* were to be taken into account, the realisation of that substantive policy could, in some instances, run the risk of being frustrated. **24**

In the end, the Rome II Regulation, by excluding *renvoi*, confirms that, from the point of view of the European legislator, the goals of full uniformity and "simplicity" have a higher rank than international harmony of solutions. This way, the exclusion of *renvoi* substantiates the idea of the Regulation being an instrument serving a set of well-defined substantive and conflictual policies. Its provisions are in no way politically neutral, and the exclusion of *renvoi* is a means to protect their ability to perform the function they have been charged with. **25**

6. Are the parties free to agree that *renvoi* should, instead, be considered?

With respect to the Rome Convention and the Rome I Regulation the question has been raised by some scholars of whether the parties may agree that, notwithstanding the **26**

30 One should consider, however, that an unrestricted exclusion of *renvoi* prevents the seised court from benefiting from the practical advantages associated with the application of the *lex fori* whenever the conflict-of-law provisions of the specified legal order envisage a first-degree *renvoi*.

31 See, e.g., the Stockholm Programme, OJ C 115 of 4 May 2010, para. 3.

32 See already, in this vein, the *Giuliano*/*Lagarde* report on the Rome Convention on 1980, OJ C 282 of 31 October 1980, *sub* Art. 15, noting that, since uniform conflict-of-law rules in the Convention attempt, as far as possible, "to localize the legal situation and to determine the country with which it is most closely connected, the law specified by the conflicts rule … should not be allowed to question this determination of place". On the relationship between *renvoi* and proximity, see *Lagarde*, Rec. des Cours (1986, vol. 196), p. 40, and *Siehr*, in: Coester et al., FS für Hans Jürgen Sonnenberger zum 70. Geburtstag (2004), p. 667.

exclusion of *renvoi*, regard should be had to the rules of private international law of the specified legal order. An agreement of this kind could, in theory, present itself as a choice-of-law clause under Art. 3 of the two texts above, explicitly stipulating that the chosen law is to include the conflict-of-law provisions in force therein. The admissibility of a clause to this effect finds support in a resolution adopted by the Institut de Droit International in its Session of Basel of 1991 on party autonomy in international contracts,[33] and in The Hague Principles on Choice of Law in International Commercial Contracts, approved on 19 March 2015.[34]

27 The same question may, in principle, be raised concerning the Rome II Regulation. Party autonomy plays an important role in the latter instrument, too, and one might be tempted to say that the freedom of the parties can go as far as derogating from Art. 24.

28 Very strong arguments suggest that no such freedom exists either under the Rome I Regulation[35] or under Rome II.

29 Art. 24 of the Rome II Regulation is not itself a conflict-of-law rule, but rather a rule on the operation of the conflict-of-law rules set forth in the Regulation, including Art. 14, on choice of law. The latter provision is meant to alter the operation of other conflict-of-law provisions, not the operation of any rule in the Regulation, regardless of the function performed.

30 Nothing suggests that the Regulation lays down a non-binding or an optional regime, i.e., one that the seised court may disregard if the parties so decide, or if the courts itself so deems fit. Rather, as indicated in Art. 288 TFEU, the Regulation is "binding in its entirety". Accordingly, it must be assumed that derogations are permitted only insofar as the Regulation so provides.

31 Besides, expanding the autonomy of the parties beyond the scope resulting from Art. 14 would defeat the uniform application of the Regulation and undermine its predictability.

32 In the end, absent a rider similar to those envisaged in the Basel Resolution or in The Hague Principles, an agreement purporting to derogate from Art. 24 must be considered to be invalid.

Article 25: States with more than one legal system

1. Where a State comprises several territorial units, each of which has its own rules of law in respect of non-contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation.

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33 According to Art. 2 (2) of the Resolution, the law chosen by the parties "shall apply to the exclusion of its choice of law rules, unless the parties expressly provide otherwise". The text of the Resolution is available at http://justitiaetpace.org.

34 Art. 8 stipulates that a choice of law "does not refer to rules of private international law of the law chosen by the parties unless the parties expressly provide otherwise".

35 *Franzina*, in: Magnus/Mankowski, Rome I Regulation, Article 20 (2017), p. 819 *et seq*.

2. A Member State within which different territorial units have their own rules of law in respect of non-contractual obligations shall not be required to apply this Regulation to conflicts solely between the laws of such units.

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I. The notion of States comprising more than one legal system

1. Composite, as opposed to unitary, legal systems

The legal orders of some States feature a complex structure. They do not provide a single set of rules of private law – as may be found, e.g., in Germany or Italy, where the *Bürgerliches Gesetzbuch* and the *Codice civile* lay down the private law in force for the whole country – but rather comprise two or more sub-systems. The latter may be orga- 1

nised either on a territorial or on a personal basis. In the first case, the country is divided into separate units (regions, provinces, federated States, etc.), each with its own sub-system of private law. In the second case, different legal regimes coexist for people of separate ethnic or religious communities.

2 The United Kingdom, Canada and the United States of America, among others, fit in the former scheme. The law of England and Wales in matters relating to private law is different from Scottish law, and the law of Ontario is not the same as the law of Québec.

3 Within complex legal orders the issue arises of which sub-system should apply to situations connected with two or more territorial units, or involving the members of two or more communities. The rules that govern these conflicts are generally referred to, respectively, as territorial (or inter-local) and inter-personal conflict-of-law rules.[1]

2. The relevance of complex legal systems to the operation of the Rome II Regulation

4 Art. 25 deals with two issues relating to States that comprise two or more legal systems,[2] organized on a territorial basis.[3]

5 The first issue concerns the operation of the conflict-of-law provisions of the Regulation whenever the law specified under such provisions includes different sub-systems, each having its own substantive rules regarding non-contractual obligations.[4] Art. 25 (1) addres-

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1 In general, concerning complex legal systems, see *Borrás Rodriguez*, Rec. des Cours 1994 (vol. 249), p. 145.

2 The Rome II Regulation is only concerned with countries whose sub-systems provide for different rules relating to non-contractual obligations. Thus, for example, although Swiss Cantons enjoy a considerable degree of autonomy, including the power to enact legislation in some areas, the legal order of Switzerland is not a complex legal system for the purposes of the Regulation. Pursuant to the Swiss Constitution, the Confederation has in fact exclusive competence in matters of private law, and in fact one set of substantive rules on torts and other non-contractual obligations is in force for the whole country.

3 Composite legal systems organized on a personal basis are not considered in the Regulation. As a matter of fact, in the countries where different personal laws exist – such as Lebanon or India – the various sub-systems usually lay down rules that only concern personal status and family relationships, not the law of torts or other non-contractual obligations. Should the Regulation exceptionally designate the law of a country where the substantive rules on non-contractual obligations vary depending on the ethnic, cultural, or religious status of the parties, recourse should be had – it is submitted – to the rules in force in the forum that govern references to complex legal systems, provided they do not defeat the *effet utile* of the Regulation. This is in fact the line of conduct that the interpreter is normally required to follow whenever a gap appears in the uniform rules. See, *Ricci*, Il richiamo di ordinamenti plurilegislativi nel diritto internazionale privato (2004), p. 203.

4 For Art. 25 to apply, it is not necessary that the sub-systems of the legal order in question provide a *self-standing* body of rules laying down a *complete* substantive Regulation of contractual relationships. As a matter of fact, the specified legal order may well comprise some general rules, common to the different sub-systems, and some special provisions, varying from one sub-system to the other. In these circumstances, it is submitted, Art. 25 of the Regulation will apply to the extent to which the issue to be decided in the instant case is one governed, or affected, by provisions that changes depending on the sub-system considered. *Cf.*, with respect to contracts, *Hartley*, International Commercial Litigation (2009), p. 537.

ses this issue by clarifying that, for conflict-of-law purposes, each territorial unit must be considered as a country.

The second issue is whether the Regulation applies to conflicts involving solely the laws of two or more territorial units of one Member State, namely the Member State whose courts are seised of the matter. Pursuant to Art. 25 (2), the Regulation is not concerned with these situations. This means that the latter situations are governed, in principle, by the rules in force in the Member State of the forum that deal with inter-local conflicts of laws. **6**

II. The operation of the conflict-of-law provisions of the Regulation in the event of the designation of a complex legal system

1. The problem with the designation of complex legal systems and the solution envisaged by the Regulation

The conflict-of-law provisions of the Rome II Regulation point to the law of a "country".[5] This language is understood to exclude any possible reference to non-State law[6] and should be construed, it is contended, as excluding the law of political or administrative entities that fail to qualify as States for the purposes of public international law, such as the constituent entities of federal States.[7] **7**

If the specified legal order includes two or more sub-systems, each laying down substantive rules on non-contractual obligations, then the conflict-of-law provision, through which the said legal order has been designated, proves unable to perform its function in full, unable as it is to result in the identification of a single body of rules regulating the matter. **8**

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5 For example, Art. 5 (1)(a), on product liability, refers to "the law of the *country* in which the person sustaining the damage had his or her habitual residence when the damage occurred", and Art. 8 (1), regarding the infringement of intellectual property rights, refers to "the law of the *country* for which protection is claimed" (emphasis added in both cases). Under Art. 14 (1), the parties may agree to submit their non-contractual obligations "to the law of their choice". The provision does not specify that this law, too, must be the law of a country. The specification, however, implicitly arises from Art. 14 (2), which contemplates the case where "all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in a *country* other than the *country* whose law has been chosen" (emphasis added), and from the partly similar provision in Art. 14 (3).

6 It is common ground that EU conflict-of-law rules, as they currently stand, only allow for a designation of State law. See already, concerning Art. 3 of the Rome Convention, *Lagarde*, Rev. crit. dr. int. priv. 1991, 287. Recital 13 of the Rome I Regulation indirectly confirms this approach by acknowledging that the parties may rather decide to "incorporate by reference" into their contract a non-State body of law or an international convention.

7 *Cf. De Nova*, Rec. des Cours (1968, vol. 118), p. 551 *et seq*., noting the traditional assumption, in continental European countries, that conflict-of-law rules refer, in principle, to the legal system of sovereign States. Concerning the legal position of federal States and the respective federated entities in public international law, see generally *Crawford*, The Creation of States in International Law (2nd ed., 2006), p. 483 *et seq*.

9 Art. 25 (1) of the Rome II Regulation, whose roots are in Art. 19 (1) of the Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations, fills this gap by indicating the connecting factors whereby one must identify, within the specified legal order, the applicable sub-system. Under Art. 25 (1), these supplementary connecting factors are, in fact, the same as those by which the specified (State) legal order has been determined in the first place. In practice, relying on a *fictio iuris*, the Regulation requires that each territorial unit of the designated country be treated, for these purposes, as if it was a sovereign State, i.e., a "country" within the meaning above.

10 An example will illustrate the reasoning. Pursuant to Art. 4 (1) of the Rome II Regulation, the law applicable to a traffic accident is the law of the *country* on whose territory the accident occurred. Where the country in question is a State with more than one legal system, say the United States, the *same* connecting factor will have to be used to identify, as a second step of the reasoning, the specific sub-system that governs the matter. Thus, if the accident occurred in Miami, the applicable law would be the law of Florida, whereas, if the accident occurred in Boston, the governing law would rather be the law of Massachusetts.

11 The same reasoning applies to choice-of-law agreements. Under Art. 14 (1) of the Regulation, taken in conjunction with Art. 22 (1), the parties are free to submit their non-contractual relationship to the law in force in a given territorial unit of a State possessing more than one legal system, e.g., English law or the law of the State of New York. In this case, the will of the parties simultaneously performs a double function, as it selects both the legal order of a given country (the United Kingdom, the United States) and the legal system of a particular territorial unit within the country in question.

12 Doubts may arise where the parties refer in their agreement to the law of a State with more than one legal system, without designating the specific sub-system whose rules should govern the relationship (as in the following clause: "The parties agree that the non-contractual liability of A towards B shall be governed by the law of the United Kingdom"). Where this occurs, the first thing to do is to determine whether, despite the ambiguous wording of the clause, the parties had in fact agreed on a more specific designation.[8] Useful indications may be drawn, for example, from the references made by the parties to a certain sub-system of the country in question during their negotiations. It should be stressed that the inquire – actually, an exercise in contract interpretation – is only consistent with the Regulation (namely with Art. 14 thereof) insofar as it purports to construe the *real*, albeit unexpressed, will of the parties. Otherwise stated, a court seised of an "incomplete" or otherwise doubtful choice of law should not wonder whether the parties would have plausibly chosen the law of this or that territorial unit of the country in question, had they made a choice. The task of the court is rather to look at the available indicia to infer the existence of an *actual* designation of the law in force in a territorial unit.

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[8] See, for a discussion of the matter and further references, *Eichel*, in: Leible, General principles of European private international law (2016), p. 287. In the view of *Altenkirch*, in: Huber, Rome II Regulation – Pocket Commentary (2011), p. 422, the following facts could shed light on the parties' intent: is one party habitually resident in a territorial unit of the designated country? Has the event giving rise to the damage occurred within a territorial unit? Have the consequences of the tort been primarily felt in one territorial unit?

If no choice can be detected (with the required degree of certainty), then the court, it is submitted, will need to conclude that the parties have failed to make a valid agreement under Art. 14, and will turn to the objective conflict-of-law rules of the Regulation.[9] **13**

2. The rationale underlying the adopted solution

Art. 25 (1) adopts a solution that is widely followed for uniform conflict-of-law provisions, both in the legislation of the European Union[10] and in international conventions.[11] **14**

This is not, however, the only conceivable approach. A different solution may in fact be found in some national codifications of private international law and has now made its way into the private international law of the European Union itself, albeit only in some of its areas. For example, Art. 5 (3) of the Austrian Statute on Private International Law of 1978, Art. 34 of the Slovak Statute on Private International Law of 1993 and Art. 18 of the Italian Statute on Private International Law of 1995, among others, provide that, whenever the specified legal order comprises more than one legal system, the applicable local law must be identified through the provisions of the legal order in question that govern inter-local conflicts. Similarly, pursuant to Art. 37 of Regulation No. 650/2012 on successions, any reference to the law of a State which comprises two or more systems of law with respect to successions "shall be construed as referring to the system of law or set of rules determined by the rules in force in that State".[12] **15**

In practice, where the so-called comprehensive reference approach is employed, the conflict-of-law provisions of the forum are only concerned with the designation of the country whose legal order, taken as a whole, will govern the situation. The identification of the applicable sub-system is left to the inter-local conflict-of-law rules of the specified legal order. **16**

A parallel may be drawn between the logic underlying Art. 25 (1) and the exclusion of *renvoi* according to Art. 24 of the Rome II Regulation. The situations considered are different,[13] but the two provisions have something in common. They both rest on the idea that, in circumstances where the Regulation could in theory be supplemented by some other provisions (the conflict-of-law provisions of the specified legal order, in the case of *renvoi*; the rule of **17**

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9 See, however, *Altenkirch*, in: Huber, Rome II Regulation – Pocket Commentary (2011), 422, according to whom, if the law of one unit cannot be determined with reasonable certainty, it is for the inter-local conflict-of-law rules of the chosen country to determine the applicable law; and, where these rules do not exist, the seised court should determine the law with the closest connection to the dispute, bearing in mind the connecting factors provided for in the Regulation. See, for a similar view, *Gebauer*, in: Calliess, Rome Regulations – Commentary (2nd ed. 2015), p. 798.

10 Reference is made to Art. 22 (1) of the Rome I Regulation and Art. 14 of the Rome III Regulation on the law applicable to divorce and legal separation.

11 See, for instance, Art. 20 of The Hague Convention of 14 March 1978 on the Law Applicable to Agency.

12 See further *Christandl*, Journal of Private International Law 2013, p. 226 *et seq*. A similar solution can be found in Articles 33 and 34 of Regulation 2016/1103 on matrimonial property regimes and in Articles 33 and 34 of Regulation 2016/1104 on the property consequences of registered partnerships.

13 On the different nature of the problem of *renvoi*, on the one hand, and the problem of the designation of non-unified legal systems, see already *Maury*, Rec. des Cours (1937, vol. 57), p. 551.

the specified legal order that deal with inter-local conflicts, in the case of complex legal systems), such other provisions must be disregarded.

18 Thus, the reasons behind the rejection of *renvoi* in Art. 24 do not substantially differ from those underlying the "direct" solution adopted with respect to sub-systems.[14] To begin with, the direct solution enhances the unity of the European conflict-of-law regime, since the Regulation does neither require nor accept to be supplemented by outside sources. Predictability is reinforced, at least in the sense that the process leading to the identification of the applicable law is kept simple.

19 On the other hand – but, again, similarly to what happens with the rule on *renvoi* – international harmony of solutions may prove impossible to reach. The unwillingness of the Regulation to take into consideration the point of view of the specified legal order implies that the same situation could end up being submitted to different substantive regimes, depending on whether the case is viewed from the angle of a Member State or that of a third country.

3. Art. 25 (1) as a guide to understanding references made to a State with more than one legal system for purposes other than the designation of the applicable law

20 The wording of Art. 25 (1) suggests that the rule therein is exclusively concerned with the case where a *conflict-of-law provision* of the Regulation designates a complex legal system to *govern* a non-contractual obligation or a specific issue arising in connection therewith. Some provisions of the Regulation include geographical references that are not intended, as such, to designate the applicable law. These references, however, may point in fact to States that comprise more than one legal system. Should Art. 25 (1) apply in these cases, too?

21 Art. 5 (1), for example, sets forth a cascade of conflict-of-law rules for product liability cases. Pursuant to Art. 5 (1)(a), product liability is governed by "the law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred", provided however that the product concerned "was marketed in that country". Art. 5 (1)(b), which only applies where the latter condition has not been met, refers, instead, to "the law of the country in which the product was acquired", but, again, the latter designation is only operative if the product was marketed in that country. Art. 5 (1)(c) goes down one more step in the ladder: absent the latter condition, the law of the country in which the damage occurred applies, provided, however, that the product was marketed in the designated country. One may wonder whether, for the purposes of Art. 5, the "country" where the product was marketed should be understood – in the event of a State with more than one legal system – as referring to a given territorial unit of the country in question (the unit where the victim was habitually resident, where the product was acquired or where the damage occurred, respectively). The former option, it is submitted, should be preferred. This approach is in fact better suited to reflect the goal pursued by the European legislator in the provisions in question, i.e., the respect for the expectations of the parties. One of the ideas behind Art. 5 (1) is in fact that the person whose liability is at issue should be able to know in advance, based on the place where its products are marketed, under which law its liability

[14] See, for a more comprehensive analysis of these reasons, the comment of Art. 24. See also *Eichel*, in: Leible, General principles of European private international law (2016), p. 279 *et seq*.

would be assessed.[15] Thus, for example, if damage has been sustained by a person who habitually resides in Montréal, the condition set out in Art. 5 (1)(a) should not be considered as satisfied if it is established that the manufacturer or the other person whose liability is at issue had opposed to the products being marketed in Québec, but not in other Canadian provinces.

22 It is submitted that Art. 25 (1) should be understood to mean that each time the Regulation refers to a "country", and the country in question is in fact a State with more than one legal system, the individual territorial units of such country should in principle be treated as if they were sovereign States, no matter whether the reference in question is meant to designate the applicable law, to determine the conditions of applicability of a given conflict-of-law provision, or to perform a different function.

23 As a matter of fact, some more recent legislative measures enacted by the European Union in the field of conflicts of laws include a general provision that clarifies the way in which one should construe *any* reference made to factors and circumstances arising in a country comprising several territorial units. This approach, which echoes the solutions adopted in several international conventions,[16] has been followed, for example, in Art. 14 of the Rome III Regulation on divorce and legal separation, and in Art. 37 of Regulation No 650/2012 on successions. Art. 25 (1) of the Rome II Regulation, despite its wording, should be understood to perform in fact a similarly broad function.

4. Issues, arising in respect of situations within the scope of application of the Regulation, to which Art. 25 (1) does not apply

24 Art. 25 (1) is only concerned with situations where the applicable law is to be determined *in accordance with the Rome II Regulation*. Consequently, the provision is not applicable where – in a case relating to a non-contractual obligation – regard must be had to conflict-of-law provisions coming from other sources, such as the law of the forum. This occurs, for instance, with preliminary, or incidental, questions.[17] According to a widely-accepted view, preliminary questions that fall outside the scope of the Regulation must be decided in accordance with the private international law rules in force in the forum that deal with the issue at stake (the so-called *lex fori* approach).[18] Art. 25 (1) has accordingly no bearing on

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15 *Marenghi*, Profili internazionalprivatistici della responsabilità del produttore e diritto dell'Unione europea (2013), p. 29 *et seq*.

16 This is the case, among others, of The Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (Art. 47), and The Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations (Art. 16). Older Hague conventions, such as the Convention of 2 October 1973 on the Law Applicable to Products Liability (Art. 12) or the Convention of 14 March 1978 on the Law Applicable to Agency (Art. 19), employ in this connection a wording similar to the one that is now found in the Regulation.

17 Regarding the basically similar problem arising with respect to *renvoi*, see in this commentary under Art. 24.

18 See generally on this topic *Goessl*, Preliminary Questions in EU Private International Law, Journal of Private International Law 2012, p. 63, and *Mäsch*, Preliminary Question, in *Leible*, General Principles of European Private International Law (2016), p. 101.

the identification of the law applicable to incidental questions. The seised court will rather rely on the relevant conflict-of-law rules applicable in the forum (for example, those concerning rights in rem, if the issue is whether the person claim damages for the destruction of a valuable object was in fact the owner of that object at the time of the destruction), including as regards the designation of composite legal systems.

III. The non-application of the Regulation to purely local, as opposed to international, conflicts

1. The solution adopted by the Regulation and its *raison d'être*

25 Pursuant to Art. 25 (2), a Member State that comprises different territorial units with their own substantive rules on non-contractual obligations is not required to apply the Regulation to conflicts "solely between the laws of such units".

26 The rule applies where a conflict among the laws of two or more units of a Member State arises before the courts of *that same* Member State, e.g., as long as the Regulation will remain in force for the United Kingdom, where a court in Scotland is required to determine the law applicable to the non-contractual obligations resulting from a traffic accident in England.[19] If the situation were to be considered from the standpoint of a Member State other than the United Kingdom, the case would no longer be one involving a conflict *solely* between Scottish law and the law of England and Wales, and would accordingly need to be decided pursuant to the Rome II Regulation.[20]

27 Art. 25 (2) reproduces *verbatim* Art. 19 (2) of the Rome Convention on the law Applicable to Contractual Obligations. However, the function performed by Art. 25 (2) of the Rome II Regulation (and by the identical provision in Art. 22 (2) of the Rome I Regulation) is not identical to the function performed by Art. 19 (2) of the Convention. The legal basis on which the Regulation was adopted – Art. 65 of the Treaty establishing the European Community, now Art. 81 of the Treaty on the Functioning of the European Union – vests the Union with the power to enact measures aimed at developing judicial cooperation in civil matters "having cross-border implications". The latter expression is generally understood to mean that the European legislature can deal with nothing more than situations featuring an international character.[21] Although it may sometimes prove difficult to state exactly where the dividing line should be drawn between cross-border and purely domestic situations, there is, in fact, little doubt that the latter situations remain essentially the province of individual Member States. Art. 25 (2) of the Rome II Regulation must accordingly be under-

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19 In principle, the standards to be applied to determine whether a situation involves a conflict "solely" between the laws of two or more units of a given Member State should not differ from those used to determine whether the situation is one "involving a conflict of laws" within the meaning of Art. 1 (1), or to assess whether, under Art. 14 (2), apart from the choice of law made by the parties, "all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in a country other than the country whose law has been chosen".

20 Cf., in respect of contracts, the *Giuliano/Lagarde* report on the Rome Convention, OJ C 282 of 31 October 1980, *sub* Art. 19.

21 See, generally, *Papadopoulou*, Cahiers du droit européen 2002, p. 95, and *Idot*, in Le droit international privé: esprit et methods – Mélanges en l'honneur de Paul Lagarde (2005), p. 431.

stood as reiterating, for the sake of clarity, a limitation which is imposed in fact by the primary law of the European Union.

2. The possibility for Member States to regulate local conflicts in conformity with the Rome II Regulation

Although they are not under an obligation to do so, Member States may still decide to regulate conflicts solely among the laws of their territorial units roughly along the lines of the Regulation, if not fully in conformity with the provisions therein. Actually, a Member State is free to unilaterally extend the scope of application of the Regulation as to include conflicts arising solely among the laws of its territorial units. **28**

A similar extension may have a two-fold advantage. First, it facilitates the work of the seised court. Where the uniform rules are extended without exceptions (or almost without exceptions), it becomes practically irrelevant to determine whether the situation involves a conflict solely among the laws of the territorial units of the country of the forum, or rather features a connection, no matter how weak, with another State. On the other side, extension enhances international harmony of solutions. Thanks to extension, the legal relationship in question will in fact be submitted to the rules of the same sub-system, irrespective of whether the relationship itself is viewed from the standpoint of the Member State to which the matter relates or from the standpoint of a different Member State. **29**

The practical implications of an extension are all the more relevant if one considers that the Court of Justice is available, in principle, to give a preliminary ruling under Art. 267 TFEU, whenever the provision of European Union law submitted for the Court's interpretation is made applicable by the law of a Member State, even though it is outside the scope defined by EU law.[22] This means that the courts of a Member State, where the decision has been made to make use of the Regulation (or, at least, the essential provision thereof) in circumstances within the scope of Art. 25 (2) of the Rome II Regulation, are entitled to refer to the Court of Justice the interpretive questions raised by the Regulation no matter whether, in the case at hand, the latter only applies by virtue of national legislation. **30**

The United Kingdom – the only Member State for which Art. 25 (2) of the Regulation is of practical importance – chose to extend the European regime to the solution of local conflicts (as it did with the Rome Convention and, later, with the Rome I Regulation). Pursuant to Regulation 6 of the Law Applicable to Non-Contractual Obligations (England and Wales and Northern Ireland) Regulations 2008[23], the Rome II Regulation applies in England, Wales and Northern Ireland to conflicts "between the laws of different parts of the United Kingdom" or "between the laws of one or more parts of the United Kingdom and Gibraltar", as it applies in the case of conflicts between the laws of other countries. An almost identical provision is found in Regulation 4 of the Law Applicable to Non-Contractual Obligations (Scotland) Regulations 2009.[24] **31**

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22 ECJ Joined Cases C-297/88 and C-197/89 – *Dzodzi*, ECR I-3763 [1990], para. 36 *et seq.*; ECJ Case C-231/89 – *Gmurzynska-Bscher*, ECR I-4003 [1990], para. 15 *et seq.*

23 UK Statutory Instrument No. 2986 of 2008, available at http://www.legislation.gov.uk.

24 Scottish Statutory Instrument No. 404 of 2008, available at http://www.legislation.gov.uk.

Article 26: Public policy of the forum

The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum.

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I. General purpose

1 The general purpose of the provision is to safeguard the fundamental substantive rules and principles in force in the forum State legal order, rules which it does not waive even where the relationship is international and the law applicable, according to the choice of law rules, is foreign. It is a fundamental institution of Private International Law, which assures that the justice of Private International Law is pursued not only at a conflictual level, through the

choice of the most suitable connecting factors, but also at a substantive level, namely where fundamental substantive values are at stake.[1]

The unification of choice of law rules at the international and European level cannot hinder this institution, although it needs to be shaped in such a way as not to conflict with the purpose of unification by allowing domestic courts to easily discard the governing foreign law.[2] This may lead to certain qualifications of the public policy exception, as well as to limits on its operation. **2**

The wording of Art. 26 – "The application of a provision of the law of any country specified by this Regulation" – shows that the public policy exception applies to all non-contractual obligations covered by the Regulation, regardless as to whether the applicable law is designated by the parties or by an objective connecting factor.[3] It is also, in principle, irrelevant that the foreign governing law belongs to a Member State of the EU or to a third Sate, since tort law is not unified within the EU.[4] **3**

II. Legislative history

The public policy clause of Art. 26 corresponds to the provision of Art. 22 of the *Commission's Proposal of 2003*.[5] The Commission's Proposal, however, contained three other provisions relevant to the matter. **4**

First, a special public policy clause was provided by Art. 6 (1) regarding non-contractual obligations arising out of a violation of privacy or of certain rights relating to the personality. This provision has not been adopted in the Regulation following the exclusion of these non-contractual obligations from its scope (Art. 1 (2) (g)).

Second, a specific Community public policy clause was contained in the third indent of Art. 23, providing that the Regulation "shall not prejudice the application of provisions contained in the Treaties establishing the European Communities or in acts of the institutions of the European Communities which:

(…)
– prevent application of a provision or provisions of the law of the forum or of the law designated by this Regulation."

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1 See *Neuhaus*, Die Grundbegriffe des internationalen Privatrechts (2nd ed. 1976) 43 *et seq*.

2 See also *von Hein*, in: Calliess (ed.), Rome Regulations (2nd ed. 2015), Art. 26 Rome II para. 1.

3 See also *Fawcett*/*Carruthers*/*North*, in: Cheshire/North/Fawcett, Private International Law (14th ed. 2008), 852; *Jünker*, in Münchener Kommentar zum Bürgerlichen Gesetzbuch, Vol. X (6th ed. 2015), Art. 26 Rom II-VO para. 15; *von Hein*, in: Calliess (ed.), Rome Regulations (2nd ed. 2015), Art. 26 Rome II para. 2.

4 See also *Jünker*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Vol. X (6th ed. 2015), Art. 26 Rom II-VO para. 1, and *Jakob*/*Picht*, in: Rauscher (ed.), Europäisches Zivilprozess- und Kollsionsrecht Kommentar, Vol. III, Rom I-VO. Rom II-VO (4th ed. 2016), Art. 26 Rom II-VO (2011) paras. 12–13, but distinguishing the cases in which the governing rules are based upon EU Law. In general, on the issue, see *Spickhoff*, Der ordre public im internationalen Privatrecht. Entwicklung, Struktur, Konkretisierung (1989), 89–90.

5 COM(2003) 427 final.

Lastly, Art. 24 contained a special Community public policy clause stating that the "application of a provision of the law designated by this Regulation, which has the effect of causing non-compensatory damages, such as exemplary or punitive damages, to be awarded shall be contrary to Community public policy". According to the Explanatory Memorandum,[6] this was a practical application of the Community public policy exception provided for by the third indent of Art. 23 (1), which seemed sufficiently important to be specified, as is the case with section 40(3) of the German EGBGB. The same Memorandum defined non-compensatory damages as those serving a punitive or deterrent function instead of compensating for damage sustained by the victim or liable to be sustained by him at a future date.

5 The *Draft European Parliament Legislative Resolution of 2005*[7] proposed an Amendment of Art. 22 adding three paragraphs. The first specified that the public policy exception might apply in the case of a breach of fundamental rights and freedoms as enshrined in the European Convention on Human Rights, national constitutional provisions or international humanitarian law. The second replaced Art. 24, leaving to the Member States courts the decision, based upon forum public policy, on the awarding of non-compensatory damages under a foreign law. The last subjected the operation of public policy against the law of a Member State to a request by one of the parties.

6 In its *Amended Proposal of 2006*,[8] the Commission refused the specification of instruments relevant to public policy, arguing that there are variations in the content of the public policy of Member States. It accepted the drafting changes, making clear that punitive damages are not *ipso facto* against public policy and refused to subject the operation of public policy to a request by one party because "it is for the court to ensure compliance with the fundamental values of the forum, and that task cannot be delegated to the parties, especially as they are not always legally represented".

A further formal amendment was the relocation of the provision on the relationship with other provisions of Community law to Art. 3, keeping the Community public policy clause in (1)(c).

7 The *Common Position adopted by the Council in 2006* deleted this Community public policy clause as well as the provision on non-compensatory damages.[9] This second deletion was aimed at accommodating the concerns of the UK and other Member States whose legal systems allow the awarding of non-compensatory damages.[10] This position prevailed and, as a consequence, the final text of the Regulation only provides for a general public policy clause of the forum in Art. 26. Non-compensatory damages are only addressed in Recital 32, which states that where excessive, they may, "depending on the circumstances of the case and the legal order of the Member State of the court seized, be regarded as being contrary to the public policy (*ordre public*) of the forum". The issue will be dealt with below (IV).

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6 P. 29.

7 A6-0211/2005.

8 COM (2006) 83 final, Explanatory Memorandum, 4–5.

9 (EC) No. 22/2006 of 25 September 2006.

10 See *von Hein*, in: Calliess (ed.), Rome Regulations (2nd ed. 2015), Art. 26 Rome II para. 12.

III. Concept of public policy

In the context of Art. 26, public policy (*ordre public*) is understood in the Private International Law sense, as a more restrictive concept than public policy in the domestic law sense.[11] This is common to Art. 16 of the Rome Convention on the Law Applicable to Contractual Obligations and to all European Regulations unifying Private International Law.[12] **8**

Recital 32 and the Explanatory Memorandum to the Commission's Proposal, as well as the Explanatory Reports and the ECJ case law regarding the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and the Brussels Regulations provide guidelines on the determination of the content of this public policy. **9**

The *exceptionality* of the public policy clause is pointed out in Recital 32 and this exceptionality is reinforced by the wording of Art. 26 when it requires, for its operation, a manifest incompatibility with the public policy of the forum.[13] **10**

According to the Explanatory Memorandum to the Commission's Proposal, Art. 26 is inspired by Art. 16 of the Rome Convention, and therefore, the comments contained in the Giuliano/Lagarde Report on this provision are also relevant in this context. **11**

The guidelines on the determination of public policy content have to be conciliated with its nature as a general clause, since it is not possible to establish, *a priori*, its content, i.e., to list a set of rules which exhaust its content. This is a consequence not only of the difficulty of listing exhaustively the fundamental rules and principles of the forum legal order, but also, and mainly, due to the dependence of public policy operation on the circumstances of the particular case. It is not sufficient that the content of the foreign law violates a fundamental rule or principle of the forum legal order. The operation of public policy further requires that the result of the application of this foreign law is fully unacceptable in the light of all circumstances of the particular case.[14] Thus, it has been written that the public policy "is a very unruly horse".[15] **12**

In legal systems in which International Law is automatically received in the domestic legal order, public policy is also comprised of fundamental rules and principles of International Law. International public policy is, therefore, a necessary element of forum public policy.[16] The **13**

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11 Cf. Explanatory Memorandum to the Commission's Proposal, 28.

12 Namely Article 21 of Rome I Regulation, Article 12 of Rome III Regulation and Article 35 of Regulation on successions.

13 Cf. Explanatory Memorandum to the Commission's Proposal, 28. The exceptionality of the public policy clause was also enshrined in the Resolution of the Institut de Droit International on the Equality of Treatment of the Law of the Forum and of Foreign Law (Saint-Jacques-de-Compostelle, 1989).

14 See also Report on the Convention on the law applicable to contractual obligations by Mario Giuliano and Paul Lagarde, OJ C 282, 31/10/1980, p. 1–50, p. 0001 – 0050, comment to Article 16.

15 See *Katzenbach*, "Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law", The Yale Law Journal 65 (1956) 1087, quoting the English ruling in the case *Richardson* v. *Mellish* 1824 [294 *E.R* 303], which referring to public policy in general, states that "is a very unruly horse, and when once you get astride it you never know where it will carry you".

16 See *Goldman*, "La protection internationale des droits de l'homme et l'ordre public international dans le

same may be said of the fundamental rules and principles stemming from the international conventions in force in the forum legal order, such as the European Convention on Human Rights.[17]

14 The fundamental principles of EU Law and the Charter of Fundamental Rights of the EU (Art. 6 of the EU Treaty) are also part of the public policy of Member States.[18] Therefore, the question as to whether there is a "European Union public policy" has no practical meaning in the context of Art. 26.[19]

15 Under Art. 26, public policy only operates *a posteriori*, after the determination of the applicable law. Overriding mandatory rules of the forum, which claim applicability *a priori*, are relevant under Art. 16, not under Art. 26. Rules of safety and conduct in force at the place of the event giving rise to liability shall be taken into account, in virtue of Art. 17, where the liability is governed by other law.

16 Special public policy clauses of Member States that do not trigger the overriding applicability of mandatory rules may be applied under Art. 26, insofar as they constitute a concretization of the concept of public policy relevant for this provision (above III) and insofar as they respect the limits to its operation (below VI).[20] Special public policy clauses contained or based upon secondary EU law are applicable under Art. 27.[21]

17 Since the public policy clause operates *a posteriori*, it requires a comparison between the effects produced by the foreign law and those that would result from the application of the

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fonctionnement de la règle de conflit de lois", in: René Cassin Amicorum Discipulorumque Liber (1969), 449 *et seq*.; *Dolinger*, "World Public Policy: Real International Public Policy in the Conflict of Laws", *Texas International Law Journal* 17 (1982) 167, 170 *et seq*. and 192–193; *Moura Ramos*, Da Lei Aplicável ao Contrato de Trabalho Internacional (1991), 307–308, fn. 471, with more references; *Vischer*, "General Course on Private International Law", RCADI 232 (1992) 9, 101.

17 Strictly speaking, the rules and principles on fundamental rights guaranteed by Public International Law of universal scope and by international conventions which define their scope of applicability are applicable with autonomy in relation to the public policy exception – see *Lima Pinheiro*, Direito Internacional Privado, vol. I (3rd ed. 2014) § 48 A. Difficulties may arise where the convention does not define its scope of applicability. The autonomy of these conventions in relation to the public policy exception is evidenced by the fact that they operate as a limit to the applicability of the foreign law even in the absence of a significant relationship with the forum State – see *Lagarde*, Public Policy, in: IECL, vol. III, cap. 11 (1994), para. 56. See also, regarding the Rome II Regulation, *Fawcett*/*Carruthers*/*North*, Cheshire, North & Fawcett Private International Law (14th ed. 2008), 853; *Plender*/*Wilderspin*, The European Private International Law of Obligations (4th ed. 2015), paras. 27-029-27-030; and *Schulze*, in: Hüßtege/Mansel (eds.), Nomos BGB Kommentar. Rom-Verordnungen zum Internationalen Privatrecht (2013), para. 7.

18 See *Sonnenberger*, "Europarecht und Internationales Privatrecht", ZvglRWiss 95 (1996) 3, 42–43, and ECJ in the case *Eco Swiss* (1999) ECR 1999 I-03055.

19 See also *Jünker*, in Münchener Kommentar zum Bürgerlichen Gesetzbuch, Vol. X (6th ed. 2015), Art. 26 Rom II-VO para. 4, and *von Hein*, in: Calliess (ed.), Rome Regulations (2nd ed. 2015), Art. 26 Rome II para. 5.

20 See below fn. 43 and V.

21 See also *Heinze*, "Bausteine eines Allgemeinen Teils des europäischen Internationalen Privatrechts", in: FS Kropholler (2008) 105, 122–123.

forum law.[22] In virtue of its exceptionality, the clause only intervenes as a limit to the application of foreign law where the solution given to the case is not only divergent from the solution that would result from the application of the forum law, but also manifestly unacceptable.

18 Strictly speaking, the manifestly unacceptable nature of the solution should not be confused with the degree of divergence between the foreign law and the forum law. In effect, the solution given to the case by foreign law may be incompatible with the forum law, even if this contains similar provisions, when these provisions protect national public interests or local private interests and clash with the foreign provisions in the particular case.[23]

19 In legal systems in which the Constitution enshrines the basic values of the community, the content of the public policy clause tends to be determined in the light of constitutional principles.[24] This does not preclude the possibility that, in those systems, there are fundamental principles without constitutional standing relevant to the public policy clause, but these should result from an implementation and consolidation in important sectors of the legal system, through legislative enactment or custom, legitimated by the collective will expressed by political power bodies or by social consensus. Mere particular solutions, which result from circumstantial or occasional options of the legislator in matters of Private Law do not meet this test. The same may be said, in principle, of exceptional solutions in these matters.

A fortiori, mere academic doctrines, as well as solutions developed by the case law in Civil Law systems, of controversial meaning and scope, can never amount to fundamental conceptions of justice relevant to the public policy exception.

20 Every court that applies this clause shall justify clearly its ruling in conformity with these guidelines.

21 Another feature of the public policy clause is its *evolutionary* character. The public policy content follows the evolution of the legal order, namely of the fundamental values constitutionally enshrined. The court shall take into account the content of the public policy clause at the moment in which it rules on the case.[25]

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22 Cf. *Jayme*, Identité culturelle et intégration: le droit international privé postmoderne, RCADI 251 (1995) 9, 227–228.

23 See *Pérez-Beviá*, La aplicación del Derecho público extranjero (1989) 62–63, and also case mentioned by *Batiffol/Lagarde*, Droit international privé, vol. I (8th ed. 1993) 576 and para. 358 fn. 43.

24 See *Gamillscheg*, "Ordine pubblico e diritti fondamentali", in: Studi Roberto Ago, vol. IV (1987) 89, 104; *Fernández Rozas/Sánchez Lorenzo*, Derecho Internacional Privado (8th ed. 2015) para. 128; *Moura Vicente/Helena Brito*, in: Esplugues/Iglesias/Palao, Application of Foreign Law, "Portugal" (2011) 301, 309; and *Sousa Brito*, in: Est. Miguel Galvão Teles, vol. I, "O que é o direito para o jurista ?" (2012) 27, 40. See also *Menezes Cordeiro*, in: Tratado de Direito Civil, vol. II, Parte Geral/Negócio Jurídico (4th ed. 2014) 616.

25 See also, specifically regarding Article 26 of the Regulation, *Jakob/Picht*, in: Rauscher (ed.), Europäisches Zivilprozess- und Kollsionsrecht Kommentar, Vol. III, Rom I-VO. Rom II-VO (4th ed. 2016), Art. 26 Rom II-VO, para. 25; *Schulze*, in: Hüßtege/Mansel (eds.), Nomos BGB Kommentar. Rom-Verordnungen zum Internationalen Privatrecht (2013), para. 22.

22 Last but not the least, the public policy clause is characterized by its *relativity*, i.e., in that its operation depends on the intensity of the connection between the case and the forum State.[26] The weight of the different contacts with the forum State depends, to a certain extent, on the matter at stake. The place of the damage and the habitual residence of the parties are contacts obviously relevant, but other contacts, such as the nationality of the parties, may be relevant depending on the type of non-contractual obligation involved. In many situations, the case has a significant relationship with the forum State on which the jurisdiction of its courts is grounded. However, this does not happen in certain situations, namely where jurisdiction is based upon an agreement by the parties.

A given result may be manifestly unacceptable when the relationship with the forum is more significant, but not when the relationship is less significant. In any case, the public policy clause shall apply even in the absence of a significant relationship where fundamental rights of special weight are at stake.[27]

23 In this context, the connection between the case and another State in which fundamental rules and principles convergent with those belonging to the public policy of the forum State are in force, shall also be taken into account. Thus, in the absence of a sufficient connection with the forum State, the operation of public policy may be justified by the intensity of the connection with another State in which a convergent rule or principle of public policy is in force.[28] This foreign State may be either a Member State of the EU or a third State.[29]

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26 See *Batiffol*/*Lagarde*, Droit international privé, vol. I (8th ed. 1993), 576 *et seq*., and *Gaudemet-Tallon*, "Le pluralisme en droit international privé: richesses et faiblesses (Le funamble et l'arc-en-ciel)", RCADI 312 (2005) 9, 425 *et seq*. Regarding specifically Article 26 of the Regulation, see *Fuchs*, "Article 26", in: Huber (ed.), Rome II Regulation. Pocket Commentary (2011), para. 14; *Jünker*, in Münchener Kommentar zum Bürgerlichen Gesetzbuch, Vol. X (6th ed. 2015), Art. 26 Rom II-VO para. 20; *Jakob*/*Picht*, in: Rauscher (ed.), Europäisches Zivilprozess- und Kollsionsrecht Kommentar, Vol. III, Rom I-VO. Rom II-VO (4th ed. 2016), Rom I-VO. Rom II-VO, Art. 26 Rom II-VO, para. 7; and *Schulze*, in: Hüßtege/Mansel (eds.), Nomos BGB Kommentar. Rom-Verordnungen zum Internationalen Privatrecht (2013), para. 19.

27 Cf. *Lewald*, "Règles générales des conflits de lois", RCADI 69 (1939) 1, 123; *Ferrer Correia*, Lições de Direito Internacional Privado I (2000), 413–414; *Baptista Machado*, Lições de Direito Internacional Privado (2nd ed. 1982), 264; *Fawcett*/*Carruthers*/*North*, Cheshire, North & Fawcett Private International Law (14th ed. 2008), 145; and *Nygh*, Conflict of Laws in Australia (6th ed. 1995), 284–285. See also *Supreme Court of Pennsylvania* in the case *David* v. *Veitscher Magnesitwerke Actien Gesellschaft* (1944) 35 A. 2d 346 (Pa. 1944). For the view that the protection of fundamental rights shall not depend, as a rule, on a connection with the forum State, see *Kinsch*, "Droits de l'homme, droits fondamentaux et droit international privé", RCADI 318 (2005) 9, 226 *et seq*., and *Basedow*, "The Law of Open Societies – Private Ordering and Public Regulation of International Relations. General Course on Private International Law", RCADI 360 (2012) 9, 445–446. Compare, for an entirely contrary view, *Gaudemet-Tallon*, "Le pluralisme en droit international privé: richesses et faiblesses (Le funamble et l'arc-en-ciel)", RCADI 312 (2005) 9, 429–430.

28 See also the remarks of *Mayer*, "Le phénomène de la coordination des ordres juridiques étatiques en droit privé. Cours générale de droit international privé", RCADI 327 (2007) 9, 315–316, 327–328 and 350, having in mind matters of personal status.

29 Compare *Jakob*/*Picht*, in: Rauscher (ed.), Europäisches Zivilprozess- und Kollsionsrecht Kommentar, Vol. III, Rom I-VO. Rom II-VO (4th ed. 2016), para. 8; *Schulze*, in: Hüßtege/Mansel (eds.), Nomos BGB

The public policy exception is the only general limit to the application of a foreign governing law provided for by the Regulation. Specific limits to the application of the law chosen by the parties in cases connected only to one State or with EU States are provided in Art. 14 (2) and (3). Other limits are provided in Arts. 27 and 28 concerning other provisions of EU Law and international conventions to which Member States were parties at the time the Regulation was adopted and to which, at least, one third State is party. **24**

Although, strictly speaking, it is arguable that the Constitution, Public International Law and EU law may impose autonomous limits to the application of the governing foreign law,[30] whose operation does not depend on the pre-requisites of the public policy exception,[31] in practical terms it seems that Art. 26 may be invoked whenever constitutional or international rules and principles in force in the forum legal order are violated, that the compatibility of the law of a third State with self-executory EU law is required by EU treaties and that the compatibility with domestic rules which transpose Directives is, to a certain extent, assured by the provisions of Arts. 14(3) and 27 of the Regulation. Where the situation has significant contact with a third State, and there is no special choice of law rule explicitly or implicitly contained in the Directive, the compatibility with domestic rules that transpose the Directive is only relevant within the framework of Art. 26 and that of the pre-requisites required to the operation of the public policy clause under this provision. **25**

IV. Punitive or exemplary damages

Pursuant to Art. 15 (c), the "assessment of damage or the remedy claimed" are governed by the law applicable to the non-contractual obligation. While compensatory damages are mainly designed to compensate for damages actually suffered, punitive damages (or exemplary damages as they are called in English law) are mainly designed to punish the defendant and to deter others. Punitive damages may be awarded under several Common Law systems, namely under US law, as well as exceptionally under English law.[32] The expression may be understood as referring only to damages awarded in addition to actual damages suffered[33] or as also comprising damages given to punish the defendant as well as to compensate the claimant.[34] **26**

As previously mentioned (II), the proposals for a provision regarding non-compensatory damages have not been adopted by the EU legislator and, therefore, these damages are only addressed in Recital 32, which states that where excessive, they may, "depending on the **27**

Kommentar. Rom-Verordnungen zum Internationalen Privatrecht (2013), para. 21; and *von Hein*, in: Calliess (ed.), Rome Regulations (2nd ed. 2015), Art. 26 Rome II para. 19.

30 See *Lima Pinheiro*, Direito Internacional Privado, vol. I, Introdução e Direito de Conflitos. Parte Geral (3rd ed. 2014) 674 *et seq*., with more references.

31 See namely *supra* fn. 17.

32 See *Hay*, Law of the United States (4th ed. 2016), paras. 421 *et seq*; Oxford Dictionary of Law (7th ed. 2009) under "exemplary damages"; and *Fuchs*, in: Huber (ed.), Rome II Regulation. Pocket Commentary, "Article 26" (2011), paras. 20 *et seq*., remarking that some Civil Law systems within the EU, as well as EU law, also allow in some cases the award damages that go beyond compensation.

33 See Black's Law Dictionary (8th ed. 2005) under "damages, punitive damages".

34 See Oxford Dictionary of Law (7th ed. 2009) under "exemplary damages".

circumstances of the case and the legal order of the Member State of the court seized, be regarded as being contrary to the public policy (*ordre public*) of the forum".

In the light of legislative history, it is clear that this means that exemplary or punitive damages are not *ipso facto* against EU public policy and that, in principle, it depends on the legal order of the forum State to determine whether punitive damages may be awarded based upon the governing foreign law.[35] However, the wording of Recital 32 raises the issue as to whether the public policy clause may operate even if the punitive damages are not excessive. This wording might be understood in a limitative sense, but the issue is very controversial,[36] and only a ruling by the ECJ will clarify it.

28 In any case, there is a large convergence in many EU legal systems, including those that do not provide for punitive damages, in the sense that punitive damages awarded by the foreign governing law are not *de per se* against their public policy: to be contrary to their public policy they, at least, have to be excessive.[37] This understanding deserves approval in the light

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35 Cf. *Fawcett*/*Carruthers*/*North*, in: Cheshire/North/Fawcett, Private International Law (14th ed. 2008), 852; *Dicey*/*Morris*/*Collins*, in: Dicey/Morris/Collins, on the Conflict of Laws (15th ed. 2012), para. 34–082; and *von Hein*, in: Calliess (ed.), Rome Regulations (2nd ed. 2015), Art. 26 Rome II para. 20.

36 Compare *Fawcett*/*Carruthers*/*North*, in: Cheshire/North/Fawcett, Private International Law (14th ed. 2008), 852; *Brière*, "Le règlement (CE) nº 864/2007 du 11 juillet 2007 sur la loi applicable aux obligations non contractuelles ('Rome II')", JDI 135 (2008) 31, paras. 55–56; *Plender*/*Wilderspin*, The European Private International Law of Obligations (4th ed. 2015) para. 27-035 but see also para. 27–036; *Fuchs*, in: Huber (ed.), Rome II Regulation. Pocket Commentary, "Article 26" (2011), paras. 6 and 27–28; *Elsa Dias Oliveira*, Da Responsabilidade Civil Extracontratual por Violação de Direitos de Personalidade em Direito Internacional Privado (2011), 638; *Anabela de Sousa Gonçalves*, Da Responsabilidade Extracontratual em Direito Internacional Privado. A Mudança de Paradigma (2013), 544, who seem to favor this view, with the contrary view suggested by *Garcimartín* Alférez, "The Rome II Regulation: On the Way Towards a European Private International Law Code", The European Legal Forum 7 (2007/3) I-77, 91; *Leible*/*Lehmann*, "Die neue EG-Verordnung über das auf außervertragliche Schuldverhältnisse anzuwendende Recht ('Rom II')", RIW 53 (2007) 721, 734–735; *Graziano*, "Das auf außervertragliche Schuldverhältnisse anzuwendende Recht nach Inkrafttreten der Rom II-Verordnung", RabelsZ. 73 (2009) 1, 74; *Jünker*, in Münchener Kommentar zum Bürgerlichen Gesetzbuch, Vol. X (6th ed. 2015), Art. 26 Rom II-VO paras. 21 *et seq*.; *Jakob*/*Picht*, in: Rauscher (ed.), Europäisches Zivilprozess- und Kollsionsrecht Kommentar, Vol. III, Rom I-VO. Rom II-VO (4th ed. 2016), paras. 23–24; *Schulze*, in: Hüßtege/Mansel (eds.), Nomos BGB Kommentar. Rom-Verordnungen zum Internationalen Privatrecht (2013), paras. 28 and 30; and *von Hein*, in: Calliess (ed.), Rome Regulations (2nd ed. 2015), Art. 26 Rome II para. 20.

37 Cf., in France, *Cour de cassation* 1/12/2010, Case *Les époux X* v. *La société Fountaine Pajot; La société AGF-IART, devenue la société Allianz IART* (*https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/1090_1_18234.html*); *Mayer*/*Heuzé*, Droit international privé (11st ed. 2014), para. 723; for a convergent view see already *Batiffol*/*Lagarde*, Droit international privé, vol. I (8th ed. 1993), 556; in Portugal, *Moura Vicente*, Da Responsabilidade Pré-Contratual em Direito Internacional Privado (2001), 705 *et seq*.; *Elsa Dias Oliveira*, Da Responsabilidade Civil Extracontratual por Violação de Direitos de Personalidade em Direito Internacional Privado (2011), 632 *et seq*.; *Anabela de Sousa Gonçalves*, Da Responsabilidade Extracontratual em Direito Internacional Privado. A Mudança de Paradigma (2013), 543 *et seq*.; compare *Menezes Cordeiro*, Tratado de Direito Civil, vol. II, Parte Geral. Negócio Jurídico (4th ed. 2014), 615–616; in Spain, Tribunal Supremo 13/11/2001, Case *Miller Import Corp.* v.

of the plurality of functions assigned to tort law in the legal systems of Member States (not only compensatory but also punitive and deterrent) and, mainly, to the exceptionality that characterizes the public policy clause (above III).

The reference made by Recital 32 to non-compensatory damages may also be of relevance regarding the material scope of applicability of the Regulation. Certain legal systems provide for liability with a mere punitive function, which does not require the causation of damage.[38] Since Art. 4 is centered on the notion of damage (including damage which is likely to occur) it could be thought that non-compensatory liability would be excluded from the relevant tort concept. Taking into consideration Recital 32, it may be deemed that non-compensatory liability, as a whole, is not excluded from the scope of the Regulation,[39] although there is a gap in the Regulation when no damage has occurred or is likely to occur. In this case, one may think that the law of the country where the tortious conduct took place shall be applicable, since this is the only significant connection available. **29**

It is, in any case, required that non-compensatory liability relates to a civil or commercial matter (Art. 1 (1)). This is the case as long as the damages are adjudicated to the claimant, but the situation can be different where the damages are adjudicated to the State or to an organization of public utility.[40] **30**

The possibility of excessive damages being against public policy is not limited to non-compensatory damages. The general idea is that, regarding both compensatory liability and non-compensatory liability, the compatibility of the damages awarded with the public policy of the forum will depend on the circumstances of the particular case and, namely, on their excessive character.[41] **31**

V. Exclusion and limitation of liability

The exclusion or excessive limitation of liability, resulting from particularly permissive **32**

Alabastres, and thereon *Calvo Caravaca*/*Carrascosa González*, Derecho Internacional Privado, vol.II (17th ed. 2017), paras. 288 *et seq*.; in the UK, *Fawcett*/*Carruthers*/*North*, in: Cheshire, North & Fawcett Private International Law (14th ed. 2008), 852; and apparently, *Dicey*/*Morris*/*Collins*, Dicey, Morris and Collins on the Conflict of Laws (15th ed. 2012), para. 34–082. It seems that Article 40(3) nos 1 and 2 of the German EGBGB, when understood in the light of the pre-requisites of the public policy exception – see *Kropholler*, Internationales Privatrecht (6th ed. 2006) 532 –, might be understood in the same manner; but compare *Jünker*, in Münchener Kommentar zum Bürgerlichen Gesetzbuch, Vol. X (6th ed. 2015), Art. 26 Rom II-VO paras. 21 *et seq*., and *Jakob*/*Picht*, in: Rauscher (ed.), Europäisches Zivilprozess- und Kollsionsrecht Kommentar, Vol. III, Rom I-VO. Rom II-VO (4th ed. 2016), Art. 26 Rom II-VO (2011), para. 24.

38 See *Wagner*, "Comparative Tort Law", in: Reimann/Zimmermann, The Oxford Handbook of Comparative Law (2006), 1006.

39 See also *Fuchs*, in: Huber (ed.), Rome II Regulation. Pocket Commentary, "Article 26" (2011), para. 10.

40 See also *Jünker*, in Münchener Kommentar zum Bürgerlichen Gesetzbuch, Vol. X (6th ed. 2015), Art. 26 Rom II-VO para. 14. Compare *Fuchs*, in: Huber (ed.), Rome II Regulation. Pocket Commentary, "Article 26" (2011), para. 10.

41 See *Jünker*, in Münchener Kommentar zum Bürgerlichen Gesetzbuch, Vol. X (6th ed. 2015), Art. 26 Rom II-VO para. 21; *von Hein*, in: Calliess (ed.), Rome Regulations (2nd ed. 2015), Art. 26 Rome II para. 21.

regimes on clauses of exclusion or limitation of liability (applicable also to non-contractual obligations) or legal rules laying down very low limits of liability or very short time-limits for liability claims, will also be, in principle, contrary to the public policy.[42]

33 In any case, Art. 26 does not apply where the liability is governed by international conventions, in force in the forum State, providing a unified substantive regime of liability and prevailing over the Regulation, nor does it apply where the non-contractual obligation is excluded from the scope of the Regulation, as is the case of those arising out of nuclear damage (Art. 1 (2)(f)).[43]

VI. Limits to the operation of public policy

34 As above mentioned (I and III), Art. 26 refers to the public policy (*ordre public*) of the forum State. The ECJ has repeatedly stated, in relation to the recognition of judgments of other Member States under the Brussels Convention, the Brussels I Regulation and the Brussels II*bis* Regulation, that although the Contracting/Member States, in principle, remain free to determine, according to their own conceptions, what public policy requires, the limits of this concept are a matter for interpretation of the Convention/Regulation subject to the competence of the ECJ.[44]

The control over the limits within which the public policy clause may operate is especially relevant where the foreign governing law belongs to another Member State (in parallel with the recognition of judgments of other Member States).

35 This control mainly concerns the exceptional character of the public policy clause (above III). Thus, under the Brussels Convention and the Brussels I Regulation, the ECJ stated that recourse to the public policy clause can be envisaged only where recognition or enforcement of the judgment given in another Member State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought, inasmuch as it would infringe upon a fundamental principle. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in

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42 See also *Audit*, Droit international privé (7th ed. 2013), para. 886, with reference to the French case law; *Elsa Dias Oliveira*, Da Responsabilidade Civil Extracontratual por Violação de Direitos de Personalidade em Direito Internacional Privado (2011), 635; *von Hein*, in: Calliess (ed.), Rome Regulations (2nd ed. 2015), Art. 26 Rome II para. 23. See further *Graziano*, "Das auf außervertragliche Schuldverhältnisse anzuwendende Recht nach Inkrafttreten der Rom II-Verordnung", RabelsZ. 73 (2009) 1, 74–75.

43 From the special public policy clause of Article 40(3) No. 3 of the German EGBGB results that claims under a foreign law cannot be made to the extent that they conflict with an international convention in force in Germany even if it is not under the spatial scope of application of the convention – see *Kropholler*, Internationales Privatrecht (6th ed. 2006), 532–533. It seems that this special clause is superseded by Article 26 within the scope of the Regulation, because it cannot be seen as a concretization of that provision. See also *von Hein*, in: Calliess (ed.), Rome Regulations (2nd ed. 2015), para. 23.

44 Cf. *Krombach*, Case C-7/98 (ECR I-1956), para. 22; *Renault*, Case C-38/98 (ECR I-02973), para. 27; *Apostolides*, Case C-420/07 (ECR I-03571), para. 56; *flyLAL ./. Lithuanian Airlines*, Case C-302/13, nyr, para. 47; *Diageo Brands*, Case C-681/13, nyr, para. 42; and *Meroni*, Case C-559/14 (ECLI:EU:C:2016:349), para. 40.

which enforcement is sought or of a right recognized as being fundamental within that legal order.[45]

This should apply, *mutatis mutandis*, to recourse to the public policy clause as a limit to the applicability of a foreign governing law under Art. 26.[46] From the widespread idea that public policy has an attenuated effect regarding the recognition of situations constituted in a foreign country and of foreign judgments,[47] it could be inferred that the parallel between the case law of the Brussels Convention and Regulations and Art. 26 should be relativized.[48] In my opinion, however, this is doubtful. Ultimately, what matters is not the distinction between the constitution and the recognition of a situation, but the intensity of the connection between the situation and the forum State at each relevant moment.[49] A situation that has no sufficient connection with the forum State at the time of its constitution to trigger the operation of public policy can naturally be invoked later in an incidental matter regarding effects that are not, in themselves, contrary to the public policy. In the case of the recognition of a foreign judgment, as well, what matters is the intensity of the connection between the situation, at the time of its constitution, and the State of recognition. If this connection was strong, I see no reason for an attenuated effect.

A further limit within which the public policy clause may operate concerns the compatibility **36**
of this operation with the Charter of Fundamental Rights of the EU. This limit, mentioned in Recital no 25 of Rome III Regulation and in Recital 58 of Regulation on successions, will be more significant in personal status matters, but its relevance in patrimonial law shall not be excluded.

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45 Cf. *Krombach*, Case C-7/98 (ECR I-1956), para. 37; *Renault*, Case C-38/98 (ECR I-02973), para. 30; *Gambazzi*, Case C-394/07 (ECR I-02563), para. 27; *Apostolides*, Case C-420/07 (ECR I-03571), para. 59; and *P.*, Case C-455/15 PPU, nyr, para. 39; *flyLAL ./. Lithuanian Airlines*, Case C-302/13, nyr, para. 49; *Diageo Brands*, Case C-681/13, nyr, para. 44; and *Meroni*, Case C-559/14 (ECLI:EU:C:2016:349), para. 45. See also *Pocar*, "Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Lugano on 30 October 2007 – Explanatory report", OJ C 319/1, of 23/12/2009, para. 133.

46 Cf. Explanatory Memorandum to the Commission's Proposal, 28. See also *Lima Pinheiro*, "Choice of law on non-contractual obligations between communitarization and globalization. A first assessment of EC Regulation Rome II", Rivista di diritto internazionale privato e processuale 44 (2008) 5, 35; *Fawcett/Carruthers/North*, in: Cheshire/North/Fawcett, Private International Law (14th ed. 2008), 853; *Dickinson*, The Rome II Regulation (2nd ed. 2010), paras. 15.05–15.07; *Dicey/Morris/Collins*, in: Dicey/Morris/Collins, on the Conflict of Laws (15th ed. 2012), para. 34–02; and *von Hein*, in: Calliess (ed.), Rome Regulations (2nd ed. 2015), para. 17.

47 See, namely, *Batiffol/Lagarde*, Droit international privé, vol. I (8th ed. 1993), 581; *Isabel de Magalhães Collaço*, Direito Internacional Privado II (1959), 428; *Ferrer Correia*, Lições de Direito Internacional Privado I (2000), 414 *et seq.*; *Baptista Machado*, Lições de Direito Internacional Privado (2nd ed. 1982), 267; *Marques dos Santos*, Direito Internacional Privado. Sumários (2nd ed. 1987), 188; *Moura Ramos*, "L'ordre public international en droit portugais" (1998), in: Estudos de Direito Internacional Privado e de Direito Processual Civil Internacional (2002), 245, 255–256; and *Kropholler*, Internationales Privatrecht (6th ed. 2006), 667.

48 For this view, see *von Hein*, in: Calliess (ed.), Rome Regulations (2nd ed. 2015), Art. 26 Rome II para. 18.

49 See *Lima Pinheiro*, Direito Internacional Privado, vol. I – Introdução e Direito de Conflitos/Parte Geral (3rd ed. 2014), 672. See further *Lagarde*, Public Policy, in: IECL, vol. III, cap. 11 (1994), paras. 48 and 51.

37 On the other hand, the operation of the public policy clause is especially justified where fundamental rights that constitute "general principles" of the EU Law are at stake, namely those set out in the Charter of Fundamental Rights of EU (Art. 6 (1) of the EU Treaty) and in the European Convention for the Protection of Human Rights and Fundamental Freedoms and that result from the constitutional traditions common to the Member States (Art. 6 (3) of the EU Treaty).[50]

VII. Effect of the operation of public policy

38 The effect of the operation of the public policy clause under Art. 26 is the displacement of the result produced by the application of the foreign governing law.

39 As inherent to the institute and highlighted by the legislative history (above II), Art. 26 is applicable *ex officio* .[51]

40 Before certain domestic Private International Law systems, it is widely accepted that, when applying the public policy clause, the court shall be guided by the principle of minimal damage to the foreign governing law.[52] Where the displacement of the solution contrary to public policy does not give rise to a gap, the foreign governing law should continue to apply. That is the case where the solution contrary to public policy results from a special rule. In this case, the general rules in force in the foreign govern law shall be applied.[53] Where a gap occurs, the solution should be sought in the context of the foreign governing law, by resorting to analogy or to general legal principles. These adjustments to the solution resulting from the foreign governing law amount to cases of adaptation.[54]

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50 Cf. *Krombach*, Case C-7/98 (ECR I-1956), paras. 26–27 and 38–39; and *Gambazzi*, Case C-394/07 (ECR I-02563), para. 28.

51 See also *Leible*/*Lehmann*, "Die neue EG-Verordnung über das auf außervertragliche Schuldverhältnisse anzuwendende Recht ('Rom II')", RIW 53 (2007) 721, 734; *Dickinson*, The Rome II Regulation (2nd ed. 2010), para. 15.11; *Jünker*, in Münchener Kommentar zum Bürgerlichen Gesetzbuch, Vol. X, Rom II-VO (6th ed. 2015), para. 13; *Fuchs*, "Article 26", in: Huber (ed.), Rome II Regulation. Pocket Commentary (2011), para. 8; *Jakob*/*Picht*, in: Rauscher (ed.), Europäisches Zivilprozess- und Kollsionsrecht Kommentar. Rom I-VO. Rom II-VO (4th ed. 2016). Art. 26 Rom II-VO, para. 2; *Thorn*, in: Palandt Bürgerliches Gesetzbuch (71st ed 2012), (IPR) Rom II, Article 26 para. 1; *Schulze*, in: Hüßtege/Mansel (eds.), Nomos BGB Kommentar. Rom-Verordnungen zum Internationalen Privatrecht (2013), para. 10; and *von Hein*, in: Calliess (ed.), Rome Regulations (2nd ed. 2015), Art. 26 Rome II para. 24.

52 See namely *Kegel*/*Schurig*, Internationales Privatrecht (9th ed. 2004), 538–539; *Kropholler*, Internationales Privatrecht (6th ed. 2006), 254–255; *von Hoffmann*/*Thorn*, Internationales Privatrecht (9th ed. 2007), para. 154; specifically regarding Article 26 of the Regulation, *Dickinson*, The Rome II Regulation (2nd ed. 2010), para. 15.13; *Fuchs*, in: Huber (ed.), Rome II Regulation. Pocket Commentary, "Article 26" (2011), para. 19; and *Jakob*/*Picht*, in: Rauscher (ed.), Europäisches Zivilprozess- und Kollsionsrecht Kommentar. Bearbeitung 2011. Rom I-VO. Rom II-VO. Art. 26 Rom II-VO (2011), para. 28.

53 Where the solution contrary to public policy results from a new retroactive law, it can be applied the law in force at the time of the occurrence of the facts, as suggested by *Mayer*, "Le phénomène de la coordination des ordres juridiques étatiques en droit privé. Cours générale de droit international privé", RCADI 327 (2007) 9, 223.

54 Cf. *Baptista Machado*, "Problemas na aplicação do direito estrangeiro – adaptação e substituição", *BFDUC* (1960) 327, 336–337; *Ferrer Correia*, "Considerações sobre o método do Direito Internacional

To respect the unification purpose of the Regulation and reduce the risk of forum shopping, this approach rather than an automatic resort to the forum's substantive law, should be followed under Art. 26, even if the domestic approach is traditionally different.[55]

41 At least, as a last resort, most Private International Law systems prescribe the applicability of the forum substantive law. The Explanatory Memorandum to the Commission's Proposal also points in this direction.[56] The best solution, however, would be to resort, in the first place, to the law that is successively applicable, and only in case there is no successively applicable law, or where its applicability is also contrary to public policy, to turn to the forum substantive law. For example, where the law chosen by the parties to govern the tort does not provide for a solution compatible with the forum public policy, one should turn to the law of the place of damage before resorting to the forum law.

Article 27: Relationship with other provisions of Community law

This Regulation shall not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict-of-law rules relating to non-contractual obligations.

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55 See also *Jünker*, in Münchener Kommentar zum Bürgerlichen Gesetzbuch, Vol. X (6th ed. 2015), Art. 26 Rom II-VO para. 26; *von Hein*, in: Calliess (ed.), Rome Regulations (2nd ed. 2015), Art. 26 Rome II para. 24.

56 28. See also *Jünker*, in Münchener Kommentar zum Bürgerlichen Gesetzbuch, Vol. X (6th ed. 2015), Art. 26 Rom II-VO para. 26.

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I. Principle

1 Arts. 27; 28 deal with the relation between the Rome II Regulation and other legal instruments. The single provisions distinguish with regard to the source and quality of these instruments. Art. 27 starts with the relation to other EU instruments by establishing the principle of *lex specialis*. The other, more special instrument takes priority and precedence over the Rome II Regulation. This is on the basis of the supposition that the other legal instrument contains more specific ideas and interests so that it is better in tune with the relevant field of law than the Rome II Regulation which is based on more general thoughts.[1] It is irrelevant if the concerned instruments take effect before or after the Rome I Regulation. The principle of *lex posterior derogat legi priori* is not applied.[2] Equally irrelevant is whether the potentially conflicting other act of EU legislation expressly provides for it demanding priority.[3]

2 The other legal instrument involved prevails and takes precedence under the condition that it deals directly or indirectly with the determination of the law applicable to contractual obligations. Otherwise such instruments are not in conflict with the Rome II Regulation because the scopes of application, as regards the subject matter, do not overlap.[4]

1 *Mankowski*, in: Rauscher Art. 67 Brüssel Ia-VO note 1.
2 *Kropholler/von Hein* Art. 67 EuGVO note 2 *in fine*.
3 Tentatively *contra David C. Jackson*, Enforcement of Maritime Claims (3rd ed. 2000) para. 6.6.
4 *Marongio Buonaiuti*, NLCC 2009, 923, 927; *Mankowski*, in: Rauscher, Art. 67 Brüssel Ia-VO note 2.

II. Conflict with PIL rules stemming from primary law

In the rather unlikely event that some art of interpretation unveils a conflicts rule relating to contracts in the primary law, i.e. the TFEU or the EU Treaty this conflicts rule will prevail over the Rome I Regulation at least by virtue of Art. 27,[5] if nor simply as a matter of legal hierarchy with primary law exerting precedence over any secondary rule. **3**

In particular, there does not exist something like a country of origin rule in primary law.[6] The ECJ itself has denied the existence of such rule.[7] The fundamental freedoms provide yardsticks for a control in the negative; they do not establish rules positively. The negative outcome of a control procedure results in a negative order not to apply the law not conforming and does not urge to apply a certain law positively.[8] On the other hand, even the laws of the country of origin are subject to such control.[9] Furthermore, a positive country of origin rule would fit oddly with the "passive" fundamental freedoms of the demand side.[10] A not existing rule can of course not trigger Art. 27,[11] regardless whether it would really be a conflicts rule if it ever existed. **4**

III. PIL rules stemming from secondary legislation

There are some legal instruments of secondary EU legislation gaining relevance for the purposes of Art. 27. Art. 27 does not refer to any Annex listing which Acts of EU law are concerned. Nor does Art. 27 specify conditions to be fulfilled by qualifiers. **5**

Art. 23 Proposal was at least more verbose, and its (2) attempts to add a certain quality: **6**

"(1) This Regulation shall not prejudice the application of provisions of Community law contained in the Treaties establishing the European Community or in acts of the institutions of the European Community which:
- in relation to particular matters, lay down conflict-of-law rules relating to non-contractual obligations; or
- lay down rules which apply irrespectively of the national law governing the non-contractual obligation in question by virtue of this Regulation; or
- prevent application of a provision or provisions of the law of the forum or of the law designated by this Regulation.

(2) This Regulation shall not prejudice the application of Community instruments which, in

5 *Marongio Buonaiuti*, NLCC 2009, 923, 925–926.

6 In detail *Mankowski*, in: Münchener Kommentar zum Lauterkeitsrecht (2nd ed. 2014) IntWettbR notes 78–83.

7 *Germany/Parliamant and Council* (Case C-233/94), [1997] ECR I-2405 para. 64.

8 *Brödermann*, in: Brödermann/Iversen, Europäisches Gemeinschaftsrecht und Internationales Privatrecht (1995) para. 411; *Schauer*, in: Blaho/Švidroń (eds.), Kodifikation, Europäisierung und Harmonisierung des Privatrechts (Bratislava 2005), p. 83, 92.

9 *Mankowski*, IPRax 2002, 257 (261).

10 *Heuzé*, in: Mélanges Paul Lagarde (2005), p. 393, 408.

11 *Philip Denninger*, Grenzüberschreitende Prospekthaftung und Internationales Privatrecht (2015) pp. 255–257.

relation to particular matters and in areas coordinated by such instruments, subject the supply of services or goods to the laws of the Member State where the service-provider is established and, in the area coordinated, allow restriction on freedom to provide services or goods originating in another Member State only in limited circumstances."

7 Envisaged by, and the background to, Art. 23 (2) Proposal was the country-of-origin principle as enshrined in Art. 3 E-Commerce Directive[12]. It has been subject to a heated and very intense debate[13] whether Art. 3 E-Commerce-Directive constitutes a conflict rule[14] or only a substantive rule,[15] or something in between[16].

8 For practical purposes, the most prominent case of a special conflicts rule taking precedence to the Rome II Regulation is Art. 3 General Data Protection Regulation[17] (GDPR) after it has become effective on 25 May 2018.[18] Art. 3 (1) GDPR renders the GDPR applicable to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the EU, regardless of whether the processing takes place in the EU or not.

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12 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ 2000 L 178/1.

13 See the references in the following footnotes and *Fallon*/*Meeusen*, ERCDIP 91 (2002), 435; *Fallon*/*Meeusen*, Private (2002) 4 Yb. PIL 37; *Michael Hellner*, in: Angelika Fuchs/Muir Watt/Pataut (dir.), Les conflits de lois et le système juridique communautaire (2004), p. 205; *Henning-Bodewig*, GRUR 2004, 822; *Kur*, in: FS Willi Erdmann (2002), p. 629; *Landfermann*, in: FS 75 Jahre Max-Planck-Institut für Privatrecht (2001), p. 503; *Leible*, in: Nordhausen (ed.), Neue Entwicklungen in der Dienstleistungs- und Warenverkehrsfreiheit (2002), p. 71; *Lurger*/*Vallant*, RIW 2002, 188; *Morshäuser*, Internet-Werbung im europäischen Binnenmarkt (2003); *Naskret*, (2003); *Ohly*, GRUR Int. 2001, 899; *Piekenbrock*, GRUR Int. 2005, 997; *Norbert Reich*, in: Büllesbach/Thomas Dreier (eds.), Konvergenz in Medien und Recht: Konfliktpotenzial und Konfliktlösung (2002), p. 21; *Ruess*, Die E-Commerce-Richtlinie und das deutsche Wettbewerbsrecht (2003); *Thünken*, IPRax 2001, 15; *Thünken*, (2002) 51 ICLQ 909; *Thünken*, Das kollisionsrechtliche Herkunftslandprinzip (2003).

14 So in particular *Mankowski*, ZVglRWiss 100 (2001), 137; *Mankowski*, in: Aufbruch nach Europa – FS 75 Jahre Max-Planck-Institut für Privatrecht (2001), p. 595; *Mankowski*, CR 2001, 630; *Mankowski*, IPRax 2002, 257; *Mankowski*, in: Münchener Kommentar zum Lauterkeitsrecht (2nd ed. 2014), IntWettbR notes 48–73.

15 So *Spindler*, MMR 1999, 199 (206); *Hans-Jürgen Ahrens*, CR 2000, 835 (837); *Glöckner*, ZVglRWiss 99 (2000), 278 (305 f.); *Fezer*/*Koos*, IPRax 2000, 349 (352)-353; *Rolf Sack*, WRP 2001, 1408 (1417); *Rolf Sack*, WRP 2002, 271 (277); *Anja Verena Schefold*, Werbung im Internet und das deutsche Internationale Privatrecht (2004) p. 235.

16 So in varying variations OLG Köln K&R 2014, 43 with note *Court-Coumont*; *Spindler*, ZHR 165 (2001), 324 (334, 336); *Spindler*, IPRax 2001, 400 (401); *Spindler*, RIW 2002, 183 (185); *Spindler*, NJW 2002, 921 (926); *Spindler*, RabelsZ 66 (2002), 633 (652)-653; *Spindler*, in: Gounalakis (ed.), Rechtshandbuch Electronic Business (2003), § 9 notes 80–100; *Croquenaire*/*Lazaro*, in: Le commerce électronique européen sur les rails? (2001), p. 41, 50 no. 91 and also *Francq*, Rev. ubiquité 7/2000, 47, 66.

17 Regulation 679/2016/EU of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, repealing Directive 95/46/EEC (General Data Protection Regulation), OJ EU 2016 L 119/1.

18 In more detail on the conflict-of-law issues of the GDPR *Brkan,* EDPL 2016, 1; *Christian Kohler,* RDIPP 2016, 653; *de Miguel Asensio,* REDI 69 (2017), 5; *Melcher,* in: Gössl (ed.), Politik und Internationales rivatrecht (2017), p. 129; *Lüttringhaus,* ZvglRWIss 117 (2018), 50.

However, the key notion of 'establishment' is not defined in the catalogue of Art. 4 GDPR, but rather circumscribed in Recital (22) 2nd sentence GDPR. Art. 3 (2) GDPR extends the territorial scope of the GDPR to the processing of personal data of persons who are in the EU by a controller or processor not established in the EU, where the processing activities are related to (a) the offering of services or goods to such data subjects in the EU or (b) the monitoring of their behavior as far as their behavior takes place in the EU. This gains relevance for private law aspects since Art. 82 GDPR grants damages in an autonomous European manner.

Usually, the other instruments of EU law do not regulate questions of conflicts law. Due to respect for the Rome II Regulation, some of them intentionally even leave the area of conflicts law concerned out of consideration, at least if taken at face value and verbatim. The prime example for this technique (which is very open to criticism[19]) is Art. 1 (4) var. 1 E-Commerce Directive. Likewise, pursuant to its Arts. 3 (2); 17 (15) the Services Directive[20] is not concerned with private international law, but only with substantive law.[21] But on the other hand, some influence may result from other legal instruments. Such constellations may be provided for by the application of Art. 27.[22] If one is prepared to qualify Art. 3 E-Commerce-Directive and its national implementations as choice of law rules,[23] they will gain precedence over the Rome II Regulation by virtue of Art. 27. Another possible candidate whose character is subject to debate is Art. 6 (2) subpara. 1 Prospectus Directive[24].[25] The Data Protection Directive[26] is potentially not a competitor,[27] but the case would be entirely dif- **9**

19 See in particular *Mankowski*, in: Münchener Kommentar zum Lauterkeitsrecht (3rd ed. 2018), IntWettbR notes 48–52.

20 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ EU 2006 L 376/36.

21 *Kieninger*, in: Ferrari/Kieninger/Mankowski/Otte/Saenger/Götz Schulze/Ansgar Staudinger, Internationales Vertragsrecht (2nd ed. 2012) Art. 23 Rom I-VO note 5; *Leible*, in: Nomos Kommentar BGB, Art. 23 Rom I-VO note 9.

22 See Aud. Prov. Santa Cruz de Tenerife REDI 2002, 378 with note *Jiménez Blanco*; *Heinig*, GPR 2010, 36 (41); *Steinrötter*, Beschränkte Rechtswahl im Internationalen Kapitalmarktprivatrecht und akzessorische Anknüpfung an das Kapitalmarktordnungsstatut (2014) pp. 152–157.

23 *Pro* LG Hamburg NJOZ 2013, 1981 (1983). *Contra* BGH GRUR 2012, 850 (852) – rainbow.at II; BGH GRUR 2013, 751 (752) – Autocomplete-Funktion; OLG Stuttgart NJW-RR 2014, 423 (424).

24 Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC, OJ EC 2003 L 345/64.

25 Negating a conflictual character *Benicke*, in: FS Erik Jayme (2004), p. 25, 36; *Kuntz*, WM 2007, 432 (433, 437); *Oulds*, WM 2008, 1573 (1574); *von Hein*, in: Perspektiven des Wirtschaftsrechts – Beiträge für Klaus J. Hopt (2008), p. 371, 385 *et seq.*; *Steinrötter*, Beschränkte Rechtswahl im Internationalen Kapitalmarktprivatrecht und akzessorische Anknüpfung an das Kapitalmarktordnungsstatut (2014) pp. 148–151; *Philip Denninger*, Grenzüberschreitende Prospekthaftung und Internationales Privatrecht (2015) pp. 234–235.

26 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ EC 1995 L 281/31.

27 See OGH GRUR Int 2015, 722 (725).

ferent for the General Data Protection Regulation. Less clear is the impact of Arts. 11 (2) subpara. 1, (1) 1st sentence; 24 (1) 1st sentence Prospectus Regulation.[28]

10 The scope of the EU instrument in question has to be ascertained by interpretation on its own terms,[29] particularly if it addresses matters relevant for the Rome II Regulation at all.[30] Sometimes this might require some art of interpretation or even some differentiation.

11 If the other EU Act has an optional nature only the Rome II Regulation is not prejudiced. But whether an Act is optional or, albeit optional, defines a special relation with the Rome II Regulation hinges yet again on the interpretation of that very Act.

12 Special Regulations and directives of the Union law and Decisions of the Union institutions can claim precedence. Pursuant to Art. 288 subpara. 3 TFEU (ex-Art. 249 (3) EC Treaty) directives have to be transformed into national law. Necessarily the national transforming act has to take precedence because otherwise the directive system would be inferior to the Rome I Regulation. Art. 27 does not takes this into account expressly by giving priority to national legislations harmonized pursuant to the above-mentioned EU instruments. But the overarching principle remains valid, though. Art. 67 Brussels I Regulation (and Brussels I*bis* Regulation) is more expressive and employs a better and more precise wording which should be used as model for interpreting Art. 27. This is meant to cover the national acts implementing the respective directives and transforming them into parts of national law.[31] But it does not cover national legislation which extends legislative Acts of the EU beyond their own scope (so called *überschießende Umsetzung*).[32]

13 The Passenger Rights Regulations which the EU has promulgated in order to deal with passenger rights in air traffic,[33] in rail traffic,[34] in sea and inland water traffic[35] and in overland carriage by road[36] respectively do not touch on the non-contractual realm, but only on the contractual realm. But Regulations No. 2027/97[37] and No. 392/2009[38] (the so called

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28 Regulation (EU) 2017/1129 of the European Parliament and the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC, OJ EU 2017 L 168/12.

29 See ArbG Wiesbaden NZA-RR 2000, 321 (322) = IPRspr. 1999 Nr. 131 p. 312; *Mankowski*, in: Rauscher Art. 67 note 2.

30 *Garriga Suau*, AEDIPr 2008, 876, 877.

31 *Mankowski*, in: Rauscher Art. 67 Brüssel Ia-VO note 3; *Garriga Suau*, AEDIPr 2008, 876, 877.

32 *Marongio Buonaiuti*, NLCC 2009, 923, 929.

33 Regulation (EC) No. 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation of long delay of flights, and repealing Regulation (EEC) No. 295/91, OJ EU 2004 L 46/1.

34 Regulation (EC) No. 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, OJ EU 2007 L 315/14.

35 Regulation (EU) No. 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No. 2006/2004, OJ EU 2010 L 334/1.

36 Regulation VO (EU) No. 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No. 2006/2004, OJ EU 2011 L 55/1.

"Athens Regulation" as it imports the Protocol[39] to the Athens Convention[40] into EU law) aspire at dealing with liability for accidents in air traffic and sea traffic respectively and are candidates insofar as specific unilateral conflict rules can be detected in them.[41] Art. 2 Athens Regulation certainly qualifies in this regard.[42]

A purposive interpretation of Art. 27 should lead to an approach that gives way also to implicit or implied conflict rules in other Acts of EU law which do not expressly regulate matters of PIL. The role model, albeit in the field of contract Regulation and not of non-contractual obligations, is Arts. 17; 18 Commercial Agents Directive[43] in the light of the *Ingmar* judgment of the ECJ[44].[45] Since *Ingmar* only revealed and unearthed the conflicts rule already dormant but pre-existent in Arts. 17; 18 Commercial Agents Directive it is not decisive that this conflicts rule is not expressly spelled put in a written act of legislation.[46] An implied conflicts rule is a conflicts rule nonetheless, and it takes precedence as *lex specialis*. Qualifying the respective rules as special conflicts rule for the purposes of Art. 27 relieves one of the more difficult question to which extent the rules contained in **14**

37 Council Regulation (EC) No. 2027/97 of 9 October 1997 on air carrier liability in the event of accidents, OJ EC 1997 L 285/1.

38 Regulation (EC) No. 392/2009 of the European Parliament and of the Council of 23 April 2009 on air carrier liability of carriers of passengers by sea in the event of accidents, OJ EC 2009 L 131/24.

39 Protocol of 2002 to the Athens Convention relating to the carriage of passengers and their luggage by sea, signed on 1 November 2002, IMO Doc. LEG CONF 8/10. See also Council Decision 2012/22/EU of 12 December 2011 concerning the accession of the European Union to the Protocol of 2002 to the Athens Convention relating to the carriage of passengers and their luggage by sea, 1974, with the exception of Articles 10 and 11 thereof, OJ EU 2012 L 8/1; Council Decision 2012/23/EU of 12 December 2011 concerning the accession of the European Union to the Protocol of 2002 to the Athens Convention relating to the carriage of passengers and their luggage by sea, 1974, as regards Articles 10 and 11 thereof, OJ EU 2012 L 8/13.

40 Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea, opened for signature at Athens on December 13, 1974, 1463 U.N.T.S. 20.

41 A-G *Szpunar* ECLI:EU:C:2015:325 para. 53; *Loacker*, EuZW 2015, 797 (798).

42 See *Czerwenka*, TranspR 2011, 249 (255); *Mankowski*, in: Reithmann/Martiny, Internationales Vertragsrecht (8th ed. 2015) para. 6.2146.

43 Directive 86/653/EEC of the Council of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, OJ EC 1986 L 382/17.

44 *Ingmar GB Ltd. v. Eaton Leonard Technologies, Inc.*, Case C-381/98, [2000] ECR I-9305; annotations i.a. by *Reich*, EuZW 2001, 51; *Thume*, RIW, 4/2001, I; *Jayme*, IPRax, 2001, 190; *Raynard*, JCP E, 2001 supp. n °. 2 p. 12; *Idot*, RCDIP 90 (2001), 112; *van Hoek*, SEW, 2001, 195; *Freitag*, EWIR § 89 b HGB 4/2000, 1061; *Michaels/Kamann*, EWS 2001, p. 301; *Leible/Freitag*, RIW 2001, 287; *Simon Schwarz*, ZVglRWiss 101 (2002), 45; *Ofner*, ecolex 2001, 715; *Nourissat*, Les petites affiches N° 124, 22 juin 2001, p. 14; *Wulf-Henning Roth*, (2002) 39 CML Rev. 369; *Verhagen*, (2002) 51 ICLQ 135; *Nemeth/Rudisch*, ZfRV 2001, 179; *Höller*, RdW 2001, 396; *Ansgar Staudinger*, NJW 2001, 1974; *Jacquet*, RTDcomm 2001, 1067; *Font i Segura*, EuLF 3–2000/01, 179; *Font i Segura*, Rev. der. com. eur. 9 (2001), 259; *Adobati/Giangrossi*, Dir. comm. int. 2001, 725; *Bitterich*, VuR 2002, 155; *Schwartze*, in: FS Wolfgang Kilian (2004), p. 783; *Schurig*, in: FS Erik Jayme (2004), p. 837; *Ezquerra Ubero*, in: Calvo Caravaca/Areal Ludeña (dir.), Cuestiones actuales del derecho mercantil internacional (2005), p. 193.

45 To a like result *Leible*, in: Nomos Kommentar Art. 23 note 4.

46 *Contra Martiny*, in: Münchener Kommentar zum BGB Art. 23 note 10; *Thorn*, in: Rauscher, Art. 23 note 6; *Magnus*, in: Staudinger, Art. 23 note 15; *Lüttringhaus*, IPRax 2014, 146 (148).

the Directives can be characterized as internationally mandatory rules as envisaged by Art. 16.[47]

15 Secondary law operating outside the field of private law and of the law on non-contractual obligations in particular is not addressed by Art. 27.[48] Even if an Act of secondary legislation operates in the field of non-contractual obligations and contains conflict rules this does not necessarily lead to a collision with the Rome II Regulation since there is the possibility that the respective rule itself refers to the law applicable to the conduct and thus impliedly to the Rome II Regulation. Sometimes rules of secondary law constituting specific substantive obligations might be characterised as internationally mandatory rules for the purposes of Art. 16. Art. 10 Market Abuse Directive[49] (and its national implementations), Art. 35 (4) Rating Agency Liability Regulation[50] and Arts. 74; 93 (2); 94 (1) UCITS IV Directive[51] are possibly candidates.[52]

Article 28: Relationship with existing international conventions

1. 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.

2. However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation.

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47 See *Freitag*, in: Reithmann/Martiny, para. 547; *Wulf-Henning Roth*, in: FS Ulrich Spellenberg (2010), p. 309, 319–320 with regard to Arts. 23; 9 Rome I Regulation.

48 *Steinrötter*, Beschränkte Rechtswahl im Internationalen Kapitalmarktprivatrecht und akzessorische Anknüpfung an das Kapitalmarktordnungsrecht (2014) p. 341.

49 Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), OJ EC 2003 L 96/16.

50 Regulation (EU) No. 462/2013 of the European Parliament and of the Council of 21 May 2013 amending Regulation (EC) No. 1060/2009 on credit rating agencies, OJ EU 2013 L 146/1.

51 Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), OJ EC 2009 L 362/62.

52 See *Freitag*, WM 2015, 1165 (1171).

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I. Multilateral and bilateral conventions with non-Member States

1. Ranking rule

1 Given the rather technical nature of Arts. 27 *et seq*., the most important provision amongst them is (1). The objective of (1) is to deal with possible conflicts of directly applicable law-making instruments.[1] Such conflicts may arise between the Rome II Regulation and other

eminent conventions in the area of PIL of contracts, particularly those concluded with third countries.[2] The focus lies on the multiple conventions of the Hague Conference on Private International Law in particular. The potential conflict is solved by (1)[3] allowing specialised conventions to take precedence over the Rome II Regulation, in order to ensure compliance with those conventions and to enable Member States to meet with paramount obligations as arising from international law.[4] Recital (41) cl. 1 unambiguously asserts that respect for international commitments entered into by the Member States means that this Regulation should not affect conventions relating to specific matters to which the Member States are parties. Phrased in the terminology generally prevailing in international law, (1) is a so called disconnection clause,[5] a safeguard or compatibility clause.[6] It is to secure maximum uniformity with respect to the legal order of individual Member States and their obligations towards Third States.[7] Of course, Art. 28 is only called into operation in matters which fall in the temporal[8] and the material scope of application of the Rome II Regulation as defined by Art. 1.

The application of the Regulation is deemed to be precluded solely in relation to questions governed by a specialised convention.[9] The purpose of the exception is to ensure compliance with the rules on determining the applicable law laid down by such specialised conventions, since when those rules were enacted, account was taken of the specific features of the matters to which they relate.[10] (1) emulates a *lex specialis* rule.[11] Although the Rome II Regulation generally accounts for an overall approach, this is an appropriate way to pay due regard to the particularities of some areas of the law, in particular maritime law.[12] Of course, it is a prerequisite in order for Art. 28 to become operable that the Regulation and the international convention at stake contain concurrent rules.[13] But where **2**

1 *Mankowski*, EWS 1996, 301 (302); *Gaia*, RDIPP 1991, 253, 255.

2 Conventions concluded solely among Member States do not lie within the scope of Art. 71, but are dealt with in Art. 69.

3 On the legislative history of this rule *Bonfanti*, in: Boschiero (a cura di), La nuova disciplina comunitaria della legge applicabile ai contratti (Roma I) (2009), p. 383, 392–394.

4 See *The "Po"* [1991] 2 Lloyd's Rep. 206, 209 (C.A., per *Lloyd* L.J.).

5 *Pauknerová*, in: Liber Fausto Pocar, vol. II (2009), p. 793, 802; *Pauknerová*, in: Liber amicorum Algeria Borrás (2013), p. 671, 673.

6 *Franzina*, CDT 1(1) (2009), 92, 94.

7 *Pauknerová*, in: Liber Fausto Pocar, vol. II (2009), p. 793, 803.

8 See *Bonfanti*, in: Boschiero (a cura di), La nuova disciplina comunitaria della legge applicabile ai contratti (Roma I) (2009), p. 383, 402.

9 *The owners of the cargo lately laden on board the ship "Tatry"* v. *The owners of the ship "Maciej Rataj"* (Case 406/92), [1994] ECR I-5439, I-5471 para. 24; *The "Anna H"* [1995] 1 Lloyd's Rep. 11, 18 (C.A., per *Hobhouse* L.J.); Trib. Lecco RDIPP 1990, 357, 359.

10 *The owners of the cargo lately laden on board the ship "Tatry"* v. *The owners of the ship "Maciej Rataj"* (Case 406/92), [1994] ECR I-5439, I-5471 para. 24; *Nürnberger Allgemeine Versicherungs-AG v. Portbridge Transport International BV*, (Case C-148/03) [2004] ECR I-10327, I-10335 para. 14; *TNT Express Nederland BV v. AXA Versicherung AG* (Case C-533/08, [2010] ECR I-4107 para. 48; A-G *Kokott*, [2010] ECR I-4110, I-4120 para. 34; *Rolf Wagner*, TranspR 2009, 103 (106).

11 See only A-G *Strikwerda*, NJ 2008 Nr. 623 p. 6446, 6449; *Delebecque*, Rev. trim. dr. com. 2010, 622, 626; *van den Oosterkamp*, SEW 2011, 193.

12 *Pataut*, RCDIP 93 (2005), 129.

generally an international convention is applicable, but does not cover the issue concretely at stake, the Rome II Regulation reigns.[14]

3 National legislation providing for the enforcement and execution of a ratified Convention precedes the Rome II Regulation to the same extent as the specialised Convention itself does.[15] Otherwise the UK and other Member States that consider multilateral Conventions as non-binding, with respect to the national legal framework, and rely solely on provisions of a national origin which stem from the Convention, would face unwarranted discrimination.[16] On the other hand, national legislation deriving from a Convention takes only precedence over the Rome II Regulation if the Convention has been formally ratified.[17] Similarly, national provisions designed for the execution of a ratified convention but clearly exceeding its scope of application may not take any precedence over the Rome II Regulation.[18]

2. Conventions already ratified by the Member States

a) Principle

4 Although (1) withholds priority of other conventions on specific matters over the general rule of the Regulation, this only applies to conventions to which the Member States already were parties at the time of the adoption of the Regulation.[19] There is no reservation in favour of conventions to which Member States "will be" parties.[20] In sharp contrast to Art. 21 Rome Convention, respect for any such new conventions is not maintained. This reflects a remarkable shift of competence to the European Institutions, largely corresponding to the growth of EU legislative activity in the field of private international law.[21] According to the so-called AETR doctrine established by the CJEU, the EU alone is in a position to assume and carry out contractual obligations towards third countries, as far as EU rules are promulgated for the attainment of the objectives of today the TFEU.[22] On the basis of Art. 81

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13 *TNT Express Nederland BV v. AXA Versicherung AG* (Case C-533/08, [2010] ECR I-4107 para. 46.

14 OGH ZfRV 2016, 182 = ZVR 2016, 437, 439 with note *Michtner*; *Reisinger*, Internationale Verkehrsunfälle (2011) pp. 61, 88; *Neumayr*, in: Koziol/Bydlinski/Bollenberger, ABGB (4th ed. 2014) Art. 28 Rom II-VO note 2; see also *Claudia Rudolf*, ZfRV 2008, 528, 529.

15 *The "Po"* [1991] 2 Lloyd's Rep 206 (C.A.); *Mankowski*, in: Rauscher Art. 71 note 2.

16 *Mankowski*, in: Rauscher Art. 71 Brüssel I-VO note 2.

17 *Mankowski*, Seerechtliche Vertragsverhältnisse im Internationalen Privatrecht (1995) pp. 297 *et seq*.; *Mankowski*, EWS 1996, 301 (302).

18 *Philip*, NTIR 46 (1977) 113, 119; *Basedow*, VersR 1978, 495 (502); *Basedow*, in: Handbuch des internationalen Zivilverfahrensrechts, Vol. I (1982) Ch. II note 140; *Lagarde*, RCDIP 68 (1979), 100, 101; *Mankowski*, EWS 1996, 301 (302).

19 See only *Bonfanti*, in: Boschiero (a cura di), La nuova disciplina comunitaria della legge applicabile ai contratti (Roma I) (2009), p. 383, 403.

20 *Kennett*, (2001) 50 ICLQ 725, 736; *Droz/Gaudemet-Tallon*, RCDIP 90 (2001), 601, 620 *et seq*.; *Laviani*, RDIPP 2004, 157, 190 *et seq*.; *Tuo*, RDIPP 2011, 377, 379.

21 *Takahashi*, (2003) 52 ICLQ 529, 530; *Jonathan Harris*, (2001) 20 Civ. Just. Q. 218, 223; *Tuo*, RDIPP 2011, 377, 380.

22 *Commission of the European Communities* v. *Council of the European Communities* (AETR) (Case 22/70), [1971] ECR 263, 275 para. 28; *Cornelis Kramer* (Joined Cases 3, 4 & 6/76), [1976] ECR 1279, 1311 paras. 30–33*; Draft Agreement establishing a European laying-up fund for inland waterway vessels* (Opinion 1/76), [1977] ECR 741, 756 para. 5; *Convention No. 170 of the International Labour Organization*

(a) TFEU (formerly Arts. 61; 65 (c) EC Treaty in the Amsterdam version), private international law falls within the competence of the EU. It is a competence that has been exercised, as the Rome I Regulation derives directly from the then new Title IV of the EC Treaty. Therefore individual Member States must not accept international commitments that could affect the EU rules or alter their scope. Exclusive EU competence as acknowledged internally within the EU comes forth externally also and restricts Member States' liberty to negotiate conventions. (1) is a brainchild of the AETR doctrine.[23]

(1) does not distinguish between multilateral and bilateral conventions. It covers both kinds indiscriminately. The decisive feature is that at least one non-Member State must be amongst the Contracting States of the respective convention. Bilateral conventions between a Member State and a non-Member State qualify for this criterion.[24] This coincides with the *ratio* underlying (1) for bilateral conventions do not exert lesser binding force under international law than multilateral treaties. A limiting "international" or "multilateral" must not be read into the wider wording of (1).[25] The Report *Schlosser* might only list multilateral conventions,[26] but the list contained in it is not exclusive and exhaustive.[27] In a wider context, (1) should accord with the yardsticks prevailing under Art. 351 TFEU since Art. 351 TFEU provides the backing for (1) and its likes in other Regulations of European PIL and international procedural law.[28] Art. 19 Rome III Regulation even expressly refers to Art. 351 TFEU. Under Art. 351 (1) TFEU it is accepted that this rules gives precedence also to bilateral conventions with a single non-Member State.[29] Further support is rendered by Art. 69 (1) Maintenance Regulation where bilateral conventions are expressly given precedence.[30] **5**

concerning safety in the use of chemicals at work (Opinion 2/91), [1993] ECR I-1061, I-1079 para. 18; *Competence of the Union to conclude international agreements concerning services and the protection of intellectual property*, (Opinion 1/94) [1994] ECR I-5267, I-5411 para. 76, I-5413 para. 82 *et seq*., I-5416 para. 95; *Competence of the Union or one of its institutions to participate in the Third Revised Decision of the OECD on national treatment* (Opinion 2/92), [1995] ECR I-521, I-559 paras. 31–33; *Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* (Opinion 2/94), [1996] ECR I-1759, I-1787 paras. 25–27; *Cartagena Protocol* (Opinion 2/00), [2001] ECR I-9713, I-9764 para. 45; *Commission of the European Communities v. Kingdom of Denmark (Open Skies)* (Case C-467/98), [2002] ECR I-9519, I-9556 para. 82.

23 *Franzina*, CDT 1(1) (2009), 92, 99.

24 To the same result Hoge Raad NJB 1980, 40 = S&S 1980 Nr. 25; *Geimer/Schütze*, Internationale Urteilsanerkennung I/1, p. 71; *Donzallaz*, para. 212; *Domej*, in: Dasser/Oberhammer, Art. 67 LugÜ 2007 note 2; see also *Basedow*, in: Handbuch des Internationalen Zivilverfahrensrechts, vol. I (1982) ch. II note 133; *Klauser*, in: Fasching/Konecny, Art. 71 EuGVVO note 1; *Kropholler/von Hein*, Art. 71 EuGVO note 1.

25 *Mankowski*, ZEV 2013, 529 (531).

26 Report *Schlosser*, OJ EEC 1979 C 59/71 para. 59.

27 See *Mankowski*, ZEV 2013, 529 (531).

28 *Franzina*, CDT 1(1) (2009), 92, 94; *Mankowski*, ZEV 2013, 529 (533).

29 *Terhechte*, in: Schwarze, EU-Kommentar (3rd ed. 2012) Art. 351 AEUV note 4; see also *Commission v. Austria* (Case C-205/06), [2009] ECR I-1301 para. 33; *Commission v. Sweden* (Case C-249/06), [2009] ECR I-1335 para. 34; *Commission v. Finland* (Case C-118/07), [2009] ECR I-10889 para. 27 where in all three Cases the CJEU applies Art. 307 (1) EC Treaty to Bilateral Investment Treaties without even discussing whether this rule covers bilateral conventions.

30 *Mankowski*, ZEV 2013, 529 (532).

b) Authorisation by the EU to conclude new conventions

6 Difficulties arise as some conventions on specific matters may not allow for direct EU participation.[31] The EU itself cannot conclude any agreement which lacks an accession clause allowing not only States, but also organizations to accede.[32] As a solution the Council may authorize Member States to sign and ratify such a convention in the interest of the EU. Such authorization has for instance been provided by a Council Decision (the Bunkers Decision) of 19 September 2002 regarding the International Convention on Civil Liability or Bunker Oil Pollution Damage 2001.[33] Originally a reservation had been considered in favour of applying the Brussels I Regulation if the defendant was domiciled in a Member State and the damage occurred in a Member State,[34] but that was opposed[35] and finally dismissed.[36] Nothing akin to that happened with regard to the Rome II Regulation.

7 The same delegatory procedure was employed specifically in the context of private international law and international procedural law when the Council decided in December 2002 to authorize the Member States to sign the Hague Convention on the Protection of Children of 1996.[37] In Recital (4) cl. 1 of this Decision the Council on the one hand reserved the exclusive competence of the EC but on the other hand emphasised that such competence would follow the principle of *begrenzte Einzelermächtigung*. Recital (4) cl. 2 accordingly acknowledges that the Member States remain competent where the respective convention goes beyond the areas covered by EU law. For now it has become established and common practice that the Member States receive authorization by the EU to ratify or accede to Conventions.[38] Insofar competence is returned to the Member States.[39] The EU might even direct respective recommendations to open negotiations towards the Member States (with the ensuing danger of such recommendations being ignored).[40] The second option for a way-out is for the EU to implement parallel EU legislation if it is not allowed to accede as such to an international instrument.[41]

c) The impact of the CJEU judgments in *TNT v. Axa*, *Nipponkoa* and *Nickel & Goeldner*

8 The comparative look on the Brussels I Regulation as required by Recital (7) reveals a hidden limitation resulting from the CJEU's jurisprudence relating to Art. 71 (1) Brussels I Regulation,

31 *Mankowski*, in: Rauscher Art. 71 Brüssel I-VO note 4.

32 *Takahashi*, (2003) 52 ICLQ 529, 530.

33 Council Decision 2002/762/EC of 19 September 2002 authorising the Member States, in the interest of the Union, to sign, ratify or accede to the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (the Bunkers Convention), OJ 2002 L 256/7.

34 COM (2001) 675 final p. 8.

35 European Parliament A5-0201/2002 final p. 8.

36 *Dörfelt*, IPRax 2009, 470 (471)f.

37 Council Decision 2003/93/EC of 19 December 2002 authorising the Member States, in the interest of the Union, to sign the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children, OJ EU 2003 L 48/1.

38 E.g. Council Decision 2004/246/EC of 2 March 2004, OJ EU 2004 L 78/22, as revised by Council Decision 2004/664/EC of 24 September 2004, OJ EU 2004 L 303/28.

39 *Ramming*, TranspR 2007, 13 (15); *Mankowski*, in: Rauscher Art. 71 Brüssel I-VO note 4.

40 *Kuijper*, (2001) 38 Legal Issues Econ. Integr. 89, 97.

41 *Kuijper*, (2001) 38 Legal Issues Econ. Integr. 89, 97.

the Brussels I *pendant* and, to some extent, model for (1). A paradigm shift might have occurred, a deviation from classic principles of international law to idiosyncratic precedence of EU law.[42]

9 Even with regard to such Conventions which Member States had already ratified before the Brussels I Regulation came into force, the CJEU superimposes some additional restrictions. Pursuant to the CJEU the application of such specialised Conventions cannot compromise the principles underlying judicial cooperation in the EU, such as the principles recalled in recitals (6), (11), (12) and (15)–(17) Brussels I Regulation, namely free movement of judgments, predictability as to the courts having jurisdiction, legal certainty for litigants, sound administration of justice, minimisation of the risk of concurrent proceedings, and mutual trust in the administration of justice in the EU,[43] which principles are deemed to be the *raison d'être* of the Brussels I Regulation.[44] The CJEU asserts that conventions concluded by Member States with non-Member Countries cannot, in relations between the Member States, be applied to the detriment of the objectives of EU law.[45] The CJEU restricts Art. 71 Brussels I Regulation for this rule is said that it cannot have a purpose that conflicts with these basic principles.[46] The practical result of this restriction is to avoid results which are less favourable for achieving sound operation of the internal market than the results to which the provisions of the Brussels I Regulation would lead.[47] The objectives of EU law are thus held paramount.[48] Member States' own obligations at public international law are thus relegated to an inferior status vis-à-vis EU law.[49]

10 Methodologically, teleological and purposive means of interpretation gain the upper hand over verbal and textual interpretation.[50] In the effect, the Brussels I Regulation is taken as establishing some kind of minimum harmonisation which specialised Conventions being only applicable where they enhance the European level reached.[51] The CJEU constitutes a paramount nature of the goals identified in Recitals (11), (12) and (15) Brussels I Regulation in the field of jurisdiction including *lis pendens* and identified in Recitals (6), (16) and (17) Brussels I Regulation in the field of recognition and enforcement.[52] To the CJEU this means for instance that rules governing jurisdiction as contained in a Convention apply but only provided that they are highly predictable, facilitate the sound administration of justice and enable the risk of concurring proceedings to be minimised.[53] This is the strictest and least generous way of interpreting Art. 71 Brussels I Regulation,[54] violating to the wording of

42 Cf. *Pauknerová*, in: Liber amicorum Algeria Borrás (2013), p. 671, 683.

43 *TNT Express Nederland BV v. AXA Versicherung AG* (Case C-533/08, [2010] ECR I-4107 para. 49.

44 *TNT Express Nederland BV v. AXA Versicherung AG* (Case C-533/08, [2010] ECR I-4107 para. 50.

45 *TNT Express Nederland BV v. AXA Versicherung AG* (Case C-533/08, [2010] ECR I-4107 para. 52.

46 *TNT Express Nederland BV v. AXA Versicherung AG* (Case C-533/08, [2010] ECR I-4107 para. 51.

47 *TNT Express Nederland BV v. AXA Versicherung AG* (Case C-533/08, [2010] ECR I-4107 para. 51.

48 *TNT Express Nederland BV v. AXA Versicherung AG* (Case C-533/08, [2010] ECR I-4107 para. 52 with reference to *Ministère public v. Gérard Deserbais* (Case 286/86), [1988] ECR 4907 para. 18; *RTE and IPT v. Commission* (Joined Cases C-241/91P and C-242/91P), [1995] ECR I-743 para. 84; *Irène Bogiatzi, married Ventouras v. Deutscher Luftpool* (Case C-301/08), [2009] ECR I-10185 para. 19.

49 *Biran Harris*, (2014) 25 ICCLR 98, 102.

50 *Haak*, NJ 2010 Nr. 482 p. 4741 *et seq.*

51 *Kuypers*, NTER 2011, 13, 19.

52 *TNT Express Nederland BV v. AXA Versicherung AG* (Case C-533/08, [2010] ECR I-4107 paras. 53–54.

53 *TNT Express Nederland BV v. AXA Versicherung AG* (Case C-533/08, [2010] ECR I-4107 para. 56.

Art. 71 Brussels I Regulation[55] and having a potentially devastating effect.[56] Legal certainty is damaged by adding unwritten requirements of an unclear ambit.[57] The unity of the EU systems steps upfront as it has done in other respects of Member State agreements with third states.[58] But any attempt to educate Member States to pay proper attention to the purposes of EU law[59] is entirely futile if in the respective field only Conventions concluded in the past are concerned.

11 Yet it appears highly questionable that the Recitals take precedence over the wording of the genuine rules as to such far reaching measure. Nothing in the Recitals specifically relates to Art. 71 Brussels I Regulation and to solving the possible conflict with conventions on special matters. The specific conflict and the specific weighing of interests involved are dealt with in Art. 71 Brussels I Regulation, not in any Recital whatsoever. The Recitals contain general statements and are in no ways meant to restrict even express rules addressing a specific problem. The rules in an Act of EU legislation are normatively binding whereas the Recitals are an interpretative means only. The approach implemented by the CJEU switches heads and heels.

12 Furthermore, it undermines and in fact disregards the *ratio* underpinning Art. 71 Brussels I Regulation as evidenced in Recital (35) Brussels I Regulation, perpetuated, continued, and upheld in Recital (25) Brussels I*bis* Regulation. If the EU legislator has intended to implement any kind of rather strict EU control before in fact delegating regulatory power to the specialised convention it should have established respective safeguards expressly. This has not been done which reversely, gives rise to a strong *argumentum e contrario*. The tension between the restriction of the field of application of the Brussels I Regulation and the fundamental claim to applicability of EU law[60] has been resolved by Art. 71 Brussels I Regulation in a clear manner. Recital (35) Brussels I Regulation adds additional strength. If and insofar EU law itself cedes and gives way it has withdrawn from any struggle for supremacy. This is the particularity here which should not be overlooked in order to bring the area in line with current practice of the CJEU in other areas (which in itself might be questioned for very good reasons[61]).[62] Continuity is badly disrupted.[63] The CJEU is overstepping its competence for it in fact strives to occupy quasi-legislative power.[64]

13 The restrictive approach of the CJEU in *TNT v. AXA*, however irreconcilable it is with the

54 *Haak*, NJ 2010 Nr. 482 p. 4741, 4742; see also *Tuo*, RDIPP 2011, 377, 391 *et seq*.

55 *Attal*, Petites affiches n°. 238, 30 novembre 2010, p. 32, 36; *Marmisse-d'Abbadie d'Arrast*, Rev. trim. dr. com. 2010, 825, 826; *Kuijper*, (2001) 38 Legal Issues Econ. Integr. 89, 99; *van den Oosterkamp*, SEW 2011, 193; see also *Tuo*, RDIPP 2011, 377, 385.

56 *Tuo*, RDIPP 2011, 377, 388.

57 See *Tuo*, RDIPP 2011, 377, 391.

58 *Kuijper*, (2001) 38 Legal Issues Econ. Integr. 89, 98. See the references in fn. 47.

59 *Marmisse-d'Abbadie d'Arrast*, Rev. trim. dr. com. 2010, 825, 827.

60 A-G *Kokott*, [2010] ECR I-4110, I-4120 para. 35.

61 See most extensively *Klabbers*, Treaty Conflict and the European Union (2009).

62 *Vettorel*, Riv. dir. int. 2010, 826, 827 *et seq*.

63 *Wesołowski*, ETL 2011, 133, 137; *van den Oosterkamp*, SEW 2011, 193.

64 *Vettorel*, Riv. dir. int. 2010, 826, 829 *et seq*.

wording of (1), has yet to prove its effectiveness in practice. For instance, it would appear not only far-fetched, but beyond any belief if the heads of jurisdiction as contained in Art. 31 (1) CMR or Art. 33 Montreal Convention were alleged to be unpredictable[65] (and the CJEU rightly[66] followed suit in this assessment[67]). In practical effect, the CJEU's approach might thus be less subject to criticism than with regard to its theoretical and dogmatic ambition. Practical results might differ less than policy statements. *TNT v. AXA* should be taken as a mere programmatic statement and not a truly operational device. Else and paradoxically, *TNT v. AXA* itself would amount to a source of uncertainty and unpredictability.[68] Particularly, if differences as to the interpretation of substantive rules as contained in the Convention at stake happen to occur between the courts of the Contracting States this does not affect the procedural rules and even less the rules on jurisdiction. These issues are to be judged quite separately and have no repercussions on Art. 71 Brussels I Regulation which is only applicable with regard to limited aspects of the procedural sphere.[69] Yet in the field of recognition and enforcement results might differ in the CJEU's approach based on *favour executionis* is applied to the letter.[70] Difficulties in combining specialised Conventions and the Brussels I Regulation will occur and grow after *TNT v. AXA*, though.[71]

Recital (7) notwithstanding, to give *TNT v. Axa*, *Nipponkoa* and *Nickel & Goeldner* impact also for (1) would require a transfer of the *rationale* from Art. 71 Brussels I Regulation to (1). The CJEU has not expressly pronounced on (1) yet. (1) cedes unconditionally to Conventions already ratified by the Member States and does not reiterate the conditional regime established by Art. 351 (2) TFEU (ex-Art. 307 (2) EC Treaty).[72] Insofar it differs remarkably form the wording of Art. 69 (1) Maintenance Regulation.[73] A possible explanation might be that the conventions envisaged mainly generate benefits in external relations with Third States and that the EU acknowledges this with the second thought of profiting from it.[74] Furthermore, the lack of any preconditions might avoid any negative conflict with disconnection clauses contained in the respective Conventions.[75] **14**

3. Specialised Conventions newly ratified by the EU

(1) does not specify how the Regulation relates to specialised conventions to which the EU itself will be party in the future. It provides for precedence solely with regard to conventions to which the Member States are parties already. At a first glance, the *lex specialis* rule may apply as well: As far as the convention in respect covers aspects comprised within the **15**

65 See to a similar avail *Kuypers*, NTER 2011, 13, 19 when testing Art. 31 (1) CMR against Art. 6 (1) Brussels I Regulation.

66 *Mankowski*, TranspR 2015, 120–121.

67 *Nickel & Goeldner Spedition GmbH v. "Kintra" UAB* (Case C-157/13), ECLI:EU:C:2014:2145 paras. 35–42.

68 See *Attal*, Petites affiches n°. 238, 30 novembre 2010, p. 32, 35.

69 See *Haak*, NTHR 2009, 69, 76.

70 *Hoeks*, NIPR 2011, 468, 471.

71 *Douchy-Oudinot/Guinchard*, Rev. trim. dr. eur. 2010, 421, 428.

72 *Franzina*, CDT 1(1) (2009), 92, 95.

73 *Franzina*, CDT 1(1) (2009), 92, 95.

74 *Franzina*, CDT 1(1) (2009), 92, 95 *et seq.*

75 *Franzina*, CDT 1(1) (2009), 92, 96.

Regulation, the specialised convention may take precedence. The Union acts on behalf of the Member States, and the effects of direct Union participation may be the same as all Member States participating in the enactment of a specialised convention simultaneously. But there are hints to a deviant approach. Any specialised convention is binding exclusively between its own Member States; and the Union is deemed to act as such a single Member State if it participates in the enactment of the a convention. Then there is no binding effect of such a convention within any of the Member States, and consequently no intra-Union ruling by the convention, for the Union as a whole is treated as a single Member State. This approach benefits from disturbing the Brussels I Regulation as little as possible compared to any *lex specialis* rule. Technically, two competing avenues are open: The first is an analogy to Art. 71,[76] the second to apply Art. 23 for Conventions ratified by the EU are said to become part of EU law by virtue of Art. 218 (7) TFEU (ex-Art. 300 (7) EC Treaty).[77]

16 The problem of concurring EU conventions will probably, at a first blow, be tested in the neighbouring field of international procedural law on the Hague Convention on Choice of Courts Agreements (HCCA).[78] According to its autonomous conflict rule as laid down in Art. 26 (6) lit a HCCA, the Hague Convention shall not affect the application of the rules of a Regional Economic Integration Organisation where none of the parties to a choice of court agreement is resident in a Contracting State that is not a Member State of the Regional Economic Integration Organisation. This solution allows for distinguishing several specific settings.[79]

17 As a whole, the EU will, and is bound to, pay attention to not tampering with the scope of the well-adjusted Rome II Regulation and its approach to intra-Union matters if participating in the enactment of specialised conventions. Thus, sorting out conflicts of law-making-rules must not be dealt with academically, but is to remain sufficiently flexible. Practical solutions are to be found according to the following schedule: Fundamentally and by virtue of (1), the Regulation leaves it to the specialised convention itself whether it precedes Rome II. Here, one must scrutinize the miscellaneous provisions of the convention in respect, where the Commission is obliged to put up a specific conflict rule. As far as the convention in respect refrains from ruling matters of a solely intra-EU nature, the Regulation applies. As far as the convention in respect claims to be applicable even in intra-community cases, so be it, and the Regulation gives way to the Convention at stake. Any future convention ratified by the EU will prevail over the Rome II Regulation as it demands so.[80]

4. Specialised Conventions newly ratified by the Member States authorized by the EU

18 Although in general the EU has the external competence, in practice it is more likely that the EU re-delegates competence to the Member States. This has already happened several times by single Resolutions of the Council.[81] A general framework[82] defining the limits has been

76 *Florian Schulz*, HanseLR 2005, 147, 154; *Ansgar Staudinger*, RRa 2007, 155 (156); *Michael Lehmann*, NJW 2007, 1500; *Mankowski*, TranspR 2008, 67.

77 *Rolf Wagner*, TranspR 2009, 103 (109).

78 Hague Convention on Choice of Court Agreements of 30 June 2005, available at http://www.hcch.net.

79 See *Mankowski*, in: Rauscher Art. 23 Brüssel I-VO notes 77–80.

80 *Franzina*, CDT 1(1) (2009), 92, 101.

81 *Supra* Art. 28 note 6 with references.

implemented[83] by virtue of Regulations (EC) Nos. 662/2009[84] and 664/2009[85] if only for matters outside the scope of the Rome II Regulation. If the Member States, authorized and duly empowered by the EU, conclude, sign and ratify new Conventions they do so in their own names and not as agents for the EU. The respective conclusion takes place under the traditional rules of international law, the only particularity being the authorization in the internal relationship between the EU and its Member States. Clinging to the letter Art. 71 does not cover such Conventions newly ratified by the Member States. Yet it appears advisable to apply it *per analogiam*.

5. Application of specialised conventions

Insofar as a specialised convention is applicable pursuant to (1), the Rome II Regulation is precluded.[86] Whether such a convention actually contains conflicts rules for contractual obligations, is left to the convention itself and to its interpretation.[87] The convention might aim at an interpreting which amounts to as small an incursion into the territory of the Rome II Regulation as possible. But there must not be a principle that the Rome II Regulation would only give way if there is a binding (and this means: binding in the strict sense) interpretation[88] of the convention for almost no convention has a supra- and international instance of interpretation which would issue binding rulings, and thus (1) would be reduced almost to nil by such a restrictive understanding. This extends to implications not expressly spelt out in the other Convention but to be derived from it.[89] To the extent to which the convention in respect does not affect the PIL of non-contractual obligations, the Regulation remains applicable without alteration or modification.[90] Similarly, the Regulation remains **19**

82 *Leible*, in: Nomos Kommentar Art. 25 Rom I-VO note 6.

83 *Bischoff*, ZEuP 2010, 321.

84 Regulation (EC) No. 662/2009 of the European Parliament and of the Council of 13 July 2009 establishing a European procedure for the negotiation and conclusion of agreements between Member States and third countries on particular matters concerning the law applicable to contractual and non-contractual obligations, OJ EU 2009 L 200/25.

85 Regulation (EC) No. 664/2009 of the European Parliament and of the Council of 7 July 2009 establishing a European procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligations, OJ EU 2009 L 200/46.

86 *The owners of the cargo lately laden on board the ship "Tatry"* v. *The owners of the ship "Maciej Rataj"* (Case 406/92), [1994] ECR I-5439, I-5471 para. 24; *TNT Express Nederland BV v. AXA Versicherung AG* (Case C-533/08, [2010] ECR I-4107 para. 48.

87 *Deaville v. Aeroflot Russian International Airlines* [1997] 2 Lloyd's Rep 67, 71 (Q.B.D., Judge *Brice* Q.C.) (with relation to the Warsaw Convention and *lis pendens*); *Tuo*, RDIPP 2011, 377, 380 *et seq*.

88 *Contra Valdini*, Der Schutz der schwächeren Vertragspartei im Internationalen Vertriebsrecht (2013) p. 101–102.

89 *Mankowski*, Seerechtliche Vertragsverhältnisse im Internationalen Privatrecht (1995) pp. 297 *et seq*.; *Briggs*/*Rees* para. 2.47; see also *David C. Jackson*, Enforcement of Maritime Claims (3rd ed. 2000) para. 6.31. *Contra Baatz*, [2011] LMCLQ 208, 219; *Treitel*/*Reynolds*, Carver on Bills of Lading (2nd ed. 2005) para. 9.077 fn. 92; *Aikens*/*Lord*/*Bools*, Bills of Lading (2006) para. 10.50 fn. 73, para. 14.43 and tentatively *Layton*/*Mercer* para. 32.021 fn. 48.

90 Cassaz. Foro it. 1978 I col. 2240; Cassaz. RDIPP 2004, 245, 251; *The "Anna H"* [1995] 1 Lloyd's Rep. 11, 18

applicable as far as the rules prescribed in a specialised convention are confined to specific aspects.[91] As a whole, (1) intends to integrate any specialised set of rules into the larger legal framework of the Regulation.[92] Insofar it goes beyond a simple *lex specialis* rule, but tentatively amounts to a rule of coordination;[93] generally, subsidiarity fits the bill better than strict precedence of the other convention.[94]

6. Reference to specialised Conventions

20 From a methodical point of view, (1) refers to other conventions. As far as other legal instruments are concerned, the Regulation considers itself explicitly as an instrument of reference, but, by referring to other conventions, does by no means refrain from governing matters of judicial cooperation on a general basis. As a consequence, the Rome II Regulation is in no way excluded from application if (1) a specialised convention referred to in Art. 28 (1) fails to govern a matter dealt with in the provisions of the Regulation or (2) if any specialised convention referred to in Art. 28 (1) re-refers to the law of the forum State. If so, the Rome II Regulation happens to supersede any forum State's conflicts law due to the general precedence of EU rules. The situation is similar if the specialised convention follows the principle of *favor negotii* and takes, by means of an alternative reference rule, explicit provisions not to deprive an interested party of any right he may have according to another law or multilateral agreement.[95] The Regulation is excluded from application not in a wholesale manner[96] but only to the extent to which the specialised convention purports to govern a specific matter exclusively.[97] It follows by way of converse inference that the Rome II Regulation may be relied on where a specialised Convention contains no rules or only incomplete

(C.A., per *Hobhouse* L.J.); *Vassalli di Dachenhausen*, Il coordinamento tra convenzioni di diritto internazionale privato e processuale (1993) pp. 110 *et seq.*; *Siig*, [1997] LMCLQ 362, 364 *et seq.*; *David C. Jackson*, Enforcement of Maritime Claims (3rd ed. 2000) para. 6.9; *Ramming* TranspR 2007, 13 (16); *Dörfelt*, IPRax 2009, 470 (472); *Tiefenthaler*, in: Czernich/Tiefenthaler/Kodek Art. 71 EuGVVO note 2.

91 *Kropholler/von Hein* Art. 71 EuGVO note 5; *Mankowski*, in: Rauscher Art. 71 Brüssel I-VO note 5.

92 See *Vassalli di Dachenhausen*, Il coordinamento tra convenzioni di diritto internazionale privato e processuale (1993) p. 108.

93 *Mari*, Il diritto processuale civile della convenzione di Bruxelles (1999) pp. 119 *et seq.*; *Tuo*, RDIPP 2004, 193, 208 *et seq.*

94 Applauded by *Tuo*, RDIPP 2011, 377, 381.

95 A-G *Kokott*, [2010] ECR I-4110, I-4122 paras. 42 *et seq.*; *Mankowski*, EWS 1996, 301 (304); OLG Köln, MDR 1980, 1030; OLG Koblenz, EuZW 1990, 486; OLG Frankfurt, DAVorm 1989 col. 102; OLG Hamm, IPRax 2004, 437 (438); App. Milano 13 April 1973 (see *Pocar* RDIPP 1978, 655, 676); *Strikwerda*, in: Bundel opstellen aangeboden aan C.J.H. Brunner (1994), p. 389, 395; *de Meij*, Samenloop van CMR-Verdrag en EEX-Verordening (2003) p. 144; *Mankowski*, in: Rauscher Art. 71 Brüssel I-VO note 8; *Geimer*, IPRax 2004, 419 (420). *Contra* e.g. *H. Stein*, in: Offerhauskring vijfentwintig jaar (1987), p. 185, 186 *et seq.*; *Verschuur*, Vrij verkeer van vonnissen (1995) p. 181.

96 *Tuo*, RDIPP 2011, 377, 383.

97 A-G *Kokott*, [201] ECR I-4110, I-4120-I-4122 paras. 36, 40, 44; CA Orléans Rev Scapel 2007, 111, 113; *Mankowski*, EWS 1996, 301 (304); *Cerina*, RDIPP 1991, 953, 959; *Basedow*, VersR 1978, 495 (501); *Basedow*, in: Handbuch des internationalen Zivilverfahrensrechts, Vol. I (1982) Ch. II note 144; *de Meij*, Samenloop van CMR-Verdrag en EEX-Verordening (2003) pp. 221 *et seq.*; *Haak*, NTHR 2009, 69, 70; *Tsimplis*, (2010) 16 JIML 289, 298; *Tuo*, RDIPP 2011, 377, 381 *et seq.* Sceptical *Haak*, TranspR 2009, 189 (196).

rules.[98] Whether a given Convention claims exclusivity is a matter of interpretation of that very Convention.[99]

Art. 28 might be thought of as an integration clause designed to embed specialised conventions in the Rome II Regulation.[100] It deserves to be stressed that the concept of reference as laid down in (1) does not aim at full integration of specialised conventions into the Rome I Regulation, but resembles a fictitious implantation of single provisions from other conventions into the structure of the European regime of jurisdiction.[101] Any attempt to fully integrate multilateral commitments of the Member States into the Rome II Regulation would meet severe vicissitudes from the points of view of EU law and international law as well. The scope of application of the Regulation must not hinge upon individual Member States' membership to international conventions.[102] Furthermore, an integrative approach might iniquitously amplify the CJEU's competence of interpretation by extending it to non-EC laws and statutes. Yet in effect the CJEU has rejected to assume such competence when it refused to interpret the CMR in the context of Art. 71 (1) Brussels I Regulation.[103] **21**

Mere Model Laws are not covered by (1). Model Laws are optional only by their very nature. They contain an offer which States might select from the menu but they do not oblige States to take the respective steps. This is true even where a Model Law is promulgated by an international organisation to which States are Member States. If a Model Law is promulgated by an international institution with a different structure, for instance UNCITRAL, it is even less binding. Model Laws are strict and logical alternatives to proper Treaties. They do not submit States to obligations which might conflict with obligations stemming from the Rome I Regulation and thus do not trigger Art. 25. This becomes of particular importance with regard to Art. 28 UNCITRAL Model Law on Arbitration. Every national conflicts rule which is designed after the model set by this Article (like § 1051 ZPO in Germany) may succumb to the preponderance and precedence of the Rome I Regulation without any relief to be gained from (1).[104] **22**

7. Main examples for specialised Conventions

There are two prominent examples for specialised Conventions falling under (1): the Hague Traffic Accidents Convention[105] and the Hague Products Liability Convention[106]. In those Member States which are also Contracting States of either Hague Convention the respective **23**

98 A-G *Kokott*, [2010] ECR I-4110, I-4121 para. 39; *Wesołowski*, ETL 2011, 133, 138; *Tuo*, RDIPP 2011, 377, 382, 385.

99 See only *Haak*, NJ 2010 Nr. 482 p. 4741.

100 See A-G *Tesauro*, [1994] ECR I-5442, I-5447 para. 9; *The "Anna H"* [1995] 1 Lloyd's Rep. 11, 21 (C.A., per *Hobhouse* L.J.); *Haak*, NTHR 2009, 69, 70; *Tsimplis*, (2010) 16 JIML 289, 297.

101 *Mankowski*, EWS 1996, 301 (303); *Verschuur*, in: Handbuch des internationalen Zivilverfahrensrechts, Vol. I (1982) p. 180; *Tuo*, RDIPP 2011, 377, 398; see Report *Schlosser* para. 240.

102 *Mankowski*, EWS 1996, 301 (303).

103 *TNT Express Nederland BV v. AXA Versicherung AG* (Case C-533/08, [2010] ECR I-4107, I-4162 *et seq.* paras. 58–62.

104 *Mankowski*, in: FS Rolf A. Schütze zum 80. Geburtstag (2014), p. 369, 383–384.

105 Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents http://www.hcch.net/en/instruments/conventions/full-text.

Hague Convention takes precedence over the Rome II Regulation by virtue of (1).[107] This was accepted as an attempt to achieve harmony with important neighbouring (Third) States which are Contracting States of the respective Convention.[108] In the Member States which are not Contracting States of either Hague Convention, the Rome II Regulation applies. This is detrimental to international uniformity and encourages forum shopping.[109] Forum shopping is widely used and rather common in practice.[110] The conflict rules of the Hague Conventions differ in many aspects from the Rome II system.[111] Despite the EU's considerate effort to harmonise and unify the conflict rules of its Member States for non-contractual obligations different results can be the outcome if courts in a Contracting State on the one hand and in a non-Contracting State on the other hand have to judge the same case. Different substantive laws might be applied in the result, and the differences in the field of traffic accidents might relate to *inter alia*: contributory negligence (including accountability for using a car at all); reimbursement of costs for car hire or legal costs; compensation for non-pecuniary loss; time limits; prescription; burden of proof.[112] The higher the number of persons concerned (for instance in the incident of a bus accident), the higher the number of possibly competent jurisdictions.[113] Admittedly, there are some issues which the Hague Traffic Accidents Convention does not cover, for instance *cessio legis* and redress.[114]

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106 Hague Convention of 2 October 1973 on the Law Applicable to Products Liability http://www.hcch.net/en/instruments/conventions/full-text.

107 A-G *Jääskinen*, Opinion of 11 July 2013 in Case C-22/12, ECLI:EU:C:2013:471 para. 50; Cass. D. 2014, 1040 = Clunet 141 (2014), 1251 note *Latil* = JCP G 2014, 696 note *Corneloup*; Cass. Bull. Civ. 2014 I n°. 71 = Gaz. Pal. 12 août 2014, p. 20 note *Ehrenfeld* = Les Petites Affiches 16 septembre 2014, p. 8 note *Lasserre* = Rev. gén. dr. ass. 2014, 340 note *Landel* = RTDeur 2915, 348 obs. *Dalmazir*/*Pascale*; OGH ZfRV 2016, 182 = ZVR 2016, 437, 439 with note *Michtner*; OGH ÖJZ 2017, 33 with note *Wittwer*; OGH IPRax 2018, 274; Trib. Trieste RDIPP 2013, 796; Trib. Varese RDIPP 2013, 798; Rb. Amsterdam NIPR 2015 Nr. 280 pp. 461–462; Politie-Rb. West-Vlanderen, Afdeling Brugge RW 2014–15, 1236, 1237; *Claudia Rudolf*, ZfRV 2008, 528, 531; *Reisinger*, Internationale Verkehrsunfälle (2011) pp. 4–5; *Ofner*, in: Fucik/Hartl/Schlosser, Verkehrsunfall vol. VI (2nd ed. 2012) para. 994; *Thiede*, Zak 2013/751, 407, 408; *Neumayr*, in: Koziol/Bydlinski/Bollenberger, ABGB (4th ed. 2014) Art. 28 Rom II-VO note 2; *Heindler,* IPRax 2018, 279; see also *Rochat*, Les petites affiches n° 124, 22 juin 2016, p. 18, 19; see also *Katarína Haasová v. Rastislav Petrík and Blanka Holingová* (Case C-22/12), ECLI:EU:C:692 para. 36; Cass. Les petites affiches n° 124, 22 juin 2016, p. 18.

108 *Pauknerová*, in: Liber Fausto Pocar, vol. II (2009), p. 793, 803.

109 See only *Thiede*/*Kellner*, VersR 2007, 1624; *Kadner Graziano*, NIPR 2008, 425; 427; *Ansgar Staudinger*, in: FS Jan Kropholler (2008), p. 691, 700; *Csongor István Nagy*, (2010) 6 PrIL 93; *Sandrini*, RDIPP 2013, 677, 689–690; *Gaudemet-Tallon*/*Jault-Seseke*, D. 2015, 1056, 1063; *Maseda Rodríguez*, REDI 2016–1, 187, 190; *Wurmnest*, ZvglRWiss 115 (2016), 624, 633.

110 *Wurmnest*, ZvglRWiss 115 (2016), 624, 633.

111 In meticulous detail explained by way of comparison between the Rome II Regulation and the Hague Traffic Accidents Convention by *Czaplinski* pp. 55–410.

112 *Ansgar Staudinger*, in: FS Jan Kropholler (2008), p. 691, 700–701.

113 *Ansgar Staudinger*, in: FS Jan Kropholler (2008), p. 691, 701–702.

114 OGH ZfRV 2016, 182 = ZVR 2016, 437, 439 with note *Michtner*; *Reisinger*, Internationale Verkehrsunfälle (2011) pp. 61, 88; *Neumayr*, in: Koziol/Bydlinski/Bollenberger, ABGB (4th ed. 2014) Art. 28 Rom II-VO note 2; see also *Claudia Rudolf*, ZfRV 2008, 528, 529; *Ofner*, in: Fucik/Hartl/Schlosser, Verkehrsunfall vol. VI (2nd ed. 2012) para. 1044.

(1) introduces a split in the conflicts regime in one of the most important areas of torts with an international element, namely traffic accidents. This is particularly unwelcome.[115] Traffic accidents have been the nucleus and the proteus for modern PIL rules in tort. Traffic accidents have triggered the main debates, and traffic accidents provides for the bulk of cases with a cross-border element reaching the courts. Nonetheless, the adherence or non-adherence to the Hague Traffic Accidents Conventions splits the field of the Member States: Austria, Belgium, Croatia, the Czech Republic, France, Latvia, Lithuania, Luxemburg, Poland, Slovenia, Slovakia, and Spain are Contracting States of this Convention whereas the other Member State are not. The Contracting States have to apply the Hague Traffic Accidents Convention, the non-Contracting States do not.[116] Likewise, the Hague Products Liability Convention has gained quite some adherence. The Member States who are also Contracting States of that Convention feature Croatia, Finland, France, Luxembourg, the Netherlands, Slovenia, and Spain. On the other hand Belgium, Italy, and Portugal have only signed the Convention but never ratified, or acceded to, it. The remaining Member States, i. e. the bulk of the Member States, have neither signed nor even less ratified the Hague Products Liability Convention. **24**

Insofar (1) undermines legal certainty and uniformity[117] in a major field of torts with a cross-border element. It nurtures a potential for forum shopping not to be underestimated.[118] The way out of the ensuing impasse would have been to oblige the Member States who had ratified, or acceded to, any Hague Convention, to denounce their ratification or accession of the respective Hague Convention.[119] On the other hand the principle enshrined in (1) reappears in all Regulations of European PIL and European international procedural law, for instance in Art. 71 (1) Brussels I*bis* Regulation. The EU pays respect to the already existing obligations of its Member States under international law. But a denunciation permitted by the respective Act of international law, would perfectly conform to international law opening up such escape device. (1) should have been supplemented by an obligation to denounce the Hague Conventions. That this was not done is a missed opportunity. Art.351 (2) TFEU form the level of primary law might provide some push in this direction, though.[120] **25**

Another feasible escape route would be that the EU as such did and does not venture to become a Contracting State of the Hague Conventions, but that would come with the price of reducing the relevance of the Rome II Regulation dramatically.[121] Less conform with general principles are any solutions[122] which attempt at awarding the Rome II Regulation precedence over the **26**

115 *Wurmnest*, ZvglRWiss 115 (2016), 624, 632–633.

116 See only *Ansgar Staudinger*, in: FS Jan Kropholler (2008), p. 691, 699.

117 *Kropholler*, Internationales Privatrecht (6th ed. 2006) pp. 535–536.

118 *Thiede/Kellner*, VersR 2007, 1624 (1627); *Ansgar Staudinger*, in: FS Jan Kropholler (2008), p. 691, 700–701; *Kadner Graziano*, RabelsZ 73 (2009), 1 (26); *Nugel*, NJW-Spezial 1/2010, 9; *Nordmeier*, IPRax 2011, 292 (295); *Lafuente Sánchez*, AEDIPr 2016, 463, 469.

119 *Sandrini*, RDIPP 2013, 677, 692–693. See also *Garriga*, YbPIL 9 (2007), 137, 148; *von Hein*, VersR 2007, 440 (452); *Junker*, JZ 2008, 169 (171); *Illmer*, RabelsZ 73 (2009), 269 (312); *Illmer*, in: Peter Huber, Art. 28 note 4; *Kadner Graziano*, ZVR 2011, 40 46; *Halfmeier/Sender*, in: Calliess, Art. 28 note 15; *Wurmnest*, in: jurisPK, Art. 5 note 12.

120 *Kreuzer*, in: FS Jan Kropholler (2008), p. 129, 146; *Ansgar Staudinger*, in: FS Jan Kropholler (2008), p. 691, 709 *et seq*.; *Nagy*, (2010) 6 JPrIL 93, 108; *Czaplinski* pp. 447–471.

121 *Ansgar Staudinger*, in: FS Jan Kropholler (2008), p. 691, 705–706.

Hague Traffic Accidents Convention in intra-EU cases (such cases being defined by all persons concerned having their respective habitual residences in the EU).[123]

II. Bilateral or multilateral Conventions exclusively between Member States

27 According to (2), the Rome II Regulation shall, as between Member States, take precedence over Conventions concluded exclusively between two or more of them in so far as such Conventions concern matters governed by the Rome II Regulation. (2) follows in the tradition of Art. 59 Brussels Convention and Art. 69 Brussels I Regulation (today Art. 69 Brussels I*bis* Regulation). It deals with relations solely and exclusively between Member States. The participation of one or more non-Member States as Contracting States of the Convention at stake demarcates the borderline between (1) and (2) and the distinguishing feature. Whereas (1) can be said to be a compatibility clause, (2) can be said to be an incompatibility clause.[124] The basic idea is that specialised Conventions should only take precedence where also Third States are involved and where Member States owe duties under international law to Third States.[125]

28 Pure intra-EU-relations between Member States only shall be governed solely and exclusively by the Rome II Regulation. Recital (36) cl. 1 and its *rationale* to carry respect for international commitments entered into by Member States *vis-à-vis* non-Member States are not at stake here since non-Member States are not involved. *E contrario*, multilateral conventions to which also non-Member States are Contracting Parties do not fall under (2), but under (1).[126]

29 A problem might arise where a multilateral Convention presently and actually applies only between Member States, but is virtually open for the future accession of non-Member States.[127] One might possibly think of a convention developed in the framework of the Hague Conference on Private International Law but actually ratified only by Member States empowered and authorised by the EU to which other, non-European Contracting States of the Hague Conference might accede. The framework is not an intra-EU one. But virtual scenarios and possibilities are not actualities, finalisations and realisations, either.

30 The historical background of (2) and its sister rule, Art. 25 (2) Rome I Regulation, indicates that primarily bilateral conventions solely and exclusively between Member States were envisaged.[128] The legislative history of (2) is quite specific:[129] The European Parliament tried to introduce a third paragraph expressly providing for the Hague Traffic Accidents Con-

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122 As proposed by *Malatesta*, in: Malatesta (ed.), The Unification of Choice of Law Rules on Torts and Other Non-Contractual Obligations in Europe (Padova 2006), p. 85, 104 *et seq.*; *Kadner Graziano*, SZIER 2006, 279, 291; *Kadner Graziano*, NIPR 2008, 425, 428; *Kadner Graziano*, RabelsZ 73 (2009), 1 (31); *Kadner Graziano*, ZVR 2011, 40, 46–47.

123 *Czaplinski* pp. 442–445.

124 *Bonfanti*, in: Boschiero (a cura di), La nuova disciplina comunitaria della legge applicabile ai contratti (Roma I) (2009), p. 383, 391 fn. 10.

125 *Gaudemet-Tallon/Jault-Seseke*, D. 2015, 1056, 1063.

126 See *von Hein*, in: FS Meinhard Schröder (2012), p. 29, 37.

127 *Magnus*, in: Staudinger, Art. 25 Rom I-VO note 19.

128 *Magnus*, in: Staudinger, Art. 25 Rom I-VO note 19.

129 *Rolf Wagner*, in: FS Jan Kropholler (2008), p. 715.726–727; *Czaplinski* pp. 414–416.

ventions being reduced to second rank in intra-Community cases,[130] and did not succeed in that.[131] The same result might be derived if one takes Arts. 55 Brussels Convention; 69 Brussels I Regulation; 69 Brussels I*bis* Regulation into account for the sake of comparison and as required by Recital (7).

There is a decisive argument which turns the table in favour of applying (2) to conventions to which non-Member States can and might accede in the future: Else the Rome II Regulation would apply until the first non-Member State accedes, and after this point of time the respective convention would apply; this would generate unsustainable uncertainty about the status and the applicability of the convention on the one hand and the Rome II Regulation on the other hand.[132] **31**

Member States are not obliged by Art. 10 TFEU or loyalty towards the EU to cancel conventions to which at present only Member States are Contracting Parties, but to which non-Member States might accede in the future.[133] **32**

Chapter VII: **Final Provisions**

Article 29: List of conventions

1. By 11 July 2008, Member States shall notify the Commission of the conventions referred to in Article 28(1). After that date, Member States shall notify the Commission of all denunciations of such conventions.
2. The Commission shall publish in the Official Journal of the European Union within six months of receipt:
(i) a list of the conventions referred to in paragraph 1;
(ii) the denunciations referred to in paragraph 1.

I. Duty to notify Conventions relevant under (1) on the Member States' side, (1)

The main and primary purpose of Art. 29 is to generate transparency[1] and informational clarity. It has an auxiliary character and pursues organisational goals.[2] It supplements Art. 28 (1) and makes this rule operable.[3] To accomplish this feat, (1) obliges the Member States to notify the Commission of the relevant conventions of which they are Contracting Parties respectively, and in turn the Commission shall publish a compiled list in the OJ EU pursuant **1**

130 Legislative Decision of the European Parliament of 6 July 2005, P6_TA(2005)0284.
131 Recital (32), Art, 28 Common Position (EC) No. 22/2006 of 25 September 2006.
132 *Magnus*, in: Staudinger, Art. 25 Rom I-VO note 19.
133 *Contra Magnus*, in: Staudinger, Art. 25 Rom I-VO note 19.
1 *Magnus*, in: Staudinger, Art. 26 Rom I-VO note 1.
2 *Knöfel*, in: Nomos Kommentar BGB, Art. 29 Rom II-VO note 1.
3 *Magnus*, in: Staudinger, Art. 26 Rom I-VO note 1.

to (2). Information thus would be official, and information costs would be low. Furthermore, the Member States clarify which conventions they believe to contain conflicts rules relevant in the field of non-contractual obligations. If a convention has been notified to the Commission and has been included in the list officially published by the Commission this goes beyond a mere declaratory act but exerts some normative force.

2 The Member States were obliged to perform their notifications by 11 July 2008. This deadline was reached by reverse calculation: The Rome II Regulation was to become effective on 11 January 2009, and the Commission was allowed six months to collect and publish the data received. 11 January 2009 less six months equates 11 July 2008.

3 The early deadline was fully justifiable for (1) is only concerned with such Conventions to which the Member States became Contracting Parties before the entry into force of the Rome II Regulation. According to Art. 32 cl. 1, the Rome II Regulation entered into force on 11 January 2009. Additionally, Art. 32 cl. 1 2nd part expressly declared that Art. 29 should be applicable as of 11 July 2008. This avoids internal contradictions between different rules of the Rome II Regulation.

4 Yet which conventions are effectively referred to in (1) was frozen on 11 January 2008. Ratifications of, or accessions to, international conventions after that date could not trigger (1). Only subsequent denunciations matter, and (1) subpara. 2 duly acknowledges a respective duty to notify.

5 (1) ought to be applied *per analogiam* to Croatia after her accession to the EU became effective as of 1 July 2013. Of course, the relevant date by which Croatia had to comply with her respective duty, cannot be 11 July 2008 but should be calculated as 1 January 2014 roughly mirroring the time span of six months between 11 July 2008 and 11 January 2009.

II. Official publication of the data collected, (2)

6 Unpublished information would not have value for the general public and the contract parties specifically interested. Hence, (2) calls for a publication of the data collected and compiled on the basis of the notifications which the Commission received from the Member States. Publication is due in no lesser organ than the Official Journal (if only Part C, not Part L). But the publication is declaratory only and not constitutive, though.[4] Conventions either not notified by the respective Member State or not included in the list published by the Commission albeit duly notified by the respective Member State retain their significance and prevail over the Rome II Regulation.[5]

7 Recital (36) cl. 2 states that the publication by the Commission makes the rules of the Conventions concerned more accessible. This holds barely true since the Convention rules as such are not published but it is only notified which Member States are Contracting States of which Conventions they deem relevant.

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4 *Leible*, in: Nomos Kommentar Art. 26 Rom I-VO note 3.

5 See Cass. 1re civ. 24 September 2014 – Case n°. 13–21.339; *Gaudemet-Tallon/Jault-Seseke*, D. 2015, 1056, 1063 with regard to a bilateral Agreement between France and Monaco.

The Commission did not fulfil its obligation with utmost expedition and speed, perhaps due to the Member States providing the necessary data only lazily. A certain sloppiness reigned and resulted in a remarkable delay,[6] in sharp contrast to the – perhaps over-optimistic – date of 11 July 2008 plus six months. The Commission published the initial list as late as in the OJ of 17 December 2010.[7] Later supplements are not discernible. It should be noted that under (2) there is not a deadline until which the Commission has to publish the data collected, in contrast to the deadline set for the Member States under (1). It should further be noted that the published list only comprises data under (2) (a) in conjunction with (1) cl. 1.[8] **8**

In the field of non-contractual obligations, one would believe not too many Conventions to exist. Rather surprisingly, the list published by the Commission contains a number of entries. It does not, as one would expect, substantially concentrate on the two Hague Conventions on Traffic Accidents and Product Liability respectively. Practically, (2) is almost superfluous in this regard since the status reports of the Hague Conventions can be easily accessed online under http://www.hcch.net.[9] Of other Conventions, the European Patent Convention of 5 October 1973 draws a number of votes as do the International Convention on Salvage of 28 April 1989 and the Ship Arrest Convention of 10 May 1952. Sweden and Finland both nominate the Nordic Convention on Protection of Environment of 19 February 1974. Germany adds some Swiss-German bilateral particularities. **9**

Many of the former COMECON countries, the Accession States of 2004 and of 2007, notified a surprising number of bilateral treaties with single non-Member States on legal assistance and/or legal relations in civil, family or criminal matters. Latvia nominated, *inter alia*, a pre-war Treaty with the USA of friendship, commerce and consular rights of 20 April 1928 and bilateral Agreements on social security with the Ukraine and Canada respectively. **10**

Interestingly, UN Conventions on Freedom of Association and to Organise (which could possibly gain some relevance with regard to Art. 9 Rome II Regulation) and a number of Conventions in the field of air traffic are amongst the nominees from Romania whilst no other State bothered to nominate the Chicago Convention[10]. **11**

Italy notified that she had nothing to notify whereas Belgium failed to notify anything. Surprise candidates amongst the Conventions notified are the Hague Agency Convention[11] from Portugal and, given Art. 1 (2) (e), the Hague Trusts Convention from the United Kingdom and Cyprus. **12**

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6 *von Hein*, in: FS Meinhard Schröder (2012), p. 29, 30–31.

7 Notifications under Article 29 (1) of Regulation (EC) No. 864/2007 of the European Parliament and of the Council on the law applicable to non contractual obligations, OJ EU 2010 C 343/7.

8 *Leible*, in: Nomos Kommentar BGB, Art. 26 Rom I-VO note 3.

9 See *Knöfel*, in: Nomos Kommentar BGB, Art. 29 Rom II-VO note 2; *Junker*, in: Münchener Kommentar BGB, Art. 29 Rom II-VO note 1.

10 Convention on International Civil Aviation, done at Chicago on 7 December 1944, 15 UNTS 295.

11 However, the liability of the *falsus procurator* might justify the precautionary measure of nominating this Convention if one is prepared to qualify such liability as non-contractual.

Article 30: Review clause

1. 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) a study on the effects of the way in which foreign law is treated in the different jurisdictions and on the extent to which courts in the Member State apply foreign law in practice pursuant to this Regulation;

(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.

2. Not later than 31 December 2008, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, taking into account rules relating to freedom of the press and freedom of expression in the media, and conflict-of-law issues related to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.[1]

I. Generalities

1 Reporting duties of the Commission with a particular emphasis on a possible review have become a tradition in European PIL. They are an attempt to preserve against the respective Regulation becoming utterly dated. They are intended to keep legislation in pace with developments under the promulgated Regulation. And they shall prevent that the Regulation rules are deemed to be set in stone and gain some moment of unchangeable eternity. The addressees of the Commission reports are the legislative organs of the EU plus the European Economic and Social Committee as the most important advisor as to European legislation, hence the very organs which would have to legislate for any recast Regulation.

II. Reporting duties of the Commission, (1)

1. General aspects

2 The particular date of 20 August 2011 for fulfilling the Commission's reporting duty in (1) is deliberately chosen for the Rome II Regulation was published in the Official Journal on 31 July 2007 without spelling out an express date of its entry into force. Thus every 20 August marks an anniversary of the entry into force Rome I Regulation. 20 August 2011 was the fourth anniversary of the Regulation. Apparently, EU legislators believed it to be fine idea to

[1] OJ L 281, 23.11.1995, p. 31.

welcome and celebrate this occasion by a review report being issued. (In reality the Commission spoiled the party.)

The two topics expressly mentioned in (1) (a) and (b), namely the treatment of foreign law and the application of the Hague Traffic Accidents Convention, do not exactly feature amongst the most burning issues of the Rome II Regulation. One might take (b) as an indication that the European legislator was aware of the possible problems of forum shopping caused by the Hague Traffic Accidents Convention, and took a respective mental note.[2] **3**

Yet to address the two topics expressly mentioned in (1) (a) and (b) only describes the minimum content of the Commission report called for. The Commission report may address other topics, too, if it feels like that.[3] **4**

(1) obliged the Commission to present a report four years after the entry into force of the Rome II Regulation at latest. The Commission did not comply with this obligation, and did not even set out to commission the preparatory academic reports on which the official report would be based, around the time when according to the letter an official report would have been due. Four years are only a rather short span of time. In four year time only very few, if any cases, and requests for preliminary rulings on the Regulation will have reached the CJEU. A steady case-law of the CJEU is given small opportunity only to develop with regard to the interpretation of the newly implemented rules. Four years are simply too short to substantiate and issue a sensible and robust review report. The ten years after the entry into force opted for by Art. 79 Brussels I Regulation by contrast, were far more realistic and sensible. It takes little wonder and it does not come as a surprise that there no Commission report was out in 2011. **5**

Both reports requested from the Commission might go beyond merely reviewing the then past and the developments in the life of the Rome II Regulation, but also comprise proposals to amend the Rome I Regulation. The Commission is at liberty to decide in its discretion whether it deems it appropriate to make proposals to amend. There is no obligation in the strict sense to submit such proposals. On the other hand, nothing in (1) would stop the Commission in its tracks from making a full-scale recast proposal. Unlike Art. 27 (2) Rome I Regulation, it is not deliberated that an impact assessment might be added to a proposal made. Yet this should be equally applicable to the report envisaged by (1). Impact assessments have become a standard feature of EU legislation, in particular in the field of PIL and International Procedural Law. **6**

2. Treatment of foreign law

The treatment of foreign law is not even an issue specific to the Rome II Regulation, but rather a general issue which if any should be addressed in a separate Act of EU legislation overarching all areas of PIL. All academic research[4] and the entire discussion on this topic, – **7**

[2] *Nordmeier*, IPRax 2011, 292 (295).

[3] *Martiny*, in: Münchener Kommentar zum BGB, Art. 27 Rom I-VO note 3; *Magnus*, in: Staudinger, Art. 27 Rom I-VO note 1.

[4] Most prominently Esplugues Mota/Iglesias Buhigues/Palao Moreno (eds.), Application of Foreign Law (2011); Schweizerisches Institut für Rechtsvergleichung, The Application of Foreign Law in Civil and

culminating in the so called Madrid Principles of 2010,[5] a project initiated by the Universitat de Valencia, the Università di Genova and the Colego de Registradores de la Propriedad y Mercantiles de España, and supported by the Commission - is definitely not restricted to the PIL of non-contractual obligations, but a truly cross-sectional matter, reappearing for instance in the contexts of the Rome I Regulation or the Maintenance Regulation.[6] One is talking about an element of a General Part of European PIL here,[7] if any. Furthermore, the issue is intricately woven with procedural law if it is not duly characterised at all as an issue of procedural law.[8] One may conclude that endeavours have been shifted (if they are maintained at all) towards a separate legislative project.[9] There are similar attempts in the organisational context of the Hague Conference on Private International Law.[10]

8 (1) (a) apparently owes its existence to a compromise triggered by the European Parliament, proposing to impose duties to cooperate and to prove on the parties on the one hand and duties to finally determine the content of the applicable law on the court,[11] and the Council opposing this since it believed the matter to be procedural and too complex to be covered by the Rome II Regulation.[12] The Parliament wanted to ensure that the Commission conduct a survey on how national judges could be helped in the complex and challenging task to apply foreign law on a potentially regular basis.[13] The Commission felt obliged to issue the following Statement accompanying the promulgation of the Regulation:[14]

Commercial Matters in the EU Member States and its perspectives for the Future, JLS/2009/JCIV/PR/0005/E4; *Fentiman*, Foreign Law in English Courts (1998); *Rogoz*, Ausländisches Recht im deutschen und englischen Zivilprozess (2008); *Urs Peter Gruber/Bach*, (2009) 11 YbPIL 157; *Pauknerová*, RHDI 64 (2011), 5; *Trautmann*, Europäisches Kollisionsrecht und ausländisches Recht im nationalen Zivilverfahren (2011); *Kieninger*, in: Leible/Unberath (eds.), Brauchen wir eine Rom 0-Verordnung? (2013), p. 479; *Kieninger*, in: Leible (ed.), General Principles of European Private International Law (2016), p. 357; *Rudolf Hübner*, Ausländisches Recht vor deutschen Gerichten (2014); *Remien*, in: Schmidt-Kessel (ed.), German National Reports on the 19th International Congress of Comparative Law (Tübingen 2014), p. 223; *Remien*, in: FS Wulf-Henning Roth (2015), p. 431; *Remien*, ZvglRWiss 105 (2016), 570; *Corneloup*, RabelsZ 68 (2014), 844.

5 Principles for a Future EU Regulation on the Application of Foreign Law (The Madrid Principles), in: Esplugues Mota/Iglesias Buhigues/Palao Moreno (eds.), Application of Foreign Law (2011), pp. 95–97. See *Esplugues Mota*, (2011) 13 YbPIL 273.

6 *Rolf Wagner*, in: FS Jan Kropholler (2008), p. 715, 728; *Illmer*, in: Peter Huber, Art. 30 note 3.

7 See e.g. *Sonnenberger*, in: FS Jan Kropholler (2008), p. 227, 245–246; *Kreuzer*, in: Jud/Rechberger/Reichelt (eds.), Kollisionsrecht in der Europäischen Union (2008), p. 1, 6 *et seq.*; *Kieninger*, in: Leible/Unberath (eds.), Brauchen wir eine Rom 0-Verordnung? (2013), p. 479; *Corneloup*, RabelsZ 78 (2014), 844.

8 *Illmer*, in: Peter Huber, Art. 30 note 3.

9 *Bach*, in: Peter Huber, Art. 1 note 62.

10 *Duintjer Tebbens*, in: Liber amicorum Kurt Siehr (2010), p. 635, 641–643; *Trautmann*, Europäisches Kollisionsrecht und ausländisches Recht im nationalen Zivilverfahren (2011) pp. 434–435.

11 Arts. 12; 13 European Parliament Legislative Resolution, P6_TA(2005)0284 of 6 July 2005, p. 16.

12 *Rolf Wagner*, in: FS Jan Kropholler (2008), p. 715, 728.

13 *Wallis*, in: Ahern/Binchy (eds.), The Rome II Regulation on the Law Applicable to Non-Contractual Obligations (2009), p. 1, 5–6.

14 OJ EC 2007 L 199/49.

"Commission Statement on the treatment of foreign law

The Commission, being aware of the different practices followed in the Member States as regards the treatment of foreign law will publish at the latest four years after the entry into force of the "Rome II" Regulation and in any event as soon as is available a horizontal study on the application of foreign law in civil and commercial matters by the courts of the Member States, having regard to the aims of the Hague Programme. It is also prepared to take appropriate measures if necessary."

The very existence of Art. 30 (a) clearly leads to an important conclusion: The Rome II Regulation does not interfere with the national laws treating foreign law as they wish. In particular, Art. 4 does not exclude any presumption (as it is prevalent in particular in the United Kingdom) that foreign law is the same law as the respective *lex fori* save for proof and evidence to the contrary being submitted.[15] **9**

3. Road traffic accidents

The first purpose underlying (1) (b) appears plain: to discover and to announce any distortions possibly arising from the coexistence of the Rome II Regulation on the one hand and the Hague Traffic Accident Convention on the other hand. In this regard, severe concerns about forum shopping had been raised.[16] The Commission's reporting duty in this regard results from a compromise with the European Parliament which would have preferred a truly uniform solution.[17] **10**

But there is second line of progeny behind (1) (b).[18] It relates to compensation for personal injury as it so often plays the central role after road traffic accidents. This issue generated some ideas from the European Parliament. After the first reading, the European Parliament endeavoured, and ventured, for a special conflict rule regulating traffic accidents in a newly proposed Art. 4 (2) which would have deviated from the general rule as it then was and now is contained in Art. 4 (1): Compensation should become a separate issue and subjected to the law of the State where the injured party has its habitual residence unless inequitable to it, while all other aspects should remain in the ambit of the general rule.[19] This did not find favour with the Council since it would have generated legal uncertainty and would have privileged the victims of traffic accidents compared to the victims of other torts.[20] Yet the European Parliament did not surrender but resumed arguing. It tabled another proposal, namely that the court, regardless of which aw is applicable, should apply the principle of **11**

15 *James Rhodes v. OPO* [2015] UKSC 32 [121], [2016] AC 219 (S.C. per Lord *Neuberger*); *OPO v. MLA* [2014] EMLR 4 [111] (C.A., ct. judgm. delivered by *Arden* L.J.); *Brownlie v. Four Seasons Holding Inc.* [2015] EWCA Civ 665 [88]-[89], [2016] 1 WLR 1814 (C.A., per *Arden* L.J.); *Dickinson*, in: Dicey/Morris/Lawrence Collins, The Conflict of Laws, First Supplement to the 15th Edition (2014) para. 35–122.

16 See only *Thiede*/*Kellner*, VersR 2007, 1624; *Ansgar Staudinger*, in: FS Jan Kropholler (2008), p. 691, 700; *Csongor István Nagy*, (2010) 6 PrIL 93; *Sandrini*, RDIPP 2013, 677, 689–690; *Gaudemet-Tallon*/*Jault-Seseke*, D. 2015, 1056, 1063.

17 *Rolf Wagner*, in: FS Jan Kropholler (2008), p. 715, 726–727; *Knöfel*, in: Nomos Kommentar BGB, Art. 30 Rom II-VO note 7.

18 *Illmer*, in: Peter Huber, Art. 30 note 5.

19 European Parliament Legislative Resolution, P6_TA(2005)0284 of 6 July 2005.

20 *Rolf Wagner*, in: FS Jan Kropholler (2008), p. 715, 722.

restitutio in integrum, having regard to the victim's circumstances at its habitual residence and taking into account the costs for medical attention and after-care in particular.[21] The Council dismissed as too much of an ingression into the substantive tort laws of the Member States to harmonise which the EC lacked the competence.[22] The conciliation process produced Recital (33) on the one hand, obliging the court to take account of all circumstances of the victim at stake) and (1) (b).

12 Another time, the Commission felt bound to issue an official Statement:[23]

"Commission Statement on road accidents

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."

13 This Statement does not mention the Hague Traffic Accidents Convention anywhere but rather relates to differences in the substantive laws of the Member States. It looks at compensation level and thus at financial means. Furthermore, the final hint towards a possible Green Paper rather points in the direction of a harmonisation of substantive law, too. The further hint towards insurance aspects supports this contention. The line taken thus happens to coincide not with the wording of (1) (b), but with the second string of legislative history underlying (1) (b).[24] It duly reflects the compromise that the Commission should provide a preparatory study on the possible options to regulate compensation for personal injury with the mid-term perspective of a Green Paper.[25] The process was stalled, though, after a Study[26] which the Commission had ordered, had been published and after the Commission had launched a Consultation Paper[27] and a Feedback Statement[28] spelling out and advancing not less than eight policy options on compensation awards and nine policy options on limitation periods.

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21 Art. 22; Recital (34) European Parliament Legislative Resolution, P6_TA(2007)0006 of 18 January 2007.

22 *Rolf Wagner*, in: FS Jan Kropholler (2008), p. 715, 722.

23 OJ EC 2007 L 199/49.

24 *Supra* Art. 30 note 10 (*Mankowski*).

25 *Illmer*, in: Peter Huber, Art. 30 note 5.

26 Rome II Study on compensation of cross-border victims in the EU (ETD/2007/IM/H2/116), by Hoche Demoulin Brulard Barthélemy, submitted on 30 December 2008 and published on 29 January 2009 http://ec.europa.eu/internal_market/insurance/docs/motor/20090129report_en.pdf.

27 Consultation Paper on the Compensation of Victims of Cross-Border Traffic Accidents in the European Union of 26 March 2009 http://ec.europa.eu/internal_market/consultations/docs/2009/cross-border-accidents/rome2study_en.pdf.

28 Feedback Statement of 7 October 2009 http://ec.europa.eu/internal_market/consultations/docs/2009/cross-border-accidents/feedback.pdf.

III. Review clause, (2)

Even more unrealistically, (2) obliged the Commission to present a report on the trickiest and most contested issue not only surrounding Art. 1, but of the entire Rome II Regulation, after only some sixteen months following the entry into force of the Rome II Regulation at latest. **14**

Seen in a wider context, (2) served a political purpose only: It formed part of the overall compromise to keep the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality out of the scope of the Rome II Regulation. In effect, such "agreement to disagree"[29] saved the Rome II project. One might recall that this very issue was so hotly contested that for quite some time it threatened the coming into existence of the entire Rome II Regulation. It is quite understandable that the Commission did not feel any urgency and any haste to raise it again the less since the philosopher's stone did not emerge before 31 December 2008 (and has not emerged ever since). (2) serves a cosmetic alibi function. It is pure camouflage and is schemed as some kind of cover-up action. Any hope that Art. 1 (2) (g) would be easier to remove once the Rome II Regulation has been seen to be robust and satisfactory in its operation,[30] is faint at best. **15**

Characteristically, the Commission's Statement accompanying (2) is the least verbose of all three Statements:[31] **16**

"Commission Statement on the review clause (Article 30)

The Commission, following the invitation by the European Parliament and by the Council in the frame of Article 30 of the "Rome II" Regulation, will submit, not later than December 2008, a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality. The Commission will take into consideration all aspects of the situation and take appropriate measures if necessary."

This commitment leaves out some elements which are contained in the wording of (2): It does not expressly relate to taking into account rules relating to freedom of the press and freedom of expression in the media. One could think, however, that these aspects might be included in the "all aspects" which the Commission promises to take into consideration. It might mean emphasising nuances too much if one set out to distinguish between "taking into account" and "taking into consideration." **17**

The second omission is more striking: The Commission does not issue a pledge with regard to the second topic mentioned in (2), namely PIL aspects of data protection issues. This is a second topic quite distinct from, and independent of, media-related questions of freedom of press, liberty of expression, personality rights, or privacy in general. But perhaps it is better taken care of in the review process of the Data Protection Directive[32] and the debate about the details of a General Data Protection Regulation[33]. **18**

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29 See *Fentiman*, 17 Ind. J. Glob. Led. Stud. 245 (245) (2010).

30 *Briggs*, Private International Law in English Courts (2014) para. 8.59.

31 OJ EC 2007 L 199/49.

32 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection

19 The Commission is in no position to mitigate any duty imposed on it by a Regulation of the European Parliament and of the Council. Hence, the Commission's Statement cannot limit the ambit of (2).

20 (2) set into motion a chain of events. First the Commission ordered a Study from private contractors. This became known as the so called MainStrat Study,[34] named after its principal contractor.[35] Second the Commission published a Comparative Study[36] of its own based on the MainStrat Study. Third a Report of the Libel Working Group of the UK Ministry of Justice of 23 March 2010 was published.[37] Fourth the Committee on Legal Affairs of the European Parliament submitted a Working Paper, drafted by the indefatigable *Diana Wallis* MEP.[38] This became, fifth, in turn the object of an invited online symposium 'Rome II and Defamation' on Conflict of laws.net[39] to which several law professors from a number of Member States, and again *Diana Wallis* MEP, contributed[40] and which gained fame immediately.

21 After having commenced work on the topic already in November 2009,[41] the European Parliament on 10 May 2012 finally reached a Non-legislative Resolution,[42] based on Art. 225 TFEU. Reporter in the Committee on Legal Affairs was initially yet again *Diana Wallis* MEP[43] who was later-on succeeded by *Cecilia Wikström* MEP.[44] The Parliament's work culminated in a proposal[45] to insert a new Art. 5a and a new Recital (32a) into the Rome II

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of individuals with regard to the processing of personal data and on the free movement of such data, OJ EC 1995 L 281/31.

33 Currently on the basis of Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COM (2012) 11 final (25 January 2012); European Parliament Legislative Resolution of 12 March 2014 (COM(2012)0011 – C-7/0025/2012 – 2012/0011 (COD)).

34 Available at http://ec.europa.eu/justie_home/doc_centre/civil/studies/doc/study_privacy_end.pdf.

35 MainStrat – Managing Innovation Strategies sll of Getxo, Spain, cooperating with the University of Basque, particularly with Prof. Dr. *Juan José Alvarez*, Universidad del País Vasco in San Sebastián, and the San Sebastián law firm of Cuatrecasas.

36 Comparative study on the situation in the 27 Member States as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, JLS/2007/C4/028.

37 Available at http://webarchive.nationalarchives.gov.uk/20110333191207/publications/docs/libel-working-group-report.pdf.

38 Committee on Legal Affairs of the European Parliament, Working Paper of 23 June 2010, available at http://conflictoflaws.net/2010/rome-ii-and-defamation-diana-wallis-and-the-working-paper.

39 http://conflictoflaws.net/2010/rome-ii-and-defamation-online-symposium.

40 Namely *Boskovic*, *Dickinson*, *Hartley*, *Heiderhoff*, *von Hein*, *Magallón*, *Mills Wade* and *Perreau-Sassine*.

41 2009/2120/INI.

42 P7_TA(2012)0200.

43 Committee on Legal Affairs of the European Parliament, Draft Report with recommendations to the Commission on the amendment of Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations (Rome II), Committee on Legal Affairs, Rapporteur: *Diana Wallis*, 21 November 2011, 2009/2170 (INI) – PR\874724EN.doc.

44 Committee on Legal Affairs of the European Parliament, Report with recommendations to the Commission on the amendment of Regulation (EC) No. 864/2007 on the law applicable to non-contractual

Regulation.[46] Neither Commission nor Council have followed up in the years which have passed since.

Article 31: Application in time

This Regulation shall apply to events giving rise to damage which occur after its entry into force.

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I. Basic approach

Art. 31 addresses an issue important for the early phase in the life of the Rome II Regulation, namely to which non-contractual obligations the Regulation shall apply. It does so in a seemingly simple, but comprehensive manner: The Rome II Regulation shall apply to *all* events giving rise to damage after its entry into force. There is not an exact date of entry into force expressly set out in the Rome II Regulation itself.[1] But Art. 254 (2) cl. 1 EC Treaty (applicable at the relevant time[2]) served as a default rule and filled the ensuing gap: A Regulation was deemed to enter into force on the 20th day from its publication in the OJ.[3] The publication in the Official Journal of the EU dates from 31 July 2007. Accordingly, the Rome II Regulation entered into force on 20 August 2007.[4] Sometimes 19 August 2007 is given,[5] but this happens to disregard that the day when the respective number of the OJ is **1**

obligations (Rome II), Committee on Legal Affairs, Rapporteur: *Cecilia Wikström*, 2 May 2012, A7–0152/2012 – PE 469.993v03–00.

45 Reprinted in Art. 1 note 174 (*Mankowski*).

46 Critical on the proposal *Knöfel*, in: Nomos Kommentar BGB, Art. 30 Rom II-VO notes 13–17.

1 *Deo Antoine Homawoo v. GMF Assurances SA* (Case C-412/10), [2011] ECR I-11603 para. 29.

2 *Kramme*, IPRax 2015, 225 (227). *Deo Antoine Homawoo v. GMF Assurances SA* (Case C-412/10), [2011] ECR I-11603 para. 30 refers, incorrectly, to Art. 297 subpara. 3 TFEU; cf. also *Illmer*, GPR 2012, 82 (84).

3 *Deo Antoine Homawoo v. GMF Assurances SA* (Case C-412/10), [2011] ECR I-11603 para. 30.

4 *Plender/Wilderspin*, para. 17–019; *Kramme*, IPRax 2015, 225 (227).

5 *Dicey/Morris/Collins/Dickinson*, The Conflict of Laws, 13th ed., First Supplement (2007) para. S 35–168;

published does not count but that time is running only from the following day.[6] The entry into force made the Regulation directly binding upon the Member States.[7]

2 The terminology used in Art. 31 is unduly focused on torts and mirrors the (equally questionable) terminology employed in Art. 15. "Damage" is germane to torts (and *culpa in contrahendo*) but does not properly fit for unjust enrichment and *negotiorum gestio* even taking into account Art. 2 (2), (3) "Damage" in Art. 31 has to be interpreted in the same rather broad sense as in Art. 15, adapting it to the needs of these other kinds of non-contractual obligations. In the context of *negotiorum gestio*, the "event giving rise to damage" has to be equated with exerting the relevant effort or spending.[8]

3 But the solution envisaged in Art. 31 is only seemingly simple if Art. 31 is read together with Art. 32. Three cases can be distinguished:

(1) The first case concerns events which happen only after 11 January 2009 and accordingly cause damage only after 11 January 2009. This case is definitely covered by the Rome II Regulation.[9] It is by now the regular case.

(2) The second case concerns events which happened before 11 January 2009 and caused damage only before 11 January 2009. This case definitely falls outside the Rome II Regulation.[10]

(3) The third case concerns events which happened before 11 January 2009 but caused damage only after 11 January 2009. This is the problematic issue.

4 The problem with that third issue arises from a possible inherent contradiction between Art. 31 and Art. 32. Eventually one has to prefer one of the rules over the other. A normative choice has to be made in order to decide as to whether the Rome II Regulation should have retrospective effect or not. A literal reading of Art. 31 in conjunction with Art. 32 would lead to such a retrospective effect. It would cause the oddity that before 11 January 2009 a court sitting in a Member State was not required to apply the Regulation rules to cases involving harmful events which occurred after 20 August 2007 whereas if sitting after 11 January 2009 in the same case the same court would have to apply the Regulation rules. Such a result would have been alarming,[11] an unsatisfactory muddle,[12] bizarre,[13] and absurd.[14] In practical terms it would be problematic to apply different conflict of law rules and possibly different substantive laws to the same event particularly so where several claimants are concerned[15] or

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Rushworth/Scott, [2008] LMCLQ 274; *Hartley*, (2008) 57 ICLQ 899; *Kadner Graziano*, RabelsZ 73 (2009), 1 (3).

6 *Illmer*, in: Peter Huber, Arts. 31, 32 note 4.

7 *Magnus*, in: Staudinger, Art. 29 Rom I-VO note 3.

8 OGH ZfRV 2015, 173, 174 = ecolex 2016/119, 296.

9 See only Hof Den Haag NIPR 2015 Nr. 170 p. 291.

10 OGH ÖBA 2014, 948.

11 *Wilderspin*, NIPR 2008, 408, 412.

12 *Dickinson* para. 3.316.

13 *Légier*, JCP G 2007 n°. 47, p. 1, 13.

14 *Plender/Wilderspin*, para. 17–019.

where several lawsuits have been commenced.[16] Two events happening on the very same day could be judged differently on the date when the respective proceedings were commenced.[17] Splitting lawsuits in the middle would be a particularly unfortunate and unwelcome result.[18]

Problems emanated from an unexplained and unreasoned switch of terminology in the drafting process[19] when, on request by certain Member States,[20] the Council Working Group introduced changes to the Commission's Proposal.[21] A later reason indicated namely that the date of the entry into force brought along obligations or the Member States which would have to be fulfilled prior to application (e.g. notification of Conventions)[22] is unsatisfactory for it falls short of Art. 32 subpara. 1 which caters for exactly this contingency. Two main, alternative ways of reading were suggested: The first advocated for interpreting "entry into force" synonymously with "entry into application", thus correcting the wording which used two different terms.[23] The second amounted to adding a phrase like "provided that legal proceedings in respect of such events have been introduced on or after 11 January 2009" to the wording of Art. 31.[24] Even its supporters coined it 'clearly, but arbitrarily'.[25]Some systematic support was gained from Art. 30 (1) which gives the date of 20 August 2011 in turn described by the accompanying Commission Statement[26] describes as four years after the entry into force of the Regulation,[27] and from the fact that the studies on violation of privacy **5**

15 A-G *Mengozzi*, Opinion of 6 September 2011 in Case C-412/10, [2011] ECR I-11606 para. 52.

16 *Illmer*, GPR 2012, 82 (83).

17 *Deo Antoine Homawoo v. GMF Assurances SA* (Case C-412/10), [2011] ECR I-11603 para. 35.

18 *Jafferali*, RGAR 2008 n°. 14386 [16]; *Brière*, Clunet 139 (2012), 695, 700.

19 An account of the legislative rising of what became Arts. 31; 32 is given by A-G *Mengozzi*, Opinion of 6 September 2011 in Case C-412/10, [2011] ECR I-11606 paras. 25–33.

20 Council Doc. 9009/04 ADD 8 JUSTCIV 71 CODEC 645 p. 34 (11 May 2004) (Sweden); Council Doc. 9009/04 ADD 11 JUSTCIV 71 CODEC 645 p. 19 (24 May 2004) (Germany); Council Doc. 9009/04 ADD 16 JUSTCIV 71 CODEC 645 p. 6 (28 May 2004) (Netherlands).

21 Council Doc. 7432/06 JUSTCIV 62 CODEC 247 p. 20 (16 March 2006); Council Doc. 9143/06 (19 May 2006).

22 Council Doc. 7709/06 (3 May 2006), p. 6.

23 *Heiss*/*Loacker*, JBl 2007, 613, 618; *Junker*, NJW 2007, 3765; *Junker*, JZ 2008, 169; *Ofner*, ZfRV 2008, 10, 15; *Brière*, Clunet 135 (2008), 31; *Nourissat*, in: Corneloup/Joubert p. 13, 14; *Xandra Ellen Kramer*, NIPR 2008, 414, 417; *von Hein*, ZEuP 2009, 6 (11); *Bücken*, IPRax 2009, 125; *Francq*, in: Actualités de droit international privé (2009), p. 69, 72; *Halfmeier*/*Sonder*, in: Calliess, Art. 32 note 9; *Kramme*, IPRax 2015, 225 (227); see also BGHZ 182, 184.

24 *Gerard Maher and Daniela Maher v. Groupama Grand Est* [2009] EWHC 38 para. 16 (Q.B.D., *Blair* J.); *Robert Bacon v. Nacional Suiza Compania Seguros y Reaseguros SA* [2010] EWHC 2017 (QB) [42]–[66] (Q.B.D., *Tomlinson* J.); *Handig*, GRUR Int. 2007, 24, 25; *Dicey*/*Morris*/*Collins*/*Dickinson*, The Conflict of Laws, 14th ed., First Supplement (2007) para. S. 35–168; *Dickinson*, para. 3.319; *Kadner Graziano*, RCDIP 97 (2008), 445, 447; *Kadner Graziano*, RabelsZ 73 (2009), 1 (3); *Ansgar Staudinger*, in: FS Jan Kropholler (2008), p. 691, 692; *Ansgar Staudinger*, AnwBl 2008, 316, 322; *Ansgar Staudinger*, NJW 2011, 650; *Ansgar Staudinger*/*Steinrötter*, JA 2011, 241 (242); see also *Clinton David Jacobs v. Motor Insurers Bureau* [2010] EWHC paras. 18–48 (Q.B.D., *Owen* J.); *Glöckner*, IPRax 2009, 121 (124).

25 *Robert Bacon v. Nacional Suiza Compania Seguros y Reaseguros SA* [2010] EWHC 2017 (QB) [66] (Q.B.D., *Tomlinson* J.).

26 OJ EC 2009 L 199/49.

27 *Illmer*, in: Peter Huber, Arts. 31, 32 note 7.

and personality rights or traffic accidents respectively were due by the end of 2008 which presupposes an entry into force before that date.[28] The entry into force of the Rome II Regulation did not depend with the Member States complying with their obligation under Art. 29 or the Commission complying with its obligations under Art. 30, anyway.[29] Else the Rome II Regulation would still not be in force since the Commission has not fulfilled Art. 30 (2) yet.[30]

6 In addition to these two main approaches, there are two further alternative approaches: Thirdly, to leave the matter to the judge's discretion if and insofar as the previously applicable conflicts regime and the Rome II Regulation reach the same results.[31] Fourthly, to give such effect to the Regulation at the earliest point of time once it has been promulgated that national conflict rules have to conform with the Regulation.[32]

7 In *Homawoo*, the ECJ gave its blessing to the first interpretation and did not apply the Rome II Regulation retrospectively; national courts had to apply the Rome II Regulation only to events giving rise to damage which occurred on or after 11 January 2009. The ECJ placed particular reliance on the heading of Art. 31, "Application in time", which could not be interpreted without reference to Art. 32 defining the date of application.[33] Only such interpretation was to ensure predictability of the outcome of litigation, legal certainty as to the applicable law and uniform interpretation of the Regulation.[34] The legislature was believed to have been not aware of the fundamental consequences flowing from a literal interpretation of the change of wording during the negotiation process and to have not intended to apply the Regulation to events that had occurred before its date of application.[35] To hold the Rome II Regulation in some sense applicable without an opportunity of actually applying it would not make sense.[36] An indirect retrospective effect was not envisaged.[37] Furthermore, in at least three language versions, namely the Dutch, the Spanish and the Romanian,[38] there does not appear to be any distinguishing and any marked difference in terminology used between entry into force and date of application which indicates that there should not be a contemplated difference of concept.[39] Even beyond that, in other Acts of European PIL[40] under the heading of "entry into force" the formula is "shall apply".[41]

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28 *Deo Antoine Homawoo v. GMF Assurances SA* (Case C-412/10), [2011] ECR I-11603 para. 32; *von Hein*, ZEuP 2009, 1 (11).

29 *Brière*, Clunet 139 (2012), 695, 698.

30 *Brière*, Clunet 139 (2012), 695, 699.

31 OGH GRUR Int 2012, 468, 471 = ecolex 2012, 65–66 with note *Horak*; *Hillside (New Media) Ltd. v. Bjarte Baasland*, *BET365 International NV*, *Hillside (Gibraltar) Ltd.* [2010] EWHC 3336 (Comm) (Q.B.D., *Andrew Smith* J.).

32 *Knöfel*, in: Nomos Kommentar BGB, Art. 31, 32 Rom II-VO note 8.

33 *Deo Antoine Homawoo v. GMF Assurances SA* (Case C-412/10), [2011] ECR I-11603 para. 33.

34 *Deo Antoine Homawoo v. GMF Assurances SA* (Case C-412/10), [2011] ECR I-11603 para. 34.

35 A-G *Mengozzi*, Opinion of 6 September 2011 in Case C-412/10, [2011] ECR I-11606 para. 30.

36 A-G *Mengozzi*, Opinion of 6 September 2011 in Case C-412/10, [2011] ECR I-11606 para. 23.

37 *Claudia Hahn*, Trav. Com. fr. DIP 2006–2008, 187; *Brière*, Clunet 139 (2012), 695, 700.

38 "Inwerkingtreding"; "Entrada en vigor"; "Data intrării în vigoare".

39 A-G *Mengozzi*, Opinion of 6 September 2011 in Case C-412/10, [2011] ECR I-11606 para. 39; *den Tandt/Verhulst*, ERPL 2013, 289, 290. But cf. *Deo Antoine Homawoo v. GMF Assurances SA* (Case C-412/10), [2011] ECR I-11603 para. 27.

Any alternative approach relying on the time when a lawsuit was commenced would have to answer questions stemming from the field of Alternative Dispute Resolution.[42] Arts. 31; 32 do not contain any restriction indicating that the Rome II regulation should only apply if a judicial lawsuit has been commenced.[43] To rely decisively on the issuing of the writ or the time when the applicable law ought to be determined or rendering the final decision closing the instance would be prone to manipulating tactics playing with particularities of the *lex fori*.[44] Finally, whereas European legislature clearly expressed a deferred application with regard to the Articles directly preceding Art. 31 it did not express a like intention as to apply the Rome II Regulation to events which occurred between 20 August 2007 and 11 January 2009.[45] This basic approach ought to be vindicated.[46] **8**

Undeniably, the basic approach might lead to a temporal split within a factually continuous process. Imagine unfair commercial practices which occurred in the same fashion before and as of 11 January 2009. The former part is subjected to national conflicts rules, the latter to the Rome II Regulation.[47] **9**

II. Remaining issues

Unfortunately, the basic approach does not answer all questions, though. The first remaining issue is whether the relevant event is the damage or the event giving to the damage, i.e. the event causal for the damage. Insofar, the wording of Art. 31 at least in the English and the German version[48] is unambiguous, focusing on the event giving rise to the damage.[49] Art. 4 (1) applies only in a later stage and cannot lead the interpretation of Art. 31.[50] Accordingly, if all relevant causal events (be it a single event, be it a number of events) have taken place before 11 January 2009, the Rome II Regulation does not apply.[51] If the damage itself occurred before 11 January 2009 all events leading to it must have clearly occurred before that date.[52] **10**

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40 Arts. 24 Regulation (EC) No. 1206/2001; 72 Regulation (EC) No. 2201/2003; 33 Regulation (EC) No. 805/2004; 33 Regulation (EC) No. 1896/2006; 29 Regulation (EC) No. 861/2007; 26 Regulation (EC) No. 1393/2007; 76 Regulation (EC) No. 4/2009.

41 A-G *Mengozzi*, Opinion of 6 September 2011 in Case C-412/10, [2011] ECR I-11606 para. 38.

42 A-G *Mengozzi*, Opinion of 6 September 2011 in Case C-412/10, [2011] ECR I-11606 para. 53; *Deo Antoine Homawoo v. GMF Assurances SA* [2010] EWHC 1981 (QB) [46] (Q.B.D., *Slade* J.).

43 *Deo Antoine Homawoo v. GMF Assurances SA* [2010] EWHC 1981 (QB) [44] (Q.B.D., *Slade* J.).

44 *Illmer*, GPR 2012, 82 (83).

45 A-G *Mengozzi*, Opinion of 6 September 2011 in Case C-412/10, [2011] ECR I-11606 para. 45.

46 *Contra Glöckner*, WRP 2011, 137 (140)-141; *Knöfel*, in: Nomos Kommentar BGB, Art. 31, 32 Rom II-VO note 6.

47 BGH GRUR 2017, 397 para. 39 – World of Warcraft II.

48 The French version "faits générateurs de dommages, survenus à partir de", is admittedly less clear.

49 *Docherty v. Secretary of State for Business Innovations and Skills* [2018] CSOH 25 paras. 10-14, 2018 SLT 349 (O.H., Lord *Tyre*); *Plender/Wilderspin*, para. 17–023; *Di Rollo,* 2018 SLT Art. 57, 58. Conceded by *Knöfel*, in: Nomos Kommentar BGB, Art. 31, 32 Rom II-VO note 10.

50 *Contra Alliance Bank JSC v. Aquanta Corp.* [2011] EWHC 3281 (Comm) [38] (Q.B.D., *Burton* J.); *Knöfel*, in: Nomos Kommentar BGB, Art. 31, 32 Rom II-VO note 10.

51 *Plender/Wilderspin*, para. 17–023; see also *Lawrence Allen v. Depuy International Ltd.* [2014] EWHC 753 (QB) [14]–[15], [2015] 2 WLR 442 (Q.B.D., *Stewart* J.).

11 Even the pragmatic emphasis put on the event giving rise to damage might trigger difficult sub-issues particularly and firstly when an endangerment becomes, and turns into, an illicit danger.[53] These are the cases envisaged by Art. 2 where a damage is likely to occur which are indubitably covered by the Rome II Regulation and thus have to be catered for.[54] The later damage at last reveals the existence of the event.[55] The alternative to treat the previous stages as non-events is not convincing.[56]

12 The second remaining issue is whether the Rome II Regulation applies where a continuous tort was at stake, i.e. where a multiplicity of events giving rise to the damage have occurred, some before and some after 11 January 2009. There is a plethora of conceivable solutions: First, the last causal event matters. One would run into severe trouble in identifying which event is the last.[57] Second, the first causal event matters. Third, the most relevant causal event matters. Fourth, all causal events are treated as equivalent, and it disqualifies for the purposes of applying the Rome II Regulation that one of them occurred before 11 January 2009. Fifth, all causal events are treated as equivalent, and it suffices for the application of the Rome II Regulation that one of them occurred on or after 11 January 2009.

13 If one is prepared to adopt as a general policy that the Rome II Regulation and its uniform rules should be applied to the widest possible extent, the fifth approach ought to be preferred.[58]

14 A third issue relates to omissions. Arts. 2 (2); 3 lit. a demand to treat them equivalently to actions. Distinguishing whether the likelihood of an event giving rise to a damage existed before or after 11 January 2009[59] (with only adding to an existing danger topples the threshold[60]) appears rather complicated and is prone to generate difficulties in practice.[61] The sounder if stricter solution is to treat claims based on omission which claims are subject of lawsuits only commenced after 11 January 2009 as a unitary pattern of facts and to subject them in their entirety under the Rome II Regulation.[62]

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52 This rescues the otherwise imprecise formula in *VTB Capital plc v. Nutritek International Ltd.* [2012] EWCA Civ 808 [145], [2012] 2 Lloyd's Rep. 313 (C.A., ct. judgm, delivered by *Lloyd* L.J.).

53 See *Spickhoff*, in: Bamberger/Roth, Artt. 30–32 Rom II-VO note 3; *Knöfel*, in: Nomos Kommentar BGB, Art. 31, 32 Rom II-VO note 10; *Junker*, in: Münchener Kommentar BGB, Art. 32 Rom II-VO note 9.

54 *den Tandt*/*Verhulst*, ERPL 2013, 289, 298–299.

55 *den Tandt*/*Verhulst*, ERPL 2013, 289, 299.

56 See *den Tandt*/*Verhulst*, ERPL 2013, 289, 299.

57 *Francq*, in: Actualités de droit international privé (2009), p. 69, 84–85; *den Tandt*/*Verhulst*, ERPL 2013, 289, 298.

58 *Knöfel*, in: Nomos Kommentar BGB, Art. 31, 32 Rom II-VO note 14.

59 BGHZ 185, 66 (68–69); *von Hein*, ZEuP 2009, 6 (11)-12; *Junker*, in: Münchener Kommentar BGB, Art. 32 Rom II-VO note 12.

60 *Heiss*/*Loacker*, JBl 2007, 613, 618; *Oliver Brand*, GPR 2008, 298 (300).

61 *Jakob*/*Picht*, in: Rauscher, Artt. 31, 32 Rom II-VO note 4; *Knöfel*, in: Nomos Kommentar BGB, Art. 31, 32 Rom II-VO note 15.

62 OGH GRUR Int 2012, 468, 470–471 = ecolex 2012, 65–66 with note *Horak*; *Knöfel*, in: Nomos Kommentar BGB, Art. 31, 32 Rom II-VO note 15; see also BGHZ 182, 24 (28–29).

A fourth and last issue concerns parties' choice of law. An *argumentum e contrario* can be drawn from the lack of any parallel, and even anything remotely akin, to Art. 83 (2) Successions Regulation: Since nothing in the Rome II Regulation emphasises the point of time when the choice of law agreement is concluded, there is no deviation from the general principle that the coming into existence of the claim matters and is the relevant element.[63] 15

Article 32: Date of application

This Regulation shall apply from 11 January 2009, except for Article 29, which shall apply from 11 July 2008.

Art. 32 establishes a two-step tier and distinguishes between entry into force and application. 'Application' equates to 'becoming practically effective'. The rule employs the technique of a *vacatio legis*.[1] Insofar it provided for a deferred application of the Regulation.[2] This follows the principle that legislation must give those concerned sufficient time to adapt,[3] and that accordingly the date of application may be set after the date of entry into force and only where retro-application is duly justified before that latter date.[4] Insofar it follows a widely used standard pattern.[5] 1

"From" means "on, or after".[6] Any equation to 'after' alone is incorrect for it would leave events happening exactly on 11 January 2009 uncovered. Art. 28 Rome I Regulation in its original version got that tiny detail wrong with regard to 17 December 2009 and had to be corrected in a hurry at the expense of an express legislative corrigendum.[7] 2

Article 29 became effective and applicable six months year before the remainder, or better: the bulk, of the Rome II Regulation. It relates to obligations by the Member States to convey certain information to the Commission and are only relevant in the interaction between the Member States and the Commission, but not as for or against private parties. The data collected by the Commission should be available to interested persons when the operative part of the Rome II Regulation became applicable. 3

63 *Dickinson*, para. 13.42; *Halfmeier/Sonder*, in: Calliess, Art. 32 Rome II Regulation note 13; *den Tandt/Verhulst*, ERPL 2013, 289, 300; *Renate Schaub*, in: PWW, Art. 32 Rom II-VO note 1; see also *Rugullis*, IPRax 2008, 319 (323).

1 *Marongio Buonaiuti*, NLCC 2009, 947 *et seq.*

2 See Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of legislation within the Community institutions (2003) para. 20.10.

3 Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of legislation within the Community institutions (2003) para. 20.2.1.

4 Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of legislation within the Community institutions (2003) para. 20.2.2.

5 *Robert Bacon v. Nacional Suiza Compania Seguros y Reaseguros SA* [2010] EWHC 2017 (QB) [42]-[66] (Q.B.D., *Tomlinson* J.).

6 *Plender/Wilderspin*, para. 17–022 with fn. 62.

7 Corrigendum of 24 November 2009, OJ EU 2009 L 309/87.

4 The reference to Art. 29 is not a legislative masterpiece, anyway.[8] Read literally, Art. 29 applied for a single day, namely the 11th of July 2008 for Art. 29 itself states that the Member States should provide the data required *by* 11 July 2008 whereas subpara. 1 asserts that Art. 29 shall apply *from* 11 July 2009. The ensuing pseudo-contradiction between the two rules should be solved in favour of, and giving precedence to, Art. 29 over subpara. 1.[9]

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Strasbourg, 11 July 2007.

For the European Parliament	**For the Council**
The President	**The President**
H.-G. Pöttering	**M. Lobo Antunes**

8 See *Freitag*, in: Rauscher, Art. 29 Rom I-VO note 6.

9 See *Freitag*, in: Rauscher, Art. 29 Rom I-VO note 6.

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