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MODULE III

UNIT X

The law applicable to obligations: Rome I (Regulation 593/2008 of 17 June 2008 on the law applicable to contractual obligations) and Rome II (Regulation 864/2007, of 11 July 2007 on the law applicable to non-contractual obligations). Enhanced cooperation in the field of the law applicable to divorce and legal separation.

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SUMMARY

The aim of the three Regulations we will be dealing with in unit 7 is to ensure predictability when it comes to determining the law applicable to a cross-border matter. With regard to *Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)*) and *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)*) this requirement directly affects the internal market. As for *Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III*), the free movement of persons is the justification for a text that regulates the law applicable to legal separation and divorce.

The development of the unification of the rules of conflict means that the same legal system will resolve the matter, regardless of the Court of the Member state in question, in the case of Rome III, that of the participant Member State where the application is filed. In this way, in all three cases (Rome I, II or III) the matter must be heard by a Community court in order for either of the three instruments to apply, depending, of course, on the subject matter of the dispute in question.

As such, the mechanism chosen in establishing rules to coordinate the different national legal systems in the areas in question is the unification of conflicts. This means that the community authorities have used the mandate contained either in current Article 81 of the Treaty on the Functioning of the European Union (on which the authority of the Rome III Regulation is based) or on the earlier Article 65 of the Treaty of Amsterdam (which provides the basis for the Rome I and II Regulations)

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REGULATION (EC) NO 593/2008 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 17 JUNE 2008 ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS (ROME I)

1. Introduction

Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations[1] *(Rome I)* represents the unification of the rules of conflict on contractual matters. Freedom of choice and control on the part of the state cohabit in this instrument, which is descended from the *Rome Convention on the Law Applicable to Contractual Obligations of 1980*, and whose transformation into a Regulation is the result of the obligations assumed following the Treaty of Amsterdam; this has had important consequences, not least of which are the obligatory nature of all its terms and the authority of the CJEU to interpret it.
However, it is important to keep in mind that the regulation of contractual matters has a more complex regulatory panorama insofar as there are international conventions that supplement Rome I, such as the *United Nations Convention for Contracts on International Sale of Goods* or the different Directives existing covering various aspects such as *Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts*, *Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services* etc.

2. Scope

(A) Spatial scope

The *erga omnes* or universal application established in Article 2 of Rome I entails the possibility for the legal system of a Member State or of a third state to apply. This means that filing a claim before a court in a Member State (with the exception of Denmark, which is excluded) is sufficient to ensure that Rome I is applicable as the legal regime of the contract or contracts in dispute.

(B) Material scope

Pursuant to the provisions of Article 1.1, Rome I applies to contractual obligations in civil and commercial matters in situations involving a conflict of laws. As a result, it is necessary for there to be a contractual relationship either related to or with contacts in two or more legal systems and that ultimately justifies taking recourse to the laws of private international law. It is worth pointing out the difficulties in reaching a uniform notion and the problems that may arise in terms of interpretation.

In particular the application or otherwise of Rome I in certain internal scenarios or the circumstance covered in Article 3.3 of the Regulation.

Rome I expressly determines those contractual relations that are excluded from its scope (Article 1.2); a careful reading of the article shows how the different rules of

[1] OJEU Series L 177, 4.07.2008.

conflict with different origins in the States parties will be applied in a very limited fashion, while the determination of the legal system applicable via Rome I will be very much standard.

(C) Application in time

The Rome I Regulation is applicable to contracts concluded after 17 December 2009 (Article 28).

3. Relationship between Rome I and other existing instruments

As for the relationship between Rome I and other instruments, it is important to note that it replaces the *Rome Convention on the Law Applicable to Contractual Obligations of 1980*, and establishes the priority of earlier international conventions signed by Member States and third countries, while in the case of past conventions that only bind Member States, the priority of Rome I is ensured. With regard to its relationship with special rules in existing secondary legislation or that may appear in other regulatory acts, it stipulates that such rules will take precedence over Rome I when the case of specific areas that regulate rules of conflict in laws on contractual obligations applies.

4. General solutions: freedom of choice and subsidiary connection in the absence of agreement

The Rome I Regulation establishes the criterion of freedom of choice as a general solution (Article 3)[2]. This means that the parties can choose the legal system they want, without having to have a relationship with the same.

The submission regime is regulated in Article 3, which must be read in the context of Articles 10, 11 and 13. The aspects regulated in these articles, time, manner in which the agreement is expressed, as well as consent and capacity, seek to ensure that the agreement on submission of one of the parties (considered the stronger) is not imposed on the other. The judge assumes a leading role in verifying the agreement between the parties to submit to the legal system they have chosen[3]. Even though this control on the agreement exists, the fact is that Article 3.1 represents the greatest expression of freedom of choice insofar as it allows the parties to submit their contract to one or more legal systems.

Freedom of choice is the main pillar supporting the solution of the legal regime established in Rome I; however it is not unlimited – instead the interplay of mandatory

[2] Although in the reform of the Rome Convention, the Rome I Regulation again had to face the question regarding the validity or otherwise of the parties submitting to the *lex mercatoria*; it was finally determined that they would have to submit to the law of a state. Another question is the inclusion of non-state or even international convention law by reference in the agreement (Whereas 13) and an exception is raised in Whereas 14 which admits the possible submission by the parties to the "Common Framework of Reference", should such an instrument be approved.

[3] For example, in cases in which there is no express agreement and the submission is deduced from the terms of the contract, it is the judge who must take recourse to the intrinsic elements of the contract to be in a position to deduce the parties' intentions in submitting to a specific forum. Or, for example, when in the course of proceedings, the parties decide to change the forum to which they wish to be subject.

rules that exist in the relationship and that come from different legal systems linked to the relationship, prevent the parties' contract eluding the application of certain rules (Articles 3.3, Article 3.4 and Article 9).
In the event that the parties had not chosen the applicable law or the submission clause were not valid, Article 4 determines the scope of the legal system under which the judge has to resolve the case. In the first section it establishes types of contracts; in the event that the relationship is included in one of them the applicable legal regime will be the one that Rome I stipulates for that case; in the event that the above is not the case, the applicable legal regime will be that of the habitual residence of the party required to effect the characteristic performance; and, finally, the judge may choose a different legal system, either because the relationship does not fall under any of the types of contract and it is not possible to identify the habitual residence of the party required to effect the characteristic performance, or he/she may consider that there is another country with a closer connection and decide that its legal system applies, rejecting all others.

5. Solutions for special cases

The cases that have received special treatment aside from the solutions of general nature are: contracts of carriage, consumer contracts, individual employment contracts and insurance contracts. It is important to highlight that in many cases the existing network of directives or international conventions –for example, in the case of insurance or contracts of carriage – may modify the solution established in the Regulation, but purely for reasons of space, here we will just be analysing the response for each one in Rome I, the odd brief mention apart.
(A) Contracts of carriage, it is well known that this is a type of contract in which there has been an important material unification of law, due to the significant number of conventions that regulate it. The determination of the applicable law for contracts of carriage is established in Article 5 of Rome I and will depend on whether they are: a) contracts for the carriage of goods, where the preferred solution is the freedom of choice, although in the absence of an agreement, the law applicable shall be the law of the country of habitual residence of the carrier provided that the place of receipt or the place of delivery or the habitual residence of the consignor is also situated in that country, and finally, if the above criteria are not met, the law of the country where the place of delivery as agreed by the parties is situated shall apply; b) carriage of passengers, even though the freedom of choice is limited to a *numerus clausus* list of legal systems contained in Article 5.2, and in the absence of such a choice, the law applicable shall be the law of the country where the passenger has his/her habitual residence, provided that either the place of departure or the place of destination is situated in that country, otherwise the law of the country where the carrier has his/her habitual residence shall apply. Finally, in both cases there is an exception in the third paragraph which does not apply if the parties have used their freedom of choice, but does apply even if the conditions for application required by sections 1 and 2 are met: depending on the type of contract, another legal system with which the authority decides the contract has closer links will apply.
(B) Consumer contracts, Article 6 of Rome I regulates the types of consumer contracts. Here we can see the material scope in question: supply of goods or services and financing contracts (Article 6.4 determines the cases in which it is not applicable); the personal sphere, the consumer must be a natural person acquiring goods or services

outside his/her trade or profession, whereas the professional is acting in the exercise of his/her trade or profession. It is important to note that the protection does not cover all consumer operations, but only those in which there is a sedentary consumer, i.e., the one involved in an international contract without moving from his/her country of habitual residence; the ultimate aim is to avoid surprises.

As far as the applicable legal system is concerned, the precept does not rule out the use of the freedom of choice, meaning that the parties may choose the applicable law, although this legal system must not to grant the consumer a lower level of protection than that provided by the rules of the state in which he/she is habitually resident and whose application cannot be ruled out by freedom of choice.

If the conditions set out in Article 6 are not met, i.e., if it is a type of contract that is excluded or if some of the conditions set out in the rule are not met, then the determination of the applicable legal system is performed using the general regime (Articles 3 and 4). In these latter cases, and even though the consumer may not be eligible for protection, practice has shown that the legal system that is ultimately applicable was the one with the closest connection to the party considered stronger and in order to remedy unbalanced results, rules were included to correct said effect. Thus, the court hearing the case will apply at least the mandatory rules under its legal system (Article 9.2 of Rome I), a solution that is not without its detractors. With regard to the same point, it is important to take into account the range of Directives that have been regulating these matters since the nineties.

(C) Individual employment contract, regulated in Article 8 and in the *Directive concerning the posting of workers in the framework of the provision of services*; said article allows the parties the parties to choose the law applicable to said contract but, as in the case of consumer contracts, the forum chosen must provide a minimum degree of protection. Unlike with consumer contracts, in an employment scenario the worker who is posted to provide work or a service is protected.

Thus, in principle, the applicable forum will be the one chosen by the parties, although it must ensure at least the same level of protection as that offered in the forum where the worker habitually provides his/her services (Article 8.2), moreover, a temporary posting of the worker does not change the applicable law. If the law of the place where the worker usually performs his/her work cannot be determined, then the law of the country of the establishment that hired the worker will apply (Article 8.3). This rule was included with a view to covering those professionals who transfer their residence from one state to another as a result of their labour obligations. Finally, the court is allowed to reject previous forums when it can be deduced from the set of circumstances that there is another forum with which the contract has closer connections (Article 8.4)[4].

(D) Insurance contracts, regulated in Article 7 of Rome I: the text differentiates between: insurance contracts that cover large risks[5] (regardless of whether or not the

[4] Reference to the Directive concerning the posting of workers in the framework of the provision of services.

[5] In order to clarify what is to be understood by large risks, we have to look at the *First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance* OJEC Series L 228, 16.08.1973.

risk is located in a Member State); other insurance contracts when the risk is located in a Member State[6].

As for the applicable law, in the case of large risk insurance, insofar as the applicable law has not been chosen by the parties, the insurance contract shall be governed by the law of the country where the insurer has his/her habitual residence. Where the court considers that the contract is manifestly more closely connected with another country, other than that of the habitual residence of the policyholder, and the parties have not chosen the applicable law, the law of that other country shall apply.

As for insurance contracts that cover risks located in a Member State, the determination of the location of the damage is regulated in the Community Directives[7].

On determining the applicable forum: 1) the freedom of choice criterion is applied, albeit limited to: the law of the country where the risk is located (which, under the scope of Article 7.3, must be a Member State); the law where the policyholder is habitually resident; in the case of life assurance, in addition to the above options, the law of the Member State of which the policyholder is a national may also be chosen[8]; the law of the Member State where the event occurs can be chosen when the contract covers risk limited to events that occur in a different state to where the damage is located; in cases where the policyholder performs a commercial or industrial activity or a liberal profession and the insurance contract covers risks which relate to those activities and are situated in different Member States, the law of any of the Member States concerned or the law of the country of habitual residence of the policyholder may be chosen. Finally, Article 7 allows the parties to exercise greater freedom of choice in relation to the applicable law if the forum of the country where the risk is located or the forum of the country where the policyholder has his/her habitual residence or where the policyholder pursues a commercial activity, etc. so allows. 2) If the parties do not choose the applicable law, the law of the Member State where the risk is located at the time the contract was concluded applies. This last section must be read in conjunction with section 5 insofar as the measure contemplates the possibility for risks to be located in different Member States in such a way that it would be understood that the contract is comprised of several contracts, each one referring to just one Member State. In the case of a contract that covers risks in a Member State and in a third country, the Article 7 solution would only apply to the former, while the general rule would apply in the second scenario.

In the case of obligatory insurance, and as it is not possible to amend them, the Regulation contains additional rules in Article 7.4. It regulates the relationship between the law applicable to the contract (Article 7.2 and 3) and that of the state that

[6] Meaning that if it is not a large risk insurance contract and it is situated outside a Member State, the general rules of Articles 3 or 4 would apply instead of Article 7 or Article 6 of the Regulation. This general regime also applies to reinsurance contracts.

[7] With regard to the situation of the risk, we have to make a double distinction between: a) life assurance contracts in which the location of the risk is determined by *Directive 200283/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance* OJEC L 345, of 19.12.202, with the same solution as the one envisaged for these cases in Article 7.6, i.e. the risk is considered situated in the country of the commitment which is identified, according to the Directive, as the one in which the policyholder is habitually resident; and b) contracts other than life assurance, which are governed by the *Second Directive (88/357/EEC)*, OJEC L 172, of 4.07.1988.

[8] This option is a possibility in accordance with the *Directive on life assurance*, when the policyholder is a national of a Member State.

establishes the obligatory nature of the insurance, a relationship that becomes more and more complex where there are maladjustments between the two.

REGULATION (EC) NO 864/2007 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 11 JULY 2007 (ROME II)

1. INTRODUCTION

The unification of the rules of conflict by *Regulation (CE) N. 864/2007 of the European Parliament and of the Council of 11 July 2007* [9] (Rome II) represents an important step in the context of European Private International Law. This Community instrument represents the unification of the law applicable to non-contractual obligations in terms of conflict, while the diversity of the different legal systems on a material level remains. It is important to highlight that pursuant to the provisions of Article 1.1 of the text, it only applies to those situations that imply a conflict of laws, which only occurs when several legal systems are involved.

2. SCOPE

(A) APPLICATION IN TIME

Pursuant to the provisions of Article 32, the Regulation entered into force on 11 January 2009. The date that must be taken into account in order to determine whether or not the case falls within the remit of Rome II in terms of time, pursuant to the provisions of Article 31, will be the moment at which the event giving rise to damage occurs, which may be prior or simultaneous to the moment at which the damage is manifested, depending on the case.

(B) SPATIAL SCOPE

The universal nature of the text established in Article 3 means that the applicable material law in the context of proceedings on non-contractual obligations, contained in the material scope of Rome II, will even be the law of a state to which the text does not apply. The provisions of Rome II will always apply regardless of where the damage occurs, when a court of a Member State[10] has jurisdiction[11].

(C) MATERIAL SCOPE

According to the terms of Article 1, the provisions of Rome II will apply to civil and commercial matters. Likewise, Whereas 8 states that it is the subject matter of the dispute rather than the nature of the court with jurisdiction that is relevant.

[9] OJ L 199/40.
[10] Pursuant to the provisions of section 4 of Article 1, any reference to a Member State is to all Member States except Denmark.
[11] With the exception of the cases in which there are internal conflicts where Rome II is not obligatory.

As with the civil and commercial definition, the interpretation of what is understood by *non-contractual* obligation in the context of the Brussels I Regulation provides a precedent for Rome II. Pursuant to CJEU case law, the definition of non-contractual matters includes all claims designed to enforce the liability of the defendant and that are not related to contractual matters[12]. The fact is that the interpretation of non-contractual matters has always been residual when compared to contractual matters[13].
The scope of Rome II also covers what are termed preventative actions, i.e., that include damage that may be caused.
Article 1.2 contains a long list of excluded matters, although the most important excluded matter is without doubt the suppression of the scope of violations of privacy and rights relating to personality, including defamation. This represents a significant watering down of the Community text in practice. The most common form of international damage, even more so in the current information society in which we live, is without doubt damages to rights relating to personality.

3. RELATION WITH OTHER COMMUNITY INSTRUMENTS AND INTERNATIONAL CONVENTIONS

With regard to the relationship between Rome II and other provisions of Community law, the superiority of the latter is established. As for other international conventions, it is worth mentioning the *Convention of 4 May 1971 on the Law Applicable to Traffic Accidents*, done in The Hague and the *Convention of 2 October 1973 on the Law Applicable to Products Liability*, done in The Hague, which will continue to apply between a Member State and non-members and in relations between Member States. Finally, Rome II takes precedence over any conventions entered into between Member States alone.

4. FREEDOM OF CHOICE: ITS APPEARANCE IN THE LAW ON DAMAGE

The choice by the parties of the law that is to regulate non-contractual liability is contained in Article 14 of Rome II as the main connection. The different aspects analysed with regard to the legal system in the clause on choice are: (A) *scope*, (B) *the moment the choice was made*, (C) *the limits to said choice*, and (D) the *manner* in which the parties express said choice.
(A) With regard to the scope of the freedom of choice for the applicable law, it covers non-contractual damage, *culpa in contrahendo* and quasi-contracts. Moreover, it is important to highlight, as we have already analysed in relation to the universal application of Rome II, that the parties may opt for the law of a Member State or that of a non-EU state[14].

[12] Case C-189/1987, *Kalfelis* de 27 September 1988; case C-26/1991, *Hazte* of 17 June 1992; case C-51/1997 *Réunion* of 27 October 1998.
[13] Although the modus operandi of the CJEC has not always been the same. In this regard, see the *Tacconi* case C-334/00; and the *Henkel* case C-167/00.
[14] This latter possibility, the choice of the law of a non-EU state, exists in relation to Article 14.3 which seeks to safeguard the application of the provisions of Community law when all the elements of the relationship are located in one or more Member States. Likewise, Article 14.2 determines the impossibility of revoking the application of the mandatory provisions of the state

(B) As for the moment the choice is made, Rome II allows the choice to be made both *ex antes* or *ex post* the event giving rise to the damage. In the case of an *ex ante* choice, two additional conditions have been included: *both parties must pursue a commercial activity* and *the clause must be freely negotiated*.
(C) The choice of the applicable law by the parties is subject to limits that can be divided into two groups: (a) *those affecting subject matter* in which the provisions of Article 14 do not apply, the parties cannot agree on the applicable law or in the case of the infringement of the intellectual or industrial property rights or the right to the freedom of competition. As for (b) *those affecting content* the law chosen by the parties cannot harm third parties (Article 14).
(D) The way in which the parties express the choice of the applicable law may be *express* or *derived from the elements of the case*.

5. OPERATION OF THE GENERAL RULE

The general rule is contained in Article 4 of Rome II, the first section of which establishes the *lex loci delicti comissi*. Below are the connections under the general rule by order of application:
(A) the law of the country in which the parties have their habitual residence: in the context of Article 4 of Rome II this criterion appears as an exception to the *lex loci* operating with absolute precedence over the same. The place of habitual residence is that of the person who is alleged to be liable (which may be different to the party that caused it) and the injured party.
(B) The criterion of closer connections: contained in Article 4.3. It must be applied in an exceptional manner if we take into account the wording of the precept which includes the adverb *manifestly* closer. Likewise, it must be observed that this clause does not apply to the cases regulated by specific rules, unless specifically envisaged in the precept that is being applied (*ad. ex.* Article 5, Article 10, Article 11 and Article 12).
(C) *Locus damni*: Article 4.1 enshrines the application of the law where the damage occurred. Even though it appears first in the text, it is applied on a subsidiary basis both in relation to the other connections and in the cases of the special rules set out in the Regulation. By choosing the place where the damage occurred, we rule out the application of the forum where the event that gave rise to the damage occurred, as well as the law of the states where indirect damage occurs[15].
With regard to the former, as can be seen, Rome II rules out any possible ubiquity (application either of the law where the event giving rise to the damage occurred or the place where the harmful event occurred), setting itself apart from the CJEU case law which interprets Article 5.3. of the Brussels I Regulation; indeed, with this solution, in the event of remote damages, Rome II opts for the application of the law of the place where the harmful event occurred. A different situation arises when the action causes direct damages in more than one state, in which case each of the material laws of the states where the direct damages occurred would apply. As for the second, indirect damages, CJEU case law is of use insofar as it has established that: "*The term "place where the harmful event occurred" in Article 5(3) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial*

in which all the elements of the relationship are situated by agreement, even if the parties have chosen the law of another state.
[15] See Whereas 15, 16 and 17.

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"[16].

6. SPECIAL RULES

Here we have a list of special cases categorised by subject matter: (A) product liability, (B) unfair competition and acts restricting free competition, (C) environmental damage, (D) infringement of intellectual property rights and (E) industrial action.

(A) Product liability: the special solution contained in Article 5 which refers to the *locus damni* link. Article 5.2 envisages a specific exception for this category of tort/delict.

> With regard to this category of tort/delict, it is important to remember the *Hague Convention of 2 October 1973 on the Law Applicable to Products Liability* and its effect on the application of Rome II.

(B) Unfair competition and acts restricting free competition: cases contained in the different sections of Article 6; it contemplates the now familiar connection with the law of the market affected. Article 6 distinguishes two cases: unfair competition and acts restricting free competition.

(C) Environmental damage: the solution in Article 7 of Rome II contains the application, in principle, of the law of the state where the damage is suffered, although if the victim so desires, the law of the state of origin may apply.

> This rule covers environmental damage of a public nature and private damage, i.e., those caused to persons or property. Freedom of choice is not ruled out, although it is an unlikely option.

(D) Infringement of intellectual property rights: the solution contained in Article 8 of the text establishes the application of the law of the country for whose territory protection is claimed, a solution that is clearly inspired by territorialist principles. The operation of Article 8 in relation to the other precepts is as follows: the general rule of Article 4 is not applicable, and the law responsible for regulating non-contractual liability for damages to intellectual property cannot be displaced by freedom of choice either.

Article 13 establishes the application of the forum responsible for resolving the matter according to the solution in Article 8 and not that which derives from the application of the rule set out in Chapter III[17] (unfair enrichment, *culpa in contrahendo* and *negotiorum gestio*).

Finally, section 2 of Article 8 sets out those cases in which the non-contractual obligation is derived from an infringement of a unitary Community intellectual property right. In this case the applicable law is not *lex loci protectionis* as above, but *lex loci delicti commissi* (the law of the state where the infringement took place). However, this law will regulate those questions that are not already governed by the different Community instruments[18].

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[16] CJEU Judgment of 21 January 1993, case C-364/93, (*Antonio Marinari v Lloyds Bank Plc and Zubaidi Trading Company*)

[17] Such as claims related to unjust enrichment derived from the infringement of intellectual property rights, which are subject to Article 8 and not Article 10.

[18] Which include: Regulation 40/1994 on the Community trademark, OJ L11 of 14 January 1994; Regulation 6/2002 on Community designs OJ L3, of 5 January 2002; Council Regulation 2100/94 of 27 July 1994 Council Regulation 2100/94 OJ L 227 of 1 September 1994 amended by Council Regulation 873/2004 OJ L162 of 30 April 2004; Council Regulation 2081/92 on the

(E) Industrial action: the definition refers in particular to strikes or lockouts. Article 9 establishes that the law of the state where the action is to be or has been taken will apply to non-contractual damage caused by industrial action.

7. NON-CRIMINAL CIVIL LIABILITY

Chapter III, comprised of Articles 10, 11 and 12, covers non-criminal civil obligations, in particular (A) unfair enrichment (Article 10); (B) *negotiorum gestio* (Article 11) and (C) *culpa in contrahendo* (Article 12).

8. ASPECTS RELATED TO THE SCOPE OF THE APPOINTED LEGAL SYSTEM AND OTHER QUESTIONS

In this section we will be referring to a range of rules (Articles 15 to 22) that regulate different aspects.
(A) Scope of the law applicable: this determines the scope of the law that is applicable in accordance with the connections envisaged in Rome II.
(B) Police laws: the provisions of the law of the forum in a situation where they are mandatory will be irrespective of the law otherwise applicable to the liability. An international mandatory rule is understood as a body of legislation in a country that is essential for its political, social or economic organisation.
(C) Rules of safety and conduct: this refers to a body of rules in force in the place and at the time of the event that gives rise to the liability, which will be taken into account when assessing the conduct of the person claimed to be liable.
Pursuant to the wording of this precept, the judge will take into account said rules where appropriate; as such, the only ones that must actually be applied are those referred to by the applicable rule of conflict.
(D) Direct action against the insurer of the person liable: Article 18 allows the victim to bring direct action provided the law applicable to the non-contractual obligation or the law applicable to the insurance so provides. The operation of the connections is an alternative, allowing the victim to choose.
(E) Subrogation: this refers to cases in which a third party (an insurance company for example) has made or is obliged to make payment to the creditor by virtue of a non-contractual liability. The law applicable to the third party's payment obligation will determine to what extent the third party can or cannot use the rights of the victim (the creditor) against the debtor.
(F) 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. In practice, this forum may be different for some debtors and for others.
(G) Formal validity: this rule envisages the formal validity of a unilateral legal act vis-à-vis a non-contractual obligation, if performed in accordance with the law of the place

protection of geographical indications and designations of origin for agricultural products and foodstuffs OJ L 208 of 24 July 1992.

where the act took place or in accordance with the law that governs the non-contractual obligation.
(H) Burden of proof: pursuant to Article 22 the law governing a non-contractual obligation 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. With regard to the admissibility of evidence of legal acts, they are subject either to the law of the forum or any of the laws which regulate the formal validity of said act (by the law that regulates the non-contractual obligation or the law of the place where the act was performed).

COUNCIL REGULATION (EU) NO 1259/2010 OF 20 DECEMBER 2010 IMPLEMENTING ENHANCED COOPERATION IN THE AREA OF THE LAW APPLICABLE TO DIVORCE AND LEGAL SEPARATION (ROME III)

1. Introduction

On 29 December 2010 *Council Regulation (EU) no 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation* (Rome III) was published in the OJEU. The text emerged after a long and difficult negotiation process and it was the first time that the enhanced cooperation mechanism was used[19].
The articles of this text include rules of conflict that determine the law applicable to divorce and legal separation in cases with a cross-border element[20].

2. Scope

(A) Spatial scope

Article 3 of Rome III defines what is understood by participant Member State, including not just those that have participated in the enhanced cooperation mechanism since the outset (both those that promoted it and the ones that joined prior to the publication of the text) but also those that may join subsequently, in accordance with Article 331, section 1 of the TFUE[21].
Regulation 1259, following the logic of other texts, is universally applicable (Article 4) meaning that the designated law will apply even if it is the law of a non-participant Member State or that of a third state. The justification can be found in the intention that

[19] OJEU Series L343/10 of 29.12.2010.
[20] The equivalent in the sector of international jurisdiction is Regulation (EC) no. 2201/2003 concerning jurisdiction and the recognition of judgments in matters of divorce, separation and annulment.
[21] Pursuant to Whereas no. 6, there are 15 participant Member States: Belgium, Bulgaria, Germany, Greece, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia, (Greece withdrew its request to form part of the enhanced cooperation).

the applicable forum be the closest one (whereas 14) and this may be that of a non-participant Member State or that of a third state.

> With regard to this aspect, there is a point we would like to emphasise, namely the difference in the intervention of a court when participating in the hearing of foreign law. This means that if the parties or the law that is ultimately applicable is that of a Member State (participant or otherwise) the Community legislator directly refers us to the assistance that may be provided by the European Judicial Network in terms of informing on such foreign law; this circumstance does not arise when the law chosen is that of a third state. We feel that this is an important question in a vital matter and as difficult in practice as the allegation and proof of foreign law in a trial.

The spatial scope of the Regulation means that this text will apply to any agreement on the choice of a forum (regardless of whether the parties have submitted to the law of a participant Member State, a non-participant Member State or a third country) when the application is filed before a Court in a participant Member State regardless of whether the court has jurisdiction due to rules of an institutional, conventional or internal nature. Therefore, the link required for application will be that the claim was filed before a Court in a participant Member State.

(B) Material scope.

The determination of the applicable law is in relation to the areas of judicial separation and divorce, excluding annulment.
With regard to the questions covered under the areas included with the scope of the text, it is important to specify that it will only determine the law applicable to the causes of dissolution of the tie, meaning that Rome III does not apply to the determination of the applicable law with regard to the consequences that may arise as a result of the legal separation or divorce (Article 1.2 of the Regulation).

> On this latter point, it is worth recalling that there are numerous texts that may be applicable when resolving such matters due to the limited scope of Rome III, something that is consistent with the material scope of Regulation (EC) no. 2201/2003.

(C) Application in time

According to Article 21, Rome III entered into force on 30 December 2010. It has been applicable since 21 June 2012, with the exception of Article 17, which applied as of 21 June 2011.
Article 17 establishes the information that the participant Member States must supply to the Commission, for example the possible formal requirements applicable to agreements on the choice of law or the possibility of choosing the applicable law once the procedure has commenced. The idea is for the Commission to make this information available to the public prior to the full application of the text, preferably using the website of the European Judicial Network.

> Those other states that join the enhanced cooperation subsequently will have to submit to the prerogative establishing the date of application of the Regulation.

The transitional provisions are set out in Article 18 of the text.

3. Relationship with other international texts:

Rome III takes precedence over other international agreements concluded by participant Member States alone if said texts regulate the law applicable to separation and divorce (Article 19.2). Those Conventions that bind participant Member States, Member States or third countries will not be affected by Regulation 1259 (Article 19.1).

4. Solutions regarding the applicable law

A) Freedom of choice: Article 5 of the text establishes the freedom of the parties in this regard, albeit limited to the following forums:- the law of the State where the spouses are habitually resident at the time the agreement is concluded;- the law of the State where the spouses were last habitually resident, in so far as one of them still resides there at the time the agreement is concluded;- the law of the State of nationality of either spouse at the time the agreement is concluded;- the law of the forum.
This limitation is justified because it is a question of the parties choosing a legal system with which they have a connection. Moreover, it is important to recall that they may designate the law of a participant Member State, a non-participant Member State or a third country. Of course, as occurs in those areas in which the freedom of choice is permitted in the applicable law, there is a referral to the material law and not the foreign legal system in its entirety.

Moment at which the agreement is concluded or modified: this can occur at any time prior to filing the application before a court. The spouses may only choose the applicable law in the course of the proceedings when so established by the law of the forum. In those legal systems where there is no possibility to justify the modification of the agreement on choice of the law, the rule of Article 5.2 applies, preventing any invocation of the agreement choosing the law once the claim has been filed.
The configuration of the agreement choosing the law is regulated in Articles 6 (material validity) and 7 (formal validity) of Rome III. These precepts seek above all to ensure that the spouses are aware of the choice and that the law chosen is not the result of the imposition of the will of one over that of the other.

B) Applicable law in the absence of a choice

Where no choice of law is made or where the agreement choosing the law is not valid, the parties' legal separation or divorce will be subject to one of the legal systems set out in Article 8: a) where the spouses are habitually resident at the time the court is seized; b) where the spouses were last habitually resident, provided that the period of residence did not end more than 1 year before the court was seized, in so far as one of the spouses still resides in that State at the time the court is seized; c) the law of the state of which both spouses are nationals at the time the court is seized; d) the law of the forum.
The law applicable to separation will apply in the same way to divorce, unless the parties have stated otherwise pursuant to Article 5. In the event the law applicable to separation does not envisage the conversion into divorce, the provisions of Article 8 will apply, unless the parties have established otherwise.

5. Problems with application

As with other instruments containing the freedom of choice, *renvoi* is excluded. A special clause on public policy is included in Article 12. The problem of referral to states with two or more legal systems is addressed in Article 14 of the text.

6. Application of the law of the forum and differences in the applicable legal systems

There are two articles that constitute a testament to the tension caused by the differences between the material law of the states. Article 10 (special clause on public policy) and Article 13.

Article 10 contemplates two cases in which the law to be applied under the legal system of the forum is displaced, namely where: a) the law to be applied makes no provision for divorce (note that it only refers to the non-existence of the institution of divorce), b) does not grant one of the spouses equal access to divorce or legal separation on grounds of their sex [22].

Article 13 represents the possibility for the competent authorities not to apply the solutions of Regulation 1259 insofar as their legal system either a) makes no provision for divorce [23]; b) does not deem the marriage in question valid for the purposes of divorce proceedings[24].

It is still surprising, albeit logical if the aim is to attract the highest number of states, how the same text can contain a precept leaning towards *favor divortii* as well as one that dictates the opposite.

[22] This solution was included following a proposal from the Spanish delegation and is very similar to Article 107 of the Spanish Civil Code regarding the law applicable to separation, divorce and annulment.

[23] This rule was included thinking of Malta, which has accepted divorce in an Act passed on 25 July which amended the Civil Code and included Chapter 16 Section IV “On divorce”. It can be seen at http://parlament.mt/divorcereferendum

[24] For example, the most noteworthy case is the recognition or otherwise of same sex marriages, although it is of course not the only case.

LEGISLATION OF INTEREST

ROME I

Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)
- http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0006:EN:PDF

- 1980 United Nations Convention for Contracts on International Sale of Goods
http://www.uncitral.org/uncitral/uncitral_texts/sale_goods/1980CISG.html

- Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of a provision of services
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1997:018:0001:0006:EN:PDF

- Directive 93/13 of 5 April 1993 on unfair terms in consumer contracts
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1993:095:0029:0034:EN:PDF

ROME II

- 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
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:199:0040:0049:EN:PDF

- Hague Convention of 2 October 1973 on the Law Applicable to Products Liability
http://www.hcch.net/index_es.php?act=conventions.text&cid=84

- Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents
http://www.hcch.net/index_es.php?act=conventions.text&cid=81

ROME III

Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:343:0010:0016:EN:PDF

LINKS OF INTEREST.

European Judicial Atlas in civil matters,
http://ec.europa.eu/justice_home/judicialatlascivil/html/index_en.htm

Academy of European Law,
https://www.era.int/cgi-bin/cms?_SID=NEW&_sprache=en&_bereich=ansicht&_aktion=detail&schluessel=era

Database of the European Commission (DORIE),
http://ec.europa.eu/dorie/home.do

The Hague Convention
http://www.hcch.net

Interesting blogs
http://conflictuslegum.blogspot.com/

http://www.marinacastellaneta.it/

http://conflictoflaws.net/

News of the European Court of Justice and other Legal Developments
http://www.ecjblog.com/