CONSEJO GENERAL DEL PODER JUDICIAL
ESCUELA JUDICIAL

Red Europea de Formación Judicial (REFJ)
European Judicial Training Network (EJTN)
Réseau Européen de Formation Judiciaire (REFJ)

COURSE VIRTUEL
ETUDE SYSTEMATIQUE DE L'ESPACE
JUDICIAIRE EUROPEEN EN MATIERE CIVIL ET
COMMERCIALE
2009-2010

MODULE II

SUBJECT 6

REGULATION (EC) 864/2007 OF 11 JULY ON THE LAW APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS (ROME II)

AUTEUR

Mónica HERRANZ BALLESTEROS
Lecturer in Private International Law at the Spanish Open University (UNED)

Con el apoyo de la Unión Europea
With the support of The European Union
Avec le soutien de l'Union Européenne

LAW APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS: *REGULATION (EC) NO. 864/2007 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 11 JULY 2007* (ROME II)[1]

1. INTRODUCTION

The unification of conflict-of-law rules by *Regulation (EC) No. 864/2007of the European Parliament and of the Council of 11 July 2007* (hereinafter referred to as Rome II) entails considerable progress within European Private International Law. The choice of the law applicable to non-contractual obligations was a matter intended to be included in the *Convention on the Law applicable to contractual obligations of Rome 1980.* However, as it is widely known, this did not succeed.

The background and origins of the current text can be found in the Proposal of the Commission of 22 July 2003[2], on which the Parliament presented several amendments that were rejected by the Commission. On 28 November 2006 a *Common Position (EC) No. 22/2006 of 25 September 2006 adopted by the Council acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II)*[3] was issued and finally Rome II was published on 31 July 2007[4].

This Community instrument entails the unification of conflict rules of the law applicable to non-contractual obligations. Diversity at the material level of the various legal systems is maintained in this issue.

It must be pointed out that, pursuant to Article 1.1 therein, it is only applicable to situations involving conflict of law, which means that it operates only when several legal systems are involved.

> Undoubtedly the notion of internationality raises questions which were already raised in the *1980 Rome Convention* which includes the same regulation in its Article 1.1.[5], *Regulation (EC) No. 593/2008 on the law applicable to contractual obligations*

2. SCOPE OF APPLICATION OF REGULATION (EC) Nº 864/2007: (A) TEMPORAL, (B) SPATIAL, (C) MATERIAL

(A) TEMPORAL SCOPE

[1] Mónica Herranz Ballesteros, Lecturer in Private International Law at the Spanish Open University (UNED).
[2] COM 2003 427 final
[3] Official Journal C289E/68 of 28 November 2006.
[4] Official Journal L 199/40.
[5] For the problems with the internationality of contracts see D*erecho internacional privado* Vol. II, UNED COLEX, 4th edition, December 2004, pp. 304-305.

Pursuant to Article 32 the Regulation will come into force on 11 January 2009. The date to be taken into account to determine whether the case is included or not in the temporal scope of application of Rome II, according to the provisions set forth in Article 31, shall be the moment in which the event that gives rise to the damage takes place.

> It must be pointed out that the provisions set forth in Article 29, whereby the States shall notify the Commission of the list of Conventions mentioned in Article 28.1 as well as all denunciations thereof, will come into force on 11 July 2008[6].

(B) SPATIAL SCOPE

The universal character of the text set forth in Article 3 of the Regulation means that the material law applicable within the framework of a case on non-contractual obligations, contained in the material scope of Rome II, could be even the law of a State that has not ratified the text. The provisions of Rome II shall always apply, irrespective of where the damage has been caused, provided a Court of a Member State (hereinafter referred to as MS) has jurisdiction[7].

Pursuant to the provisions in par.4, Art.1, Member States will be all MS except for Denmark. Upon exercise of its *right to opt out* as provided for in Article 69 of the Treaty of Amsterdam and the Protocol on the position of Denmark annexed to the Treaty of the European Union of 1997, the Regulation does not apply[8].

> Therefore unification in terms of conflict does not cover the whole Community area as the Danish conflict-of-law rules shall apply if a lawsuit is filed with the Courts of this State on this matter.

Although there was considerable controversy on the Community's jurisdiction to draft a text with a universal scope, this universal character, as commented on by Professor GARCIMARTÍN, has been chosen for various reasons: the difficulty of distinguishing between *intra or extra* Community cases within the scope of the applicable law, and the two-fold system that would exist if two different applicable texts were maintained, depending on whether the action was considered to be *intra or extra* Community[9].

(C) MATERIAL SCOPE

Under Article 1, Rome II shall apply to civil and commercial matters. There are several judgments of the Court of Justice that have defined civil and commercial matters within the framework of *Regulation (EC) No. 44/2000* (hereinafter referred to as Brussels I) which can certainly be used as a reference for defining both concepts for the purposes of the new Community instrument. At the same time, as it is set forth in Whereas Clause no.8, it is not the nature of the court with jurisdiction which is relevant, but rather the matter in dispute.

---

[6] This precept, as will be analysed in Section 8, refers to conventions already ratified by the Member States and by third States.

[7] Except for cases involving internal conflicts for which Rome II is not mandatory.

[8] However, for the United Kingdom and Ireland Rome II applies.

[9] See GARCIMARTÍN ALFEREZ, F.J., "*La unificación del derecho conflictual en Europa*: *el Reglamento sobre Ley aplicable a las obligaciones extracontractuales (<<Roma II>>)*", *La Ley, no.* 6798, Thursday 11th October 2007.

As stated in Article 1.1 in relation to Whereas Clause no.9, the provisions of the Regulation do not apply to cases where the State is liable for acts or omissions when they refer to *acta iure imperii*; however, regulatory provisions shall apply to claims by an individual against a State when they involve *iure gestionii*s.

The interpretation of what *non-contractual obligation* means within the framework of the Brussels I Regulation is used as a reference for Rome II. According to the case law of the Court of Justice, the definition of a non-contractual matter includes all actions intended to call for the defendant's liability and which are not related the contractual matter[10]. The truth is that the interpretation of non-contractual matters has always had a residuary character as against contractual matters[11].

The scope of application of Rome II also extends to the so called preventive actions, that is to say, the damages that may be caused are included.

A long list of excluded matters is included in article 1.2 The list has been greatly criticised by the doctrine, which has pointed to the fact that what is actually important is not the fact that Rome II fails to extend the material scope of application to the said matters, but rather the determination of the fact that the law that applies to them is the legislation that governs the said relation[12]. The excluded matters are as follows:

> 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

Finally, non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation are excluded from the scope of application of Rome II. This exclusion considerably reduces the practical application of the Community text. In fact, it is a matter that, although included in the Proposal of the

[10] Case C-189/1987, Kalfelis 27 September 1988; case C-26/1991, Hadte 17 June 1992; case C-51/1997 Reunion 27 October 1998.

[11] However, the *modus operandi* of the Court of Justice of the European Communities has not always been the same. See Tacconi C-334/00; and Henkel C-167/00. Also REQUEJO ISIDRO, M., "*Incertidumbre sobre la materia delictual en el Convenio de Bruselas de 1968*: *método de delimitación y determinación del Tribunal competente*", *La Ley,* no.5709, Friday 31st March 2003. For the Spanish definition of non-contractual obligations see AMORES CONRADI, M., TORRALBA MENDILOLA, E., "*XI Tesis sobre el Estatuto delictual*", *Revista Electrónica de Estudios Internacionales*, 2004, on reei.org

[12] HAMBURG GROUP FOR PRIVATE INTERNATIONAL LAW, "Comments on the European Commission´s Draft Proposal for a Council Regulation on the Law Applicable to Non-Contractual Obligations", *Rabels* 2003, pp. 1-56, in espec., pp. 5-6. *Ibid,* AMORES CONRADI, M., TORRALBA MENDILOLA, E.,

Commission, was excluded from the material scope of application by the Parliament amendments (owing to a lobby campaign, as the authorities maintain). Finally in the *Common Position (EC) No 22/2006 of 25 September 2006 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome* II) it is also excluded from the material scope of application. There is no doubt that the most frequent international damage, especially in the society in which we live, is the damage to personality rights [13].

3. AUTONOMY OF INTENTION: ENTRY INTO THE LAW OF TORT

The choice by the parties of the legal system governing non-contractual liability is provided for in Article 14 of Rome II. The factors that determine the applicable legal system, in order of operation, are the following: (1) the autonomy of the intention of the parties; (2) common habitual residence of the parties; (3) closer connections -should these exist-; (4) *lex loci delicti*.

The aspects analysed below are the following: (A) *scope*, (B) *moment of choice*, (C) *limitation to the said choice*, and (D) the *manner* by which the parties express this choice.

(A) As for the scope of autonomy of intention in choosing the applicable law, this includes non-contractual damage, *culpa in contrahendo* and quasi-contracts. It must be pointed out, as we have already seen in relation to the universal application of Rome II, that the parties can choose a legal system of a MS or of a non-Community country.

> The latter possibility, choice of the applicable law of a non-Member State, is related to Article 14.3, which intends to safeguard the application of the provisions of Community Law when all the elements in the relationship are located in one or several MS. Likewise, Article 14.2 sets forth the impossibility of overruling, by agreement of the parties, the application of the mandatory provisions of the law of the State where all the elements relevant to the relationship are found, even if the parties have chosen the law of another State [14].

(B) The moment of choice. In Rome II the choice is admitted *ex ante* or *ex post* the event giving rise to the damage, unlike what happened in the Proposal of the Commission, where the choice of applicable law by the autonomy of intention of the parties was not admitted *ex ante*. For the *ex post* choice two cumulative conditions have to be met: that *both parties are pursuing a commercial activity* and that the *clause is freely negotiated*. As to the former, no consumers or employees may be involved; as to the latter, this condition excludes the possibility of choice in clauses included in the general terms and conditions.

(C) The choice of the applicable law by the parties has two types of limitations: (a) *matters* for which Article 14 does not apply and (b) *content* of the law chosen by the parties.

---

[13] See the review clause of Article 30 of Rome II. See also DE MIGUEL ASENSIO, P.A., *Derecho privado de Internet*, Cívitas, 3rd edition, 2002, pp. 529-578.

[14] The same doubts raised in the *1980 Rome Convention* could be posed in that the question is if the relationship may not become international because of the autonomy of the parties if they choose a foreign law when all the elements in the relationship are located in a single State. The doctrine is highly sceptical.

(a) As regards the matters, the parties may not agree on the applicable law in cases of infringement of intellectual or industrial property rights or the right of free competition. Therefore the applicable law, according to the provisions, will be mandatory as set forth in Article 8 for the former case and Article 6 for the latter. The argument used not to admit the autonomy of intention in both matters lies in the defence of public interest present in their material regulation which makes it advisable to withdraw them from the autonomy of the intention of the parties[15].

(b) As for the content of the law chosen by the parties, Article 14 sets forth that the choice of law shall not prejudice the rights of third parties [16].

The fact that the parties must agree on the application of a law with which they have a closer connection under no circumstances means a limitation on the choice of law clause; in fact, this law may have no relationship with the parties at all.

(D) The way in which the parties express the choice of the applicable law can be *expressly so or as a result of the elements of the case*. Although the first option (expressly so) does not appear to contain interpretation difficulties, the second option involves the implicit choice of the law, where the judge has to interpret on the basis of various circumstances the legislation to which the extra-contractual responsibility is submitted.

Although it has successfully incorporated the autonomy of the will in the law on damages, which has also received positive criticism, its applicability is greatly limited on the one hand by its prohibition in certain matters and, on the other, by the difficulty of its practical effectiveness.

4. THE GENERAL RULE

The general rule is contained in Article 4 of Rome II, which includes in its first paragraph the *lex loci delicti comissi*; the second paragraph refers to the habitual residence in the same country by the parties; finally, a closer connection with another country is dealt with in Article 14.3. Although the wording of the text is based on the general rule of *lex loci delicti comissi,* after reading the article a different result is derived. Indeed, the first connection mentioned shall actually apply as the last resort, right after the non-coincidence of the common habitual residence of the parties and of the inexistence of a law with which the event giving rise to the damage has a closer connection. Each of these will be briefly analysed below, in order of application.

(A) Habitual residence in the same country of the parties: It derives from the well-known *Jackson* rule[17]. In Article 4 of Rome II this criterion is included as an exception to *lex loci,* prevailing over it. The place of habitual residence that must be taken into account is that of the person claimed to be liable (who may not be the person causing the damage) and of the person sustaining the damage.

---

[15] AMORES CONRADI, M., TORRALBA MENDIOLA, E. have been very critical of this argument (p.15).

[16] Professor F.J., GARCIMARTÍN provides an example related to insurance companies. Article 18 of Rome II includes the possibility for the person having suffered damage to bring his claim directly against the insurer of the person liable if the law applicable to the non-contractual obligation or the law applicable to the insurance contract so provides. Thus, together with Article 14.1 this entails that the choice of a more favourable law or a law that would allow a direct action is not allowed (see "*La unificación del derecho conflictual en Europa*:…", *op. cit.*).

[17] Judgement of the Supreme Court of New York in *Babcock v. Jackson.* The criterion of *lex loci delicti* was ignored given the absence of connection of all the parties with the place of the accident. The criterion of common habitual residence was applied instead.

This has some advantages: the choice of the law of the habitual residence in the same country of the parties is more predictable for such parties and also more familiar to them. Besides, if an action is brought in the closest courts, there may be a *forum-ius* correlation. However, a complex situation may arise if there are more individuals not having a habitual residence in the same State, so that different laws would apply with possibly different material results [18].

Rome II defines in Article 23 the habitual residence of legal persons as the place of central administration. When there is a branch, agency or any other establishment the habitual residence shall be the place where the branch, agency or establishment is located[19]. The article mentions the place of residence of natural persons only when they are professionals. Thus the place where their business activity is shall be considered as the principal place of business.

(B) Closer connection: the clause of closer connections is found in Article 4 paragraph 3 of Rome II.
The criterion of closer connection must be applied as an exception in view of the wording of the Article, which includes the adverb *manifestly* before 'more closely connected'. Likewise, it must be pointed out that this clause does not apply to the cases regulated by specific rules, unless it is specifically stated that it applies (*ad. ex.* Articles 5, 10, 11 and 12).
A manifestly closer connection is defined in the article as a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question. Therefore, the judicial authority may interpret that the law that governs the contractual relation has a manifestly closer connection with the tort/delict and extend the application of this law to the non-contractual liability derived from the damage.

(C) *Locus damni*. Paragraph 1 of Article 4 states the application of the law of the place where the damage arises. Although it is the first to be mentioned, it is subsidiary to the autonomy of intention, the habitual residence in the same country, or the possible application of the law with closer connections to the situation. It must be pointed out that the *locus damni* will also apply subsidiarily to the special rules provided for by Rome II.
The choice of law of the place where the damage arises rules out the application of the law of the place where the event giving rise to the damage occurs and also the law of the States where indirect damage occurs[20]. Rome II excludes the possible ubiquity (application of the law where the event giving rise to the damage occurred or of the place of the damage), unlike the case law of the Court of Justice which interprets Article 5.3 of the Brussels I Regulation. Thus, for long-distance (far-reaching) damage, in Rome II the option is the application of the law where the damage occurs. A different situation would occur when the action causes direct damage in more than one State. In this case, each of the material laws of the States where the direct damage occurred would apply.

As for indirect damage, the case law of the Court of Justice provides the following: "*The term "place where the harmful event occurred" in Article 5(3) of the Convention of 27*

[18] AMORES CONRADI, M., TORRALBA MENDIOLA, E., "*XI Tesis sobre el estatuto*…", p. 10.
[19] See the difference with Brussels I in terms of international jurisdiction, where a lawsuit may be filed in the place of the address of the parent company or, pursuant to Article 5, before the courts of the place where the branch, agency or any establishment is located. The difference is not trivial in that Rome II allows companies to open production establishments in places whose law has a lower level of protection than that where the central administration is located, which is where decisions are taken, and the law of the former State would apply.
[20] See Whereas Clauses nos.15, 16 and 17.

September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters does not, on a proper interpretation, cover the place where the victim claims to have suffered financial damage following upon initial damage arising and suffered by him in another Contracting State "[21].

5. SPECIAL RULES

The special rules have been set forth for those cases in which the criterion *locus damni* is not considered appropriate for certain unlawful acts, with a tendency to specialisation according to the matter. The aforesaid categories are: (A) liability of product manufacturers, (B) unfair competition and acts restricting free competition, (C) environmental damage, (D) infringement of industrial and intellectual property rights and (E) industrial action.

(A) Product manufacturer liability: The solution set forth in Article 5 does not totally replace the provisions in the general rule of Article 4. Indeed, it is the general rule, *locus damni*, which under paragraph 1 of Article 5 shall not apply. However, according to the aforementioned provisions, the application of the law of the common habitual residence of the parties in Article 4.2 is allowed. The law of the place of common habitual residence shall not apply: (a) if the product is sold in the State of the habitual residence of the party sustaining the damage, in which case the law of the latter applies; (b) if the product was acquired in the State where it is marketed, in which case the law of the latter applies, (c) if the country in which the damage occurs is the same country where the product is manufactured, in which case the law of the latter country applies.
There is considerable neutrality in the conflict-of-law rule aimed at regulating the law applicable to product liability, and this is due to the balance of interests of the parties. The aim is twofold: the applicable law to be closer to the damaged party and the person liable for the damage to be aware that he is subject to the aforesaid law. This lies in the marketing clause, so that if the person liable for the product could not reasonably know that the product would be marketed in the country whose law applies pursuant to paragraphs a), b) and c) the applicable law is that of the habitual residence of the person liable for the damage.
Finally, in Article 5.2 Rome II sets forth an exception clause for this category of tort/delict which extends the application of a law if the event causing damage is more closely connected with a country other than that in paragraph 1 of the article. In this case there must be a prior legal relationship, in such a manner that the law that regulates the relationship, usually a contractual relationship, shall extend to the liability derived from damage arising from a defective product [22].

The *Convention on the law applicable to product liability* done in The Hague on 2nd October 1973 must be borne in mind for this type of tort, as well as its influence on the application of the Regulation, as seen in Section 8 of this unit.

(B) Unfair competition and acts restricting free competition. These cases are described in the paragraphs under Article 6. As the authorities have pointed out, the provisions in the aforesaid article do not make a new rule, but rather specify the general rule in Article 4. Thus, the *locus delicti* in the market affected is stated[23]. Thus, Article 6 does

[21] Antonio Marinari vs. Lloyds Bank Plc and Zubaidi Trading Company C-364/93.
[22] This circumstance will be the usual one, see TORRALBA MENDIOLA, E., "*El Proyecto de Reglamento Roma II y la ley aplicable a la responsabilidad por productos*", *Revista Jurídica de la Universidad Autónoma de Madrid*, number 13, p. 63.
[23] This rule has been criticised by authorities which claim for it omission; see AMORES CONRADI, M., TORRALBA MENDIOLA, E., "*XI Tesis sobre el estatuto…*", pp. 19-21.

not include the common habitual residence of the parties, closer connection or the autonomy of intention. The cases specified in Article 6 are unfair competition and acts restricting free competition[24].
For the first case two different situations are contemplated: if the act affects the collective interests of consumers, that is to say, the market in general, or if it only affects a single consumer. While in the first case the law of the State where the competition relations or the interests of consumers are affected is applicable, in the second case Article 4 applies.
As for acts that restrict free competition, the law of the State where the market is affected shall apply. Where the market is affected in more than one country, if the person who claims damages files the lawsuit with the court of the address of the defendant, the applicant may choose the application of the law of the court seized generating a union between *forum* and *ius*. This is possible if the market is also that of the persons directly affected by the act restricting competition. If there are several defendants and the plaintiff wants to file a lawsuit where one of them is domiciled, this law may apply if the said market is also that of the persons directly affected by the act restricting competition.

(C) Environmental damage. Article 7 of Rome I contains the provision on this type of damage[25]. This includes the application, in principle, of the law of the State where the damage is sustained. However, if the victim so desires, the law of the original State may apply. This option prevents situations in which the intention is not to apply inflexible laws but rather laws that are more flexible[26]. Indeed, the rule is based on a clear *favor laesi* eloquently defended in Whereas Clause no. 25.
The cases included are not only public environmental damage but also private environmental damage, that is to say, damage caused to persons or property [27]. It must be pointed out that autonomy of intention is not ruled out here; thus the applicable law may be modified, although this is very unlikely.

(D) Intellectual and industrial property. Article 8 states the application of the law of the country for which protection is claimed, a solution based on a clear territorial principle. The operation of Article 8 is as follows: the general rule of Article 4 does not apply and the law that regulates non-contractual liability for damage to industrial or intellectual property cannot be replaced by the autonomy of intention. This has been criticised by the authorities.
The choice of the *lex loci protectionis* undoubtedly presents certain advantages, although such a strict rule has disadvantages when it comes to solving certain current problems such as infringements of copyright in several locations which is ever more

[24] The Commission drafted a green paper on damages action for breach of the EC antitrust rules, Brussels 19 December 2005 COM (2005) 672 final. And the European Parliament drafted a Resolution of 25 April 2007 on the Green Paper: Damages action for breach of the EC antitrust rules. Finally, the Commission drafted a White Paper on damages actions for breach of the EC antitrust rules, Brussels 2 April 2008, COM (2008) 165 final.
[25] The definition of environmental damage appears in Whereas Clause no.24: an 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. In the Regulation proposal Rome II for the definition of the concept of environmental damage the text made reference to Directive 2004/35/EC of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (Official Journal L143/56 of 30 April 2004).
[26] An analysis thereof may be seen in CRESPO HERNÁNDEZ, A., "Daños al medio ambiente y regla de la ubicuidad en el art. 8 del futuro Reglamento Roma II", InDret, July 2006, www.indret.com
[27] The ubiquity rule for the latter case has been much criticised.

frequent in information society. The multiplicity of applicable laws, as many as States in which the infringement has occurred, makes the intervention of courts very difficult[28].
Article 13 states the application of the law that is ultimately to resolve the matter according to Article 8 rather than the law which derives from the rules in Chapter III [29] (unjust enrichment, *culpa in contrahendo* and *negotiorum gestio*).
Finally, paragraph 2 in Article 8 describes the cases in which the non-contractual obligation derives from a unitary Community intellectual property right. In this case the applicable law is not the *lex loci protectionis* but the *lex loci delicti commissi* (the law of the State in which the act of infringement was committed). However, this law will regulate on matters that may not be already present in the various Community instruments [30].

(E) Industrial actions: The definition of 'industrial action' (Article 9, Rome II) can be found in Whereas Clause no.27, which refers in particular to strike and lock-out. Article 9 provides that the law of the State where the action is to be, or has been, taken is applicable to non-contractual damage caused by an industrial action. This rule must be understood as a concretion of Article 4 so that, if there is non-contractual damage to employers located abroad caused by such actions, the law applicable shall not be that of the place where they are located but the law of the State where the action is to be, or has been, taken[31].

6. NON-DELICTUAL CIVIL LIABILITY

Chapter III, which includes Articles 10, 11 and 12, is devoted to non-delictual civil obligations, in particular (A) unjust enrichment; (B) *negotiorum gestio* and (C) culpa *in contrahendo*.

(A) Unjust enrichment. Article 10 of Rome II contains a conflict-of-law rule whose connections operate subsidiarily. Thus, firstly, if the non-contractual obligation has originated within the framework of a pre-existing relationship between the parties, such as a contract, the same law that regulates this relationship shall apply to the non-contractual damage originated from the unjust enrichment. Where the law applicable cannot be determined on the basis of paragraph 1, Article 10.2 provides that the applicable law shall be that where the parties have their habitual residence in the same country, if this exists. Thirdly, 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. Finally, paragraph 4 allows for the application of a law different from the previous ones if there is a law with which it is more closely connected.

---

[28] See LÓPEZ-TARRUELLA, A., "Ley aplicable a la propiedad industrial e intelectual en la propuesta de Reglamento Roma II", *Gaceta Jurídica de la Unión Europea y de la Competencia*, no. 235, 2005, pp. 38-41.

[29] Thus, for instance F.J. GARCIMARTÍN states that claims for unjust enrichment derived from an infringement of industrial or intellectual property rights are subject to Article 8 and not to Article 10. See "La unificación del derecho conflictual en Europa…"

[30] Regulation 40/1994 on Community Trademark, Official Journal L11 of 14 January 1994; Regulation 6/2002 on Community designs, Official Journal L3 of 5 January 2002; Regulation 2100/94 of the Council of 27 July 1994 on Community plant variety rights, Official Journal L 227 of 1 September 1994 modified by Regulation 873/2004 of the Council, Official Journal L162 of 30 April 2004; Regulation 2081/92 of the Council on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, Official Journal L 208 of 24 July 1992.

[31] See the difference in this matter when the intention is to resolve the international jurisdiction pursuant to the *Brussels I Regulation*, which allows the ubiquity rule: the place where the event causing damage has occurred may be the place where the damage was caused or the place of the causal event. This may lead to an applicable law other than that of the place where the industrial action takes place, a circumstance that Article 9 tries to prevent.

(B) *Negotiorum gestio*. Refer back to the explanation given above for Article 10, as Article 11 includes the connection points used for unjust enrichment as well as their operation.

C) *Culpa in contrahendo*. For the definition of culpa *in contrahend,* Whereas Clause no. 30 of Rome II expressly refers to an autonomous concept that need not be included in the national law. The said clause includes the violation of the duty of disclosure and the breakdown of contractual negotiations, covering only non-contractual obligations presenting a direct link with the dealings prior to the conclusion of a contract. The law applicable to contractual obligation derived from *culpa in contrahendo* shall be the law that would govern the contract should it be executed. If it is not possible to determine the applicable law, then the connections contemplated for non-contractual obligation in any other damage shall operate, that is to say, the law of the habitual residence of the parties in the same country, if it be the case, the law where the damage occurs and finally the clause of the closest connections, if these exist.

7. ASPECTS RELATED TO THE APPLICABLE LAW

In this section we will mention several principles (Articles 15 to 22) which govern different aspects, as we will see below.

(A) Scope of the law applicable pursuant to the connections contemplated in Rome II.

> We can mention the following: (a) the basis and extent of liability, including the determination of persons who may be held liable for their own acts; (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; (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.

(B) Overriding mandatory provisions. The application of the internationally compulsory rules in the forum takes place even if another law governs the obligation. A rule internationally mandatory is understood to be the essential set of rules in a country for its political, social or economic organisation.

(C) Rules of safety and conduct. These are rules in force in a place at the moment of the event which originates the obligation. They must be taken into account in order to assess the conduct of the person claimed to be liable.
According to the wording of this principle precept the judge shall take into account these rules provided this is appropriate. Thus, the only rules that must in fact apply shall be those referred to by the applicable conflict-of-law rule. In short, the aim is not to leave any doubt that the key law is the law chosen to govern the non-contractual obligation pursuant to Rome II.

(D) Direct action against the insurer of the person liable. Article 18 allows the person having suffered damage to bring his claim directly if the law applicable to the non-contractual obligation or the law applicable to the insurance contract so provides. The operation of the connections is alternative, thus allowing the victim to choose.

> It must be remembered that if the parties have exercised the autonomy of intention and have chosen the law applicable to the non-contractual obligation, it must not harm third parties, pursuant to the provisions in Article 14. Therefore, the person causing damage and the victim may not harm the insurer in terms of the direct action, if this action is not contemplated either in the law of the place where the damage is caused or in the law applicable to the contract[32].

(E) Subrogation. A third party (e.g., an insurance company) has satisfied or is under obligation to satisfy a payment to the creditor under a non-contractual obligation. The law applicable to the payment obligation of the third party shall determine to what extent the third party may or may not exercise the rights of the victim (the creditor) against the debtor.

(F) Multiple liabilities. 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, 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. Indeed, this law may be different depending on the debtors.

(G) 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.

(H) Burden of proof. Under Article 22, the law governing a non-contractual obligation under the 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. Acts intended to have legal effect may be proved by any mode of proof recognised by the law of the court seized or by any of the laws under which that act is formally valid (the law that regulates the non-contractual obligation or the law of the place where the act takes place).

8. OTHER PROVISIONS: APPLICATION PROBLEMS. RELATIONSHIP WITH OTHER COMMUNITY INSTRUMENTS AND INTERNATIONAL CONVENTIONS

Rome II particularly refers to the following problems of application:

(A) Article 24 excludes *renvoi* as it rules out the application of the conflict-of-law rules of the law referred to in Rome II.

(B) For non-unified systems Article 25 contemplates two situations: (a) complex systems, where direct reference is adopted; (b) cases where there are different territorial units in a Member State with their own rules of law in respect of non-contractual obligations. In this case it shall not be required to apply this Regulation, thus the State may decide on the possible extension of the Community rule to these cases.

[32] F.J., GARCIMARTÍN, "La unificación del derecho conflictual en Europa:…", *op. cit.* The impossibility of alleging such limitation given that the direct action constitutes an obligation for the insurer and not a right for the victim. See SEUBA TORREBLANCA, J.C., "Derecho de daños y Derecho internacional privado: algunas cuestiones sobre la legislación aplicable y la Propuesta de Reglamento "Roma II", In Dret, no 269, February 2005. p. 25.

(C) Public policy. As with other instruments, Article 26 of Rome II contains a public policy clause which refuses the application of a foreign law if such application is *manifestly* incompatible with the public policy in the place of the court seized.

> Whereas Clause no. 32 in Rome II mentions exemplary or punitive damages of an excessive nature as an example of the application of public policy for foreign law.

As regards the relationship of Rome II with other Community law provisions and with other international conventions two separate cases are described below:

(A) In relation to other Community law provisions, Article 27 states the superior position of the existing derived law as against the provisions in Rome II.

(B) The relationship of Rome II with other international conventions includes two possibilities:

(a) Relationship between Member States and non-Member States when a convention already exists on the matter at the time of application of the Regulation. In this case the rules of the Regulation do not exclude the application of the existing convention. Thus, as an example, texts such as the *Convention on the law applicable to road traffic accidents* done in The Hague in 1971 or the *Convention on the law applicable to defective products* done in The Hague in 1973, which have been ratified by a great majority of MS will still be applicable in relation to these matters between a MS and a non-MS and in the relationship between MS. Article 29 must be taken into account since it establishes the communication to the Commission of the list of conventions of Article 28.1 as well as all denunciations of such conventions.

(b) Relationship between Member States, in which case Rome II prevails over conventions established only between such MS.

It must be pointed out that both a) and b) refer to conventions that were already in force upon application of Rome II. However, for future conventions the matter now lies with the Community, which means that the States may not establish conventions with other States on such matters. In order to smooth out the consequences of this situation Whereas Clause no. 37 refers to 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- on limited matters, containing provisions on the law applicable to non-contractual obligations.