

# **Study on the Rome II Regulation (EC) 864/2007 on the law applicable to non- contractual obligations**

**JUST/2019/JCOO\_FW\_CIVI\_0167**

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# Executive Summary

## 1. Introduction

In reply to the EU Commission's Request for service number JUST/2019/JCOO/FW/CIVI/0167, the British Institute of International and Comparative Law (BIICL) in consortium with Civic Consulting carried out a Study to support the preparation of a report on the application of Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations ("Rome II Regulation"), hereafter, the "Study".

The Study conducts a legal analysis and assessment of the practical experiences and problems of interpretation in the application of the Rome II Regulation for the period 2010-2020.

### 1.1. Structure

The Study consists of four main parts:

A **legal study** presenting desk research and national reports covering the 26 Member States and the UK (which was an EU Member State applying the Rome II Regulation during the relevant period covered by this Study).

An **empirical study**, consisting of empirical findings per country which are based on qualitative interviews with selected experts on the Rome II Regulation and on an online survey which was distributed amongst stakeholders with relevant experience.

A **comparative table** summarising the legal issues identified across all Member States.

A **synthesis report** summarising the legal and empirical findings across all Member States.

### 1.2. Legal study

- **Desk Research**

BIICL's team conducted thorough desk research comprising an analysis of CJEU decisions, relevant studies and the main literature on the Rome II Regulation. The desk research also focused on three areas of special interest (artificial intelligence (AI), business and human rights and SLAPPs).

- **National Reports**

National Rapporteurs from each of the covered jurisdictions were charged with analysing case law and doctrine. They were instructed to address a series of questions identifying practical problems with the application of the Rome II Regulation. They carried out intensive desk research on the use of the Regulation in their respective jurisdiction, including an analysis of relevant judgments.. They further assessed whether the exclusion of certain areas from its scope of application (eg., privacy claims) created problems and whether new areas (such as business and human rights or AI) would need to be specifically addressed by the Rome II Regulation.

### 1.3. Empirical study

BIICL organised a consultation of over 100 academics and practitioners, selected from the networks of BIICL, the consortium and the National Rapporteurs. More specifically, the empirical study surveyed judges

and claimant and defendant lawyers with relevant experience in tort cases and cross-border tort litigation under the Rome II Regulation and academics with relevant experience of the Rome II Regulation.

The empirical study was based on the same series of questions addressed by the National Rapporteurs. It covered practical problems and gaps in the application of the Regulation and invited recommendations to address these.

Potential respondents contribute via two different methods:

- An **online questionnaire**, tailored to the aims of the project
- A series **qualitative individual interviews**, conducted by telephone or video-link with a selection of key stakeholders.

## 2. Legal and Empirical Data

The legal and empirical studies revealed that **the Rome II Regulation has worked well in practice**.

Many of the problems identified in the Study are **marginal issues**, some of which have only arisen in one or two jurisdictions. In other cases, the identified problems were related to cases where the Member State courts have simply failed to apply the provisions of the Regulation properly. Some consisted of theoretical issues raised by commentators, which have not given rise to difficulties in practice.

The relatively **small number of references for preliminary ruling on the interpretation of the Rome II Regulation received by the CJEU**, and the limited number of cases reaching the decision stage, also show that overall the Rome II Regulation has worked well in practice.

### 2.1. Key Provisions and conflict-of-laws rules of the Rome II Regulation

Whilst the National Rapporteurs and the stakeholders consulted in the empirical study generally agree that the provisions of the Rome II Regulation work well in practice, more than 20% of the stakeholders expressed a need for improvement of two provisions: Art. 4 and Art. 1 (respectively 29% and 28%). Seven provisions gathered 10% to 19% of respondents agreeing over a need for improvement: Art. 5 (18%), Art. 14 (18%), Art. 6 (16%), Art. 16 (16%), Art. 2 (15%), Art. 15 (12%), Art. 7 (11%). The debates around these provisions remain however largely academic or purely national, as generally also shown by the National Reports, and no significant issues were identified regarding their practical application.

- **Material scope (Art. 1)**

Several National Rapporteurs and a majority of the stakeholders were of the opinion that Art. 1 works well. The issues identified pertain to residual specific situations. 66% of the respondents were of the opinion that the sector of **defamation and privacy** needed a common set of EU choice of law rules, to improve compatibility with the Brussels I bis Regulation, to address the risks of forum shopping, and to support legal certainty and predictability.

- **Concept of "non-contractual obligations" (Art. 2)**

The shortcomings identified with the scope of the Regulation pertain to difficulties of characterising claims, and respondents reported that the scope of non-contractual obligations encompassed by the Rome II Regulation beyond simple delicts is **insufficiently clear**. Domestic caselaw across the Member States indicates that uncertainty remains as to the characterisation of a series of specific obligations, such as a

contract with protective effect for third parties, the liability of a *falsus procurator*, and obligations resulting from the offering or announcement of a promotional prize. The overall recommendation based on the legal and empirical study was that clarification of such issues should come from **case law addressing specific circumstances**. Given the marginal significance of these issues, attempts to clarify through legislation would likely create further difficulties.

- **General rule (Art. 4)**

National Rapporteurs did not report major difficulties with the application of Art. 4, although some areas of uncertainty remain. Under **Art. 4(1)**, some uncertainty was reported as to the identification of the place of direct damage in cases of financial loss. There is also no complete homogeneity among the domestic courts as to the nature of the damage suffered by relatives of victims of traffic accidents. Under **Art. 4(2)**, some uncertainty was reported regarding the identification of the “person claimed to be liable”, the operation of the rule where there are more than two parties to proceedings, and the proper approach to identifying habitual residence. Regarding **prospectus liability and financial market torts**, the doctrine in several Member States suggests the introduction of a special conflict rule designating the law of the country where the affected financial instrument is traded.

- **Product liability (Art. 5)**

The issues identified were marginal and of a doctrinal nature, including a debate regarding which law applies if none of the conditions of Art. 5(1) sentence 1 lit. (a), (b) or (c) Rome II are met.

Regarding **AI**, respondents reported uncertainty as to whether an AI system is a “product” falling within Rome II’s product liability rules. The scope of the product liability rules will affect how readily AI systems can be addressed by Rome II and its current doctrine.

- **Unfair competition (Art. 6)**

Jurisprudential debate was reported in one Member State regarding whether Art. 6 of the Rome II Regulation takes precedence over the **E-commerce Directive**. The scope of application of **Art. 6(3)** raised some limited doctrinal discussion, including whether it is necessary for the anticompetitive acts in question to have been committed by an undertaking that effectively exercised activity on the respective market, and whether it applies to all acts restricting free competition or only to acts prohibited in the TFEU.

Difficulties are expected to emerge regarding the **interlink between Art. 6 and AI**.

- **Environmental damage (Art. 7)**

Art. 7 has not caused major problems and the areas of uncertainty identified below are mostly doctrinal, including:

- The interaction of Art. 7 with Art. 17 and the effect of foreign authorisations on the liability of the polluter
- The interaction of Art. 7 with Art. 14
- The determination of the place where the harmful event occurred.

- **Freedom of choice (Art. 14)**

Several participants suggested that Art. 14 needs some improvement, although the issues reported were mostly of a doctrinal nature, and included:

- The meaning of “freely negotiated” in Art. 14(1) lit. (b), and whether it includes standard clauses or general terms and conditions.
- The assessment of the validity and form of the choice of law, and whether Art. 3(5), 10, 11 and 13 Rome I apply by analogy to Art. 14 Rome II, or if the *lex fori* applies.
- The notion of ‘commercial activity’ for the purposes of Art. 14(1)(b).

- **Scope of the law applicable (Art. 15)**

Difficulties surrounding the application of Art. 15 were reported in the doctrine and arose in the case law of several Member States. Stakeholders reported some uncertainty as to:

- whether a third party participating in a tort committed by another person will be submitted to the same law as the latter or not.
- Art. 15(c): the law applicable to the right of a court to estimate damages, and the interlink with public policy.
- whether or not interest on damages falls within Article 1(3) or Article 15.

- **Overriding mandatory provisions (Art. 16)**

Several participants suggested that Art. 16 needs some improvement, although the issues reported were mostly of a doctrinal nature, and included:

- The questions as to whether Art. 16 Rome II disallows the application of overriding mandatory provisions of third countries.
- The suggestion to import the definition in Art. 9(1) Rome I to improve the coherence between instruments.

## 2.2. Areas of special interest

- **Artificial Intelligence**

The AI findings depend more heavily on **desk research and hypothetical application of the Rome II Regulation** than other Sections of this Study. This is due to the sparsity of case law in the area, and comparatively low levels of AI-specific responses from expert study participants. The AI section of the Study analyses **what AI is, how it can cause damage** that may breach non-contractual obligations engaging Rome II, and (with hypothetical examples) **how specific Rome II articles may apply** in AI contexts.

Future application of Rome II to AI cases depends in part upon **how substantive legal systems will develop in response to AI** as more AI-related disputes come before the courts and technology continues to develop. The Study therefore considers the Draft Regulation accompanying the European Parliament’s resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for AI as a potential model for substantive AI regulation.

With that foundation, the application of **specific articles of the Rome II Regulation** is discussed in the context of new situations and challenges that may arise where AI systems are involved in breaches of non-

contractual obligations. While the challenges of applying the Rome II Regulation in this context are not necessarily new or unique to AI, the nature of AI systems may generate **increasingly frequent and complex incidences of familiar problems**, often in combination.

The most notable challenges that Rome II may face in an AI context are: (1) difficulty **localising damage** or effect where breach of a non-contractual obligation generates a purely virtual outcome; and (2) the risk of **liability gaps** where states diverge in their allocation of liability to parties responsible for different parts of complex AI systems. These challenges can be compared to difficulties in cases involving the internet, financial loss and complex manufacturing relationships. One must consider whether the rules developed in response to specific problems in those contexts are fit for purpose when applied to AI systems.

- **Business and human rights**

The business and human rights findings are based on desk research and the analysis of the legal and empirical studies conducted across the Member States. In transnational cases involving human rights abuses, the application of the general rule of **Article 4(1)** of the Rome II Regulation has led to significant problems for claimants who are victims of human rights abuses. Under Article 4(1), the applicable law is the law of the country where the damage occurred (*lex loci damni*). When multinational corporations carry out cross-border activities, human rights abuses committed by their subsidiaries or suppliers in developing countries (host states) will usually be governed by the law of the host state. Although the advantage or disadvantage of the *lex loci damni* for the claimant depends on the host State involved, there is a risk that the law applicable will be the law of a State with weak regulatory standards, poor rule of law or governance structures.

Several academics and consulted stakeholders suggested to amend the Rome II Regulation and add a conflict-of-laws provision specific to human rights abuses, mirroring the “principle of ubiquity” found under **Article 7**. Others suggested that a more efficient solution, both in terms of protection of the victims and legal certainty for businesses, would be to classify the provisions of the EU Parliament Draft Directive as overriding mandatory provisions within the meaning of **Article 16** of the Rome II Regulation. This was the approach adopted in the European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)).

- **SLAPPs**

In the EU context, **Strategic Lawsuits against Public Participation (SLAPPs)** are groundless or exaggerated lawsuits and other legal forms of intimidation initiated by state organs, business corporations and individuals in power against weaker parties – journalists, civil society organisations, human rights defenders and others – who express criticism or transmit messages uncomfortable to the powerful, on a public matter. The Study addresses the specific issue of **the law applicable to claims in tort for defamation when they are used as SLAPPs, focusing on the risks of forum and law shopping** associated with the current lack of a harmonized EU rule on the subject. The findings in this area are based on desk research, as well as a limited number of cases and national examples reported by a few National Rapporteurs.

In the current context, cross-border SLAPPs based on defamation are subject to national conflict-of-laws rules, which allows ample room for manoeuvre regarding forum and law shopping tactics on the part of plaintiffs and may lead to unsatisfactory outcomes with respect to EU standards of freedom of speech and other fundamental rights.

The Study finds that a unified EU approach to the conflict-of-laws in SLAPPs based on defamation could mitigate most of the difficulties faced by victims of SLAPPs in a cross-border context. More specifically,

defamation, including outside the context of SLAPPs, should be covered by the Rome II Regulation and a preference should be given to a rule designating the law of the victim's habitual residence, without prejudice to Art. 14.



# Executive Summary (FR)

## 1. Introduction

En réponse à la demande de service de la Commission européenne numéro JUST/2019/JCOO/FW/CIVI/0167, le British Institute of International and Comparative Law (BIICL) en consortium avec Civic Consulting a réalisé une étude pour soutenir la préparation d'un rapport sur l'application du Règlement (CE) n° 864/2007 sur la loi applicable aux obligations non contractuelles (le "règlement Rome II"), (ci-après, l'"Étude").

L'Étude effectue une analyse juridique et une évaluation des expériences pratiques et des problèmes d'interprétation liés à l'application du règlement Rome II pour la période 2010-2020.

### 1.1. Structure

L'Étude est composée de quatre parties principales :

Une **étude juridique** présentant des recherches documentaires et des rapports nationaux couvrant les 26 États membres appliquant le règlement Rome II et le Royaume-Uni (qui était un État membre de l'UE appliquant le règlement Rome II pendant la période concernée couverte par cette étude).

Une **étude empirique**, consistant en des résultats empiriques par pays, basés sur des entretiens qualitatifs avec des experts du règlement Rome II et une enquête en ligne distribuée aux parties prenantes ayant une expérience pertinente.

Un **tableau comparatif** résumant les problèmes juridiques identifiés dans tous les États membres.

Un **rapport de synthèse** résumant les résultats juridiques et empiriques dans tous les États membres.

### 1.2. Etude légale

- **Recherche documentaire**

L'équipe de BIICL a effectué une recherche documentaire approfondie comprenant une analyse des décisions de la CJUE, des études pertinentes et de la littérature sur le règlement Rome II. La recherche documentaire s'est également concentrée sur trois domaines d'intérêt particulier (intelligence artificielle (IA), entreprises et droits de l'homme, et les poursuites stratégiques contre la mobilisation publique (SLAPPs)).

- **Rapports nationaux**

Les rapporteurs nationaux de chacune des juridictions concernées ont été chargés d'analyser la jurisprudence et la doctrine. Ils ont été chargés d'aborder, à la lumière de la série de questions sur lesquelles se fonde la présente Etude, les problèmes pratiques liés à l'application du règlement Rome II. Ils ont effectué des recherches documentaires approfondies sur l'utilisation du règlement Rome II dans la jurisprudence de leurs États membres respectifs, y compris une analyse des arrêts pertinents rendus dans les États membres. Ils ont en outre évalué si l'exclusion de certains domaines du champ d'application du règlement Rome II (par exemple, la protection de la vie privée) créait des problèmes et si de nouveaux domaines thématiques (tels que les entreprises et les droits de l'homme ou l'intelligence artificielle) devraient être traités plus spécifiquement par le règlement Rome II.

### 1.3. Etude empirique

BIICL a organisé une consultation de plus de 100 universitaires et praticiens, qui ont été sélectionnés parmi les réseaux de BIICL, du consortium ainsi que des rapporteurs nationaux. Plus spécifiquement, l'étude empirique a interrogé des juges, des avocats ayant une expérience pertinente dans les affaires de responsabilité délictuelle et des litiges transfrontaliers en matière délictuelle en vertu du règlement Rome II, ainsi que des universitaires ayant une expérience pertinente du règlement Rome II.

L'étude empirique était basée sur la même série de questions que celles posées par les rapporteurs nationaux. Elle couvrait les problèmes pratiques et les lacunes dans l'application du règlement et offrait la possibilité de formuler des recommandations pour y remédier.

Les répondants potentiels ont contribué par deux méthodes différentes :

- Un **questionnaire en ligne**, adapté aux objectifs du projet,
- Une série **d'entretiens individuels** qualitatifs, menés par téléphone ou par liaison vidéo avec une sélection de parties prenantes clés.

## 2. Données juridiques et empiriques

Les études juridiques et empiriques ont révélé que **le règlement Rome II a bien fonctionné dans la pratique**.

Bon nombre des problèmes identifiés dans l'étude sont des **questions marginales**, dont une partie ne s'est posée que dans une ou deux juridictions. Dans d'autres cas, les problèmes identifiés étaient liés à des affaires dans lesquelles les tribunaux des États membres n'ont tout simplement pas appliqué correctement les dispositions du règlement, ou consistaient en des questions théoriques soulevées par les commentateurs, qui n'ont pas donné lieu à des difficultés dans la pratique.

Le **nombre relativement faible de demandes de décision préjudicielle sur l'interprétation du règlement Rome II reçues par la CJUE**, et le nombre limité d'affaires atteignant le stade de la décision, montrent également que, dans l'ensemble, le règlement Rome II a bien fonctionné dans la pratique.

### 2.1. Dispositions clés et règles de conflit de lois du règlement Rome II

Bien que les rapporteurs nationaux et les parties prenantes consultées dans l'étude empirique conviennent généralement que les dispositions du règlement Rome II fonctionnent bien dans la pratique, plus de 20% des parties prenantes ont exprimé le besoin d'améliorer deux dispositions: : l'art. 4 et l'art. 1 (respectivement 29% et 28%). Sept dispositions ont recueilli entre 10 et 19 % de répondants s'accordant sur la nécessité d'une amélioration : l'art. 5 (18%), l'art. 14 (18%), l'art. 6 (16%), Art. 16 (16%), Art. 2 (15%), Art. 15 (12%), Art. 7 (11%). Les débats autour de ces dispositions restent cependant largement académiques ou purement nationaux, comme le montrent généralement aussi les rapports nationaux, et aucun problème significatif n'a été identifié concernant leur application pratique.

- **Champ d'application (Art. 1)**

Plusieurs rapporteurs nationaux et une majorité de participants sont d'avis que l'art. 1 fonctionne bien. Les problèmes identifiés concernent des situations spécifiques résiduelles. 66% des répondants sont d'avis que le secteur de la **diffamation et de la vie privée** nécessite un ensemble commun de règles européennes sur le

choix de la loi applicable, afin d'assurer une meilleure compatibilité avec le règlement Bruxelles I bis, d'aborder les risques de *forum shopping* et d'améliorer la sécurité juridique et la prévisibilité.

- **Concept d' « obligations non-contractuelles » (Art. 2)**

Les lacunes identifiées concernant le champ d'application ont trait à la difficulté de caractériser les demandes. Les répondants ont indiqué que le champ d'application des obligations non contractuelles couvertes par le règlement Rome II au-delà des simples délits n'est **pas suffisamment clair**. La jurisprudence interne des États membres indique qu'il subsiste une incertitude quant à la qualification d'une série d'obligations spécifiques, telles que le contrat à effet protecteur pour les tiers, la responsabilité d'un *falsus procurator* et les obligations résultant de l'offre ou de l'annonce d'un prix promotionnel. La recommandation générale basée sur l'étude juridique et empirique est que **la clarification de ces questions devrait venir de la jurisprudence** traitant de circonstances spécifiques. Étant donné l'importance marginale de ces questions, les tentatives de clarification par voie législative créeraient probablement des difficultés supplémentaires.

- **Règle générale (Art. 4)**

Les rapporteurs nationaux n'ont pas signalé de difficultés majeures dans l'application de l'art. 4, bien que certaines zones d'incertitude subsistent. En vertu de **l'art. 4(1)**, une incertitude a été signalée quant à l'identification du lieu du dommage direct en cas de perte financière. Il n'y a pas non plus d'homogénéité totale entre les tribunaux nationaux quant à la nature du préjudice subi par les proches des victimes d'accidents de la circulation. En vertu de **l'art. 4(2)**, une incertitude a été signalée concernant l'identification de la « personne dont la responsabilité est invoquée », l'application de la règle lorsqu'il y a plus de deux parties à la procédure, et l'approche appropriée pour identifier la résidence habituelle. En ce qui concerne la **responsabilité en matière de prospectus et les délits sur les marchés financiers**, la doctrine de plusieurs États membres suggère l'introduction d'une règle de conflit spéciale désignant la loi du pays où l'instrument financier concerné est négocié.

- **Responsabilité du fait des produits (Art. 5)**

Les problèmes identifiés sont marginaux et de nature doctrinale, y compris un débat sur la loi applicable si aucune des conditions de l'art. 5(1) (a), (b) ou (c) de Rome II n'est remplie.

En ce qui concerne **l'intelligence artificielle**, les répondants ont fait part de leur incertitude quant à la question de savoir s'il s'agit d'un « produit » relevant des règles de Rome II en matière de responsabilité du fait des produits. Le champ d'application des règles de responsabilité du fait des produits affectera la facilité avec laquelle les systèmes d'intelligence artificielle peuvent être traités par Rome II et sa doctrine actuelle.

- **Concurrence déloyale et actes restreignant la libre concurrence (Art. 6)**

Un débat jurisprudentiel a été signalé dans un État membre concernant la question de savoir si l'art. 6 du règlement Rome II prévaut sur la **directive sur le commerce électronique**. Le champ d'application de **l'art. 6(3)** a soulevé quelques discussions doctrinales limitées, notamment sur la question de savoir s'il est nécessaire que les actes anticoncurrentiels en question aient été commis par une entreprise qui a effectivement exercé une activité sur le marché concerné, et s'il s'applique à tous les actes restreignant la libre concurrence ou seulement aux actes interdits par le TFUE.

Des difficultés devraient apparaître concernant le **lien entre l'Art. 6 et l'intelligence artificielle**.

- **Atteinte à l'environnement (Art. 7)**

L'art. 7 n'a pas causé de problèmes majeurs et les zones d'incertitude identifiées ci-dessous sont principalement d'ordre doctrinal, notamment :

- L'interaction de l'art. 7 avec l'art. 17 et l'effet des autorisations étrangères sur la responsabilité du pollueur.
- L'interaction de l'art. 7 avec l'art. 14.
- La détermination du lieu où le fait dommageable s'est produit.

- **Liberté de choix (Art. 14)**

Plusieurs participants ont suggéré que l'art. 14 a besoin d'être amélioré, bien que les problèmes signalés soient principalement de nature doctrinale, et comprennent :

- La signification de « librement négocié » aux fins de l'art. 4(1)(b), et si cela inclut les clauses standard ou les conditions générales.
- L'évaluation de la validité et de la forme du choix de la loi applicable, et si les art. 3(5), 10, 11 et 13 Rome I s'appliquent par analogie à l'art. 14 Rome II, ou si la lex fori s'applique.
- La notion d' « activité commerciale » aux fins de l'art. 14(1)(b).

- **Portée de la loi applicable (Art. 15)**

Des difficultés autour de l'application de l'art. 15 ont été signalées par la doctrine et ont été relevées dans la jurisprudence de plusieurs États membres. Les intervenants ont fait état d'incertitude concernant :

- Le fait de savoir si un tiers participant à un délit commis par une autre personne sera soumis à la même loi que cette dernière ou non.
- L'art. 15(c) : la loi applicable au droit d'un tribunal d'estimer les dommages, et le lien avec l'ordre public.
- Le fait de savoir si les intérêts sur les dommages et intérêts relèvent ou non de l'article 1(3) ou de l'article 15.

- **Dispositions impératives dérogatoires (Art. 16)**

Plusieurs participants ont suggéré que l'art. 16 a besoin d'être amélioré, bien que les problèmes signalés soient principalement de nature doctrinale, et comprennent :

- La question de savoir si l'art. 16 Rome II interdit l'application de dispositions impératives dérogatoires de pays tiers.
- La suggestion d'importer la définition de l'art. 9(1) Rome I pour améliorer la cohérence entre les instruments.

## 2.2. Domaines d'intérêt particulier

- **Intelligence artificielle**

Les conclusions de la section sur l'IA reposent davantage sur des **recherches documentaires et une application hypothétique du règlement Rome II** que les autres sections de cette étude. Cela est dû à la rareté de la jurisprudence dans ce domaine et au nombre relativement faible de réponses spécifiques à l'IA fournies par les experts participant à l'étude. La section de l'Etude consacrée à l'IA analyse ce qu'est l'IA, comment elle peut causer des dommages susceptibles de constituer une violation des obligations non contractuelles découlant de Rome II, et (à l'aide d'exemples hypothétiques) comment certains articles de Rome II peuvent s'appliquer dans des contextes impliquant l'IA.

L'application future de Rome II aux affaires d'IA dépend en partie **de la manière dont les systèmes juridiques de fond se développeront en réponse à l'IA**, à mesure que les tribunaux seront saisis d'un plus grand nombre de litiges liés à l'IA et que la technologie continuera de se développer. L'Etude considère donc le projet de règlement accompagnant la résolution du Parlement européen du 20 octobre 2020 contenant des recommandations à la Commission sur un régime de responsabilité civile pour l'IA comme un modèle potentiel de réglementation de fond de l'IA.

Sur cette base, **l'application d'articles spécifiques du règlement Rome II** est examinée dans le contexte des nouvelles situations et des nouveaux défis qui peuvent survenir lorsque des systèmes d'IA sont impliqués dans des violations d'obligations non contractuelles. Si les défis liés à l'application du règlement Rome II dans ce contexte ne sont pas nécessairement nouveaux ou propres à l'IA, la nature des systèmes d'IA peut générer des **incidences de plus en plus fréquentes et complexes de problèmes familiaux**, souvent en combinaison.

Les défis les plus notables auxquels Rome II peut être confronté dans un contexte d'IA sont les suivants : (1) la difficulté de **localiser le dommage** ou l'effet lorsque la violation d'une obligation non contractuelle génère un résultat purement virtuel ; et (2) le risque de lacunes en matière de responsabilité lorsque les États divergent dans l'attribution de la responsabilité aux parties responsables de différents éléments de systèmes d'IA complexes. Ces défis peuvent être comparés aux difficultés rencontrées dans les affaires impliquant l'internet, les dommages financiers et les relations complexes de fabrication. Il faut se demander si les règles élaborées en réponse à des problèmes spécifiques dans ces contextes sont adaptées lorsqu'elles sont appliquées aux systèmes d'IA.

- **Entreprises et droits de l'homme**

Les conclusions de la section sur les entreprises et les droits de l'homme sont basées sur des recherches documentaires et l'analyse des études juridiques et empiriques menées dans les États membres. Dans les affaires transnationales impliquant des violations des droits de l'homme, l'application de la règle générale de **l'art. 4(1)** du règlement Rome II a entraîné des problèmes importants pour les victimes de violations des droits de l'homme. En vertu de l'art. 4(1), la loi applicable est la loi du pays où le dommage est survenu (*lex loci damni*). Lorsque des sociétés multinationales exercent des activités transfrontalières, les violations des droits de l'homme commises par leurs filiales ou leurs fournisseurs dans des pays en développement (États d'accueil) seront généralement régies par la loi de l'État d'accueil. Bien que l'avantage ou le désavantage de la *lex loci damni* pour le demandeur dépende de l'État hôte concerné, il existe un risque que le droit applicable soit celui d'un État dont les normes réglementaires ou les structures de gouvernance sont plus faibles.

Plusieurs des universitaires et des parties prenantes consultées ont suggéré de modifier le règlement Rome II et d'ajouter une disposition de conflit de lois spécifique aux violations des droits de l'homme, reflétant le

« principe d'ubiquité » de l'article 7. D'autres ont suggéré qu'une solution plus efficace, tant en termes de protection des victimes que de prévisibilité et sécurité juridique pour les entreprises, consisterait à qualifier les dispositions du projet de directive du Parlement européen en tant que dispositions impératives au sens de l'article 16 du règlement Rome II. Il s'agit de l'approche adoptée dans la résolution du Parlement européen du 10 mars 2021 contenant des recommandations à la Commission sur le devoir de vigilance et la responsabilité des entreprises (2020/2129(INL)) .

- **Poursuites stratégiques contre la mobilisation publique (ou poursuites-bâillons, SLAPPs)**

Dans le contexte de l'UE, les poursuites stratégiques contre la participation publique, ou poursuites-bâillons, sont des poursuites sans fondement ou exagérées et d'autres formes juridiques d'intimidation initiées par des organes de l'État, des sociétés commerciales et des individus au pouvoir contre des parties plus faibles - journalistes, organisations de la société civile, défenseurs des droits de l'homme et autres - qui expriment des critiques ou transmettent des messages gênants pour les puissants, sur une question publique. L'Etude aborde la question spécifique du **droit applicable aux plaintes en responsabilité civile pour diffamation lorsqu'elles sont des poursuites-bâillons, en se concentrant sur les risques de *forum shopping* et de *law shopping*** associés à l'absence actuelle de règle européenne harmonisée sur le sujet. Les conclusions dans ce domaine sont basées sur des recherches documentaires, ainsi que sur un nombre limité de cas et d'exemples nationaux rapportés par quelques rapporteurs nationaux.

Dans le contexte actuel, les poursuites-bâillons transfrontalières fondées sur la diffamation sont soumises aux règles nationales de conflit de lois, ce qui laisse une grande marge de manœuvre aux plaignants en ce qui concerne les tactiques de *forum shopping* et de *law shopping* et peut conduire à des résultats insatisfaisants au regard des normes européennes en matière de liberté d'expression et d'autres droits fondamentaux.

L'Etude conclut qu'une approche européenne unifiée du conflit de lois dans les poursuites-bâillons basées sur la diffamation pourrait atténuer la plupart des difficultés des victimes de ces poursuites-bâillons dans un contexte transfrontalier. Plus précisément, la diffamation, y compris en dehors du contexte des poursuites-bâillons, devrait être couverte par le règlement Rome II et une préférence devrait être donnée à une règle désignant la loi de la résidence habituelle de la victime, sans préjudice de l'art. 14.

# Executive Summary (DE)

## 1. Einleitung

Die EU-Kommission hat das *British Institute of International and Comparative Law* (BIICL) im Konsortium mit *Civic Consulting* mit der Studie JUST/2019/JCOO/FW/CIVI/0167 beauftragt (im Folgenden "Studie"), die einen Bericht über die Anwendung der Verordnung (EG) Nr. 864/2007 über das auf außervertragliche Schuldverhältnisse anzuwendende Recht ("Rom-II-Verordnung") vorbereiten soll.

Die Studie analysiert und bewertet für den Zeitraum 2010-2020 praktische Erfahrungen und Auslegungsprobleme bei der Anwendung der Rom-II-Verordnung.

### 1.1. Aufbau

Die Studie besteht aus vier Teilen:

Eine **rechtliche Studie**, basierend auf einer Analyse der Literatur und Rechtsprechung, sowie auf Länderberichten für die 26 Mitgliedstaaten und das Vereinigte Königreich (das im relevanten Zeitraum ein EU-Mitgliedstaat war, der die Rom-II-Verordnung anwandte).

Eine **empirische Studie**, die die praktische Anwendung der Verordnung in jedem Mitgliedstaat evaluiert. Sie stützt sich auf qualitative Interviews mit ausgewählten Experten sowie auf eine Online-Umfrage, die an Stakeholder mit einschlägiger Erfahrung bei der Anwendung der Rom-II-Verordnung gerichtet war.

Eine **rechtsvergleichende Tabelle**, die in den Mitgliedsstaaten identifizierte, rechtliche Probleme aufzeigt.

Eine **Synthese**, die die rechtlichen und empirischen Ergebnisse für alle Mitgliedstaaten zusammenfasst.

### 1.2. Rechtliche Studie

- **Desk Research**

BIICL analysierte EuGH-Entscheidungen, relevante Studien und die wichtigste Literatur zur Rom-II-Verordnung. Zudem wurden drei Bereiche näher untersucht, die von besonderem Interesse sind (künstliche Intelligenz (AI), Wirtschaft und Menschenrechte sowie SLAPPs).

- **Länderberichte**

Nationale Berichtersteller aus jeder der erfassten Rechtsordnungen wurden mit der Analyse der nationalen Rechtsprechung und Lehre beauftragt. Sie hatten einen Fragenkatalog abzarbeiten, um praktische Probleme bei der Anwendung der Rom-II-Verordnung aufzuzeigen. Sie analysierten die Anwendung der Verordnung einschließlich der einschlägigen Urteile. Darüber hinaus bewerteten sie, ob der Ausschluss bestimmter Bereiche aus dem Anwendungsbereich der Verordnung (z. B. Verletzungen der Privatsphäre) Probleme aufwirft und ob neue Bereiche (z. B. Wirtschaft und Menschenrechte oder künstliche Intelligenz) in der Rom-II-Verordnung speziell geregelt werden sollten.

### 1.3. Empirische Studie

BIICL konsultierte über 100 Akademiker und Rechtspraktiker, die aus den Kontakten des Instituts, des Konsortiums sowie der nationalen Berichtersteller ausgewählt wurden. Diese waren im Wesentlichen Richter, Kläger- und Beklagtenanwälte mit einschlägiger Erfahrung in Schadensersatzfällen und

grenzüberschreitenden Schadensersatzprozessen, sowie Akademiker, die auf die Rom-II-Verordnung spezialisiert sind.

Die empirische Studie basierte auf dem gleichen Fragenkatalog, der auch den nationalen Berichterstatter vorgelegt wurde. Sie soll praktische Probleme und Lücken bei der Anwendung der Verordnung aufzeigen und den Teilnehmern die Möglichkeit eröffnen, Empfehlungen abzugeben.

Die Befragten konnten auf zwei verschiedene Arten an der Umfrage teilnehmen:

- durch Ausfüllen eines Online-Fragebogens, der die Themen des Projekts abdeckt;
- durch qualitative Einzelinterviews, die per Telefon oder Video mit einer Auswahl von Schlüsselakteuren geführt wurden.

## 2. Ergebnisse der rechtlichen und empirischen Studie

Die rechtliche und empirische Analyse haben ergeben, dass die Rom-II-Verordnung in der Praxis gut funktioniert.

Bei vielen der in der Studie festgestellten Probleme handelt es sich eher um Randthemen, die zum Teil nur in einem oder zwei Ländern aufgetreten sind. In anderen Fällen betrafen die festgestellten Probleme mitgliedstaatliche Gerichtsentscheidungen, in welchen die Verordnung nicht ordnungsgemäß angewendet wurde. In einigen Fällen handelte es sich um theoretische Probleme, die von Kommentatoren aufgeworfen wurden, die in der Praxis jedoch bislang keine feststellbaren Schwierigkeiten bereitet haben.

Die relativ geringe Zahl der beim EuGH eingegangenen Vorabentscheidungsverfahren zur Auslegung der Rom-II-Verordnung und die begrenzte Zahl der Fälle, die das Entscheidungsstadium erreicht haben, zeigen ebenfalls, dass die Rom-II-Verordnung in der Praxis insgesamt gut funktioniert.

### 2.1. Zentrale Bestimmungen und Kollisionsnormen der Rom-II-Verordnung

Während sich die nationalen Berichterstatter und die in der empirischen Studie befragten Stakeholder im Allgemeinen einig sind, dass die Bestimmungen der Rom-II-Verordnung in der Praxis gut funktionieren, sahen doch mehr als 20 % der Befragten einen Verbesserungsbedarf bei zwei zentralen Bestimmungen: bei Art. 4 und Art. 1 (jeweils 29% und 28%). Bei sieben weiteren Vorschriften sehen 10 % bis 19 % der Befragten einen Verbesserungsbedarf: Art. 5 (18%), Art. 14 (18%), Art. 6 (16%), Art. 16 (16%), Art. 2 (15%), Art. 15 (12%) und Art. 7 (11%). Die Diskussion um diese Bestimmungen bleibt, wie die Länderberichte zeigen, jedoch weitgehend akademisch oder auf bestimmte Mitgliedstaaten beschränkt, und es wurden keine wesentlichen Probleme bei der praktischen Anwendung festgestellt.

- **Materieller Anwendungsbereich (Art. 1)**

Mehrere nationale Berichterstatter und eine Mehrheit der Stakeholder waren der Meinung, dass Art. 1 bis auf einen spezifischen Punkt unproblematisch ist: 66 % der Befragten waren der Ansicht, dass der Bereich Verleumdung bzw. Schutz der Privatsphäre einer gemeinsamen EU-weiten Regelung bedarf, um eine bessere Vereinbarkeit mit der Brüssel-Ibis-Verordnung zu gewährleisten, die Risiken des "forum shopping" abzumildern, sowie Rechtssicherheit und Vorhersehbarkeit zu garantieren.

- **Konzept der "außervertraglichen Schuldverhältnisse" (Art. 2)**

Die im Zusammenhang mit dem Anwendungsbereich von Art. 2 festgestellten Unzulänglichkeiten beziehen sich auf die Schwierigkeit, Ansprüche zu qualifizieren. Die Befragten berichteten, dass abgesehen von



einfachen Delikten nicht klar ist, welche außervertraglichen Schuldverhältnisse von der Rom-II-Verordnung erfasst sein sollen. Die Rechtsprechung in den Mitgliedstaaten deutet darauf hin, dass bei der Qualifikation in einer Reihe von Fällen weiterhin Unsicherheit besteht (z. B. Vertrag mit Schutzwirkung zugunsten Dritter, Haftung eines *falsus procurator* und Verpflichtungen, die sich aus dem Angebot oder der Ankündigung eines Werbepreises ergeben). Die auf der Grundlage der rechtlichen und empirischen Untersuchung getroffene allgemeine Empfehlung war jedoch, dass die Klärung dieser Fragen durch die Rechtsprechung erfolgen sollte. Angesichts der relativ geringen Bedeutung dieser Fragen würde der Versuch einer Klarstellung durch den Gesetzgeber wahrscheinlich eher zu neuen Schwierigkeiten führen.

- **Allgemeine Kollisionsnorm (Art. 4)**

Aus den Länderberichten wurden im Allgemeinen keine größeren Schwierigkeiten bei der Anwendung von Art. 4 ersichtlich, allerdings gibt es hier doch eine Unsicherheit: Im Rahmen von Art. 4(1) wurde über Probleme bei der Bestimmung des unmittelbaren Schadensortes bei reinen Vermögensschäden berichtet. Auch bei der Bestimmung der Art des Schadens, den Angehörige von Verkehrsunfallsoffern erleiden, besteht keine vollständige Homogenität zwischen nationalen Gerichten. Im Rahmen von Art. 4(2) besteht eine Unsicherheit bei der Bestimmung der "Person, deren Haftung geltend gemacht wird", bei der Anwendung der Vorschrift im Fall von mehr als zwei Verfahrensbeteiligten und bei der Vorgehensweise zur Bestimmung des gewöhnlichen Aufenthalts. In Bezug auf die Prospekthaftung und Finanzmarktdelikte schlägt die Lehre in mehreren Mitgliedstaaten die Einführung einer speziellen Kollisionsnorm vor, nach der das Recht des Landes Anwendung findet, in dem das betroffene Finanzinstrument gehandelt wird.

- **Produkthaftung (Art. 5)**

Die identifizierten Probleme waren eher marginal und wurden in der Lehre diskutiert, so etwa die Frage, welches Recht anwendbar sein soll, wenn keine der Voraussetzungen des Art. 5(1) Satz 1 lit. (a), (b) oder (c) Rom-II-Verordnung erfüllt sind.

In Bezug auf AI ist fraglich, ob es sich um ein "Produkt" handelt, das unter die Produkthaftungsregeln von Rom II fällt. Der Anwendungsbereich der Produkthaftungsvorschriften hängt davon ab, inwieweit AI-Systeme von der Rom-II-Verordnung und ihrer derzeitigen Auslegung erfasst werden können.

- **Unlauterer Wettbewerb (Art. 6)**

In einem Mitgliedstaat wurde eine rechtswissenschaftliche Debatte darüber geführt, ob Art. 6 der Rom II-Verordnung Vorrang vor der E-Commerce-Richtlinie hat. Der Anwendungsbereich von Art. 6(3) warf einige wenige Diskussionen auf, einschließlich der Frage, ob es notwendig ist, dass wettbewerbswidrige Handlungen von einem Unternehmen begangen wurden, das tatsächlich eine Tätigkeit auf dem jeweiligen Markt ausübte, und ob Art. 6 für alle Handlungen gilt, die den freien Wettbewerb einschränken, oder nur für Handlungen, die gem. AEUV verboten sind.

Schwierigkeiten werden auch im Zusammenspiel von Art. 6 und AI erwartet.

- **Umweltschäden (Art. 7)**

Art. 7 hat keine größeren Anwendungsprobleme verursacht. Allerdings wurden die folgenden Punkte in der Literatur angesprochen:

- das Zusammenspiel von Art. 7 mit Art. 17 und die Auswirkung ausländischer Genehmigungen auf die Haftung des Schadensverursachers
- das Zusammenspiel von Art. 7 mit Art. 14
- die Bestimmung des Ortes, an dem das schädigende Ereignis eingetreten ist.

- **Rechtswahl (Art. 14)**

Mehrere Teilnehmer finden Art. 14 verbesserungsbedürftig, und führten hierzu u.a. folgende Punkte an:

- die Bedeutung von "frei ausgehandelt" in Art. 14(1) lit. (b) und die Frage, ob damit Standardklauseln oder allgemeine Geschäftsbedingungen gemeint sind.
- die Beurteilung der Gültigkeit und Form der Rechtswahl, und ob Art. 3(5), 10, 11 und 13 Rom I analog zu Art. 14 Rom II gelten, oder ob die *lex fori* Anwendung findet.
- den Begriff der "gewerblichen Tätigkeit" gem. Art. 14(1)(b).

- **Geltungsbereich des anzuwendenden Rechts (Art. 15)**

Bei der Anwendung von Art. 15 wurden von der Lehre einige Schwierigkeiten festgestellt. Diese zeigten sich auch in der Rechtsprechung mehrerer Mitgliedstaaten. Die Stakeholder berichteten über Probleme bei der Auslegung folgender Fragen:

- ob ein Dritter, der sich an einer von einer anderen Person begangenen unerlaubten Handlung beteiligt, demselben Recht unterworfen wird wie diese Person oder nicht.
- Art. 15(c): das auf eine Schadensschätzung durch ein Gericht anwendbare Recht und das Zusammenspiel mit dem *ordre public*.
- ob Zinsen auf Schadensersatz unter Artikel 1(3) oder Artikel 15 fallen oder nicht.

- **Eingriffsnormen (Art. 16)**

Mehrere Teilnehmer schlugen Änderungen von Art. 16 vor. Sie betreffen u. a.:

- die Frage, ob Art. 16 Rom II die Anwendung drittstaatlicher Eingriffsnormen zulässt.
- den Vorschlag, die Definition des Art. 9(1) Rom I in Art. 16 Rom II zu übernehmen, um die Kohärenz zwischen den Verordnungen zu verbessern.

## 2.2. Spezielle Themenbereiche

- **Künstliche Intelligenz (AI)**

Die Anwendung der Rom-II-Verordnung auf den Bereich AI beruht in stärkerem Maße als andere Abschnitte dieser Studie auf einer hypothetischen Betrachtung. Dies ist auf die spärliche Rechtsprechung in diesem Bereich und die vergleichsweise geringe Anzahl an Kommentaren von fachkundigen Stakeholdern zurückzuführen. Die Studie definiert den Begriff der künstlichen Intelligenz und erörtert, wie es im Zusammenhang mit AI zu einer außervertraglichen Haftung kommen kann, die unter Rom II fällt, sowie (mit hypothetischen Beispielen) wie bestimmte Vorschriften der Rom II-Verordnung im Zusammenhang mit AI angewendet werden können.

Die künftige Anwendung der Verordnung auf Fälle mit AI-Bezug hängt zum Teil davon ab, wie das materielle Recht reagiert wird, wenn mehr AI-bezogene Streitigkeiten vor die Gerichte kommen und sich die Technologie weiterentwickelt. Die Studie betrachtet daher die Entschließung des Europäischen Parlaments vom 20. Oktober 2020 mit Empfehlungen an die Kommission für eine Regelung der zivilrechtlichen Haftung beim Einsatz künstlicher Intelligenz (2020/2014(INL)) als potenzielles Modell für eine materielle AI-Regulierung.

Auf dieser Grundlage wird die Anwendung spezifischer Artikel der Rom-II-Verordnung im Kontext neuer Situationen erörtert, die sich ergeben können, wenn außervertragliche Schuldverhältnisse im Zusammenhang mit AI-Systemen entstehen. Während die Anwendung der Rom-II-Verordnung nicht unbedingt zu neuen oder AI-spezifischen Herausforderungen führt, kann die Natur von AI-Systemen zu immer häufigeren und komplexeren Szenarien mit bereits bekannten Problemen führen, oft in Kombination.

Die wichtigsten Probleme, die bei der Anwendung der Rom-II-Verordnung in einem AI-Kontext auftreten können, sind: (1) die Schwierigkeit, einen Schaden zu lokalisieren, wenn eine außervertragliche Verletzungshandlung ein rein virtuelles Ergebnis erzeugt; und (2) das Risiko von Haftungslücken, wenn Staaten bei der Zuweisung der Haftung an Parteien, die für verschiedene Teile komplexer AI-Systeme verantwortlich sind, divergieren. Diese Herausforderungen lassen sich mit komplexen Fällen vergleichen, in denen es um das Internet, finanzielle Schäden und vielschichtige Produktionsbeziehungen geht. Hier stellt sich die Frage, ob die Regeln, die als Reaktion auf spezifische Probleme in diesen Szenarien entwickelt wurden, auch für die Anwendung auf AI-Systeme geeignet sind.

- **Wirtschaft und Menschenrechte**

Die Analyse des Themas Wirtschaft und Menschenrechte basiert sowohl auf *desk research* als auch auf den Länderberichten und der empirischen Studie in den Mitgliedstaaten. Bei grenzüberschreitenden Menschenrechtsverletzungen hat die Anwendung der allgemeinen Regel von Artikel 4 Absatz 1 der Rom-II-Verordnung zu erheblichen Problemen für die Opfer geführt. Nach Artikel 4(1) ist das anwendbare Recht das Recht des Landes, in dem der Schaden eingetreten ist (*lex loci damni*). Wenn multinationale Unternehmen grenzüberschreitend tätig sind, werden Menschenrechtsverletzungen, die von ihren Tochtergesellschaften oder Zulieferern in Entwicklungsländern (host states/ Gaststaaten) begangen werden, in der Regel dem Recht des Gaststaates unterworfen sein. Obwohl der Vorteil oder Nachteil der *lex loci damni* für den Kläger vom jeweiligen Gaststaat abhängt, besteht das Risiko, dass das anwendbare Recht das Recht eines Staates mit schwachen Regulierungsstandards, fehlenden Rechtsstaatlichkeitsprinzipien oder schlechten Regierungsstrukturen ist.

Mehrere Akademiker und Interessenvertreter schlugen vor, die Rom-II-Verordnung zu ändern und eine spezielle Kollisionsnorm für Menschenrechtsverletzungen einzuführen, die das "Ubiquitätsprinzip" des Artikel 7 widerspiegelt. Andere finden es sowohl im Hinblick auf den Schutz der Opfer als auch auf die Rechtssicherheit für Unternehmen effizienter, die Bestimmungen des Richtlinienentwurfs des EU-Parlaments als zwingende Vorschriften im Sinne von Artikel 16 der Rom-II-Verordnung einzustufen. Dieser Ansatz wurde in der Entschließung des Europäischen Parlaments vom 10. März 2021 mit Empfehlungen an die Kommission zur Sorgfaltspflicht und Rechenschaftspflicht von Unternehmen (2020/2129(INL)) verfolgt.

- **SLAPPs**

Im EU-Kontext sind strategische Klagen gegen öffentliche Beteiligung (SLAPPs) unbegründete oder übertriebene Klagen sowie andere rechtliche Formen der Einschüchterung, die von staatlichen Organen, Wirtschaftsunternehmen und Machthabern gegen schwächere Parteien - Journalisten, Organisationen der Zivilgesellschaft, Menschenrechtsverteidiger und andere - initiiert werden, die in einer öffentlichen

Angelegenheit Kritik äußern oder für Machthaber unangenehme Botschaften übermitteln. Die Studie befasst sich mit der spezifischen Frage, welches Recht auf deliktische Ansprüche wegen Verleumdung anwendbar ist, wenn diese in der Form von SLAPPs eingesetzt werden, und konzentriert sich dabei auf die Risiken des Forum- und Law-Shopping, die mit dem derzeitigen Fehlen einer harmonisierten EU-weiten Regelung zu diesem Thema verbunden sind. Die Ergebnisse in diesem Bereich basieren auf *desk research* sowie auf einer begrenzten Anzahl von Fällen und nationalen Beispielen, die von einigen Länderberichterstatern angeführt wurden.

Im gegenwärtigen Kontext unterliegen grenzüberschreitende SLAPPs, die auf Verleumdung beruhen, den nationalen Kollisionsnormen, was einen großen Spielraum für Forum- und Law-Shopping-Taktiken der Kläger zulässt und zu unbefriedigenden Ergebnissen im Hinblick auf EU-Standards zur Meinungsfreiheit und anderen Grundrechten führen kann.

Die Studie kommt zu dem Schluss, dass ein EU-weit einheitlicher Ansatz für Kollisionsnormen im Zusammenhang mit grenzüberschreitenden SLAPPs die meisten Schwierigkeiten der Opfer abmildern könnte. Insbesondere sollten Verleumdungen, auch außerhalb des Kontexts von SLAPPs, von der Rom-II-Verordnung erfasst werden. Hier sollte einer Regelung Vorzug gegeben werden, die auf dem Recht des gewöhnlichen Aufenthalts des Opfers beruht, unbeschadet des Art. 14 Rom-II-Verordnung.

# Synthesis Report

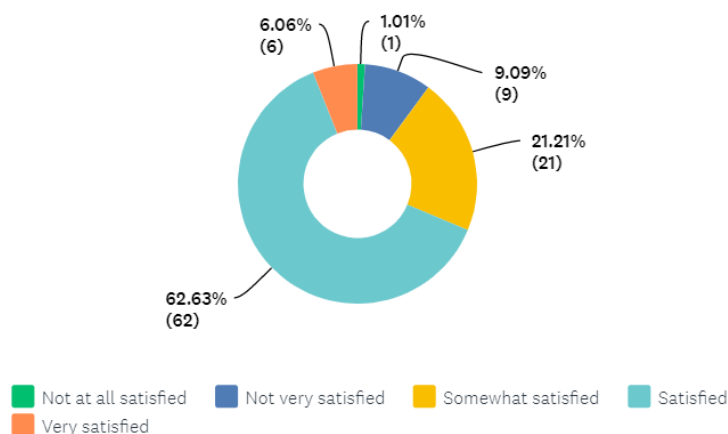
The following Synthesis combines the findings gathered from the legal and empirical studies conducted across the Member States, and draws conclusions and provides recommendations for each provision of the Rome II Regulation.

## Introduction

The consultation reveals that **the Rome II Regulation has worked well in practice**. 90% of the stakeholders ranked their approval of the Regulation from “somewhat satisfied” to “very satisfied”.

### How satisfied are you with the operation of the Rome II Regulation in your area(s) of practice/work?

Answered: 99 Skipped: 3



To the question of which features of the Rome II Regulation are in need of improvement:

- Only two provisions garnered over 20%: **Art. 4** and **Art. 1**, with respectively 29% and 28% of the consulted stakeholders of the opinion that the provisions need improvement. The main issues identified with Art. 4 relate to the identification, under Art. 4(1), of the place where the direct damage occurred when the damage is of a financial nature, and the lack of precision as to the concept of “the person claimed to be liable” under Art. 4(2). Regarding Art. 1, the exclusion under Art. 1(2) lit. (g) of non-contractual obligations arising out of violations of privacy and rights relating to personality has been identified as problematic by several national experts who pointed to forum shopping as a resulting risk.
- Seven provisions gathered 10% to 19% of respondents agreeing over a need for improvement: Art. 5 (18%), Art. 14 (18%), Art. 6 (16%), Art. 16 (16%), Art. 2 (15%), Art. 15 (12%), Art. 7 (11%). The debates around these provisions remain however largely academic, and no significant issues were identified regarding their practical application.
- The rest of the provisions garnered less than 9% of respondents noting a need for improvement.

Many of the problems identified below are rather at the periphery in terms of their significance, and reveal mostly **marginal issues** including:

- Cases where Member State courts have simply failed to apply the provisions of the Regulation properly.
- Technical or theoretical issues raised by commentators, which have not given rise to difficulties in practice.
- Issues arising in a narrow and specific class of cases, often giving rise to an issue in one or two Member States.

The CJEU has rendered 8 decisions on the Rome II Regulation (see Legal Study, Part. 2 of the Report, for a detailed analysis of the decisions). The relatively **small number of references to the CJEU**, and the limited number of cases reaching the decision stage, also illustrate how well the Rome II Regulation has worked in practice.

## Material scope (Art. 1)

The provisions regarding the scope of applicability (**Arts. 1 and 2**) are respectively the second and third provisions to which stakeholders refer to most prominently in the empirical study. Approval as to the functionality of the provisions is moderate: respectively 43% and 36% of the participants were of the opinion that Arts. 1 and 2 work well. One stakeholder commented that the scope of non-contractual obligations encompassed by Rome II beyond simply delicts is insufficiently clear. Another participant added that courts had not had ‘major problems’ with Arts. 1 and 2, but ‘in specific situations’, the provisions could generate difficulties of interpretation, such as in identifying whether a claim is contractual or non-contractual.

The difficulties in properly qualifying a claim under Art. 1 in certain specific situations appears as well in national doctrine and caselaw. German doctrine reveals a lack of consensus as to the extent to which claims for refunds based on an act of specific public power are to be classified as “civil and commercial matters” within the meaning of Art. 1. This is particularly problematic in cases where the State takes responsibility for remedying environmental damage but imposes the cost of doing so on a private party. In that respect, the English expert points to the decisions C-814/79 *Netherlands v Rüffer* (Brussels Convention) and notes that it is unclear whether the CJEU’s case law on Art. 1 (Brussels I bis) would lead to the same result today.

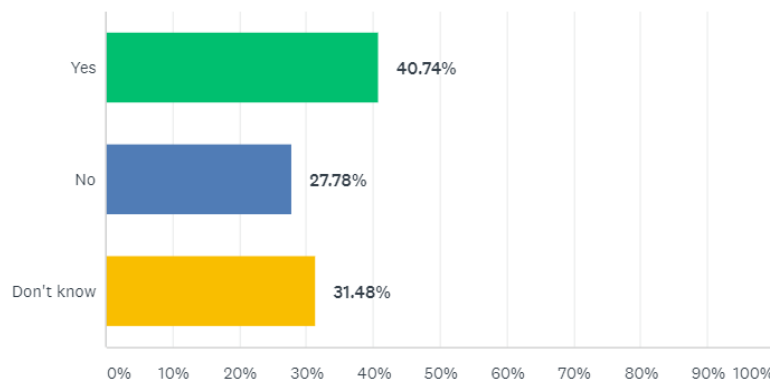
The scope of **Art. 1(2) lit. (d)** is subject to debate. It is disputed in German doctrine whether liability for incorrect prospectuses is covered by Art. 1(2) lit. (d). The English expert points to CJEU case law on the equivalent exception in the Rome I Regulation, which has taken a narrow approach (C-25/18 *Kerr v Postnov*, C-272/18 *Vfk v TVP Treuhand*). Additionally, German doctrine questions whether Art. 1(2) lit. (d) also excludes any liability of officers and shareholders in other situations, e.g. in case of an abuse of the corporate form leading to a piercing of the corporate veil. The scope of application of Art. 1(2) lit. (d) raised uncertainty in Dutch doctrine and Slovenian caselaw as well, regarding the liability of directors and administrators.

Some additional residual difficulties were identified: Slovakian caselaw reveals some uncertainty as to the application of Art. 1(1) for claims regarding unpaid tolls for motorway in a foreign country, with respect to non-contractual obligations in administrative matters. In that respect, the English expert notes that the issue is most likely contractual, by analogy with the parking cases under Brussels I (C-551/15 *Pula Parking*; C-307/19 *Obala i lučice*).

- Issues identified regarding specifically the exclusion of personality rights (including defamation) from the scope of Rome II and the interlink with SLAPPs:

Did the exclusion of violations of privacy and personality rights, including defamation, from the scope of the Rome II Regulation cause any problem in your Member State?

Answered: 54 Skipped: 48



When asked about the need for specific rules in some areas, 66% of all the respondents answered that the sector of defamation and privacy needed a common set of EU choice of law rules. Two respondents noted that including relevant provisions on defamation and privacy in Rome II would lead to a better **compatibility** with the jurisdictional rules of the **Brussels I bis** Regulation. 3 respondents mentioned that the inclusion of such rules would address the risks of **forum shopping**, and 5 respondents further added this would support **legal certainty** and **predictability**. One Portuguese academic added that the exclusion of personality rights and defamation created problems before Portuguese courts because there are divergent interpretations as to what the term “personality rights” covers. English case law has also suggested difficulties in the areas of malicious falsehood and harassment. One academic/lawyer from Belgium with practical experience in cases involving cross-border defamation pointed out that the exclusion of defamation from the scope of Rome II significantly complicated the position of the victims.

National rapporteurs for Austria, Croatia, France, Germany, Hungary, Malta, Slovenia, and Spain reported doctrine’s criticism in their respective jurisdictions over the exclusion of violations of privacy and rights relating to personality from the Rome II Regulation. It is for instance debated in German literature whether the exemption also covers injuries to the body or health stemming from the violation of personal rights, such as an incorrect medical consultation leading to an operation without consent.

In France, the exclusion of violations of privacy and rights relating to personality from the Rome II Regulation is seen as a political failure in Europe, especially in light of the recent increase in the number of cyber-offences by the media. Hungarian literature also notes that it is the ‘most unfortunate handicap’ of the Rome II Regulation. Hungarian and Maltese doctrine note that the absence of regulation provides opportunities for forum shopping. Hungarian literature places further emphasis on the new challenges raised by online platforms and asks whether a Member State could oblige a platform to remove harmful content posted by users residing in other Member States.

Austrian literature reports that the exclusion of violations of privacy and rights relating to personality leads to different conflict-of-law provisions and thus possibly the application of different laws. Croatian literature also mentions this concern, particularly for claims involving defamation, calling for a rule in Rome II according to which the law of the country would apply in which a publication is made available. The Hungarian solution (article 23 of the new Act of International Private Law) designates as applicable the law of the habitual residence/registered place of business of the victim. Additionally it allows for a limited unilateral choice of the applicable law by the victim (this choice will override the default rule). The latter may either choose Hungarian law as the applicable law, or the law of the state

where the centre of his interests is located, or, alternatively the law of the state where the violating party's habitual residence (or, for legal persons, its seat) is located. These solutions are presented as possible model rules for EU law.

In Spain, the majority of academics consider that the best solution to the current exclusion of violations of privacy and rights relating to personality is to amend the Rome II Regulation to include a rule based on the application of the law of the victim's habitual residence, without prejudice to the possibility of the parties choosing the applicable law in accordance with Art. 14, and the possible application of an escape clause based on the closest connection principle.

The German and Austrian rapporteurs link the omission of personality rights in Rome II with a discussion on the **GDPR**. They ask whether the GDPR contains provisions that could be considered as conflict-of-laws rules, in particular Art. 3 GDPR. Germany's rapporteur is doubtful whether Art. 3 GDPR is a special conflict-of-laws rule in the sense of Art. 23 Rome I Regulation and Art. 27 Rome II Regulation. The Austrian national report asks whether Art. 3 GDPR can be considered to be an overriding mandatory rule.

Few of the consulted stakeholders commented generally on **SLAPPs**, mostly for lack of caselaw and/or doctrine in their respective Member States. Of the four out of all respondents who commented on SLAPPs, three of them argued that the lack of relevant choice-of-law rules in Rome II incites **forum shopping**. They were of the opinion that specific rules are needed. One Belgian academic and lawyer based this observation on his personal practical experience with three cases where he encountered SLAPPs. In addition, Hungarian organisations are pushing for the implementation of anti-SLAPP measures at the EU level, claiming that Rome II leads to a 'race to a bottom' leaving victims with the lowest standards. In Slovenia, the policy debate focuses on the effect of lawsuits directed against journalists, and the insufficient protection both in relation to the plaintiff, as in relation between journalists and their employers. In Malta, the assassination of a Maltese journalist and actions against various Maltese media outlets have rendered the exclusion of defamation violations a matter of important concern and political divide.

The **relevance of SLAPPs in relation to the interplay between the Rome II Regulation and the treatment defamation and data protection** is generally less discussed in national literature. There is also little to no relevant case law.

The Slovenian national rapporteur suggests that the issue of SLAPPs should be tackled in the debate regarding a possible common rule on defamation and violations of privacy, and that a substantive regulation of this field should be adopted at EU level. In Malta, proposed recommendations have focused on the issue of recognition and enforcement of judgments rather than on the applicable law question. Proposals to amend the Maltese "Media and Defamation Act" of 2018 included the suggestion to apply public policy to defamation lawsuits filed abroad. The proposal was rejected by the Maltese government, which argued that to conduct a public policy test, the courts in Malta would invariably be exercising jurisdiction that they do not have, and the Brussels Regulation specifically prohibits courts of Member States to use the test of public policy to alter the rules of jurisdiction.

#### **Conclusions:**

The exclusion under Art. 1 (2) lit. (g) of non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation, is considered problematic. National experts express the need for a rule (encompassing the issue of SLAPPs) in Rome II designating the the law of the victim's habitual residence, without prejudice to Art. 14.

## **Temporal scope (Arts. 31-32)**

Arts. 31 and 32 are frequently referred to in practice according to respectively 18% and 13% of the stakeholders consulted. Greek, Dutch and English caselaw, as well as Austrian and German doctrine, identified some issues regarding the meaning of "the event giving rise to the damage" under Art. 31. In German doctrine, it is still disputed in particular whether the decisive factor should be the infringement of legal rights or the action leading to it. The answer to this question also affects the precise determination of the event giving rise to damages in cases of actions of a certain duration, such as in cases of omission and in cases of strict liability. Croatian, Hungarian and Polish caselaw also reveal some residual misapplication of the temporal scope of Rome II.

#### **No specific recommendations**



## Concept of "non-contractual obligations" (Art. 2)

48% of the consulted stakeholders refer to Art. 2 frequently in their work, and 36% found the provision "works well". Many respondents identified shortcomings with the scope, noting that characterisation of claims is a difficult issue; that the scope of non-contractual obligations encompassed by Rome II beyond simple delicts is insufficiently clear. In product liability, one respondent commented that it is not clear where contractual liability ends and non-contractual liability begins. Another noted the difficulties faced by courts in differentiating between contractual and non-contractual issues in the context of motor vehicle insurance in traffic accidents. In that respect, the English expert points here to C-559/14 *Ergo Insurance*, the leading case on classification under the Rome I and Rome II Regulations. A further respondent questioned whether the scope of the set-off rule in Art. 17 Rome I encompasses the set-off of non-contractual obligations, or solely contractual ones. Specific problem areas identified include personality rights, financial and indirect damages, and a lack of harmonisation of the concepts contractual and non-contractual obligations.

Domestic caselaw demonstrates some specific difficulties as well. Although CJEU caselaw is fairly clear on the classification under Brussels I, some uncertainty remains before Austrian and German courts as to the characterisation of a contract with protective effect for third parties under Rome II. In addition, German doctrine disagrees regarding the relationship between Rome I and Rome II. While some authors assume that the Rome I and II Regulations, taken together, determine the applicable law of each type of obligation, others argue that not every obligation can be attributed to one of the two Regulations, such as the creditor's challenge in a case of insolvency, or liability in cases of a takeover of a company. The classification of liability as a *falsus procurator* is equally controversial in German literature. Opinion is also divided as to the classification of an obligation resulting from the offering or announcement of a promotional prize, as is often done in the retail sector (case C-27/02 *Engler* points to a contractual classification). Furthermore, it is unclear whether the liability of an expert for his expert opinion to persons who have not themselves concluded a contract with the expert is to be classified as a contractual or non-contractual obligation.

Greek caselaw reveals some fluctuation as to the way courts qualify the issue of the extent of the liability of the buyer of an undertaking, or a shipowner, for their debts. Italian courts encountered some difficulties to characterise as contractual or non-contractual the obligation of a hotel towards a client who fell down the stairs, and the obligation of a doctor who failed to detect a fatal disease. Romanian judges have encountered difficulties in differentiating contractual from non-contractual claims, for instance in situations involving insurance claims. Croatian caselaw reveals some residual difficulties as well.

At the appeal level, French courts have demonstrated some resistance to the *Granarolo* approach, and implicit rejection can be found in decisions from the French *Cour de cassation* as well.

### Conclusions:

Domestic caselaw across the Member States indicates that clarification is needed as to the characterisation of a series of specific obligations, such as a contract with protective effect for third parties, the liability of a *falsus procurator*, an obligation resulting from the offering or announcement of a promotional prize.

The clarification should come from caselaw. These cases seem of marginal significance and attempts to clarify through legislation will likely create further difficulties.

## Universal application (Art. 3)

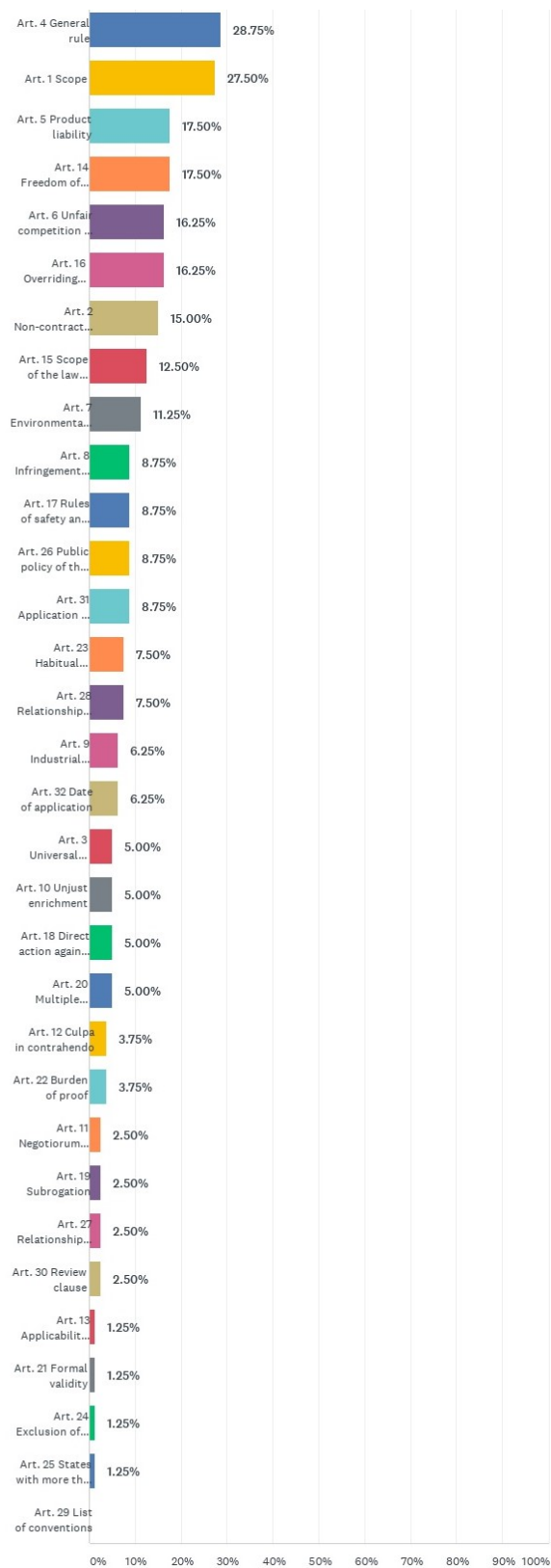
Art. 3 did not raise specific comments or criticism. Half of all participants thought that Art. 3 (universal application) "works well" (50%). The experts for Greece and Latvia noted some reluctance from the courts to apply foreign law, in particular the law of a non-Member State. They reported marginal cases where the courts seemingly tried to avoid the application of foreign law by applying the escape clause to establish a closer connection with the law of the forum.

### No specific recommendations

## General rule (Art. 4)

National rapporteurs did not report major difficulties with the application of Art. 4, although some areas of uncertainty remain. From a practitioner's perspective, the provision has raised more concern. Art. 4 is the provision to which stakeholders refer the most in practice (84%), and while 64% of the respondents are of the opinion that the provision works well, many others suggest it needs some improvement.

## Which features of the Rome II Regulation are in need of improvement, in your opinion?



- **The approach to identifying the place of direct damage in Art. 4(1)**

The application of Art. 4(1) and the identification of the place of direct damage is generally unproblematic, except for lingering uncertainties in some Member States regarding relatives of victims of traffic accidents, and financial damage.

The Cypriot and English experts reported some cases where judges experienced difficulties to identify the place where the direct damage occurred when the damage was of a financial nature, and in some cases, fell back on Art. 4(3). Cases where English courts have been required to apply Article 4(1) to financial damage often arise in the context of fraud claims and concern the torts of conspiracy or dishonest assistance. The variation in the factual scenarios underlying the disputes undoubtedly contributes to the difficulty in developing a clear approach. In that respect, the English expert notes that the CJEU's jurisprudence on the concept of "damage" under Brussels I in financial cases has lacked a clear anchor, with each step forward (*Universal Music*) being followed by a case generating doubt (*Lober*).

Hungarian doctrine, Romanian caselaw, as well as five respondents among the consulted stakeholders consider that the question of whether the damage of the relatives of victims of car accidents is direct or indirect is still an open question (some courts consider that the damage is direct, contrary to what the CJEU decided in *Florin Lazar v Allianz SpA*).

The Polish expert reported one case where the court misapplied Art. 4(1): German law was applicable under Art. 4(1) and the court ruled that, as German law provided for similar rules relating to financial compensation as Polish law, the court could thus base its decision exclusively on Polish law.

- **The approach to the first rule of displacement in Art. 4(2) in cases involving multiple parties or claims**

Bulgarian and Portuguese legal authors suggest that the application of Art. 4(2) could lead to unjust outcomes in cases involving multiple parties or claims, some of them with habitual residence in the same, but the others in different countries.

Bulgarian authors note that "the person claimed to be liable" is a broader concept than the concept of a person who caused the damage, as it includes also the situation in which one person bears liability for another person who actually caused the damages (i.e. a parent for the acts of a minor). They suggest amending Art. 4(2) and replacing "the person claimed to be liable" with "the person who caused the damage" as, under Art. 15(g), the law applicable shall govern the liability for the acts of another person. The English expert also notes that the lack of precision in the terms (use of singular, lack of precision as to who is "the person claimed to be liable" and the "person sustaining damage") has caused problems in England.

Other issues have arisen under Art. 4(2) for English courts, including the operation of the rule where there are more than two parties to proceedings, and the proper approach to identifying habitual residence. The English expert also reported unanswered questions in relation to the meaning and application of the "person sustaining damage" in the context of secondary claimants, or "ricochet" claimants. Examples of such claims, which are increasingly common, include where a dependant of an injured or deceased victim seeks to recover in respect of their loss of dependency. It is not yet clear whose habitual residence is relevant in such a context. The English expert also noted that further guidance on the proper approach to habitual residence for individuals would be helpful in practice.

Romanian and Slovenian courts experienced some difficulties applying Art. 4(2) in cases involving multiple parties, and relied on the escape clause, applying both Art. 4(2) and 4(3) as a result.

Participants also suggested specific areas that could benefit from special rules, including: rules on indirect victims and claims by family members; rules on multi-vehicle accidents, to which Art. 4 seems ill-suited, for example because it leaves unanswered whether Art. 4(2) applies where a driver injures multiple pedestrians from different countries.

- **The approach to the escape clause in Art. 4(3)**

Bulgarian authors note that Art. 4(3) has limited application in practice. Some minor criticism surrounding the application of Art. 4(3) includes unpredictability, the risk of forum shopping, and the increased probability that courts will apply the *lex fori*. In that respect, Slovenian doctrine criticises the overly broad application of the escape clause by Slovenian courts, which tend to depart quickly from the basic rule of *lex loci damni* to apply *the lex fori* under Art. 4(3).

The Belgian expert reported a case where the court misunderstood the nature of Art. 4(3) and applied both Art. 4(1) and (3). The Cypriot and Romanian experts also reported minor misunderstandings from the courts as to the application of Art. 4(3).

Polish courts encountered some difficulties in interpreting the term “manifestly more closely connected” and the close connection of the pre-existing relationship between the parties with the tort/delict in question. Romanian literature stresses this issue as well.

- **Suitability of Art. 4 to govern cases of prospectus liability or other financial market torts**

The German, French and Italian experts noted the complexity of financial market torts, and suggested a need for a special set of rules.

There is broad agreement in German literature that Art. 4(1) is ill-fitted to financial market torts for the following reasons: the localisation of financial loss is difficult, and also, any localisation involving investor-specific criteria (such as the place of the investor’s habitual residence or the place of establishment of the bank managing his account), would lead to a fragmentation of the applicable law to the liability for a single financial market tort, e.g. misrepresentation in a prospectus. This would confer an unjustified advantage on investors from a state with a high protective standard, who would be allowed to raid the coffers of the issuer at the expense of other investors. Moreover, the applicable law would become unforeseeable for the issuer given that the habitual residence of the investor or the establishment of his bank is mostly unknown to the issuer. At the same time, the fragmentation of the applicable law would also render collective actions of investors more difficult.

The German Council for Private International Law suggests amending Rome II to introduce a special conflict rule for financial market torts, designating the law of the country where the affected financial instrument is traded. Similarly, Italian doctrine is of the opinion that the liability of rating agencies would be most conveniently governed by the law of the market in which the rated title is being traded. To achieve that result, this author argued, one should be ready to resort to Art. 4(3) of the Rome II Regulation.

- **Suitability of Art. 4 to govern Artificial Intelligence cases (see also 2.2.1)**

Under Art. 4(1), AI systems that do not have tangible, physical outputs may face difficulties of localisation to a particular country. When the AI system itself is damaged, it may also be difficult to connect the damage to a country if the AI has only a virtual presence.

Under Art. 4(2), as a matter of substantive law, it may be challenging to identify which party is legally capable of being held liable. If, for example, they have masked their identity, it may also be difficult to identify them as a practical matter. That said, once an individual has been identified and a claim brought against them, the mechanics of applying Art. 4(2) to identify the applicable law should be straightforward. The biggest risk is that of a negative liability gap arising from Art. 4(2)’s interaction with Art. 4(1).

While Art. 4(3) may avoid the negative liability gap problem where the facts independently indicate a manifestly closer connection, it is by no means a reliable solution. A scheme where the default rule produces principled and predictable answers in AI cases would be more consistent with the Rome II desiderata than a heavy reliance on Art. 4(3).

- **Suitability of Art. 4 to govern business and human rights cases (see 2.2.2)**

In transnational cases involving human rights abuses, under the general rule of Article 4(1), the applicable law is the law of the country where the damage happened (*lex loci damni*). Although the advantage or disadvantage of the *lex loci damni* for the claimant depends on the host state involved, it can mean that the law applicable will be the law of a state with weak regulatory standards, poor rule of law or governance structures.

When considering the case of *Jabir and others v KiK*, which had been brought before the German courts, a study requested by the European Parliament pointed out that the fact that the law of the host State (Pakistan) was the applicable law under the general rule of Rome II “created major hurdles” for the claimants because of the lower health, safety and labour standards, weaker governance structure and enforcement mechanisms, and shorter statutes of limitation provided by Pakistani law.

In the 2020 Draft Directive on corporate due diligence and corporate accountability, the European Parliament concluded that “the application of the general rule in Article 4(1) of the Rome II Regulation can lead to significant problems for claimants who are victims of human rights abuses, particularly in cases where the companies are large multinationals operating in countries with low human rights standards, where it is almost impossible for them to obtain fair compensation.”

73% of the BHR experts are of the opinion that a set of special rules tailored to the specificities of corporate human rights abuses is needed in Rome II. Out of the 19 experts who believe specific rules are needed, 7 of them pointed to the mechanism of Article 7 of Rome II as a good solution, although some note the issue of preserving the competitiveness of EU undertakings as well. One of the experts further commented that the introduction of specific criteria leading to the application of the law of the place of incorporation / establishment of the parent company enhance the accountability of MNCs and would strengthen predictability and legal certainty for victims. Another respondent referred to the European Parliament's draft proposal and its Article 6a allowing victims to choose between the law of the country in which the damage occurred (*lex loci damni*), the law of the country in which the event giving rise to the damage occurred (*lex loci delicti commissi*) and the law of the place where the defendant undertaking is domiciled or, lacking a domicile in the Member State, where it operates. Another respondent designated Article 11 of the Second Revised Draft of the Binding Treaty 1260 as a better option, less complex and demanding than Article 6a of the Draft proposal.

#### Conclusions:

- Art. 4(1): some uncertainty remains as to the identification of the place of direct damage when the damage is financial. There is no complete homogeneity among the domestic courts as to the nature of the damage suffered by relatives of victims of traffic accidents.
- Art. 4(2): some uncertainty remains regarding the identification of the "person claimed to be liable", the operation of the rule where there are more than two parties to proceedings, and the proper approach to identifying habitual residence.
- Art. 4(3): rarely, domestic caselaw reveals a misapplication of the provision.
- Prospectus liability and financial market torts: the doctrine in several Member States suggests the introduction of a special conflict rule for financial market torts designating the law of the country where the affected financial instrument is traded.

## Product liability (Art. 5)

20% of the stakeholders consulted refer to Art. 5 frequently in their practice, and 18% identified the provision as requiring improvement. In product liability, one respondent commented that it is not clear where contractual liability ends and non-contractual liability begins. Some participants also suggested that the product liability provision could benefit from a more consumer-friendly approach.

Some debates surrounding Art. 5 exist in academic literature. A question discussed in German doctrine is which law applies if none of the conditions of Art. 5(1) sentence 1 lit. (a), (b) or (c) Rome II are met. Proposals for filling this gap include: (1) the law that of the state that is closest to the one mentioned in Art. 5(1) sentence 1 lit. (a), (b) or (c) Rome II, provided that the product is also marketed there; (2) the application of the general rule of Art. 4; and (3) the analogous application of Art. 5(1) sentence 2. Additionally, Polish doctrine reveals differences of interpretation regarding the term "marketing of a product".

Participants were less familiar with Rome II's interaction with other international conventions such as the **1973 Hague Convention on the Law Applicable to Products Liability**, with 45% responding that they did not know whether Rome II works well alongside them. Slovenian caselaw reveals at least one misapplication of Rome II where the Convention should have applied.

Regarding **Artificial Intelligence**, the uncertainty as to whether AI is a "product" falling within Rome II's product liability rules was highlighted by three respondents. The scope of the product liability rules will affect how readily AI systems can be addressed by Rome II and its current doctrine. One respondent for Poland identified AI cases involving damage caused by autonomous vehicles and drones as cases falling under Rome II's product liability rules.

#### Conclusions:

- There is some residual uncertainty as to which law applies if none of the conditions of Art. 5(1) sentence 1 lit. (a), (b) or (c) Rome II are met.
- There is uncertainty as to whether cases involving Artificial Intelligence fall under Rome II's product liability rules.

## Unfair competition (Art. 6)

27% of the respondents refer to Art. 6 frequently in their work, and 16% are of the opinion that the provision is in need of improvement, although no direct recommendations were submitted by the consulted stakeholders.

Regarding **Art. 6(1)**, in academic literature, Belgian and Romanian doctrine questions whether the “mosaic approach” should be adopted when markets of multiple countries are affected by unfair market practices. The interpretation of Art. 6(1) and its relation to the E-commerce Directive is the subject of diverging opinions in case law by two different chambers of the Austrian Supreme Court. The seventh chamber of the Court ruled that the country-of-origin principle underlying the E-commerce Directive (and the transposing Austrian Act; the “E-Commerce Act”) would govern the civil liability of a host provider. In the view of the chamber, in Austrian law this principle would have a conflict-of-laws dimension despite the CJEU’s ruling in *eDate Advertising* to the contrary. The fourth chamber of the same court, specialising in intellectual property law, has adopted a different position: in its view, Art. 6 of the Rome II Regulation takes precedence over the E-commerce Directive and the transposing Austrian Act. The law applicable to behaviour on the internet allegedly amounting to unfair competition would therefore be the law of the market affected and not that of the country of origin of the e-commerce service provider.

Regarding **Art. 6(2)**, German authors report uncertainty regarding whether the reference to Art. 4 only concerns Art. 4(1) or also Art. 4(2) and (3).

**Art. 6(3)** is also the topic of doctrinal discussion. Romanian literature questions whether it is necessary, in order to fulfil the condition, for the anticompetitive acts in question to have been committed on the respective market by an undertaking that effectively exercised activity on the respective market, or if a wider conception can be admitted to reflect the extremely large territorial scope of certain antitrust legislations worldwide. Slovenian doctrine questions the scope of application of Art. 6(3) as well, regarding in particular whether it applies to all acts restricting free competition or if Recital 23 restricts its application to acts prohibited in the TFEU.

The interlink between Art. 6 and Artificial Intelligence is discussed. Romanian doctrine highlighted that difficulties might appear in connection with illicit behaviours committed through internet or through AI. In general, substantive competition law expected to be significantly affected by the growth of Artificial Intelligence. As different competition law regimes respond differently to these new challenges, this may create complexities in determining whether an allegedly anticompetitive act falls within the (autonomously defined) scope of Art. 6. As for the Art. 6 connecting factors, the most unique challenge in AI cases may lie in identifying whether, for the purposes of Art. 6(3), a country’s market ‘is, or is likely to be, affected,’ where the market for AI systems or components is non-price and/or multi-sided.

### Conclusions:

- Jurisprudential debate was reported in one Member State regarding whether Art. 6 of the Rome II Regulation takes precedence over the E-commerce Directive or not.
- The scope of application of Art. 6(3) raised some doctrinal discussion: it is necessary for the anticompetitive acts in question to have been committed by an undertaking that effectively exercised activity on the respective market? Does it apply to all acts restricting free competition or only to acts prohibited in the TFEU?
- Difficulties are expected to emerge regarding the interlink between Art. 6 and AI.

## Environmental damage (Art. 7)

The provision did not raise much criticism among the respondents and ranked only in 9<sup>th</sup> position in the list of provisions “in need of improvement” (according to 11% of the stakeholders). However, the German expert identified two main issues with the provision: the interaction of Art. 7 with Art. 17 of the Regulation and the effect of foreign authorisations on the liability of the polluter, and the right of the victim to choose the applicable law. The French expert noted difficulties as well with the autonomy of the parties. The German expert suggested that, in order to exclude conflicts between different jurisdictions and possibilities of forum shopping, there should be coherent EU regulation regarding the question whether a choice in a particular proceeding is limited or whether it also has effects for subsequent proceedings between the same parties. The French expert underlined additional difficulties: with the identification of

the operative event for environmental damage, and whether Art. 7 allows a choice between the law of the place of the environmental damage or the law of personal damage. The English expert reported some discussion about the question whether environmental damage covers the torts of private nuisance (*Rylands v Fletcher*). Three stakeholders also identified issues regarding the determination of the notion of “environmental damage” and the determination of the place where the harmful event occurred.

#### **Conclusions:**

Art. 7 has not caused major problems and the areas of uncertainty identified below are mostly doctrinal:

- The interaction of Art. 7 with Art. 17 and the effect of foreign authorisations on the liability of the polluter,
- The interaction of Art. 7 with Art. 14, The determination of the place where the harmful event occurred.

## **Infringement of intellectual property rights (Arts. 8, 13)**

Most of the issues identified regarding Art. 8 are doctrinal, and touch upon the application of the provision to violations of intellectual property rights on the internet. Uncertainty has been reported in France, Germany, Italy, and Poland. German doctrine suggests the introduction of an “effects” principle or a de minimis threshold.

Additionally, Belgian caselaw contains two examples of misunderstanding/misapplication of Arts. 4(1) & 4(3), where the specific rule in Art. 8 should have been applied instead. A further issue reported by German doctrine is how the ownership of intellectual property rights is to be determined. Some authors think that this is a preliminary question, which has to be decided according to international conventions or national conflict-of-laws rules. Another strand in the literature wants to submit this problem to the Rome II Regulation.

Polish and Romanian doctrine questioned the relevance and application of Art. 13.

#### **Conclusions:**

Uncertainty regarding the application of Art. 8 to violations of intellectual property rights on the internet has been reported in several Member States.

## **Industrial action (Art. 9)**

Only 6% of the consulted stakeholders identified Art. 9 as a provision they refer to frequently in their practice. Some specific difficulties were identified by respondents. Two participants noted difficulties in labour law, concerning the scope and purpose of Art. 9 and the relationship between employment contracts and tort. Another respondent opined that Art. 7(2) of Brussels I bis (connecting factor for matters relating to tort, delict or quasi-delict) has been ‘interpreted in a claimant-friendly manner’ on economic injury, and that it undermines Art. 9 Rome II when industrial action in one country causes economic damage in another.

Caselaw across Member States did not reveal any specific issues with the provision, however German and Polish academic literature identified some areas of uncertainty regarding the scope of application of Art. 9. German doctrine questioned whether Art. 9 also covers the law governing the liability of officials of the organisations representing their professional interests, former employees, and atypical union members, such as students. Furthermore, German, and Polish doctrine debated whether the provision also covers the law applicable to the liability of third persons that are not directly connected to the strike, e.g. the participants of a “flash mob”. Polish doctrine reported some debate surrounding the scope of application, the connecting factor and the admission of the choice of law by parties. The concept of ‘industrial action’ gave rise to discussion as to its interpretation, and the reference to Art. 4(2) was also criticised as the application of the different connecting factors could lead to the application of different governing laws and result in unsatisfactory results. The reference also leaves open the question as to whether Art 4(2) is, in such cases, capable of displacement by Art 4(3) (cf Art 5(1), where the problem does not arise as Art 5(2) has its own escape clause).



Additionally, the English expert noted that the CJEU's decision in C-337/17 *Feniks* is potentially problematic if Rome I (like Brussels I) is extended to the knowing violation by a third party of another's contractual rights. If so, the scope of Art. 9 (and the nuanced solution it adopts) would be significantly reduced.

Regarding a potential link between Artificial Intelligence and industrial action, DDoS (Distributed Denial of Service) attacks, a common form of "hacktivism", could be used and treated as a legitimate form of protest in the future. If these developments occur, there may be a challenge in localising industrial action that occurs in a virtual space.

#### **Conclusions:**

- Clarify the scope of application of Art. 9 (for instance via a recital): does it apply to third persons not directly connected to the strike?
- Clarify what is to be considered "the country where the action is to be, or has been, taken" if the action occurs in a virtual place.

## **Unjust enrichment (Art. 10)**

Art. 10 has not caused major problems among the consulted stakeholders, however national rapporteurs reported some uncertainty.

In Austrian literature, the precise scope of the concept "unjust enrichment" is deemed unclear. The prevailing view is that Art. 10 applies to recourse claims of a party that has voluntarily settled debt of a third party. Others stress that internationally, these cases are sometimes treated using the rules of subrogation. It is also unclear in which cases a "relationship existing between the parties" can be found. Additionally, both Austrian and German literature discuss whether the "existing" condition in Art. 10(1) is met where the relationship between the parties, such as a contract or a tort, arises in the same moment the unjust enrichment occurs. In England, it is debated whether gain based damages for tort fall within Art. 4 or Art. 10 (a question complicated by a national law debate as to whether gain based damages are compensatory or not).

German doctrine also identified some uncertainty regarding the relationship between Art. 10 and Art. 4, and whether "unjust enrichment by subtraction" and "unjust enrichment by wrongdoing" both fall under Art. 10. The relationship between unjust enrichment and rights in rem is also discussed.

Art. 10(3) and the reference to the "country in which the unjust enrichment took place" create some discussion. Romanian doctrine noted that uncertainty may arise when the unjust enrichment occurred on the territories of multiple states (e.g., frequently in case of cross-borders financial transactions).

The same issue could arise regarding Artificial Intelligence, if the enrichment is virtual: blockchain systems are decentralised, hosted on multiple servers across the world, and available to anyone to access through the internet. If the enrichment is treated as taking place in the virtual space, it is difficult to localise to an individual geographic location.

Croatian caselaw reveals some marginal difficulties. Additionally, there is currently uncertainty before English courts as to whether a claim for knowing receipt falls within Article 4 or Article 10.

#### **Conclusions:**

Art. 10 has not caused major problems and the areas of uncertainty identified below are doctrinal:

- When is the "existing" condition in Art. 10(1) met?
- Regarding the relationship between Art. 10 and Art. 4: do "unjust enrichment by subtraction" and "unjust enrichment by wrongdoing" both fall under Art. 10?
- There is some residual uncertainty regarding the relationship between unjust enrichment and rights in rem.
- How to apply Art. 10(3) when the unjust enrichment takes place in multiple countries, or if the enrichment takes place in cyberspace?

## Negotiorum gestio (Art. 11)

Art. 11 appear to be rarely relied upon in practice among the stakeholders consulted (11%). The Austrian and German experts identified residual difficulties with the applicability of the provision. The Austrian expert highlighted a controversy as to how the word "existing" legal relationship should be interpreted. Some argue in favour of applying the rule to relationships which arise in the same moment as the *negotiorum gestio*. Additionally, the Austrian and German expert pointed out that there is some uncertainty under Art. 11(3) and that it is unclear whether 'the law of the country in which the act was performed' refers to the country where the action took place or where a loss occurred that was caused by an action. The German expert also noted some uncertainty with regard to the applicability of the provision if the *negotiorum gestio* consists of multiple actions taking place in different countries: it is difficult to identify the place which is decisive for Art. 11(3).

### No specific recommendations

## Culpa in contrahendo (Art. 12)

18% of the respondents frequently refer to Art. 12 in their practice. The provision did not generate much criticism among the stakeholders, but the national experts reported some difficulties.

Austrian and German doctrine contain debate regarding the relationship between Art. 12 and Art. 4 in situations involving third-party liability. Part of the doctrine argues that third persons are not party to the contract and thus Art. 4 applies. Other authors argue in favour of looking at the nature of the specific duty that was breached, and apply Art. 12 if the duty is more of a contractual nature (it is subsequently debated whether paragraph 1 or 2 of Art. 12 should apply).

The German rapporteur reported uncertainties with regard to the delineation of Art. 12 Rome II and the Rome I Regulation. First, it is deemed unclear whether the violation of precontractual disclosure obligations is governed by Rome I or Rome II. A similar problem arises with damage suffered by the conclusion of a contract that does not meet the expectations of one party as it was based on wrong information. Such damage could be subject to Rome I or Art. 12 Rome II. Moreover, it is unclear whether the liability of an agent without authority is governed by Rome II, as advocated by the minority view among German scholars, or by Rome I, as the majority thinks.

Austrian, German, Dutch and Polish doctrine question the order of priority of the lit. (a) to (c) in Art. 12(2), and whether they are to be considered alternatives, or instead form a hierarchical order.

The Italian rapporteur reported case law where courts experienced difficulties to localise damage in pre-contractual liability cases. Italian doctrine stresses that known difficulties with the localisation of pure economic loss (as addressed in *Marinari* and *Kronhofer*) are set to resurface under Art. 12(2)(a).

The Romanian expert reported residual difficulties regarding the articulation between Art. 8 and Art. 12.

### Conclusions:

Art. 12 has not caused major problems and the areas of uncertainty identified below are doctrinal:

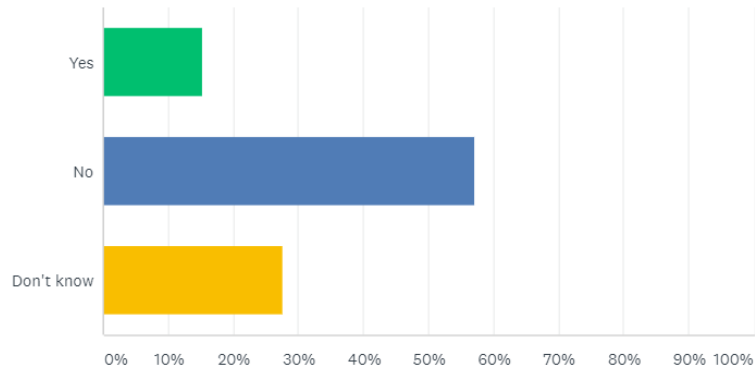
- The relationship between Art. 12 and Art. 4 in situations involving third-party liability.
- What is the order of priority of the lit. (a) to (c) in Art. 12(2): are they alternatives of equal rank, or form a hierarchical order?
- The delineation of Art. 12 Rome II and the Rome I Regulation.

## Freedom of choice (Art. 14)

Art. 14 ranked in fifth position in the list of the provisions addressed in the empirical study (44% of the respondents), with 18% of the consulted stakeholders being of the opinion that the provision needs improvement. Several participants suggested specific changes to Art. 14, and the majority of respondents indicated that parties rarely make use of the provision. This is not common opinion, however, as one participant described such clauses as 'a standard practice'.

To your knowledge, do parties take advantage of the option given by Art. 14 of the Rome II Regulation to choose the law applicable to non-contractual obligations?

Answered: 98 Skipped: 4



Austrian and German doctrine report some uncertainty around the meaning of 'freely negotiated' in Art. 14(1) lit. (b) Rome II. It is discussed whether standard clauses or general terms and conditions can be classified as freely negotiated, and if so, under what circumstances.

Austrian, German, Croatian and Italian doctrine note that the Rome II Regulation does not contain any provisions dealing with the validity and form of the choice of law, or the standards for such assessments. Consequently, it is disputed whether Art. 3(5), 10, 11 and 13 Rome I have to be applied by analogy to Art. 14 Rome II or whether the *lex fori* should apply.

French and Italian doctrine question the notion of 'commercial activity' for the purposes of Art. 14(1)(b), i.e., whether it includes activities other than those carried out in the field of industry or trade, such as the activities of artistic performers or athletes, or those of a company manager.

Italian doctrine questions the admissibility of *dépeçage* under Art. 14, and it is also discussed in Austrian literature whether the choice of law can only refer to the entire non-contractual obligation or whether it can also be restricted to parts of it, such as the amount of damages.

French commentators have noted that the choice of the parties being "expressed or demonstrated with reasonable certainty by the circumstances of the case" may give rise to some uncertainty and might result in inconsistent case law.

#### Conclusions:

The doctrine of several Member States noted some remaining uncertainty regarding:

- The meaning of "freely negotiated" in Art. 4(1) lit. (b): does it include standard clauses or general terms and conditions?
- The assessment of the validity and form of the choice of law: do Art. 3(5), 10, 11 and 13 Rome I apply by analogy to Art. 14 Rome II, or does the *lex fori* apply?
- What is included in the notion of 'commercial activity' for the purposes of Art. 14(1)(b).
- The admissibility of *dépeçage* under Art. 14.

## Exclusion of 'evidence and procedure' (Art. 1(3)) and relation to Arts. 21-22

The practical use of Arts. 21 and 22 appear limited, with respectively 2% and 17% of the stakeholders referring to them frequently in their work. National experts did not raise any specific issues, except for the German rapporteur who identified two issues regarding Art. 22. First, it is unclear under which law the required standard of proof is determined, i.e. what degree of certainty must be achieved in order to consider a fact to be proven. It is discussed whether this is

governed by the *lex causae* or the *lex fori*. Furthermore, it is debated whether the law applicable to *prima facie* evidence is to be determined according to the *lex fori* or the *lex causae*.

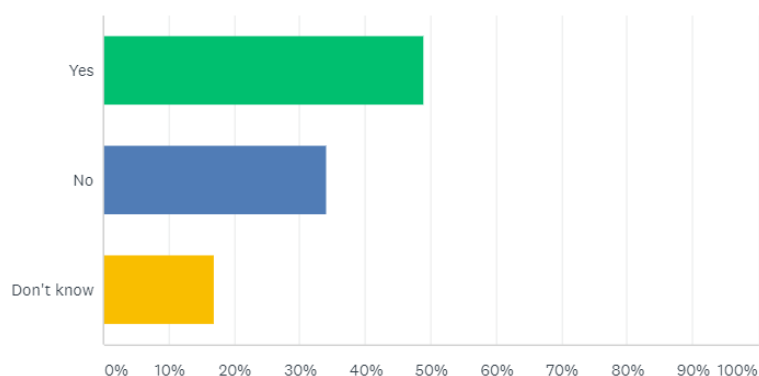
### No specific recommendations

## Pleading, proof and application of the substantive rules of the law applicable

49% of the consulted stakeholders noted courts' difficulties in ascertaining the content of foreign law. Comments highlight **procedural divergence between Member States**: foreign law is either considered law or fact, leading to differences specifically in the roles of judges, parties and experts.

Have the courts in the legal systems with which you are familiar encountered any difficulties in ascertaining the content of foreign law, in particular with expert opinions?

Answered: 94 Skipped: 8



Many participants highlight the **inadequacy of existing expertise**, particularly in the context of less frequently encountered legal systems or linguistic barriers. Several also refer to the **lengthiness of processes** for ascertaining foreign law, particularly where national bodies or foreign jurisdictions are engaged. The Italian expert reported that the approach of Italian courts to the pleading, proof and application of foreign law is not entirely satisfactory, in particular regarding the ascertainment of foreign law. Information collected through the Ministry of Justice and diplomatic or consular representations often consist in the mere reproduction of legal texts, without any background information and without an illustration of the way in which the texts in question are normally understood and applied in practice. Expert opinions do provide such additional elements of understanding, but the drafting of such opinions requires time, and the costs are borne by the parties. The Latvian and Slovenian experts noted that the national legal framework is not suitable for the application of foreign law. The Slovenian expert reported difficulties for the judges to ascertain the content of foreign law: foreign law cannot be ascertained by experts as a means of evidence because expert evidence can only be provided on matters of fact, and foreign law is considered a question of law in Slovenia. Hungarian doctrine identifies a problem regarding national laws having different rules for allowing appeals based on a wrong application and interpretation of foreign applicable (substantive) law, ultimately leading to unfair results and potentially denying parties of their important procedural right to appeal.

As to the general assessment of damages under foreign law, many respondents noted the difficulties of applying Member States' different rules on damage calculation, in particular the application of foreign tariffs. One highlighted that these tariffs are set to the standard of living in the state of the law being applied, rather than the country where the victim lives.

One respondent proposes a European-level institute for comparative law to provide expert advice to Member State courts on the content of foreign laws. This is supported by Hungarian authors who stress the need for a better system of communication between Member State courts and adequate legal framework and technical requirements to enhance the understanding of the content of foreign law.

## Conclusions :

- Procedural divergence exists between the Member States, specifically in the roles of judges, parties, experts, and national organisations, and regarding the status of foreign law (law or fact).
- Among the general issues identified are the additional time and costs pertaining to the ascertainment of foreign law, and the potential inaccuracy of application.
- Some respondents and national experts suggest the need for a European-level institute and/or an improved system of communication between Member State courts to enhance the understanding of the content of foreign law and speed up court proceedings.

## Scope of the law applicable (Art. 15)

The scope of the law applicable is frequently referred to in practice (Art. 15 ranked fourth in the list of provisions most referred to, with 47% of the respondents). Difficulties surrounding the application of Art. 15 were reported in doctrine and caselaw in Germany, France, Hungary, and the United Kingdom.

German doctrine reports persisting difficulties regarding **claims involving multiple parties**. It is discussed whether the governing law has to be determined individually for each relation between two parties or whether it could also comprise relations to third parties. Some of the consulted stakeholders mentioned uncertainty regarding secondary victims, and the standing of victims' family members to request compensation under Art. 15.

**Art. 15 (c)** raised questions in German, French and Hungarian doctrine. It is disputed in German literature whether this provision also includes the right of a court to estimate damages or whether this is to be determined according to the *lex fori* as part of procedural law. There has been some debate in French doctrine as well regarding the impact of Art. 15(c) over traffic accidents and the resulting assessment of damages. Hungarian scholars raised questions about the amount of compensation awardable under Art. 15(c) and whether the public policy clause would result in setting aside the applicable law based on Rome II if the amount of compensation awardable under the given national law would harm the human dignity of the injured person.

In connection with **Art. 15 (f)** Rome II, there is debate in German doctrine as to whether the law applicable to claims of an indirectly injured party is determined according to the law applicable to the relationship between the tortfeasor and the directly injured party or whether the applicable law to this relationship is to be determined independently.

English courts have grappled with a number of difficult issues concerning the scope of the applicable law, regarding in particular the assessment of damages, and whether or not interest on damages falls within **Art. 1(3)** or Art. 15.

## Conclusions:

The doctrine of several Member States noted some remaining uncertainty regarding:

- Whether a third party participating in a tort committed by another person will be submitted to the same law as the latter or not.
- Art. 15(c): the law applicable to the right of a court to estimate damages, and the interlink with public policy.
- Whether or not interest on damages falls within Article 1(3) or Article 15.

## Overriding mandatory provisions (Art. 16)

42% of the stakeholders refer to Art. 16 in their practice, and the provision ranked in 6<sup>th</sup> position in the list of provisions considered to be "in need of improvement" (according to 16% of the respondents).

To improve the coherence of specific provisions, two participants commented that the rules on overriding mandatory provisions under Art. 9 Rome I are superior to their equivalent under Art. 16 Rome II, one suggesting that the definition in **Art. 9(1) Rome I** be imported into the latter. The contrast between Rome I and Rome II was also noticed in the legal study. The German expert noted that an important academic debate exists as to whether Art. 16 Rome II disallows the application of overriding mandatory provisions of third countries. This debate has been caused by the absence of a rule on this subject, which stands in contrast to Art. 9(3) Rome I. The expert strongly advises that a review of Rome II

should include a specific rule on this question. Art. 19 of the Swiss Federal Act on Private International Law was given as an example.

- **Overriding mandatory provisions in business and human rights cases**

Overriding mandatory provisions may play a part in **business and human rights** litigation and have been deemed promising by the doctrine. Two stakeholders favoured the protection of human rights abuses victims through **mandatory due diligence** and the application of Article 16 of Rome II. One of those two experts nonetheless noted that mandatory due diligence at the EU level was “ambitious” and required a “firm commitment” from the EU in the protection of human rights. The recent national legislative initiatives on a mandatory corporate duty of care regarding human rights and the environment, as well as the developments about mandatory due diligence at the European level, are of particular interest. At the EU level, it has been suggested by the doctrine that the provisions of the 2020 Draft Directive should be classified as overriding mandatory provisions, so as to apply irrespective of the otherwise applicable law. This approach was adopted by the European Parliament in a resolution on 10 March 2021.

**Conclusions:**

There is some uncertainty as to whether Art. 16 Rome II disallows the application of overriding mandatory provisions of third countries.

## Direct action against the insurer of the person liable (Art. 18)

22% of the stakeholders consulted refer frequently to Art. 18 in their work. Direct claims against insurers gave rise to some challenges concerning the interaction of Rome II with Brussels I bis. One respondent raised the particular difficulties of insurers bringing claims against tortfeasors, for example in understanding which law determines the insurer’s ability to bring a claim, the amount of the claim, and the substantive requirements for liability.

Two main issues were identified in German academic literature: the consequences of choosing a law under Art. 14 Rome II that does not recognise a direct claim and the extent to which such a choice of law requires the consent of the insurer, and the delimitation of the governing tort law and the law governing the insurance contract under Art. 18 Rome II. Polish, Slovenian, and Spanish caselaw revealed similar difficulties, and scholars identified the need for Rome II to provide a definition of “direct action”.

**Conclusions:**

- Clarification is needed on the interaction between Rome II and Brussels I bis.
- The interaction between Art. 14 and Art. 18 Rome II has been deemed unclear in the doctrine and case law of several Member States. The need for Rome II to provide a definition of “direct action” has been suggested.

## Subrogation (Art. 19)

The consulted stakeholders did not report any specific difficulties regarding Art. 19, which was identified by 15% of the respondents as a provision frequently referred to.

Doctrinal discussion has been reported in Germany. There is debate as to whether Art. 19 Rome II is directly applicable or only by analogy if the third party's obligation to satisfy the creditor is not imposed directly against the creditor but only in the relationship between the third party and the debtor. In addition, it is discussed whether Art. 19 is applicable in cases where a third party who has paid the entire debt due to an obligation towards the creditor may seek recourse against other debtors who are also liable. In that respect, the English expert pointed out that the *Ergo* decision of the CJEU illustrates the difficulty in the definition of “subrogation”. If party D1 is non-contractually liable to a creditor, but their insurer E discharges the liability to the creditor pursuant to E’s contractual obligation to D1, E’s right to contribution from co-debtor D2 is (according to the CJEU) not covered by the law governing D1’s non-contractual obligation but by a much more complex analysis. If subrogation put E into D1’s shoes for choice of law purposes, D2’s liability to make contribution would be governed by the same law irrespective of whether D1 or E discharged the liability. The English expert also reported some uncertainty surrounding the question whether subrogation involves the subrogating party being treated differently from the subrogated party.

The Romanian expert reported difficulties for courts to apply Art. 19, and resulting inconsistency in caselaw. The majority of cases refer to truck accidents, and courts experience difficulties to tell the difference between the third's party right to subrogate into the victim's rights and the extent to which this third party is entitled to compensation. The Greek and Slovenian experts each reported one case where Art.19 was erroneously applied by the court, regarding the law applicable to the statute of limitation of the claim for compensation.

#### **No specific recommendations**

### **Multiple liability (Art. 20)**

Among the stakeholders consulted, 9% are of the opinion that Art. 20 "works well", however the satisfactory level may also be linked to a general unfamiliarity with the provision as only 15% of the stakeholders refer to it frequently in their practice.

German doctrine debates whether the term "same claim" in Art. 20 applies broadly (it is neither a prerequisite that the claims are subject to the same law nor that the claims are based on the same legal ground), or if Art. 20 applies only if the same law applies to all of the claims against the debtors. Additionally, it is also disputed in German and Polish doctrine how the applicable law is determined for liability exemptions of various debtors who have agreed amongst themselves to contribute if the creditor has not yet been satisfied.

The partial nature of the rule in Art. 20 has generated much discussion in England, where questions of contribution are often addressed between defendants at the trial (before any of them has satisfied the claimant).

#### **Conclusions:**

It would be desirable to clarify what law applies in cases when the obligations of the individual defendants are governed by different laws.

### **Concept of "habitual residence" (Art. 23)**

Art. 23 ranked high in the list of provisions most referred to in practice, with 29% of the consulted stakeholders declaring frequent use of the provision. Respondents did not report any specific difficulties, apart from one respondent noting divergence between domicile and habitual residence under Brussels I bis and Rome II respectively.

Domestic caselaw did not reveal particular difficulties with the application of the provision, however national literature reports some areas of uncertainties. The definition of the habitual residence of companies and other bodies (corporate or unincorporated), namely their place of central administration, is criticized in Bulgarian legal literature. By differentiating "central administration", i.e. where the decisions about the company are taken from "main place of operations/activity", Bulgarian authors argue that very often the exact place of central administration, especially for big companies operating globally, is difficult to locate as it is more "inner" information of the companies and not so visible for the public, whereas the place(s) where the company operates and has its activity is more easily identifiable. Additionally, French and Portuguese doctrine both raise questions as to how 23(2) applies, respectively in case of loss caused to secondary victims, and when damages are caused by persons acting otherwise than in the course of business.

#### **Conclusions:**

Commentators noted some remaining uncertainty regarding the definition of the concept for individuals not acting in the course of business.

### **Exclusion of renvoi (Art. 24) and States with more than one legal system (Art. 25)**

Both the legal and empirical studies did not reveal specific issues regarding the application of Arts. 24 and 25. Both articles are not applied much in practice, and do not raise cause for concern among the experts: respectively 16%

and 6% of the stakeholders refer to Arts. 24 and 25 in their work, and Arts. 24 and 25 ranked last in the list of provisions of Rome II “in need of improvement”.

One expert from the United Kingdom nonetheless reported issues arising in practice as a result of the existence of the different legal systems with the United Kingdom: for instance, in relation to the application of Article 4(2) where parties have their habitual residence in different parts of the United Kingdom.

**No specific recommendations**

## Public policy (Art. 26)

28% of the stakeholders refer regularly to Art. 26 in their practice, and 9% are of the opinion that the provision is in need of improvement. Two respondents highlighted difficulties where the applicable law conflicts with public policy of the forum, including the state’s ability to limit the amount of damages. The issue of damages was also highlighted by the expert for France, who noted the uncertainty brought by Recital 32 of Rome II (punitive damages will be contrary to public policy where the award of punitive damages is “of an excessive nature”). The expert for Luxembourg raised two issues with Art. 26: the extent to which Member States are free to apply various doctrines to limit its operation (*effet atténué, ordre public de proximité, etc...*), and the uncertainty regarding the meaning of the limitation introduced by the term “manifestly”.

One expert in business and human rights suggested a mechanism similar to Article 26 of Rome II (public policy) but specifically adapted to human rights abuses. The CJEU recognised in *Krombach v Bamberski* that the public policy exception in the Brussels Convention could be invoked “in exceptional cases where the guarantees laid down in the legislation of the State of origin and in the Convention itself have been insufficient to protect the defendant from a manifest breach of his right to defend himself before the court of origin, as recognised by the ECHR”. However, the *Renault v Maxicar* decision from the ECJ rendered in the context of the Brussels I Regulation limited the scope of application of the public policy exception by providing that it is not sufficient, to invoke a public policy exception, that a court considers the provisions of the applicable foreign law as wrong in their substance and conclusion. Additionally, in *Jabir and others v KiK*, the public policy argument was discarded, even though the Higher Regional Court of Hamm admitted that “a one-year limitation period, in particular in the event of death, is a very short limitation period which is, as far as can be seen, unknown in the European legal area”. It appears then that even though considerable differences might exist between legal systems as to statutes of limitations or level of damages, those differences do not automatically justify the intervention of public policy. As such, Art. 26, even tailored to corporate human rights abuses, does not appear as an efficient option for such cases. Relying on mandatory due diligence and overriding mandatory provisions might be more efficient (see above, Overriding mandatory provisions (Art. 16)).

**No specific recommendations**

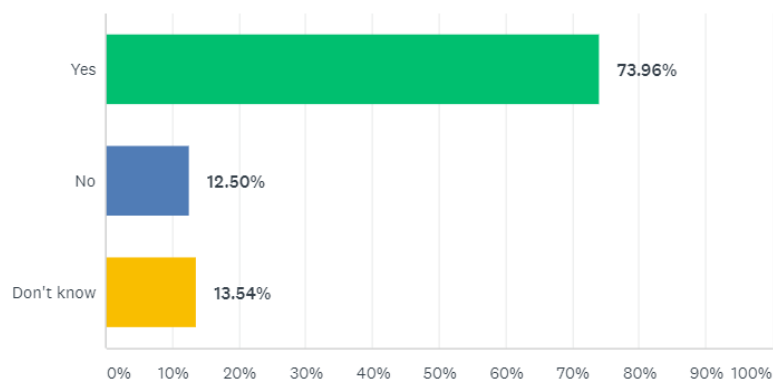
## Interaction with other EU and international legal instruments (Recital 7, Arts. 27, 28, 29)

- **Article 27: Relationship with other provisions of Community law**



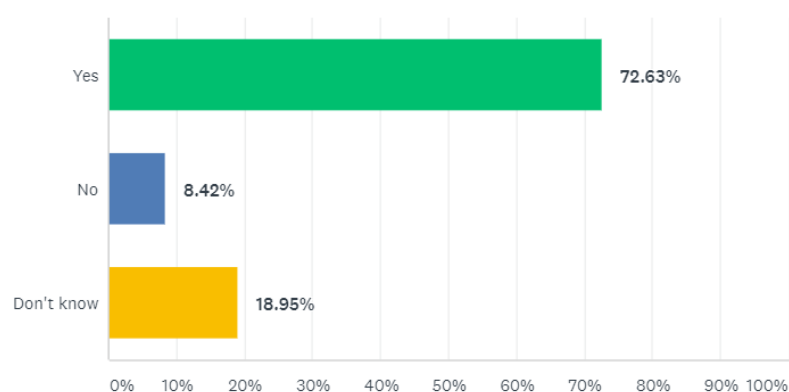
In your opinion, do the rules in the Rome II Regulation work well alongside those in the Rome I Regulation governing the law applicable to contractual obligations?

Answered: 96 Skipped: 6



In your opinion, do the rules in the Rome II Regulation work well alongside those in the Brussels I Regulation on jurisdiction and recognition and enforcement of judgments in civil and commercial matters?

Answered: 95 Skipped: 7



The consultation reveals **general satisfaction** as to how Rome II interacts with Rome I and Brussels I.

There is a debate in the Austrian and German literature as to exactly which provisions of Union law are covered by Art. 27. It is discussed whether Art. 27 only applies to other Union law containing conflict-of-law rules or whether it applies to all other substantive Union law. In this context it is also disputed under what circumstances a provision can be identified as a conflict-of-laws rule. Some German scholars argue that provisions defining the territorial scope, such as Art. 3 GDPR, are also conflict-of-law rules.

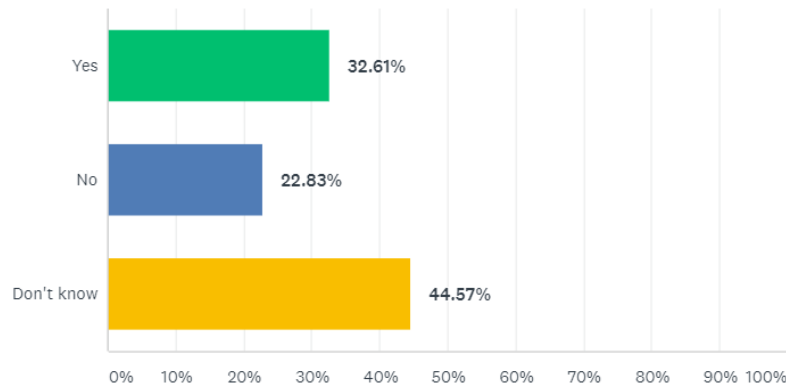
German doctrine reports some uncertainties with regard to the delineation of Art. 12 Rome II and **Rome I**: in cases involving the violation of precontractual disclosure obligations, damage suffered by the conclusion of a contract that does not meet the expectations of one party as it was based on wrong information, and the liability of an agent without authority.

The Polish expert reported some uncertainty regarding the interplay of Rome II with **Regulation 2017/1001 on the European Union trademark**. The English expert added that there was a lack of clarity about possible differences between Recital 24 and Art 2 of the **Environmental Liability Directive**.

- **Article 28: Relationship with existing international conventions**

In your opinion, do the rules of the Rome II Regulation work well alongside other international conventions (including, e.g., the Hague Conventions on traffic accidents and product liability)?

Answered: 92 Skipped: 10



Several national rapporteurs reported uncertainty as to the practical interaction of Rome II with other international instruments. The Belgian expert reported some cases where courts, when faced with potential conflict of instruments, between the **Berne Convention for the protection of Literary and artistic works (the "Berne Convention")** and Rome II in particular, tend to avoid an analysis of the hierarchy between the instruments. The French expert notes uncertainty regarding the interaction between Art. 8 of Rome II and the Berne Convention as well, and with other international instruments such as the **Paris Convention for the Protection of Industrial Property**. The Luxembourg expert reported a specific issue of coordination with the **Benelux Convention on Intellectual Property**, creating uncertainty as to whether the Rome II Regulation applies at all. The relationship between the 1973 **Hague Convention on the Law Applicable to Products Liability** and Rome II has sometimes proven difficult for Slovenian courts.

In the responses gathered through the consultation, numerous comments referred to 'uncertainty' and 'confusion' under the current system, describing the relationship between the Hague Conventions and Rome II as 'unclear'. Several respondents expressed dissatisfaction with the 'two track system' for parties and non-parties to the Conventions, as it results in different legal treatment of the same fact in different parts of the Union, and encourages **forum shopping**. One stakeholder proposed including **specific mention of relevant international instruments in Rome II**. Another suggested improving the drafting of Art. 28 Rome II to make even clearer that it encompasses Conventions to which not all Member States are party. This is supported by the national rapporteurs from Belgium, Slovenia and Hungary, who suggest that Art. 28 is not sufficient and that additional guidance, with explicit referral to the international instruments in question, should be provided in Rome II.

When considering international conventions more broadly, one participant advocated for more coordination at the EU and international level to address **modern developments**, such as in the field of technologies.

**Conclusions:**

- Art. 27: there is a debate in the Austrian and German literature as to exactly which provisions of Union law are covered by Art. 27, and whether applies to all other substantive Union law or only Union law containing conflict-of-law rules.
- Art. 28: it is suggested by both practitioners and national experts that the provision should be amended to include specific guidance on the interplay between Rome II and other international instruments (in particular the relevant Hague Conventions), with explicit referral to the instruments in question.

## Traffic accident cases and the impact of the application of the 1971 Hague Convention on the law applicable to traffic accidents on legal certainty

72% of respondents think that **Rome II lays down an effective set of rules** to regulate personal injury claims, in particular road traffic accidents, while 28% would prefer special rules. Amongst those who have been involved in cases where Rome II has been applied to personal injury claims, a higher proportion (33%) calls for special rules. One respondent suggested relying on the 'closest connecting factor' rule rather than the general rule in Art. 4(1). Other respondents suggested applying either the law of the forum or the victim's 'home law' where to do so would be more favourable to the victim. One noted difficulties created by separating material damage, dealt with under Rome II, from interests, addressed by national law.

Participants and national experts also suggested specific areas that could benefit from special rules, including: rules on **indirect victims and claims by family members**, for example in wrongful death cases; rules on **multi-vehicle accidents**, to which Art. 4 seems ill-suited, for example because it leaves unanswered whether Art. 4(2) applies where a driver injures multiple pedestrians from different countries; **product liability** rules, which could be more consumer-friendly; rules on **automated traffic control** in, for example, shipping and aviation, where current laws inappropriately emphasise master's liability; rules on particular issues in assessing loss and damage, including the extent of damages to be recovered for long-term health problems; rules on interest; special **insurance rules**, including a suggestion of limiting amounts of compensation payable and a reference to the Commission Proposal to amend the Motor Insurance Directive; and harmonisation of **limitation periods**, with reference to the EU Added Value Assessment on the Harmonisation of Limitation Periods for Claims Arising out of Cross-Border Road Traffic Accidents, although another respondent was of the opinion that limitation is better addressed by applying the rule of the place of residence.

Additionally, claims involving multiple parties caused concern for three respondents, including whether a single applicable law or the mosaic approach should apply where Rome II's general rule prima facie indicates different laws for different victims.

- **The application of the 1971 Hague Convention on the law applicable to traffic accidents (the "1971 Hague Convention")**

40% of the respondents from Contracting Parties to the 1971 Hague Convention answered that issues emerged from the interplay between Rome II and the 1971 Hague Convention.

According to such respondents, the applicability of the Hague Convention over Rome II is sometimes **overlooked**. One respondent noted that this is a particular habit of German lawyers in Austrian courts, the latter state being a party to the 1971 Hague Convention and the former not. Another respondent qualified the issue by observing that most of the cases of which they are aware where Rome II was erroneously applied would have resulted in the same outcome under either instrument. The Luxembourg, Slovakian, Slovenian and Spanish experts also note that the application of the Hague Convention can be easily overlooked by parties, attorneys, and judges alike. The Luxembourg and Slovakian experts report some cases where the Rome II Regulation was wrongly applied instead of the 1971 Hague Convention. However, in the Luxembourg cases, the application of the Rome II Regulation did not lead to the application of a different law than the one that would have been applied under the 1971 Hague Convention.

The Austrian, Croatian and Dutch doctrine noted that the fact that the criteria for the determination of the applicable law under the 1971 Hague Convention and the Rome II Regulation differ in some respects leads to the possibility of **forum shopping** within the EU. This is heavily criticised by the doctrine because of its impact on the uniformity of law in Europe and in the incentive it gives for a "race to the court". One respondent also raised the risk of forum shopping, the interplay between the two instruments in some circumstances giving the victim the unfair advantage of being able to select the forum that entails application of the law most favourable to them.

**Confusion** is expressed regarding the parallel systems, in particular where a co-driver claims against the driver responsible for the accident. Some respondents call for harmonisation of rules amongst Member States or abandonment of the Hague Convention altogether. Croatian authors argue that it would be possible to resolve issues arising out of the application of the 1971 Hague Convention by **harmonizing** or at least unifying its rules with the Rome II Regulation. To that end, **special conflict-of-law rules** should be introduced, similar to those existing for other types of damages in Rome II Regulation. The Dutch and Slovenian experts noted that the coexistence of the two instruments

simultaneously diminishes some of the main objectives of the Rome II Regulation: creating foreseeability and **legal certainty** within a uniform system.

**Conclusions:**

- Experts and practitioners indicate that the applicability of the 1971 Hague Convention is frequently overlooked.
- Experts and practitioners argue that the parallel system creates a risk of forum shopping and negatively impacts legal certainty.
- Suggestions for improvement include the introduction of special conflict-of-laws rules in certain areas such as indirect victims, multi-vehicle accidents, damage assessment for long-term health problems, interests, insurance, limitation periods.

## Suitability of the mosaic approach

Criticism of the mosaic approach is mainly doctrinal and theoretical, except for Austrian courts and other Austrian legal professionals, who characterised the mosaic approach as not only impractical, but also as creating significant and sometimes insurmountable difficulties.

Finnish doctrine finds that the mosaic approach leads to “strange” situations. German doctrine emphasises the danger of different assessments of an act due to the application of different legal systems and the additional effort for persons operating in several states who have to base their actions on several legal systems. Italian doctrine finds that the mosaic approach fails to consider that the law of torts is not only concerned with the *consequences* of a tort (which might in fact express themselves in several countries, and thus be reasonably submitted to the laws of such countries, distributively), but also to the *bases* of tort: the latter call as such for a unitary assessment, which the mosaic approach might well frustrate. Polish doctrine highlighted issues regarding differences in assessment of the same state of facts and potential risk of incorrect application of the foreign law. Slovenian literature considers that the mosaic approach could prove problematic in certain cases involving the use of Internet. Swedish doctrine contains residual opinions considering that the mosaic approach is problematic as it increases the costs and duration of proceedings, and that a general possibility to apply the law of the place where the event leading to the damage occurred (similarly to Art. 7) would be better.

**No specific recommendations**

# 1. Introduction

## 1.1 Context and Objective of the Study

In reply to the EU Commission's Request for service number JUST/2019/JCOO/FW/CIVI/0167, BIICL carried out a **Study to support the preparation of a report on the application of Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations (Rome II)**, (hereafter, the "Study").

The Study conducts a **legal analysis and assessment of the practical experiences and interpretation problems with the Rome II Regulation**.

Alongside a comprehensive analysis of the Regulation the Study specifically addresses the questions identified by the Commission (the "Questions"):

1. characterization of the concept of "*non-contractual obligations*"
2. the suitability of the rule on **financial market torts** (Art. 4)
3. difficulties with the rule on **product liability** (Art. 5) and the interaction with the application of the **1973 Hague Convention on the Law Applicable to Products Liability** in some Member States
4. difficulties with specific provisions on torts such as:
  - **unfair competition**
  - **environmental damage**
  - **infringement of intellectual property rights**
5. difficulties with the operation of the Rome II Regulation on **unjust enrichment**, *negotiorum gestio* and *culpa in contrahendo*
6. reasons which would justify the need to rethink the rule on **freedom of choice** (Art. 14)
7. practical application of the rule on **overriding mandatory provisions** (Art. 16)
8. specific problems with the application of the rules dealing with the **direct action against the insurer** of the person liable, **subrogation** and **multiple liability** (Arts. 18 et seq.)
9. the treatment of the **traffic accident cases**, including limitation periods, quantification of damages, and the impact of the application of the **1971 Hague Convention on the Law Applicable to Traffic Accidents on legal certainty**
10. difficulties arising out of differences between Member States' rules on cross-border violations of **personality rights**, including **defamation**. The study needs also to consider the interplay with the **treatment of data protection** and the relevance of "**Strategic Lawsuits Against Public Participation**" (SLAPPs)
11. to what extent Rome II duly tackles **corporate abuses against human rights**;
12. the impact of the development of **artificial intelligence** on the Rome II Regulation
13. practical **interaction between the Rome II Regulation and other EU and international legal instruments**, in specific areas such as environmental damage, intellectual property rights or data protection
14. **other practical problems**, including but not limited to the application and treatment of foreign law, and the suitability of the mosaic approach supported by the Rome II Regulation.

## 1.2 Methodology

The Study comprises a **legal** part and an **empirical** part, which have been drafted based on **desk research**, **national reports** and an **empirical study**.

BIICL has involved several experts on the Rome II Regulation from across the EU in the present Study. These experts intervene as National Rapporteurs, Expert Advisors or Pro-Bono Experts. The List of National Rapporteurs and Experts are presented in Tables 3 and 4.

In addition, BIICL's team was able consult a specialist **Advisory Board on Private International Law** which comprises the following highly respected academics and practitioners:

- The Rt Hon Lord Mance, former Justice of the Supreme Court of the United Kingdom (London)
- The Rt Hon Lord Collins, former Justice of the Supreme Court of the United Kingdom (London)
- Professor Linda Silberman, New York University.
- Prof. Michael Bogdan (Lund)
- Prof. Andrea Bonomi (Lausanne)
- Prof. Adrian Briggs (Oxford)
- Prof. Javier Carrascosa González (Murcia)
- Prof. James Fawcett (Nottingham)
- Prof. Andreas Furrer (Luzern)
- Prof. em. Trevor Hartley (London)
- Adam Johnson, Partner Herbert Smith (London)
- Alexander Layton QC, Essex Court Chambers (London)
- Prof. em. Ulrich Magnus (Hamburg)
- Prof. Horatia Muir-Watt (Paris)
- Prof. Yuko Nishitani (Japan)
- Pippa Rogerson (Cambridge)
- Prof. Luboš Tichý (Prague)

In the implementation of the framework contract between the Commission and the Justice and Consumers Evaluation Consortium (JCEC), experts and National Rapporteurs are not considered sub-contractors. The role of the Rapporteurs is to gather information regarding their assigned Member State(s) to inform the final study. Experts gave advice at different stages of the Study and carried out quality control. Full responsibility for the final written report will clearly rest with BIICL within the JCEC led by Civic Consulting. Experts and National Rapporteurs have declared that they do not have any conflict of interest related to the present Study.

**Table 3. List of Experts**

<b>Team Member</b>	<b>Affiliation</b>	<b>Role in team</b>
Alexander Layton, QC	Twenty Essex	Advice during drafting, comments on all report stages
Prof Andrew Dickinson	University of Oxford	
Marie Louise Kinsler, QC	2 Temple Gardens	
Prof. Robert McCorquodale	Inclusive Law	

**Table 4. List of National Rapporteurs**

National Rapporteur	Affiliation	Member State(s)
Prof Matthias Lehmann	University of Bonn, University of Vienna	Austria, Germany (AU, GER)
Prof Marta Pertegás Sender Dr Álvarez-Armas Michiel Poesen	Maastricht University Brule University KU Leuven	Belgium (BE)
Dr. Valentina Bineva	Oracle Czech Republic	Bulgaria (BG)
Dr. Paula Poretti	University of Osijek, Croatia	Croatia (HT)
Dr. Kostas Rokas	University of Nicosia	Cyprus, Greece (CY, GR)
Prof Monica Paukneróva Prof. Magdalena Pfeiffer	Charles University Prague	Czech Republic, Slovakia (CZ, SK)
Martin Ebers	University of Tartu	Estonia (EE)
Lina Tornberg	University of Helsinki	Finland (FI)
Dr Duncan Fairgrieve	BIICL, Université Paris Dauphine	France (FR)
Andrea Fejős	University of Essex	Hungary (HU)



<b>Marie Louise Kinsler QC</b>	Barrister, 2TG	United Kingdom, Ireland (UK, IE)
<b>Prof. Pietro Franzina</b>	Università Cattolica del Sacro Cuore	Italy (IT)
<b>Inga Kačevska</b>	University of Latvia, Riga	Latvia (LV)
<b>Solveiga Palevičienė</b>	Glimstedt, Vilnius	Lithuania (LT)
<b>Prof Gilles Cuniberti</b>	University of Luxemburg	Luxembourg
<b>Jean Pierre Gauci</b>	BIICL	Malta (MT)
<b>Xandra Kramer</b>	University of Rotterdam	Netherlands (NL)
<b>Marta Zamorska</b>	UNIL	Poland (PL)
<b>Rafael Vale e Reis</b>	University of Coimbra	Portugal (PT)
<b>George Trantea</b>	Filip & Company	Romania (RO)
<b>Dr Jerca Kramberger</b>	University of Ljubljana	Slovenia (SI)
<b>Prof Elisa Torralba</b>	University Autonoma Madrid	Spain (ES)
<b>Prof Michael Hellner</b>	University of Stockholm	Sweden (SE)

### 1.2.1 Desk Research

BIICL's team (Eva Lein, Sara Migliorini, Constance Bonzé and Sarah O'Keeffe) conducted thorough desk research comprising an analysis of the decisions of the CJEU, of the relevant studies and the main literature on the Rome II Regulation.

The desk research also focused on three areas of special interest (Artificial Intelligence, Business and Human Rights and SLAPPs).

Intermediate drafts were reviewed by specialised BIICL colleagues, the Expert Board and in-House Experts.

### 1.2.2 National Reports

The National Rapporteurs were charged with analysing the **case law and doctrine** in light of the Questions on which this study is based and **identifying practical problems** with the application of the Regulation in their respective Member States.

They carried out intensive desk research on the use of the Rome II Regulation in their respective Member States. This includes an analysis of relevant judgments delivered in the Member States. They also collected and analysed all other available materials, which is notably relevant for topics where no case law exists.

They further assessed whether the **non-coverage of certain areas** (eg privacy claims) created problems and whether new themes (such as Artificial Intelligence) need to be more specifically addressed.

Their research also covered **statistics** for the calendar period 2009-2020, where available.

National Reports follow the structure below:

#### Executive Summary

#### 1. Introduction

#### 2. Analysis of the Rome II Regulation

##### 2.1 Chapter I – Scope and Interpretation

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

- 1. The determination of the material scope of application of the Rome II Regulation, including any difficulties in applying the category of "civil and commercial matters" or in defining the exact scope of any excluded matters (Art. 1(1)-(2))*
- 2. The determination of the temporal scope of application of the Rome II Regulation (Arts. 31-32)*
- 3. The characterization of the **concept of "non-contractual obligations"**, its relationship to the concept of "contractual obligations" and any difficulties in relation to characterisation (Arts. 1(1), 2)*
- 4. The universal application of the Regulation (Art. 3)*
- 5. The approach to interpretation of the Rome II Regulation, and in particular **its relationship to other EU private international law instruments (including the recast Brussels I Regulation and the Rome I Regulation)** (Recital (7))*

##### 2.2 Chapter II – Tort/Delict

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to the implementation of:*

- 6. The general conflict-of-laws rule for tort/delict, and difficulties that have arisen in your Member State with respect to its application (Art. 4), and in particular:*

- a. the **approach to identifying the place of direct damage** in Art. 4(1)
  - b. the approach to the first rule of displacement in Art. 4(2) in cases involving multiple parties or claims
  - c. the approach to the escape clause in Art. 4(3), and
  - d. the suitability of this set of rules to govern cases of **prospectus liability or other financial market torts**
7. The rule on **product liability** (Art. 5) and, where relevant, the interaction with the application of **1973 Hague Convention on the Law Applicable to Products Liability**;
  8. The specific rule on **unfair competition** (Art. 6)
  9. The specific rule on **environmental damage** (Art. 7)
  10. The specific rule on **infringements of intellectual property rights** (Arts. 8, 13)
  11. The specific rule on **industrial action** (Art. 9)

### 2.3 Chapter III – Unjust Enrichment, Negotiorum Gestio And Culpa In Contrahendo

Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to the implementation of:

12. The specific rule on **unjust enrichment** (Art. 10), including its relationship with the general rule for tort/delict in Art. 4.
13. The specific rule on **negotiorum gestio** (Art. 11)
14. The specific rule on **culpa in contrahendo** (Art. 12)

### 2.4 Chapter IV – Freedom of Choice

Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:

15. The implementation in legal/business practice and by courts of the rule on **freedom of choice**, any difficulties therein and **any discussion that has been carried out in your Member State regarding possible reasons which would justify the need to rethink it** (Art. 14)

### 2.5 Chapter V – Common Rules

Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:

16. The scope of the exclusion of ‘evidence and procedure’ in Art. 1(3) and any difficulties in relation to that exclusion or to questions of formal validity or the burden of proof (Arts. 21-22)
17. The approach in your Member State to questions of pleading, proof and application to individual cases of the substantive rules of the law applicable under the Rome II Regulation governing non-contractual obligations.
18. The delimitation of the scope of the applicable law (Art. 15(a)-(h)), including any difficulties as its relationship to the issues addressed at points 16 17 above)
19. The application of the rule on **overriding mandatory provisions** (Art. 16)
20. The application of the specific rule on **direct action against the insurer** of the person liable (Art. 18)
21. The application the specific rule on **subrogation** (Art. 19)
22. The application of the specific rule on **multiple liability** (Art. 20)

### 2.6 Chapter VI – Other Provisions

Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:

23. The implementation of the concept of habitual residence in the Rome II Regulation, with reference both to persons covered by Art. 23 and natural persons acting otherwise than in the course of business
24. The application of and any difficulties with the specific rules on exclusion of renvoi (Art. 24) and States with more than one legal system (Art. 25)
25. The application of and any difficulties with the specific rule on public policy of the forums (Art. 26)
26. Practical **interaction between the Rome II Regulation and other EU and international legal instruments**, in specific areas such as **environmental damages, intellectual property rights or data protection** (Arts. 27, 28, 29)

### 2.7 Comments on other Practical Problems

These areas are **of particular interest** for the Commission. Please be as precise as possible regarding any issue that has been reported on:

27. *The impact of the application of the 1971 Hague Convention on the law applicable to traffic accidents on legal certainty (where relevant for your Member State)*
28. *Any other practical problems with respect to the application or interpretation of the Rome II Regulation, including but not limited to the suitability of the mosaic approach*

### 3. Comments on areas of interest

*These areas are of particular interest for the Commission. Please be as precise as possible regarding any issue that emerged in your Member State regarding:*

29. *The exclusion of violations of privacy and rights relating to personality, including defamation, from the scope of the Rome II Regulation and any difficulties arising out from differences among Member States' rules in cross-border situations*
30. *Any comment regarding the Interplay of the Rome II Regulation with the treatment of defamation and data protection, and, in these areas, the relevance of Strategic Lawsuits Against Public Participation (SLAPPs)*
31. *The extent to which Rome II Regulation has been applied to corporate abuses against human rights and lays down an effective set of rules to regulate non-contractual liability*
32. *The impact of the development of artificial intelligence on the Rome II Regulation, and in particular on the suitability of the rules that it contains to regulate non-contractual liability.*

#### 1.2.3 Empirical Study

BIICL organised a consultation of relevant stakeholders.

Stakeholders comprise:

- judges, and claimant and defendant lawyers with relevant experience on tort cases and cross-border tort litigation under the Rome II Regulation
- relevant bodies representing both the legal profession (law societies and bar councils)
- academics with relevant experience on the Rome II Regulation

Stakeholders have been identified using BIICL's and the consortium's network and the National Rapporteurs. National Rapporteurs have submitted to BIICL a list of at least 5 experts per Member State who are expert in the application of the Regulation in their respective Member States.

This consultation collected **information on the practical problems** deriving from the application of the Regulation and to describe **how the Rome II Regulation is perceived to work in practice**. It served to identify gaps in the Regulation and make recommendations for future action during the review process.

Potential respondents contribute via two different methods:

- ▶ **E-Survey:** An **online questionnaire**, tailored to the aims of the project, was drafted by BIICL and reviewed by the Commission, and was made accessible to a wide range of legal practitioners, businesses, organisations representing claimants and defendants and authorities across all Member States that are involved in tort cases. We asked the National Rapporteurs for key contacts to guarantee qualified responses.

The questionnaire included a mix of yes/no and multiple-choice questions, as well as open questions where these are required. It addressed concerns of all classes of stakeholders involved as well as all relevant aspects of this study.

To adequately address the areas of special interest (Artificial Intelligence, Business and Human Rights, SLAPPs), BIICL included a more targeted part of the questionnaire focusing mainly on open questions in such particular areas, giving plenty of opportunity for comments.

The collected data were **processed through the online system SurveyMonkey** ([www.surveymonkey.com](http://www.surveymonkey.com)) to ensure an objective and reliable outcome. BIICL already has a select account and has found it to be a valuable and well-functioning tool in earlier studies.

- ▶ A series of semi-structured, **qualitative individual interviews**: these were conducted by telephone or video-link from the above-mentioned categories of individuals and entities involved in tort litigation and the application of Rome II.

Interviews **followed the survey structure** but with **more flexibility as to open questions and the possibility of in-depth discussion**. Using the questionnaire as an interview guide allows for a coherent evaluation of all findings. After the interviews had been written up, they were fed into SurveyMonkey and processed electronically.

This allowed for a coherent presentation of the findings across countries and across questions and issues they raised. In depth findings were evaluated manually. This dual procedure, tested in earlier studies, allows for a broader range of views and a higher turnout of responses within a short timeframe and limited budget and for a more precise evaluation of the data.

## 2. Legal Study

### 2.1 Overview of the Regulation and decisions of the CJEU

Article 3(2) TEU lists the establishment of an area of freedom, security and justice (AFSJ) for all EU citizens as one of the goals of the EU. The AFSJ is based on the principles of mutual trust and mutual recognition. In order to establish the AFSJ, the EU legislator has implemented two series of secondary acts: those favouring the mutual recognition of decisions and their free circulation within the EU, and measures that are directed at harmonizing key aspects of national law, which enhance the trust among the Member States and thus also contribute to the establishment of the AFSJ.

The Rome II Regulation is part of the latter group of measures. By providing for the uniformization of rules identifying the applicable law to extra-contractual obligations, the Rome II Regulation pursues the predictability of the outcome of litigation and fosters legal certainty within the AFSJ. From this perspective, the Rome II Regulation is a trust-enhancing measure that guarantees that all Member States' courts will apply the same conflict-of-laws rule to the same question. This, in turn, limits practices such as forum shopping and other tactics that endanger the project of ensuring justice for all citizens.

In 2002, the Commission launched a public consultation, and it submitted a first proposal for a Rome II Regulation in 2003, and a second proposal in February 2006. The draft was heavily discussed within the Council and the UE Parliament. The established Conciliation Committee reached an agreement on a final text in 2007 and on 11 July 2007 the European Union adopted Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations (Rome II) (the 'Rome II Regulation'), harmonizing the Member States' rules of conflict of laws regarding noncontractual obligations. The Rome II Regulation has been applied since 11 January 2009 in the Member States, with the exception of Denmark.

The Rome II Regulation applies in situations involving a conflict-of-laws. i.e. in situations that are connected to two or more countries, including non-EU Member States (Art. 1(1) Rome II). The material scope of the Regulation covers non-contractual obligations that have arisen or are likely to arise in civil and commercial matters (Arts. 1(1) and 2(1) Rome II). The law designated by the Rome II Regulation need not be the law of a Member State (Art. 3 Rome II).

The Rome II Regulation includes different sets of provisions. A series of provisions lay down rules for the resolution of conflict-of-laws (Arts. 4 to 14, Art. 18 of the Rome II Regulation). Alongside a general conflict-of-laws rule, the Rome II Regulation includes rules for specific types of torts. The Rome II Regulation also leaves room for freedom of choice under certain conditions (Art. 14 Rome II). Another series of provisions concerns the scope of the applicable law and certain specific issues that are covered (Art. 15 to 22 of the Rome II Regulation). Other provisions list limitations to the operation of the conflict-of-laws rules, such as *ordre public* and overriding mandatory provisions (Arts. 16 and 26 Rome II). Other provisions discipline the interaction of the Rome II Regulation with other provisions issued by EU law, national law and international law (Arts. 25, 28, 29 Rome II).

The CJEU has rendered 8 decisions on the Rome II Regulation. In addition, some decisions regarding the Rome I and Brussels Ibis Regulations are also of interest for the purposes of interpreting and applying the Rome II Regulation.

Such body of the decisions has addressed and clarified the following issues:

- **The need for consistency in the interpretation and application of the Rome II, Brussels Ibis and Rome I Regulations**

In *ERGO*,<sup>1</sup> the CJEU affirmed that the definitions of ‘contractual obligation’ and ‘non-contractual’ obligation are autonomous notions of EU law, which determine in a coordinated way the respective scopes of application of the Rome I and II Regulations. In order to interpret such notions, the CJEU affirmed this, and that account should be taken of the aim of consistency in the reciprocal application of those regulations, and the Brussels Ibis Regulation.

In *Da Silva*,<sup>2</sup> with respect to overriding mandatory provisions, the Court found that, though the Rome II Regulation does not define them, such definition could be found in Art. 9(1) of the Rome I Regulation, under which overriding mandatory provisions are “provisions the respect for which is regarded as crucial by a State for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under that regulation”. The CJEU relied on its previous decision in *ERGO* (see below), where it had found that consistency in the application of the Rome I and Rome II Regulations supports the harmonisation wherever possible of the interpretation of the concepts used by those two regulations which are, “in functional terms, identical” (par. 28).

- **The respective scopes of the Rome I and Rome II Regulations:**

In *ERGO*, the CJEU reviewed the established definition of contractual and non-contractual obligations in light of its previous decisions in order to address the specific question in the case, i.e. in order to determine the law or laws applicable in third party disputes. The claim was brought by the insurer of a tractor unit, which compensated the victim of an accident caused by the driver of that vehicle against the insurer of the trailer which, at the time of the accident, was coupled to that vehicle. The CJEU concluded that an insurer’s obligation to cover the civil liability of the insured party with respect to the victim resulting from contract of insurance concluded with the insured party, and that the conditions under which the insurer may exercise the rights the victim of the accident has against the persons responsible for the accident depend upon the national law governing that insurance contract, as determined in accordance with Art. 7 of the Rome I Regulation. However, the law applicable to the determination of the persons who may be held liable and the allocation of responsibility between them and their respective insurers remains subject, in accordance with Article 19, to Article 4 et seq. of the Rome II Regulation.

In *Amazon*,<sup>3</sup> the CJEU ruled on the respective scopes of the Rome I and Rome II Regulations regarding actions brought by consumers against unfair contract terms. The CJEU had to adjudicate on the law applicable to tort under the Rome II Regulation for the purposes of determining the law or laws applicable to an action for an injunction within the meaning of Directive 2009/22. The CJEU interpreted the respective scopes of the Rome I and II Regulations as complementary and distinguished between two kinds of actions. On the one hand, the CJEU stated that where the action for an injunction aims to prevent unfair terms from being included in consumer contracts in order to create contractual obligations, the law applicable to the assessment of the terms must be determined in accordance with the Rome I Regulation. The CJEU found that non-contractual liability extends also to the undermining of legal stability by the use of unfair terms, which it is the task of consumer protection associations to prevent. Hence, an action for an injunction under Directive 2009/22 relates to a non-contractual obligation arising out of a tort/delict within the meaning of Chapter

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<sup>1</sup> C-359/14 and C-475/14, *ERGO Insurance and Gjensidige Baltic*, EU:C:2016:40.

<sup>2</sup> Case C-149/18, *Agostinho da Silva Martins v Dekra Claims Services Portugal SA* ECLI:EU:C:2019:84

<sup>3</sup> Case C-191/15, *Verein für Konsumenteninformation v Amazon EU Sàrl*, ECLI:EU:C:2016:612

II of the Rome II Regulation, and in particular Art. 6(1) providing for a special rule relating to non-contractual obligations arising out of an act of unfair competition.

- **Temporal Scope of the Rome II Regulation**

In *Homawoo*,<sup>4</sup> the Court had to determine whether Arts. 31 and 32 of the Regulation, read in conjunction with Article 297 TFEU, must be interpreted as requiring a national court to apply the Regulation only to events giving rise to damage occurring after 11 January 2009, or if other dates (i.e. the date on which the proceedings seeking compensation for damage were brought and the date on which the applicable law was determined by the court seised) have any bearing on this issue. The CJEU referred to the established principles of interpretation of EU law relating specifically to the entry into force of secondary acts and looked at the literal meaning of the Rome II Regulation. It concluded that the Rome II Regulation applies only to events giving rise to damage occurring after 11 January 2009, and that the other two mentioned dates do not have any impact on the application of the Rome II Regulation.

- **The notion of ‘damage’ and ‘indirect consequences’**

In *Florin Lazar*,<sup>5</sup> the CJEU had to adjudicate on the law applicable to the question of who is entitled to claim compensation for indirect damage arising out of a traffic accident. In particular, the CJEU had to decide if the damage arising from the death of a person in a traffic accident sustained by close relatives of the deceased falls within the notion of ‘damage’ or as ‘indirect consequences’ of that accident within the meaning of Art. 4(1) of the Rome II Regulation. The CJEU noted that Article 4(1) designates the law of the country in which the ‘damage’ occurs, irrespective of the country in which the event giving rise to the damage occurred, and irrespective of the country or countries in which the ‘indirect consequences’ of that event occur, as the law applicable to a non-contractual obligation. The ‘damage’ to be taken into account in order to determine the place where the damage occurred is the direct damage and, in the event of physical injuries caused to a person, the county of the place where the direct damage occurs is the country of the place where the injuries were suffered. Hence, in the case of a road traffic accident, the place where the direct damage occurred is the relevant connecting factor for the determination of the applicable law, regardless of the indirect consequences of that accident. The CJEU also stated that such an interpretation was confirmed by Art. 15(f) of the Rome II Regulation, which includes the determination of which persons are entitled to claim damages within the scope of the applicable law.

- **The notion of ‘Overriding Mandatory Provisions’**

In *Da Silva*, disregarding some differences between the language versions of the Rome II Regulation and the language used in the Rome I Regulation, the CJEU considered that ‘overriding mandatory provisions’ was a concept common to the two Regulations and that it had to be interpreted consistently. As the CJEU put it: overriding mandatory provisions, falling within the meaning of Art. 16 of the Rome II Regulation, fall within the definition of ‘lois de police’ (‘overriding mandatory provisions’), within the meaning of Art. 9 of the Rome I Regulation. As a consequence, the CJEU’s interpretation applying to one must necessarily apply to the other. The CJEU also relied on its decision in *UNAMAR* (related to the Rome I Regulation),<sup>6</sup> to affirm that overriding mandatory provisions must be interpreted strictly and that the national court shall also take into account its general structure and all the circumstances in which that law was adopted, and determine whether its aim is to protect an interest judged to be essential by the Member State concerned. Then, the CJEU looked at whether the type of national provision at issue could be considered an overriding mandatory provision under this interpretative criterion. The national provision at stake laid down a limitation period for

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<sup>4</sup> Case C-412/10, *Deo Antoine Homawoo v GMF Assurances SA*, ECLI:EU:C:2011:747.

<sup>5</sup> Case C-350/14 *Florin Lazar, représenté légalement par Luigi Erculeo v Allianz SpA*, ECLI:EU:C:2015:802.

<sup>6</sup> C-184/12, EU:C:2013:663.



an action seeking compensation for damage resulting from an accident. The CJEU found that such a type of provisions could be considered 'overriding mandatory' within the meaning of Art. 16 of the Rome II Regulation only after identification of a particularly important reason, such as a manifest infringement of the right to an effective remedy and to effective judicial protection arising from the application of the law designated as applicable.

- **Functioning and interpretation of special rules:**

In *Nintendo*,<sup>7</sup>, the CJEU had to interpret Art. 8 of the Rome II Regulation, laying down a conflict rule applicable to unitary EU intellectual property rights (IPR). The CJEU was asked to clarify the notion of 'country in which the act of infringement was committed' within the meaning of Article 8(2) of the Rome II Regulation. As a preliminary point, the CJEU explained that the case at issue regarded the application of sanctions for infringement of IPR provided for by Arts. 88(2) and 89(1)(d) of Regulation No 6/2002 on Community design. Nevertheless, such sanctions refer to national law, including national private international law. As a consequence, Art. 8 of the Rome II Regulation was applicable and relevant in the case. The CJEU then interpreted Art. 8 of the Rome II Regulation, looking at its spirit and aims, and also compared different language versions. The CJEU found that the 'country in which the act of infringement was committed' within the meaning of Art. 8(2) of the Rome II Regulation refers to the country where the event giving rise to the damage occurred. In the case at issue, a single entity was accused of various acts of infringement in various Member States. The Court clarified that, in such circumstances, the 'event giving rise to the damage must not be identified by reference to each alleged act of infringement, but by making an overall assessment of the defendant's conduct in order to determine the place where the initial act of infringement at the origin of that conduct was committed or threatened by it.

In *ERGO*, the CJEU was asked how to interpret the Rome I and II Regulations and Directive 2009/13 in an insurance claim, and found that the Directive did not contain any conflict-of-laws rule. It then analysed the Rome II and I Regulations to determine which rules were applicable (see supra).

In *Da Silva*, the CJEU ruled on the Interpretation of Art. 28 of Directive 2009/103, protecting the victims of accidents of motor vehicles, and its relationship to Rome II. Relying on its previous decision in *ERGO* (see below, this Annex) the CJEU also ruled that Article 28 of Directive 2009/103, as transposed into national law, does not constitute a provision of EU law which lays down a conflict-of-law rule relating to non-contractual obligations, and that takes precedence over the rules of the Rome II Regulation within the meaning of Art. 27. In addition, the CJEU stated that though Art. 28 of Directive 2009/103 allows the adoption of rules that are more favourable to those victims than those required under the same Directive, such possibility concerns solely the transposition into legislation of a Member State and does not concern the question of whether, in a specific case, those more favourable rules are to be applied rather than the rules of other Member States.

In *Amazon*, the CJEU also gave some indications regarding the interpretation of Art. 6(1), clarifying that unfair competition within such a provision covers the use of unfair terms inserted into general terms and conditions, as this is likely to affect the collective interests of consumers as a group and hence to influence the conditions of competition on the market. In addition, the 'country in which the collective interests of consumers are affected' within the meaning of Article 6(1) of the Rome II Regulation is the country of residence of the consumers to whom the undertaking directs its activities and whose interests are defended

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<sup>7</sup> Cases C-24/16 and C-25/16, *Nintendo Co. Ltd v BigBen Interactive GmbH, BigBen Interactive SA*. ECLI:EU:C:2017:724.

by the relevant consumer protection association by means of that action. The CJEU also clarified that in the case at hand the exception to the rule, provided in Art. 4(3) of the Rome II Regulation, was not relevant.

In *Prüller-Frey*,<sup>8</sup> the CJEU had to decide on the issue of whether, under Art. 18 of the Rome II Regulation, a person who has suffered damage is entitled to bring a direct action against the insurer of the person liable to provide compensation, where such an action is provided for by the law applicable to the non-contractual obligation which forms the basis of the claim for damages, regardless of the provision made by the law that the parties have chosen as the law applicable to the insurance contract. The CJEU reasoned that Art. 18 of the Rome II Regulation does not constitute a conflict-of-laws rule with regard to the substantive law applicable to the determination of the liability of the insurer or the person insured under an insurance contract, but merely makes it possible to bring a direct action where one of the laws to which it refers provides for such a possibility. As such, the law applicable to the insurance contract cannot be a bar to a direct action being brought — should that be possible — on the basis of the law applicable to the non-contractual obligation. As a consequence, the CJEU held that a direct action against the insurer of the person liable to provide compensation can be brought, where such an action is provided for by the law applicable to the non-contractual obligation and regardless of the provision made by the law that the parties have chosen as the law applicable to the insurance contract.

## 2.2 Legal Analysis of the areas of particular interest

BIICL, supported and advised by the In-House Experts, has been working on the 3 areas identified by the Commission as areas of special interest for the Study, i.e. the interface between the Rome II Regulation and Artificial Intelligence, Business and Human Rights and SLAPPs.

### 2.2.1 Artificial Intelligence

Artificial intelligence ('AI') has already developed to the point where it touches almost every aspect of our lives, from health, to employment, transport, shopping, banking, predictive policing, judicial sentencing, social status, romantic relationships and military weapons. Nonetheless, familiarity with how AI works remains low, and (with some notable exceptions) there has been very little case law on the topic. Analysing the application of Rome II to AI therefore depends on conjecture about several unknowns: how AI and its uses are likely to continue evolving, how domestic legal systems will respond, and how Rome II and other conflicts rules will likely be applied in such cases.

This legal research section will explore in detail the realistic possible future developments of AI and the laws applied to it, while providing a solid understanding of AI's core functions and capabilities. This should ensure that any resulting legislative change squarely addresses the most probable immediate and medium-term challenges, whilst being built on an accurate foundation enabling responsiveness to the (inevitable) emergence of currently unforeseen issues. This promotes the European Parliament's goal of 'principle-based and future-proof [AI] legislation.'<sup>9</sup>

Our AI findings rely more heavily on desk research than our other areas of study, due to the relatively low levels of AI-specific responses from National Reporters and expert empirical study participants. This is to be expected, given the novelty of AI as a field of legal study.

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<sup>8</sup> C-240/14, *Eleonore Prüller-Frey contro Norbert Brodnig and Axa Versicherung AG*, ECLI:EU:C:2015:567.

<sup>9</sup> AI Civil Liability Resolution Para 2.

Of note is the European Parliament's resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artificial intelligence ('the AI Civil Liability Resolution').<sup>10</sup> This Resolution, made under Art 225 TFEU, asks the Commission to propose legislation along the lines of the 'Draft Regulation' suggested therein. While the Commission retains its prerogative to propose legislation along those lines or otherwise, there is a reasonable prospect that the AI sector will be subject to substantive regulation at the EU level. It is also expected that the Commission will adopt in April 2021 a Regulation on a new framework for AI. Given the variety and underdeveloped nature of most existing substantive AI regulation, this section will consider the Draft Regulation as a potential model of how substantive AI regulation might look. This will facilitate discussion of how conflicts rules might apply. Commentators have also noted that, if adopted by the Commission verbatim, the Draft Regulation would (perhaps accidentally) introduce a conflicts rule superseding Rome II on matters within its scope, by virtue of Art. 27 Rome II.<sup>11</sup> This possibility will be briefly addressed.

Section 1 will introduce AI and some key concepts. Section 2 will explain the practicalities of how AI can cause damage. Section 3 addresses the EU principles guiding regulation of AI, which should be considered in all relevant EU legislative processes. Section 4 explains the potential impact of the Draft Regulation, both substantively and on conflict of laws, as an example of what future EU legislative change might do. Section 5 then examines the unique considerations raised by AI in applying each Rome II article, through examples of specific AI applications. This Rome II analysis will proceed on the basis of the law as it currently stands, disregarding any future unilateral conflicts rules that may be legislated for AI.

### **Section 1: AI and key concepts**

As a recent phenomenon, the language of AI is still establishing itself in society. Particular care must be taken to ensure that terms are ascribed the same meaning when they are used, to avoid the risk of speaking at cross-purposes. To that end, this Section sets out what is meant by several key AI terms and concepts as used in this Study, drawn from definitions used in previous EU documents where possible.

#### Definition of AI

AI is notoriously difficult to define in concrete terms.<sup>12</sup> The EU White Paper on Artificial Intelligence observes that, '[i]n any new legal instrument, the definition of AI will need to be sufficiently flexible to accommodate technical progress while being precise enough to provide the necessary legal certainty',<sup>13</sup> but '[s]imply put, AI is a collection of technologies that combine data, algorithms and computing power.'<sup>14</sup> The AI Civil Liability Resolution simply states that 'the notion of AI-systems comprises a large group of different technologies, including simple statistics, machine learning and deep learning.'<sup>15</sup> Art. 3(a) of the Draft Regulation defines an AI system as 'a system that is either software-based or embedded in hardware devices, and that displays behaviour simulating intelligence by, inter alia, collecting and processing data, analysing and interpreting its environment, and by taking action, with some degree of autonomy, to achieve specific goals.'<sup>16</sup>

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<sup>10</sup> 2020/2014(INL) [https://www.europarl.europa.eu/doceo/document/TA-9-2020-0276\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2020-0276_EN.html)

<sup>11</sup> Jan von Hein, 'Forward to the Past: A Critical Note on the European Parliament's Approach to Artificial Intelligence in Private International Law' (*Conflictolaws.net*, 22 October 2020) <<https://conflictolaws.net/2020/forward-to-the-past-a-critical-note-on-the-european-parliaments-approach-to-artificial-intelligence-in-private-international-law/>>

<sup>12</sup> The Parliamentary Research Service Briefing, '[EU guidelines on ethics in artificial intelligence: Context and implementation](#)', notes at fn1 that '[t]here is no commonly agreed definition for AI', and refers to Philip Boucher's 2019 EPRS briefings on '[How artificial intelligence works](#)' and on '[Why artificial intelligence matters](#)' for an overview of the difficulty defining it.

<sup>13</sup> [https://ec.europa.eu/info/sites/info/files/commission-white-paper-artificial-intelligence-feb2020\\_en.pdf](https://ec.europa.eu/info/sites/info/files/commission-white-paper-artificial-intelligence-feb2020_en.pdf) 16

<sup>14</sup> *Ibid* 2

<sup>15</sup> AI Civil Liability Resolution F

<sup>16</sup> AI Civil Liability Draft Regulation Art. 3(a)

Further detail can be found in the High-Level Expert Group on Artificial Intelligence's ('HLEG') definitional document for AI.<sup>17</sup> For now, it suffices to note the HLEG's comment that AI refers to intelligence, which is 'a vague concept'; so, instead of using the term "intelligence", 'AI researchers use mostly the notion of rationality', understood as 'the ability to choose the best action to take in order to achieve a certain goal, given criteria to be optimised and the available resources.' The 'core' feature of an AI system is its reasoning/information processing module, which suggests an output or decision based on a data input. As such, depending on the legal instrument or context, it may be more helpful to think of an AI system's component parts ('sensors', 'reasoning/information processing module' and 'actuator', according to the HLEG; or 'data' and 'algorithms', according to the EU White Paper). Some laws may be best targeted at a concrete process or commodity, and others at the more abstract notion of AI.

### Automated decision-making

The AI Civil Liability Resolution suggests that 'using the term "automated decision-making" could avoid the possible ambiguity of the term AI', where "'automated decision-making" involves a user delegating initially a decision, partially or completely, to an entity by way of using software or a service', and 'that entity then in turn us[ing] automatically executed decision-making models to perform an action on behalf of a user, or to inform the user's decisions in performing an action.'<sup>18</sup>

### AI system components and parties

AI systems are complex in part due to their multiple component elements (*supra*). These elements also have several sub-elements; for example, information processing units may comprise multiple different codes interacting with each other and with hardware. From a legal perspective, this is significant because identifying 'which code, input or data have ultimately caused the harmful operation'<sup>19</sup> can be extremely challenging. This will be explained further in Section 2.

Also legally significant is that different parties may be 'in control of the risk associated with'<sup>20</sup> different elements and sub-elements of such systems. Indeed, the 'multitude of actors involved'<sup>21</sup> in developing and operating AI systems is widely cited as undermining effective attribution of liability. The AI Civil Liability Resolution labels the parties who may be involved in an AI system, listed below, with definitions from the Resolution where possible. While the Resolution is not a legislative proposal, it sets out an analytical structure for different elements and sub-elements of AI, relevant parties and liability. This section therefore adopts the Resolution's language where possible, in the interests of promoting terminological consistency for AI.

- **Affected person:** 'any person who suffers harm or damage caused by a physical or virtual activity, device or process driven by an AI-system, and who is not its operator.'<sup>22</sup>
- **User:** 'the person that utilises the AI-system.'<sup>23</sup> This person may be a consumer or a professional.<sup>24</sup>
- **Operator:** one who 'exercises a degree of control over a risk connected with the operation and functioning of an AI-system.'<sup>25</sup> There could be systems and situations involving more than one

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<sup>17</sup> High-Level Expert Group on Artificial Intelligence, 'A definition of AI: Main capabilities and scientific disciplines'

<https://ec.europa.eu/digital-single-market/en/news/definition-artificial-intelligence-main-capabilities-and-scientific-disciplines>

<sup>18</sup> AI Civil Liability Resolution G; Draft Regulation Recital (6)

<sup>19</sup> AI Civil Liability Resolution H; Draft Regulation (3)

<sup>20</sup> AI Civil Liability Resolution H; Draft Regulation (3)

<sup>21</sup> AI Civil Liability Resolution Para 6; Draft Regulation (3)

<sup>22</sup> AI Civil Liability Draft Regulation Art. 3(h)

<sup>23</sup> AI Civil Liability Draft Regulation Recital (11)

<sup>24</sup> Eg AI Civil Liability Draft Regulation Recital (18)

<sup>25</sup> AI Civil Liability Draft Regulation Recital (10)

operator.<sup>26</sup> Art. 3(d) excludes from the Draft Regulation's notion of 'operator' anyone who qualifies as a producer under the Product Liability Directive.<sup>27</sup>

- **Frontend operator:** a 'natural or legal person who exercises a degree of control over a risk connected with the operation and functioning of the AI-system and benefits from its operation.'<sup>28</sup> They will generally appear 'as the person who 'primarily' decides on the use of the AI-system.'<sup>29</sup>
- **Backend operator:** a 'natural or legal person who, on a continuous basis, defines the features of the technology and provides data and an essential backend support service and therefore also exercises a degree of control over the risk connected with the operation and functioning of the AI-system.'<sup>30</sup> While the frontend operator may be more readily apparent, the backend operator 'could in fact have a higher degree of control over the operational risks.'<sup>31</sup>
- **Producer:** 'the producer as defined in Article 3 of [the Product Liability] Directive 85/374/EEC.'<sup>32</sup> The Resolution calls on the Commission to review whether to include manufacturers, developers, programmers, service providers and backend operators in the Product Liability Directive's definition of "producer".<sup>33</sup>
- **Insurer:** insurers will play a special role in the proposed EU AI civil liability regime, which proposes a mandatory insurance scheme for operators of high-risk AI.<sup>34</sup>
- **Interfering third party**<sup>35</sup>: eg a hacker. May be untraceable or impecunious.
- **(Other) third party:** someone other than an affected person, user, operator or producer.<sup>36</sup>

Key to understanding some of these definitions is the notion of '**control**,' defined as 'any action of an operator that influences the operation of an AI-system and thus the extent to which the operator exposes third parties to the potential risks associated with the operation and functioning of the AI-system; such actions can impact the operation at any stage by determining the input, output or results, or can change specific functions or processes within the AI-system; the degree to which those aspects of the operation of the AI-system are determined by the action depends on the level of influence the operator has over the risk connected with the operation and functioning of the AI-system.'<sup>37</sup>

The Resolution and Draft Regulation are clear that a party may occupy more than one of these roles with respect to any given operation, such as the producer also being the backend operator<sup>38</sup> or the user also being the affected party.<sup>39</sup>

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<sup>26</sup> AI Civil Liability Resolution Para 13; AI Civil Liability Draft Regulation Recital (10)

<sup>27</sup> AI Civil Liability Draft Regulation Art. 3(d)

<sup>28</sup> AI Civil Liability Draft Regulation Art. 3(e); Resolution Para 12

<sup>29</sup> AI Civil Liability Draft Regulation Recital (10)

<sup>30</sup> AI Civil Liability Draft Regulation Art. 3(f); Resolution Para 12

<sup>31</sup> AI Civil Liability Draft Regulation Recital (10)

<sup>32</sup> AI Civil Liability Draft Regulation Art. 3(i)

<sup>33</sup> AI Civil Liability Resolution Para 8

<sup>34</sup> AI Civil Liability Draft Regulation Art. 4(4); Resolution Paras 23-25

<sup>35</sup> AI Civil Liability Resolution Para 10

<sup>36</sup> For example, the dependant of a deceased affected person: AI Civil Liability Draft Regulation Art. 6(1)

<sup>37</sup> AI Civil Liability Draft Regulation Art. 3(g); see also AI Civil Liability Resolution Para 12

<sup>38</sup> AI Civil Liability Draft Regulation Recital (10)

<sup>39</sup> AI Civil Liability Draft Regulation Recital (11)

## Other terms useful to understand when regulating AI

- **Device**<sup>40</sup>: a physical object that incorporates (for these purposes) an AI system. Generally, devices fit readily into existing notions of products and (physical) causation of harm. AI systems that do not form part of a device are more challenging, as explained in Section 2.
- **High-risk**: 'a significant potential in an autonomously operating AI-system to cause harm or damage to one or more persons in a manner that is random and goes beyond what can reasonably be expected; the significance of the potential depends on the interplay between the severity of possible harm or damage, the degree of autonomy of decision-making, the likelihood that the risk materializes and the manner and the context in which the AI-system is being used.'<sup>41</sup> The Draft Regulation proposes a strict liability regime for high-risk AI systems, accompanied by stronger oversight mechanisms (see Section 4).
- **Open source software**: 'combines copyright and a licence to grant users the freedom to run the software, to study and modify it, and share the code and modifications with others.'<sup>42</sup>
- **Regulatory sandbox**<sup>43</sup>: a tool for testing AI systems. They 'enable a direct testing environment for innovative products, services or business models, pursuant to a specific testing plan, which usually includes some degree of regulatory lenience combined with certain safeguards.'<sup>44</sup>
- **Version control**: the practice of tracking and managing changes to software code. One difficulty of establishing liability where dynamic algorithms cause damage is that the version that now exists may not be the same as the version that operated to cause damage. Version control could be a way to record iterations of an AI system as it learns, helping affected persons get access to information they may need for a claim.

## **Section 2: how AI can cause damage**

For the purposes of the Rome II Regulation, AI is of interest insofar as it leads to breaches of non-contractual obligations in civil and commercial matters that cause damage. This Section describes the main ways in which AI systems can cause damage from a practical perspective. This lays a foundation for Sections 4 and 5, which involve analysing how AI systems causing damage can breach obligations.

### (1) AI used intentionally to cause damage

AI systems may be used to cause damage where that damage is the desired outcome of its operation. An example may be a machine learning algorithm that has been programmed to transfer currency or cryptocurrency from a bank account or crypto wallet, into the bank account or crypto wallet of the operator.<sup>45</sup> A classic case is that of a hacker.<sup>46</sup> As an intentional tort, it should be relatively straightforward to determine the responsible party as an abstract matter of law, although practical difficulties may remain.<sup>47</sup>

### (2) AI does what it is designed to do, but causes unforeseen damage

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<sup>40</sup> AI Civil Liability Resolution Para 4

<sup>41</sup> AI Civil Liability Draft Regulation Art. 3(c)

<sup>42</sup> European Commission Open Source Software Strategy 2020-2023

[https://ec.europa.eu/info/sites/info/files/en\\_ec\\_open\\_source\\_strategy\\_2020-2023.pdf](https://ec.europa.eu/info/sites/info/files/en_ec_open_source_strategy_2020-2023.pdf)

<sup>43</sup> AI Civil Liability Resolution L

<sup>44</sup> Study on Regulatory Sandboxes and Innovation Hubs for Fintech

[https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652752/IPOL\\_STU\(2020\)652752\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652752/IPOL_STU(2020)652752_EN.pdf)

<sup>45</sup> See example of the DAO hack in Section 5

<sup>46</sup> See discussion of the 'interfering third party' in the AI Civil Liability Draft Regulation Recitals (7) and (9), and Resolution Para 9

<sup>47</sup> AI Civil Liability Draft Regulation Art. 8(3), for example, makes provisions for untraceable or impecunious third parties

AI systems may achieve the desired outcome, but also cause damage as an unintended consequence. For example, if a company uses a dynamic pricing algorithm to set prices in response to price changes of competing goods, one may assume that it will maximise profit by undercutting competitors to steal customers. However, the algorithm may “learn” to collude, including with other algorithms, leading to higher prices in the market.<sup>48</sup> In this situation, the AI system itself functions without error, because it achieves its programmed objective of maximising the company’s profit. However, it would have the unintended consequence of restricting competition on the market, breaching the company’s obligation to compete fairly. It is difficult conceptually to identify a responsible party, as the “learning” was to a large extent autonomous.<sup>49</sup>

AI systems are more likely to produce unintended consequences when used for applications for which they were not initially designed.<sup>50</sup>

### (3) AI fails to do what it was designed to do

An error may arise in the AI system, such that it does not produce the intended output in response to a particular input. For example, an autonomous vehicle may swerve off the road when there was no need for it to do so. Such system errors can arise in many ways:

#### (a) Faulty sensors

AI systems process data collected by sensors.<sup>51</sup> If the sensors are faulty or substandard, the processing unit will be fed the wrong data, and generate the wrong output. For example, the camera on a self-driving vehicle may be unable to perceive certain objects in sun glare, so information about traffic signals might not be fed to the processing unit.<sup>52</sup> Factual responsibility may lie with the sensor component manufacturer, the car producer, any operator responsible for ensuring the sensor’s software is maintained, or any user or third party who otherwise damages the sensors. The sensors may also be damaged by accident.

#### (b) Bugs

There are on average 1-25 bugs or defects per 1000 lines of code, which may produce unexpected outputs from the data inputs. Bugs have caused a number of high-profile, unpredicted tragedies in automated systems<sup>53</sup>, and while due diligence over debugging software is always improving, bugs remain an inevitable part of coding. Responsibility for bugs may lie with a backend operator, or whomever is tasked with auditing the code, although such audits are currently best practice rather than a legislative requirement. Otherwise, it may be difficult to identify the (factually) responsible party, particularly where code is compiled from multiple sources or worked on by multiple people. Some bugs only arise as an unforeseen consequence of codes interacting with each other in unpredictable ways.<sup>54</sup>

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<sup>48</sup> Timo Klein, ‘Assessing Autonomous Algorithmic Collusion: Q-Learning Under Short-Run Price Commitments’ (2018) Tinbergen Institute Discussion Paper No. TI 2018-056/VII [https://editorialexpress.com/cgi-bin/conference/download.cgi?db\\_name=EWM2018&paper\\_id=187](https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=EWM2018&paper_id=187)

<sup>49</sup> Ariel Ezrachi, *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy* (HUP 2016) Chs 7-8

<sup>50</sup> See AI Civil Liability Draft Regulation Art. 8(2), placing responsibility on operators for ‘selecting a suitable AI-system for the right task and skills’

<sup>51</sup> Understood, in the broad sense, as any input device, *per* the HLEG Definition

<sup>52</sup> Keisuke Yoneda, Naoki Suganuma, Ryo Yanase & Mohammad Aldibaja, ‘Automated driving recognition technologies for adverse weather conditions’ (2019) 43 IATSS Research 253 <https://www.sciencedirect.com/science/article/pii/S0386111219301463>

<sup>53</sup> For example the Therac-25 software-controlled radiation overdoses, on which see Nancy G. Leveson, ‘The Therac-25: 30 Years Later’ (2017) 50(11) Computer 8; and the ARIANE 5 space launch failure, on which see Mark Dowson, ‘The ARIANE 5 Software Failure’ (1997) 22(2) ACM SIGSOFT Software Engineering Notes 84

<sup>54</sup> See comments on connectivity between AI systems and their dependence on external data: AI Civil Liability Resolution I and Paras 6, 7 and 10; Draft Regulation Recital (3)

### (c) Data bias

Data is the driving force of AI, particularly AI systems that include machine learning elements. Training a machine learning algorithm on flawed data will teach it to apply rules that produce incorrect or undesirable outcomes. Individuals may label training data or select features in ways that reflect their own (conscious or subconscious) biases, while sampling data that is underrepresentative or influenced by historical biases may cause societal bias to be replicated by the algorithm.<sup>55</sup> As a simplified example, an autonomous vehicle may include code instructing it to avoid running people over. Consider that, at the feature selection stage, a programmer might select two arms and two legs as “relevant features” of a person, reflecting ableist bias and resulting in less accurate avoidance of people with different numbers of limbs. At the sampling stage, racial bias in automated identification of humans due to homogenous data sets is well-documented.<sup>56</sup>

It may be conceptually and practically difficult to identify whether biased labelling, feature selection, or poor quality data is the cause of biased outcomes in a particular AI system, particularly where different parties may contribute to different stages of the data compilation and machine training process. Significantly, machine learning algorithms are designed to spot patterns that humans might miss, so it is often difficult or impossible to code bias errors out of the system. Even if particular features (such as race) are explicitly labelled “irrelevant”, ‘redundant encoding’ often leads to these features being tracked by proxy, producing the same result.<sup>57</sup>

### (4) Damage to AI components and in the broader AI landscape

As AI becomes more prevalent, the shift in cases engaging Rome II will not be limited to instances of damage caused *by* AI systems. More AI also means more data collection and storage,<sup>58</sup> using more servers and processing devices,<sup>59</sup> and increasing reliance on at-distance or automated processes. Many of these changes can be dealt with effectively by existing legal tools. Some, however, give rise to new considerations.

For instance, as data becomes more valuable and more sensitive data is held, the incentives towards hacking and data theft (whether the hacker uses an AI system or more traditional methods) become much stronger. In particular, as it becomes easier to infer sensitive and/or valuable data from general data, with better algorithms and by fusing a wider range of data, the potential damage (especially to privacy and other fundamental rights) from previously low-risk data increases.<sup>60</sup> The potential material ramifications of a hack also become greater as more transactions and critical infrastructures rely on technology. As virtual assets like cryptocurrencies become more trusted and valuable, they too become more of a target for theft

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<sup>55</sup> For a more thorough exposition of how bias may enter data in a discrimination and employment context, see Solon Berocas and Andrew Selbst, ‘Big Data’s Disparate Impact’ (2016) 104 California Law Review 671, and Philipp Hacker, ‘Teaching Fairness to Artificial Intelligence: Existing and Novel Strategies Against Algorithmic Discrimination Under EU Law’ (2018) 55 Common Market Law Review 1143

<sup>56</sup> See, eg, Maggie Zhang, ‘Google Photos Tags Two African-Americans As Gorillas Through Facial Recognition Software’ *Forbes* (New York, 1 July 2015) <<https://www.forbes.com/sites/mzhang/2015/07/01/google-photos-tags-two-african-americans-as-gorillas-through-facial-recognition-software/?sh=532abccc713d>>

<sup>57</sup> Solon Berocas and Andrew Selbst, ‘Big Data’s Disparate Impact’ (2016) 104 California Law Review 671, 691-692, 720-722; Philipp Hacker, ‘Teaching Fairness to Artificial Intelligence: Existing and Novel Strategies Against Algorithmic Discrimination Under EU Law’ (2018) 55 Common Market Law Review 1143, 1146-1150

<sup>58</sup> The EU White Paper on Artificial Intelligence predicts that the volume of data produced in the world will grow from 33 zettabytes in 2018 to 175 zettabytes in 2025: [https://ec.europa.eu/info/sites/info/files/commission-white-paper-artificial-intelligence-feb2020\\_en.pdf](https://ec.europa.eu/info/sites/info/files/commission-white-paper-artificial-intelligence-feb2020_en.pdf) 4

<sup>59</sup> With a move away from cloud computing to computing devices working at the edge of the network: EU White Paper on Artificial Intelligence *ibid* 1

<sup>60</sup> See discussion of retracing and de-anonymising data in EU White Paper on Artificial Intelligence *ibid* p 11



and fraud.<sup>61</sup> The security and robustness of algorithms and the servers that host them will be of paramount importance.

There is currently little consensus on the appropriate standards of robustness in coding, so it may be difficult to identify a party at fault for a particular weakness in a system. This may be exacerbated where a system is made up of combining various codes, and where weaknesses may only arise from the interaction between them.

#### (5) Updates

With all error types (1)-(4), they do not only arise due to flaws or defects in the design or use of a product, but may also arise due to negative action, such as a failure to take reasonable care in design or a failure to provide appropriate updates. The need for (or possibility of) updates renders AI systems dynamically modifiable and is another differentiator between them and more traditional products.<sup>62</sup> Failure to install recommended updates can therefore be as causally significant as initial design, which is why the AI Civil Liability Draft Regulation assigns responsibility to operators to ensure that all available updates are regularly installed.<sup>63</sup>

### Section 3: AI and EU Principles

The EU White Paper on Artificial Intelligence sets the goal of establishing an ecosystem of excellence and trust. From a regulatory perspective, a common framework should complement actions to promote Europe's competitiveness in AI, while ensuring optimal outcomes and compliance with EU legislation, principles and values. EU principles and rights (fundamental rights, consumer protection, product liability, effective access to justice<sup>64</sup>) therefore apply. In this context, the HLEG has identified 7 requirements for trustworthy AI,<sup>65</sup> welcomed by the Commission's Communication Directorate and cited with approval in the White Paper:

- **Human agency and oversight:** AI systems should enable, rather than hamper, fundamental rights; users should be given the tools to comprehend, make informed decisions about, interact with, and challenge the decisions of AI systems, including where AI influences subconscious processes; human oversight and public enforcers should ensure that AI systems do not undermine human autonomy or cause other adverse effects.
- **Technical robustness and safety:** AI systems should be developed with a preventative approach to risks, so that they reliably behave as intended while minimising unintentional and unexpected harm, and preventing unacceptable harm; AI systems' software and hardware should be protected against vulnerabilities that can be exploited, eg by hacking, and unintended applications should be guarded against; they should have safeguards that enable a fallback plan; inaccurate classifications and predictions should be minimised and the accuracy rate indicated; and the results of AI systems must be reproducible and reliable across a range of inputs and situations.
- **Privacy and data governance:** privacy and data protection must be guaranteed for both input and output data, bearing in mind the possibility of AI systems inferring sensitive information from ordinary information; data sets must be compiled, tested and documented to minimise biases,

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<sup>61</sup> Whether or not they are treated as property by national legal systems

<sup>62</sup> Resolution Para 6; AI Civil Liability Draft Regulation Recitals (10) and (18)

<sup>63</sup> See eg AI Civil Liability Draft Regulation Art. 8(2)

<sup>64</sup> List of principles and rights taken from EU White Paper on Artificial Intelligence discussion of legislation to which AI developers and deployers are already subject: [https://ec.europa.eu/info/sites/info/files/commission-white-paper-artificial-intelligence-feb2020\\_en.pdf](https://ec.europa.eu/info/sites/info/files/commission-white-paper-artificial-intelligence-feb2020_en.pdf) 10

<sup>65</sup> HLEG Ethics Guidelines for Trustworthy AI <https://ec.europa.eu/futurium/en/ai-alliance-consultation/guidelines/1#Human%20agency>

inaccuracies and errors; organisations handling individuals' data should put protocols in place to govern who can access data and under what circumstances.

- **Transparency:** traceability requires the documentation of the data sets and processes leading to an AI system's decision, to enable identification of the reasons why an AI decision was erroneous; explainability requires that both the technical processes of an AI system and related human decisions can be understood and traced by humans; users should be informed that they are interacting with an AI system and of its limitations (eg accuracy levels), and where fundamental rights are concerned, users should be allowed to opt for human interaction instead.
- **Diversity, non-discrimination and fairness:** bias should be removed from data sets to prevent discriminatory outcomes; AI should not be used to exploit subconscious biases; oversight processes should be introduced to prevent bias being introduced through programming and development; the hiring of people from diverse backgrounds should be encouraged; systems should be user-centric and designed in a way that allows all people to access AI products and services, regardless of age, gender, abilities or characteristics; stakeholders who may directly or indirectly be affected by the AI system should be consulted throughout its life cycle.
- **Societal and environmental wellbeing:** AI systems and their supply chains should be assessed as to their environmental friendliness, impact on people's mental and physical wellbeing, and impact on institutions, democracy and society at large.
- **Accountability:** AI systems should be auditable, in that their algorithms, data and design processes should be capable of assessment; applications affecting fundamental rights and safety-critical applications should be able to be independently audited; negative impacts should be minimised and be capable of being reported, with protection for whistle-blowers or other relevant entities; decision-makers must be accountable for any trade-offs between the above requirements when developing AI systems, and systems requiring unacceptable trade-offs should not proceed; accessible mechanisms should facilitate redress for adverse impacts of AI, with particular attention paid to vulnerable persons or groups.

If AI does not meet this standard of trustworthiness, it can pose challenges to the effectiveness of EU legislation, principles and values. In particular, inaccurate, biased or malfunctioning AI can lead to uniform errors or harms being entrenched on a much larger scale than randomised human error or bias.<sup>66</sup> The cause of these harms can be difficult to identify and prove in court as a practical matter, particularly where AI is opaque ("black box"), overly complex, protected as intellectual property or damages non-monetary goods (eg privacy).<sup>67</sup> Inadequate design and implementation of AI systems can considerably impede access to justice for harms caused.

The AI Civil Liability Resolution 'encourages the promotion of the Union standards on civil liability at an international level'<sup>68</sup>, and the Commission framework proposal anticipated in April is expected to be largely based on the HLEG trustworthiness standards. However, legal claims will often arise where AI systems do not comply with best practice or legislative requirements. In a conflict-of-laws context, it is also relevant that different legal systems globally may adopt different standards.

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<sup>66</sup> Note discussion of systematic differences in rates at which different groups experience errors in Solon Berocas and Andrew Selbst, 'Big Data's Disparate Impact' (2016) 104 California Law Review 671; and analysis of uniformity of errors triggering the flash crash in Erik Gerding, 'Contract as Pattern Language' (2018) 88 Washington Law Review 1323

<sup>67</sup> See further challenges in AI Civil Liability Draft Regulation Recital (3)

<sup>68</sup> AI Civil Liability Resolution Para 4

Conflicts rules themselves, both under Rome II and otherwise, must therefore ensure that the rules for deciding which law to apply to breaches of non-contractual obligations can deal effectively with all AI systems, whether they are “trustworthy” or not. Rules should be chosen that promote legal certainty, foreseeability, and justice in individual cases, and strike a fair balance between claimant and defendant,<sup>69</sup> in the context of both “less trustworthy” (opaque, untraceable) and “more trustworthy” AI.

#### **Section 4: the AI Civil Liability Draft Regulation**

Art. 27 Rome II states that the ‘Regulation shall not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict-of-law rules relating to non-contractual obligations.’<sup>70</sup> The AI Civil Liability Draft Regulation in its current form could introduce such a unilateral conflicts rule.<sup>71</sup> Both to understand the scope of what could be excluded from Rome II, and to provide a concrete example of a potential civil liability regime for AI, it is worth reviewing the provisions of the Draft Regulation before turning to its impact on conflict of laws.

##### (1) The proposed substantive regime

The Draft Regulation contains a civil liability regime for AI which, in brief, would create two sets of rules for claims against operators of AI systems.

##### (a) High-risk AI systems

The first applies to high-risk AI systems, which classification is to be determined and reviewed by a Commission standing committee<sup>72</sup> according to the severity of the possible harm or damage, the degree of autonomy of decision-making, the likelihood of the risk materialising, and the manner and context in which the AI system is being used.<sup>73</sup> The Commission would exhaustively list such systems in an annex to the proposed Regulation, and review new and existing AI systems on a regular basis to ensure that the list remains up to date.<sup>74</sup> Operators of high-risk systems would have strict liability for harm or damage caused<sup>75</sup>, subject only to force majeure.<sup>76</sup> The Draft Regulation also sets out maximum compensation amounts<sup>77</sup>, methods for calculating the extent of compensation<sup>78</sup>, and limitation periods<sup>79</sup>, while subjecting operators of high-risk systems to a mandatory insurance regime.<sup>80</sup> The AI Civil Liability Resolution also suggests that, under certain circumstances, AI systems that have caused harm or damage may be classified as high-risk with retroactive effect.<sup>81</sup>

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<sup>69</sup> Rome II Recitals (14), (16)

<sup>70</sup> Rome II Art. 27

<sup>71</sup> Jan von Hein, ‘Forward to the Past: A Critical Note on the European Parliament’s Approach to Artificial Intelligence in Private International Law’ (*Conflictolaws.net*, 22 October 2020) <<https://conflictolaws.net/2020/forward-to-the-past-a-critical-note-on-the-european-parliaments-approach-to-artificial-intelligence-in-private-international-law/>>

<sup>72</sup> AI Civil Liability Draft Regulation Arts. 4(2) and 13; Resolution Para 16

<sup>73</sup> AI Civil Liability Draft Regulation Art. 4(3). For full definition of “high-risk”, see Section 1 *supra*. For further description of how the Commission would conduct this balancing exercise, see Draft Regulation Recital (13) and Resolution Para 15

<sup>74</sup> AI Civil Liability Draft Regulation Art. 4(2); for further details of how this is envisaged to work, see Draft Regulation Recital (14) and Resolution Para 17

<sup>75</sup> AI Civil Liability Draft Regulation Art. 4(1)

<sup>76</sup> AI Civil Liability Draft Regulation Art. 4(3); Covid-19 may arguably be one example of such force majeure.

<sup>77</sup> AI Civil Liability Draft Regulation Art. 5

<sup>78</sup> AI Civil Liability Draft Regulation Art. 6

<sup>79</sup> AI Civil Liability Draft Regulation Art. 7

<sup>80</sup> AI Civil Liability Draft Regulation Art. 4(4)

<sup>81</sup> AI Civil Liability Resolution Para 21

## (b) Other AI systems

The second set of rules applies to AI systems not deemed high-risk. Art. 8 establishes a regime where fault-based liability is presumed, unless one of the grounds in Art. 8(2) applies<sup>82</sup>, or in the case of force majeure. The operator would also be liable for harm or damage caused by untraceable or impecunious interfering third parties.<sup>83</sup> Compensation and limitation would be governed by the laws of the Member State where the harm or damage occurred.<sup>84</sup> The Draft Regulation also imposes a duty on the producer to cooperate with and provide information to requesting operators and affected persons in order to facilitate the identification of liabilities.<sup>85</sup>

### (2) Subject matter and scope

Art. 1 establishes that the Regulation would only apply to claims against operators. Recital (9) explicitly states that claims against interfering third parties can in most cases be sufficiently dealt with by the 'existing fault-based liability law of the Member States,'<sup>86</sup> and leaves claims against producers to the Product Liability Directive.<sup>87</sup> As that Directive currently stands, it is unclear whether AI systems without a physical component (ie not devices) fall within the definition of a product.<sup>88</sup> Recital (23) of the Draft Regulation therefore stresses the importance of coordinating review of the Product Liability Directive closely with the introduction of any proposed Regulation, while Para 8 of the Resolution specifically draws attention to the Directive's definitions of 'products', 'damage', 'defect' and 'producer' for consideration.

### (3) Conflicts rules

In terms of the Draft Regulation's potential impact on conflict of laws, Art. 2(1) could be interpreted as establishing a unilateral conflicts rule,<sup>89</sup> leading to its application 'on the territory of the Union where a physical or virtual activity, device or process driven by an AI-system has caused harm or damage to the life, health, or physical integrity of a natural person, to the property of a natural or legal person or has caused significant immaterial harm resulting in a verifiable economic loss.' This is not a certainty: the Draft Regulation does not explicitly purport to introduce a new conflicts rule. Therefore, it may be possible to interpret Art.

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<sup>82</sup> '(a) the AI system was activated without [the operator's] knowledge while all reasonable and necessary measures to avoid such activation outside of the operator's control were taken, or (b) due diligence was observed by performing all the following actions: selecting a suitable AI-system for the right task and skills, putting the AI-system duly into operation, monitoring the activities and maintaining the operational reliability by regularly installing all available updates.'

<sup>83</sup> AI Civil Liability Draft Regulation Art. 8(3)

<sup>84</sup> AI Civil Liability Draft Regulation Art. 9

<sup>85</sup> AI Civil Liability Draft Regulation Art. 8(4)

<sup>86</sup> See also Section 2(1) *supra* on AI used intentionally to cause damage

<sup>87</sup> 85/374/EEC

<sup>88</sup> See Robert D. Sprague, 'Software Products Liability: Has Its Time Arrived' (1991) 19 Western State University Law Review (1991) 137; K Alhelt, 'The Applicability of the EU Product Liability Directive to Software' (2001) 34 The Comparative and International Law Journal of Southern Africa 188; Sunghyo Kim, 'Crashed Software: Assessing Product Liability for Software Defects in Automated Vehicles' (2018) 16 Duke Law & Technology Review 300; Charlotte De Meeus, 'The Product Liability Directive at the Age of the Digital Industrial Revolution: Fit for Innovation' (2019) 8 Journal of European Consumer and Market Law 149; Jorge Morais Carvalho & Kristin Nemeth, 'Time for a Change: Product Liability in the Digital Era' (2019) 8 Journal of European Consumer and Market Law 160; Kevin Rihtar, 'Product Liability, Legal Transplants and Artificial Intelligence' (2019) Harmonius: Journal of Legal and Social Studies in South East 292; Greg Swanson, 'Non-Autonomous Artificial Intelligence Programs and Products Liability: How New AI Products Challenge Existing Liability Models and Pose New Financial Burdens' (2019) 42 Seattle University Law Review 1201

<sup>89</sup> Jan von Hein, 'Forward to the Past: A Critical Note on the European Parliament's Approach to Artificial Intelligence in Private International Law' (*Conflictolaws.net*, 22 October 2020) <<https://conflictolaws.net/2020/forward-to-the-past-a-critical-note-on-the-european-parliaments-approach-to-artificial-intelligence-in-private-international-law/>>

2(1) in a way that allows for the operation of Rome II. Alternatively, Art. 2(1) may be conceptualised as a 'substantive corrective', as is arguably the case with Art. 3(2) of the e-Commerce Directive, although in such a form it would have an indirect influence on conflict of laws.<sup>90</sup> It is also open to any future legislative proposal to make a different provision. In any event, it is worth discussing the potential ramifications of such a rule that may emerge from future legislation (whether intentionally or otherwise) to ensure due regard is paid to the possible consequences.

On the view of Art. 2(1) as introducing a *lex loci damni* rule,<sup>91</sup> it would apply where the conditions in Arts. 1 and 2 are satisfied. Note that, while Art. 1 qualifies the personal scope of the Regulation, of against whom claims can be brought, Art. 2(1) restricts the type of damage to which the Regulation applies. For instance, immaterial harm that does not qualify as 'significant'<sup>92</sup> would fall outside the scope of the Draft Regulation and be subject to the rules of Rome II. Art. 2(3) of the Draft Regulation also specifies that the Regulation would be 'without prejudice to additional liability claims' resulting from contract, product liability, consumer protection, anti-discrimination, labour law, environmental protection law, or any other claim under Union or national law.

The *lex loci damni* would also determine the application of Art. 9, whereby claims brought under Art. 8(1) (against non-high-risk operators) would have limitation periods and compensation amounts determined according to 'the laws of the Member State in which the harm or damage occurred.'

That said, there remains the possibility that this view of the Draft Regulation's conflicts provisions will never reach legislative form. It has been criticised as favouring operators over consumers in adopting the *lex loci damni* approach of Rome II Art. 4(1)'s general rule, without providing any exception<sup>93</sup>, escape clause<sup>94</sup>, or facility for agreement<sup>95</sup>; or considering whether a cascade approach as in Rome II's Art. 5 (product liability) may be more appropriate.<sup>96</sup> The dominance of *lex loci damni* may also not be the most suitable solution for purely virtual harms, where the place of damage has no physical location.<sup>97</sup> While the Regulation defines 'harm or damage' by reference to life, health, physical integrity, property and significant immaterial harm<sup>98</sup>, concepts such as property are currently expanding (eg to include cryptocurrencies held on decentralised blockchains – see Section 5 below), which increases the likelihood of harm or damage to goods that cannot readily be associated with a physical location. One commentator has noted<sup>99</sup> that Rome II was not included in the list of provisions to which the European Parliament had regard in drafting its Resolution,<sup>100</sup> which suggests that any future legislative proposals from the Commission may well make alternative provisions.

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<sup>90</sup> Tobias Lutz, 'Internet Cases in EU Private International Law - Developing a Coherent Approach' (2017) 66 *International & Comparative Law Quarterly* 689

<sup>91</sup> *Ibid*

<sup>92</sup> Defined in AI Civil Liability Draft Regulation Recital (16)

<sup>93</sup> Eg Art. 4(2) Rome II

<sup>94</sup> Eg Art. 4(3) Rome II

<sup>95</sup> AI Civil Liability Draft Regulation Art. 2(2) deems such agreements 'null and void', by contrast to Art. 14 Rome II's freedom of choice provisions

<sup>96</sup> Jan von Hein, 'Forward to the Past: A Critical Note on the European Parliament's Approach to Artificial Intelligence in Private International Law' (*Conflictolaws.net*, 22 October 2020) <<https://conflictolaws.net/2020/forward-to-the-past-a-critical-note-on-the-european-parliaments-approach-to-artificial-intelligence-in-private-international-law/>>

<sup>97</sup> See Section 5 on the localisation problem below

<sup>98</sup> AI Civil Liability Draft Regulation Art. 2(1)

<sup>99</sup> Jan von Hein, 'Forward to the Past: A Critical Note on the European Parliament's Approach to Artificial Intelligence in Private International Law' (*Conflictolaws.net*, 22 October 2020) <<https://conflictolaws.net/2020/forward-to-the-past-a-critical-note-on-the-european-parliaments-approach-to-artificial-intelligence-in-private-international-law/>>

<sup>100</sup> AI Civil Liability Resolution pp 1-3

For the purposes of Rome II, it will be important to observe how any future AI-specific legislation develops, and monitor how the instruments fit together.

## Section 5: AI and Rome II

Under the law as it currently stands, Rome II applies to claims involving AI. It will continue to do so even after any new legislation in cases that fall outside such new legislation's scope. This Section therefore analyses Rome II's application to AI cases under the status quo.

AI may pose particular challenges when applying the Rome II connecting factors where parties seek redress for damage caused by AI systems or to components of AI infrastructure. This Section will illustrate, through (real and hypothetical) examples, how each relevant article of Rome II might apply to cases involving AI. In general, the challenges in applying Rome II will not necessarily be new or unique to AI, but will involve increasingly complex incidences of familiar problems, often in combination.

### (i) Localisation

The first key type of difficulty involves localising damage or effect. Many rules in Rome II direct us to identify 'the country in which the damage occurs,'<sup>101</sup> 'the country where the market is... affected,'<sup>102</sup> 'the country where the action is to be... taken,'<sup>103</sup> or similar.<sup>104</sup> Some AI systems have tangible outputs in identifiable geographic places, triggering the turn of a valve or switching on of a lamp. Others, however, have purely digital outputs, which may only (directly) affect a virtual space.<sup>105</sup> One example would be an AI that "scrapes" data from one website and uses it automatically to generate content on another website.<sup>106</sup> Changes to virtual spaces, while not being tied to a particular location, may have consequences in many places at once.

The courts have grappled with this problem in cases involving the internet, settling on a 'mosaic' approach in the defamation jurisdiction case of *Shevill* concerning Brussels I bis, which allows claimants to bring claims in any jurisdiction where damage occurs, limited to the portion of damage caused in that Member State.<sup>107</sup> This has been accompanied by an alternative doctrine, allowing the claimant to bring a claim for the full damage wherever it has its 'centre of interests.'<sup>108</sup> Through the principle of common interpretation, the mosaic approach also governs the concept of where damage occurs under Rome II, requiring the court to segment the damage by where it occurred and apply the law of each country to its relevant portion.<sup>109</sup>

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<sup>101</sup> Art. 4(1)

<sup>102</sup> Art. 6(3)(a)

<sup>103</sup> Art. 9

<sup>104</sup> Note, this *lex loci damni* problem also applies to the proposed unilateral conflicts rules in the AI Civil Liability Draft Regulation: see *supra*

<sup>105</sup> While this may lead to a minor physical modification of a server somewhere in the world, the link between the country where the server is and the case in question is far too tangential to uphold the logic underpinning the connecting factor. The place of the server has also been rejected as a useful connecting factor by the ECJ in other contexts: Case C-523/10 *Wintersteiger* ECLI:EU:C:2012:220 [36]

<sup>106</sup> For further discussion of "scraping", see analysis of Rome II Art. 8 in Section 5 below.

<sup>107</sup> Case C-68/93 *Shevill* ECLI:EU:C:1995:61; for application in other contexts, see Joined Cases C-509/09 and C-161/10 *eDate* ECLI:EU:C:2011:685, Case C-523/10 *Wintersteiger* ECLI:EU:C:2012:220, Case C-441/13 *Hejduk* ECLI:EU:C:2015:28, Case C-618/15 *Concurrence SARL* ECLI:EU:C:2016:976, and Case C-230/16 *Coty Germany* ECLI:EU:C:2017:941

<sup>108</sup> Joined Cases C-509/09 and C-161/10 *eDate* ECLI:EU:C:2011:685

<sup>109</sup> Recital (7), confirmed in Commission Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("ROME II")/\*COM/2003/0427 final - COD 2003/0168, p11. For discussion and criticism of the mosaic approach, see Andrew Dickinson, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations* (2<sup>nd</sup> supp, 1 edn, OUP 2010) 4.69-4.74; and Tobias Lutz, 'Internet Cases in EU Private International Law - Developing a Coherent Approach' (2017) 66 *International & Comparative Law Quarterly* 687, 690-695

The mosaic approach may conflict with Rome II principles of certainty and sound administration of justice by requiring defendants to comply with all international laws for content available online; and may conflict with the principle of proximity by exposing defendants to liability simply because of the tenuous connection created by the content being accessible there.<sup>110</sup> Courts may as a result opt for the escape clause in Art. 4(3) where possible. It seems that the 'centre of interests' approach has yet to be applied in a choice of law context, at least by the ECJ, but has been criticised in the context of jurisdiction.<sup>111</sup>

For cases involving 'information society service providers'<sup>112</sup> established in the EU, Art. 3(1) and Recital (23) of the eCommerce Directive<sup>113</sup> create a rule by which they may not be subjected to more onerous laws of other Member States than those which operate in their own country of establishment, justified by the trust placed in regulatory systems within the EU.<sup>114</sup> If an AI system producer or operator qualifies as an information society service provider, it may only be subject to the laws of its Member State of establishment, which would avoid the difficulties of localising a virtual space. Otherwise, however, AI producers and operators may be subject to overlapping laws with which they are only tangentially connected. These challenges may not be unique to or universal across AI systems, but the growth of AI will see them engaged more often and in a broader range of contexts.

(ii) *Negative Liability Gaps*

The second key difficulty is the potential of negative liability gaps, particularly where it is unclear which of several parties is responsible for causing damage. As explained in Section 1, AI systems typically involve contributions from multiple parties, who may be responsible for different aspects of (*inter alia*) its design, training, operation, application or monitoring. The preceding Sections 1-3 demonstrate the factual difficulty of pinpointing exactly why an AI system has gone wrong, and proving which party (or parties, where due to the interaction of multiple elements) caused the malfunction. The issue of multiple parties contributing to damage is not new, but AI involves particularly complex relationships between the various economic actors coupled with difficulties establishing factual causation and understanding what went wrong as a technical matter.

In areas where fault is difficult to prove as a matter of fact, but justice requires redress, legal systems may respond with a default rule allocating strict liability to one of the parties who could be responsible, perhaps because they are the most efficient minimiser of loss (the "cheapest cost avoider"), the most able to bear the financial burden, or the most likely to be at fault as a matter of (insufficiently provable) fact.<sup>115</sup> As legal

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<sup>110</sup> Andrew Dickinson, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations* (2<sup>nd</sup> supp, 1 edn, OUP 2010) 4.70-4.71

<sup>111</sup> Tobias Lutz, 'Internet Cases in EU Private International Law - Developing a Coherent Approach' (2017) 66 *International & Comparative Law Quarterly* 687, 695-696

<sup>112</sup> Recital (17) of the eCommerce Directive 2000/31/EC defines 'internet society services' as 'any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service.'

<sup>113</sup> Directive 2000/31/EC

<sup>114</sup> Note criticisms of engendering a 'regulatory race to the bottom': Nina Höning, 'The European Directive on e-Commerce and its Consequences on the Conflict of Laws' (2005) 5(2) *Global Jurist Topics* art 2, 10-11; Tobias Lutz, 'Internet Cases in EU Private International Law - Developing a Coherent Approach' (2017) 66 *International & Comparative Law Quarterly* 687, 707. Note also, the Directive clearly does not apply to service providers established outside the EU. On the eCommerce Directive generally, including reconciling the rule with the wording of Art. 1(4) and Recital (23), see *Dacey, Morris and Collins on the Conflict of Laws* (5<sup>th</sup> supp, 15<sup>th</sup> edn, Sweet & Maxwell 2018) 35-153ff and Höning (*ibid*)

<sup>115</sup> For discussion of strict liability as shifting the burden of proof, and the role of insurance, see Expert Group on Liability and New Technologies New Technologies Formation, 'Liability for Artificial Intelligence and Other Emerging Digital Technologies' <https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupMeetingDoc&docid=36608> p25; for discussion of the cheapest cost avoider and the role of insurance in an autonomous vehicle setting, see Horst Eidenmüller,

systems attempt to determine the optimal allocation of strict liability for AI, the best solution will not always be obvious and there may be a range of “right” answers,<sup>116</sup> so we are likely to see different regimes allocating responsibility differently. A national regime may even allocate responsibility to the AI system itself, although little support now remains for granting algorithms legal personality.<sup>117</sup>

This fragmentation could lead to negative liability gaps, where claimants who have been wronged and suffered damage caused by an AI system have no redress, even if all countries involved have allocated responsibility at a national level in such a way that a claim with no cross-border element would succeed in any one of them. For example, consider a conflicts rule that indicates the country of origin of the person claimed to be liable. In this example, the operator of an AI system has their origin in State A, and the producer in State B. The law of State A assigns strict liability to producers of AI systems, but only fault-based liability to operators.<sup>118</sup> State B, by contrast, assigns strict liability to operators but only fault-based liability to producers.<sup>119</sup> Assume that an affected person can establish that there has been fault somewhere in the process, but the opacity of the processes involved renders it impossible as a practical matter to pinpoint whether the producer or operator is responsible. A claim against the operator would fail as, applying the law of State A, the claimant would fail to establish the operator’s fault. Similarly, a claim against the producer would fail as, applying the law of State B, the claimant could not establish the producer’s fault. Claimants with both operator and producer in a single country would be able to claim redress against whichever of these parties to which the State had opted to allocate the burden of strict liability: the producer in State A, and the operator in State B. The only reason for the failure of the claim is reliance on the country of origin criterion in a situation where the producer and operator originate in different countries. This kind of negative liability gap would be inimical to the principles of legal certainty and the need to do justice in individual cases that underpin Rome II.<sup>120</sup>

These two key difficulties will recur in the discussion of specific Rome II articles that follows.

#### Art. 1: Scope

Note in particular that ‘violations of privacy’ are excluded from the scope of Rome II under Art. 1(2)(g). While no case law conclusively determines the issue, it is likely that violations of privacy includes breaching obligations related to the processing of personal data,<sup>121</sup> despite the law in this area broadly having developed in the context of freedom of press and of expression. This is a type of breach that an AI is at risk of committing.

#### Art. 4(1): The General Rule

Art. 4(1) establishes the general rule, that ‘the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the [direct] damage occurs.’ This rule can apply in the

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‘Machine Performance and Human Failure: How Shall We Regulate Autonomous Machines?’ (2020) 15 *Journal of Business & Technology Law* 109.

<sup>116</sup> Expert Group on Liability and New Technologies New Technologies Formation, ‘Liability for Artificial Intelligence and Other Emerging Digital Technologies’

<https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupMeetingDoc&docid=36608>

<sup>117</sup> Ryan Abbott & Alex Sarch, ‘Punishing Artificial Intelligence: Legal Fiction or Science Fiction’ (2019) 53 *UC Davis Law Review* 323; Simon Chesterman, ‘Artificial intelligence and the limits of legal personality’ (2020) *International & Comparative Law Quarterly* 819

<sup>118</sup> Perhaps because AI systems fall outside the definition of ‘product’ under strict product liability regimes in that State

<sup>119</sup> Consider the position of non-high-risk operators of AI systems under the EU AI Civil Liability Draft Regulation, discounting the rebuttable presumption of fault

<sup>120</sup> Recital (14) Rome II

<sup>121</sup> Andrew Dickinson, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations* (2<sup>nd</sup> supp, 1 edn, OUP 2010) 3.217-221, 3.228



usual manner to AI systems with an output engaging a physical component. However, AI systems that do not have tangible, physical outputs may face difficulties of localisation to a particular country (*supra*). When the AI system itself is damaged, it may also be difficult to connect the damage to a country if the AI has only a virtual presence.

#### Art. 4(2): Exception to the General Rule

Art. 4(2) establishes an exception to the general rule, 'where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country', applying the law of that country. As a matter of substantive law, it may be challenging to identify which party is legally capable of being held liable.<sup>122</sup> If, for example, they have masked their identity, it may also be difficult to identify them as a practical matter. That said, once an individual has been identified and a claim brought against them, the mechanics of applying Art. 4(2) to identify the applicable law should be straightforward. The biggest risk is that of a negative liability gap arising from Art. 4(2)'s interaction with Art. 4(1) (see *supra*, and the medical care example below).

#### Art. 4(3): Escape Clause

Art. 4(3) indicates the law of a country which is 'manifestly more closely connected with' the breach of obligation, for example because of a pre-existing relationship between the parties. While this escape clause appears to be broad enough to consider matters particular to AI,<sup>123</sup> the Commission Explanatory Memorandum accompanying the Rome II Proposal emphasises that Art. 4(3) must reflect 'the centre of gravity of the situation', and must 'remain exceptional' because it 'generates a degree of unforeseeability as to the law that will be applicable.'<sup>124</sup> It has been convincingly argued that Art. 4(3) cannot be engaged simply because to do so would result in a more just outcome in the circumstances of the case.<sup>125</sup> Therefore, while Art. 4(3) may avoid the negative liability gap problem where the facts independently indicate a manifestly closer connection, it is by no means a reliable solution. A schema where the default rule produces principled and predictable answers in AI cases would be more consistent with the Rome II *desiderata* than a heavy reliance on Art. 4(3).

#### Art. 4 example: medical care

AI could be used in many aspects of medical care, including diagnosis, predicting developments of an illness, assisting with surgery, and incorporation into medical implants. A range of substantive law solutions have been suggested to respond to these issues, including existing regimes like product liability and medical malpractice depending on the AI system in question and how the human actors interact with the AI<sup>126</sup>; and new solutions including integrated systems based on enterprise liability<sup>127</sup>; with others suggesting that medical practitioners should retain ultimate legal responsibility<sup>128</sup>. This example will address the simple case

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<sup>122</sup> Consider the status quo: is a backend operator of an AI system, as defined in the EU AI Civil Liability Draft Resolution, currently capable of being sued as a producer under the unamended Product Liability Directive?

<sup>123</sup> Such as whether personal data of individuals or concerning a particular country was used to train the AI system, or whether the AI system was intended for use in a particular country.

<sup>124</sup> Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("ROME II")/\*COM/2003/0427 final - COD 2003/0168 [22]

<sup>125</sup> Andrew Dickinson, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations* (2<sup>nd</sup> supp, 1 edn, OUP 2010) 4.86; 3.26-3.28

<sup>126</sup> Mousa Alshanteer, 'A Current Regime of Uncertainty: Improving Assessments of Liability for Damages Caused by Artificial Intelligence' (2021) 21(4) North Carolina Journal of Law & Technology 27

<sup>127</sup> Jessica S. Allain, 'From Jeopardy! to Jaundice: The Medical Liability Implications of Dr. Watson and Other Artificial Intelligence Systems' (2013) 73 Louisiana Law Review 1049

<sup>128</sup> Megan Sword, 'To Err Is Both Human and Non-Human' 88 UMKC Law Review 211

of an AI system that diagnoses patients based on medical imaging, making the assumption that the claim is a tort claim under Art. 4(1), rather than for example an Art. 5 claim for product liability.<sup>129</sup>

*An AI system, “Dr Blotson”, diagnoses a respiratory illness by comparing lung images to a bank of lung images belonging to people with and without the illness (a training dataset). In State A, where the training data was gathered, Dr Blotson was shown to be 75% accurate in diagnoses. Dr Blotson is used by a hospital in State B, where it fails to diagnose a patient. It is discovered that the illness presents differently in people with different genetic makeups, such that Dr Blotson is only 50% effective in diagnosing illnesses in people of ethnicities other than the one dominant in State A. Had the hospital not relied on the AI system, the human doctors would have correctly diagnosed the patient and started treatment. However, because human doctors are typically only 70% effective at diagnosing this illness, the hospital relied upon Dr Blotson. Dr Blotson’s failure to diagnose the illness has caused the patient’s lungs to suffer permanent damage.*

*This is an example of sampling bias causing error.<sup>130</sup> Fault may lie with a producer,<sup>131</sup> such as the party responsible for collecting underrepresentative data, or the party who chose to train the AI system on underrepresentative data; or with a frontend operator, such as the hospital that implemented an AI system unsuitable for diagnosing patients in its geographical location. Whether any of these parties was at fault may depend on the respective knowledge of, and degree of care exercised by, each of them. The national legal systems of States A and B may adopt fault-based or strict liability regimes for each of these parties.*

*Assuming the breach is of a non-contractual obligation, the lung damage is physical, so prima facie the place of damage under the Art. 4(1) general rule is State B.<sup>132</sup>*

*If the patient habitually resides in State B, Art. 4(2) would lead to application of State B’s law in any claim against the hospital. If we presume that the producer(s) reside in State A, Art. 4(2) would not be engaged. However, application of Art. 4(1) would still most likely result in application of State B’s laws.*

*If the patient was instead a habitual resident of State A, who was visiting parents in State B when she went to hospital, Art. 4(2) would not apply to any claim against the hospital, so the law of State B would again govern. However, the law applicable as against the producer(s) would be the law of State A.*

*If the law of State B makes producers but not operators strictly liable, while the law of State A does the reverse, a patient habitually resident in State A would encounter a negative liability gap if she is unable to establish fault: she could not claim against the hospital under the laws of State B (place of damage), and could not claim against producers under the laws of State A (shared habitual residence), even though both domestic legal systems assign strict liability to one or other of the parties who may be responsible.*

*In such a case, the court may be tempted to use the escape clause in Art. 4(3), applying the law of the country with a manifestly closer connection to the claim. However, it is not clear from the facts that one country is more closely connected to the dispute than the other. Any contractual or quasi-contractual*

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<sup>129</sup> Note that, if the Product Liability Directive is amended as proposed by the AI Civil Liability Resolution, this example would likely constitute a product. The current position is unclear: see *supra*.

<sup>130</sup> See Section 2(3)(c)

<sup>131</sup> For the purposes of this simplified example, it is presumed that these parties are producers rather than non-producer backend operators

<sup>132</sup> Recital (17) Rome II: ‘in cases of personal injury [...] the country in which the damage occurs should be the country where the injury was sustained’, which includes damage likely to occur (Art. 2(3)(b)). Art. 2(1) defines damage as covering ‘any consequence arising out of’ a breach of non-contractual obligation. See also *Dicey, Morris and Collins on the Conflict of Laws* (5<sup>th</sup> supp, 15<sup>th</sup> edn, Sweet & Maxwell 2018) 32-054. This is subject to the caveat that, if the patient leaves State B after the misdiagnosis but before deterioration of the condition, a question may arise as to whether the deterioration is the direct damage or merely an indirect consequence. While there is no ECJ authority on this point, see the English case of *Henderson v Jaouen* [2002] EWCA Civ 75; [2002] 1 WLR 2971; see also discussion in Andrew Dickinson, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations* (2<sup>nd</sup> supp, 1 edn, OUP 2010) 4.38

*relationship between the patient and the hospital could probably not influence the law applicable to a claim against the producer(s). Arguments could be made concerning where the data was gathered, where the system was implemented, or which law a patient could expect to apply; however, none of these seem to point to a manifestly closer connection to one country or another. This means that Art. 4(3) could not be invoked in a way that promotes the Rome II desideratum of certainty, under which conditions the other desideratum of justice between the parties could not be sufficient alone to justify a departure from the rules in Arts. 4(1) and 4(2).*

Art. 4 example: automated investment AI

AI and machine learning have grown rapidly in financial services, including robo-advisors<sup>133</sup> and chatbots informing human decision-makers, and algorithmic trading through automated systems.<sup>134</sup> Automated systems are particularly dominant in forex trading.

*A forex trading AI system, "AFTAS", is driven by a machine learning algorithm that spots previous patterns in market data indicating an imminent rise in currency. AFTAS Ltd is the producer and operator of AFTAS. As a marketing strategy, AFTAS Ltd starts publishing some free investment tips on their website when they are above 80% likely to lead to a value increase, promising more tips for people who sign up as paid members. One day, AFTAS Ltd's CEO negligently introduces a virus into its code when illegally downloading a television show onto a work computer. The virus corrupts certain files, with the result that AFTAS starts automatically posting tips with only 40% likelihood of investment success. One user, in reliance on the 80% accuracy AFTAS Ltd advertises, invests as the tips suggest and loses €50,000 as a result. There is no contract: the parties have not voluntarily assumed obligations towards one another. However, the user wishes to bring a claim against AFTAS Ltd for breach of a non-contractual obligation. Assume that AFTAS Ltd is based in State A. Assume that the user is in State B when they see the online post, invests while in State C, then returns to their place of habitual residence in State D. The user's banks account is located in State E.*

*In this case, it is clear that AFTAS Ltd is the relevant defendant.<sup>135</sup> It may be different if, for example, AFTAS relies on a public data source about currency information, an error in which external source causes the incorrect predictions. It may also be different if the algorithm begins posting lower probability investments because it "learns" to do so as a result of unforeseeable consequences of its programming, such as where an instruction to maximise profit for users leads it to redefine its own probability parameters as it encounters more data of profit resulting from high-risk investments.*

*In the core example, however, applying Art. 4(1), there are multiple options for the place where the economic damage occurred, as opposed to indirect consequences of that damage. Cases could be made for State B, as the place of receiving negligent advice; State C, as the place of making the damaging investment; State D, as the place where the user suffers from reduced funds in practice; and State E, as the place where the quantity of the user's money is actually reduced. Such difficulties associated with purely economic damage are familiar in the case law under both Rome II and Brussels I bis.<sup>136</sup> Dicey suggests the approach to be taken is to 'identify and locate the facts which represent the outward consequences of the defendant's conduct – or of an event for which the defendant is claimed to be legally responsible – and*

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<sup>133</sup> Philipp Maume, 'Reducing Legal Uncertainty and Regulatory Arbitrage for Robo-Advice' (2019) 16 European Company and Financial Law Review 622

<sup>134</sup> The Alan Turing Institute, 'Artificial intelligence in finance' [https://www.turing.ac.uk/sites/default/files/2019-04/artificial\\_intelligence\\_in\\_finance\\_-\\_turing\\_report\\_1.pdf](https://www.turing.ac.uk/sites/default/files/2019-04/artificial_intelligence_in_finance_-_turing_report_1.pdf)

<sup>135</sup> Although the likelihood of a successful claim may be low as a matter of substantive law.

<sup>136</sup> See, eg, Case C-350/14 *Lazar* ECLI:EU:C:2015:802; Case C-220/88 *Dumez-France* ECLI:EU:C:1990:8; Case C-364/93 *Marinari* ECLI:EU:C:1995:289; Case C-375/13 *Kolassa* ECLI:EU:C:2015:37; Case C-12/15 *UM* ECLI:EU:C:2016:449; Case C-304/17 *Löber* ECLI:EU:C:2018:701.

then to treat as the relevant “damage” those consequences which are directly linked to that conduct’.<sup>137</sup> Similarly, Dickinson analyses domestic case law requiring a ‘concrete transaction’, and suggests as useful the concept of ‘reversibility’, ie that the relevant damage occurs when (and where) the damaging consequences of the relevant conduct become irreversible or unavoidable.<sup>138</sup> These solutions, if adopted, would indicate State C (the place of investment).

What if an AI system automatically invests the user’s money? Here, the irreversible transaction would be made virtually, so has no obvious physical location (see localisation problem discussion *supra*). Perhaps one could refer back to the last place the user made a decision to delegate transactional authority to the AI system, although this does not satisfy the reversibility requirement because the user could remove such authority at any point until the automated transaction is executed.

Note also the possibility of investment in cryptocurrencies, rather than traditional forex. Cryptocurrencies are held on decentralised blockchains, in other words, a network of computers holds the information relating to the owner’s asset. Unlike, for instance, a traditional bank account, which can be associated with a physical location, the network of computers making up a decentralised blockchain network can be spread across the world, can change dynamically as computers join and leave the data verification (“mining”) system, and could be difficult to reduce down to anything akin to a place of administration or centre of interests of the blockchain. That said, blockchains may be owned or operated by companies that are incorporated in a particular country, although using that as a connecting factor is arguably tenuous.

The most complex scenario would be where the AI system itself operates on a decentralised blockchain, where both the AI code and the blockchain network are open source such that nobody claims ownership of either.

#### Art. 4 example: hacking a data server<sup>139</sup>

Consider in the AFTAS example that the algorithm was instead changed by an interfering third party hacker. AFTAS Ltd or the user may wish to bring a claim against the hacker for an intentional tort. This time, imagine that AFTAS Ltd and the user both habitually reside in and have made all material decisions in State A. AFTAS’ server is located in State B. The third-party hacker habitually resides in and conducted the hack from State C.

For AFTAS Ltd, the place of direct damage appears to be State B where the server is located: any consequences for the company in State A seem indirect. However, connecting factors relying on the place of the server have been rejected by the ECJ as too tenuous in other cases<sup>140</sup> (see also discussion in localising damage *supra*), and would not indicate an answer if the AI system is hosted on a decentralised blockchain. Dickinson argues that the tenuous nature of the connection should be relevant only as an Art. 4(3) escape clause consideration, although note also the risks of uncertainty associated with overreliance on Art. 4(3) (*supra*).

For the user, the place of direct damage may be State A. Matters may vary as in the previous example where the factual scenario is more complicated, such as where decisions are automated or different parts of the investment process occur in different countries.

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<sup>137</sup> Dicey, Morris and Collins on the Conflict of Laws (5<sup>th</sup> supp, 15<sup>th</sup> edn, Sweet & Maxwell 2018) 35-026

<sup>138</sup> Andrew Dickinson, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations* (2<sup>nd</sup> supp, 1 edn, OUP 2010) 4.67

<sup>139</sup> For another (more complex) hacking example, Dickinson *ibid* 4.68

<sup>140</sup> Case C-523/10 *Wintersteiger* ECLI:EU:C:2012:220

## Art. 5: Product Liability

For discussion of substantive legal issues that may arise as to whether an AI system qualifies as a product, see Sections 1 and 4 *supra*. In terms of Rome II's provisions, the Regulation does not define the term 'product', but it has been suggested that the understanding in the Product Liability Directive should guide an autonomous interpretation.<sup>141</sup> This Section focuses on the application of Rome II's cascade of connecting factors where the claim is established as one for product liability.

### *Art 5(1): 'marketed in that country'*

Whether an AI product is marketed in a particular country should pose no more difficulties for AI products than for other products.

One issue that exists in a non-AI context is whether products marketed in different countries with slight differences, eg in packaging, is one product or several.<sup>142</sup> The dynamic nature of AI may lead to exacerbated challenges in determining when a product is the same, or when it counts as a different product. For example, is an AI system that has undergone an update still the same product? Short of a complete rewrite of the code, what degree of change must be brought about through updates in order for the AI system to qualify as a new product? Similarly, is a machine learning algorithm trained on one dataset the same underlying product as that algorithm trained on a different dataset, or are they sufficiently different in function and internal structure to count as different products?

*Consider a product which relies on AI to shut down when components overheat. A company may produce a core machine learning algorithm for such a system and train it on data from State A, a hot country, for one version of the product. The company uses data from State B, a cold country, for the version of the product marketed in State B. A person habitually resident in State B sustains damage from a version of the product trained on State A data. If the differently trained systems are the same product, Art. 5(1)(a) will indicate State B's law. If the versions constitute different products, Art. 5(1)(a) will not apply and subsequent stages in the cascade must be considered.*

### *Art 5(1)(b): 'the country in which the product was acquired'*

AI systems bought at distance face the same difficulties as other at-distance transactions, in that the place of acquisition is unclear when the places of receipt and distribution are different.<sup>143</sup> AI systems are likely to be purchased at distance, particularly where they are purely virtual. More significantly, it may not even be possible to identify a physical place of either dispatch or receipt for virtual products, hosted in a virtual marketplace for use in a virtual space, without resorting to fictions (see localisation discussion *supra*).

### *Art 5(1)(c): 'damage'*

See discussion of localisation and Art. 4(1) *supra*.

### *Art 5: 'could not reasonably foresee the marketing of the product, or a product of the same type'*

Barring the difficulties in discerning whether each iteration of a machine learning AI is the same product or different, the main difficulty with the foreseeability clause does not arise where an AI system is *marketed*, but where it is responsible for *marketing* another product. A marketing AI may autonomously decide, perhaps because of exposure to more global data or in response to a market shift, that it would be more advantageous to target its marketing at consumers in a new country. On one view, the manufacturer should

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<sup>141</sup> Andrew Dickinson, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations* (2<sup>nd</sup> supp, 1 edn, OUP 2010) 5.10-5.11

<sup>142</sup> Dickinson *ibid* 5.27

<sup>143</sup> Dickinson *ibid* 5.38

foresee marketing by an online AI system anywhere in the world unless designated as impermissible in the AI's code. Narrower interpretations could limit the regions foreseeable for marketing by the AI related to the language of the advert, any geographical restrictions on places of sale of goods with physical presence, or geographical restrictions on virtual goods subject to geoblocking.<sup>144</sup>

*Art 5(2): 'manifestly closer connection'*

See discussion of Art. 4(3) *supra*.

#### Art. 6: Unfair Competition and Acts Restricting Free Competition

Substantive competition law will be significantly affected by the growth of AI. It must respond to the growth of non-price and multi-sided data markets; increasing competition *for* rather than *on* markets, particularly as data monopolisation generates network effects that tip markets in favour of dominant players; automated algorithmic collusion without human agreement (or even intention) to collude; new ways to exploit patterns of consumer behaviour through individualised targeting, including self-preferencing<sup>145</sup> and individualised dynamic pricing;<sup>146</sup> and increasingly complex relations between upstream and downstream competitors that leverage market power in new ways.<sup>147</sup> As different competition law regimes respond differently to these new challenges, this may create complexities in determining whether an allegedly anticompetitive act falls within the (autonomously defined) scope of Art. 6.

As for the Art. 6 connecting factors, Art. 6(1)'s reference to 'collective interests of consumers', particularly since interpretation in *VKl* as concerning directing activities to that Member State,<sup>148</sup> may give rise to a mosaic of applicable laws.<sup>149</sup> The most unique challenge in AI cases may lie in identifying whether, for the purposes of Art. 6(3), a country's market 'is, or is likely to be, affected,' where the market for AI systems or components is non-price and/or multi-sided.

*If, for example, a social media company in State A gathers data on citizens of State B in exchange for use of the social media platform, and another State A company buys that data to train an individualised dynamic pricing AI targeting State B, is State B a relevant market for the purposes of a claim against the social media company, or the pricing company, or neither? Assuming that this is not excluded from the scope of Rome II by virtue of Art. 1(2)(g)<sup>150</sup>, the answer may depend on whether competition law harms are treated narrowly, as restricted to price effects for consumers; or as incorporating broader considerations as part of quality of goods.<sup>151</sup>*

#### Art. 7: Environmental Damage

AI has great potential to help the environment, including through analysing data in manufacturing, resource extraction, utilities and agriculture to identify the most resource-efficient ways to organise business

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<sup>144</sup> Unlikely to happen in the EU – see Regulation (EU) 2018/302 of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC

<sup>145</sup> Case AT.39740 *Google Search (Shopping)* European Commission, 27 June 2017

<sup>146</sup> Ariel Ezrachi, *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy* (HUP 2016) Part III

<sup>147</sup> Case T-201/04 *Microsoft Corp v Commission* ECLI:EU:T:2007:289; Case AT.39530 *Microsoft (Tying)* European Commission, 6 March 2013; Case AT.40099 *Google Android* European Commission, 18 July 2018.

<sup>148</sup> Case C-191/15 *Verein für Konsumenteninformation (VKI)* ECLI:EU:C:2016:612

<sup>149</sup> See discussion in Tobias Lutz, 'Internet Cases in EU Private International Law - Developing a Coherent Approach' (2017) 66 *International & Comparative Law Quarterly* 687, 698-699

<sup>150</sup> See *supra*

<sup>151</sup> This seems to be the Commission's approach in recent cases, eg in Case AT.40099 *Google Android* European Commission, 18 July 2018, for market definition purposes, the Commission asked whether marginal consumers would switch to a substitute product in response to a small but significant non-transitory deterioration in quality

processes, and to minimise environmentally harmful by-products and accidents. The industrial Internet of Things increasingly allows for automated real-time improvements based on inputs gathered across all devices on a network, not just a single economic operator.<sup>152</sup> However, it also means that these mechanisms become open to risks of algorithmic error or cybersecurity threats, meaning that the cause of environmental damage may not be the economic actor (frontend operator), but a party involved in the development or remote operations (producer or backend operator) of the AI system.

Art. 7 itself relies on Art. 4(1), so its application could be affected by the same considerations discussed in the relevant section above. Its second connecting factor, 'the law of the country in which the event giving rise to the damage occurred', raises unique considerations. As environmental damage by definition has a physical component, it could be tied to a country by interpreting 'event giving rise to the damage' as meaning the first location where the AI system has a physical output. However, if the system is operated remotely or if the defect lies in the system's development, this interpretation might not be the most efficient way to deter environmental damage. The Commission Rome II Proposal<sup>153</sup> emphasises that the purpose of Art. 7 is to ensure a high level of legislative protection by ensuring that the polluter pays, particularly as it typically derives economic benefit from allowing the environmental harm. If an AI backend operator or producer saves costs by implementing a system, in ways that the user does not understand, the deterrent may be more efficiently and justly targeted at the backend operator, which could perhaps be achieved by treating the 'event' as the algorithmic error or defect. This would align with *Kainz*, where the court held that the event giving rise to damage in product liability is manufacture rather than sale.<sup>154</sup> However, it may be difficult to localise the virtual event (*supra*).

#### Art. 8: IP Infringement

As AI develops, IP law faces many new challenges. Automated IP infringement is now possible through, for example, "crawling" and "scraping" websites to extract data,<sup>155</sup> for purposes ranging from publication<sup>156</sup> and passing off<sup>157</sup> to training new machine learning AIs. AI systems can create content, giving rise to the question of whether an AI's output can be copyrighted<sup>158</sup> or benefit from analogous protection.<sup>159</sup> The protection afforded to AI systems themselves is also complicated, as IP law must draw an appropriate

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<sup>152</sup> Mauricio Paez and Kerianne Tobitsch, 'The Industrial Internet of Things: Risks, Liabilities, and Emerging Legal Issues' (2018) 62 New York Law School Law Review 217

<sup>153</sup> Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("ROME II")/\*COM/2003/0427 final - COD 2003/0168

<sup>154</sup> Case C-45/13 ECLI:EU:C:2014:7

<sup>155</sup> Machine learning is now being used to further automate crawling and scraping: <https://www.semantics3.com/blog/ai-for-automated-web-crawling/>

<sup>156</sup> Case C-30/14 *Ryanair* ECLI:EU:C:2015:10, although in that case the scraped data was not protected by copyright or the *sui generis* database right (both listed in Recital (26) as IP rights for the purposes of Rome II); *Public Relations Consultants Association v The Newspaper Licensing Agency Ltd* [2013] UKSC 18

<sup>157</sup> In 2013, Google made commitments to the FTC to refrain from scraping the content of competing websites, passing it off as their own, and threatening to delist rivals if they complained: [https://www.ftc.gov/sites/default/files/documents/public\\_statements/statement-commission-regarding-googles-search-practices/130103brillgooglesearchstmt.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commission-regarding-googles-search-practices/130103brillgooglesearchstmt.pdf). Yelp! alleged that Google were still passing off Yelp! reviews and ratings as their own in 2015 (<https://www.businessinsider.com/yelp-google-ftc-full-letter-2017-9?r=US&IR=T>), although Google argued that they had complied with the terms of their commitments (<https://www.blog.google/topics/public-policy/extending-domain-opt-out-and-adwords-api-tools/>).

<sup>158</sup> WIPO Conversation on Intellectual Property and Artificial Intelligence sessions [https://www.wipo.int/meetings/en/details.jsp?meeting\\_id=55309](https://www.wipo.int/meetings/en/details.jsp?meeting_id=55309) WIPO/IP/AI/2/GE/20

<sup>159</sup> <https://ec.europa.eu/digital-single-market/en/news/staff-working-document-and-executive-summary-evaluation-directive-969ec-legal-protection> s5.4; *Autobahnmaut* BGH, 25 March 2010, I ZR 47/08

distinction between algorithms as natural mathematical functions incapable of protection, and AI applications that attract a legal response.<sup>160</sup>

The Rome II connecting factors for IP infringements indicate ‘the law of the country for which protection is claimed’ for intellectual property rights;<sup>161</sup> and for unitary Community intellectual property rights, where not identified by a specific instrument,<sup>162</sup> ‘the law of the country in which the act of infringement was committed.’<sup>163</sup> The former will depend very much on how substantive laws develop to respond to the challenges identified above.<sup>164</sup> The latter may face the difficulty of localising acts of infringement to a particular country if the copyright infringement occurs purely in a virtual space (*supra*).

#### Art. 9: Industrial Action

The law applicable to industrial action is ‘the law of the country where the action is to be, or has been, taken.’<sup>165</sup> From Recital (27), it appears that whether an act is an industrial action is to be determined by the domestic law, rather than given autonomous interpretation.<sup>166</sup>

*This example will consider DDoS (Distributed Denial of Service) attacks, a common form of “hacktivism” which overloads a company’s server with traffic to stop that company from being able to function efficiently. It is possible that, in future, countries might develop national legislation treating DDoS attacks as a legitimate form of protest.<sup>167</sup> If so, they may even be deployable as part of industrial action, including AI-driven DDoS attacks.<sup>168</sup> If these developments occur, there may be a challenge in localising industrial action that occurs in a virtual space. Dickinson suggests, in the context of more traditional applications of Art. 9, that “[t]he connecting factor should be taken to refer to the country in which the acts of the workers collide with the interests of the employer,’ such that if one protests by staying at home, the place where the action is should be understood as where one is causing disruption by absence, namely the usual workplace. This should provide a solution in many instances of DDoS-driven industrial action, for example if the attack disrupts the company’s performance of tasks in a physical location. If, however, the industrial action impacts a company producing virtual outputs, perhaps where work is usually remote, this hurdle may be difficult to clear.*

#### Art. 10: Unjust Enrichment

While unjust enrichment is difficult to define comprehensively, particularly in an autonomous way, AI systems will undoubtedly cause unjust enrichments. One ready example is through mistaken automated payment, which may occur as a result of errors such as those outlined in Section 2. Of particular note are “smart

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<sup>160</sup> In the EU, see Directive 2009/24/EC on the legal protection of computer programmes and Art. 52 of the European Patent Convention. In the US, see *Alice Corporation v CLS Bank International* 134 S. Ct. 2347 (2014), *Enfish, LLC v Microsoft Corporation* 822 F.3d 1327 (Fed. Cir. 2016), *Bascom Global Internet Services, Inc. v AT&T Mobility LLC* 827 F.3d 1341 (Fed. Cir. 2016), and discussion in Mauricio Paez and Kerianne Tobitsch, ‘The Industrial Internet of Things: Risks, Liabilities, and Emerging Legal Issues’ (2018) 62 New York Law School Law Review 217

<sup>161</sup> Art. 6.1, *alias* the *lex loci protectionis* (Recital (26))

<sup>162</sup> See, eg, Regulation (EC) 207/2009 on the Community trade mark Art. 101

<sup>163</sup> Art. 6.2

<sup>164</sup> For discussion of the ‘mosaic’ approach in an IP context, see Tobias Lutz, ‘Internet Cases in EU Private International Law - Developing a Coherent Approach’ (2017) 66 International & Comparative Law Quarterly 687, 698-699

<sup>165</sup> Art. 9

<sup>166</sup> Andrew Dickinson, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations* (2<sup>nd</sup> supp, 1 edn, OUP 2010) 9.31

<sup>167</sup> <https://www.legalcheek.com/lc-journal-posts/prioritise-intent-not-effects-a-nuanced-approach-to-ddos-cyber-attacks-and-free-speech/> - compare <https://www.legalcheek.com/lc-journal-posts/why-ddos-protests-wont-fit-into-freedom-of-expression-rights/>

<sup>168</sup> <https://securityintelligence.com/fight-fire-with-fire-how-ai-plays-a-role-in-both-stopping-and-committing-ddos-attacks/>;



contracts”, which technically speaking are not contracts at all,<sup>169</sup> but rather codes capable of executing contractual promises once a programmed condition is met, often held on a decentralised blockchain ledger. This may lead to the release of funds under inappropriate circumstances, such as where a force majeure clause is not encoded into the programme but nonetheless would absolve a party of an obligation to perform by a particular date; or where a faulty sensor misrecords rainfall as part of a farming insurance scheme and pays out in error.

Art. 10(1) indicates that, where non-contractual obligations arising out of unjust enrichment concern relationships ‘existing between the parties... closely connected with that unjust enrichment’, the law governing that relationship shall apply. “Smart contract” payment mechanisms will typically form part of a broader scheme of contractual agreement. However, they may be made operational before the parties have voluntarily assumed responsibilities to each other, so mistaken “smart contract” mechanism execution could in theory occur even where no contract has been formed. Other types of erroneous automated payment could also fall outside the rule in Art. 10(1).

Art. 10(2) identifies the place where the parties habitually reside, which should present no conceptual difficulties, although it may be practically difficult to identify parties engaged in virtual transactions, particularly where anonymous systems like blockchain and cryptocurrencies are being used. Art. 10(3) identifies the law of the country in which the unjust enrichment took place, which again may create difficulties of localisation if the enrichment is virtual. For considerations to do with Art. 10(4), see discussion of Art. 4(3) *supra* on manifestly closer connection.

*Consider the Ethereum DAO (Decentralised Autonomous Organisation) hack.<sup>170</sup> In 2016, a hacker<sup>171</sup> identified a weakness<sup>172</sup> in a “smart contract” that Ethereum, a prominent blockchain, had introduced to facilitate collective investment of cryptocurrency (“Ether”). The hacker sent a command to the “smart contract” that prompted it to repeatedly transfer Ether into the hacker’s personal wallet. If a member of the DAO could sue Ethereum for mistakenly paying out their money to the hacker,<sup>173</sup> the rule in Art. 10(1) would probably apply, such that the law governing the relationship between the DAO member and Ethereum would govern the claim. The law governing the contract would likely be found in the DAO/Ethereum terms of service, although if no law is specified, the place of the virtual contract between the parties may be difficult to localise.*

*A claim against the hacker may fall under the general rule in Art. 4 as an intentional tort. If unjust enrichment is engaged, however, one could resort to Art. 10(2) if the claimant and hacker habitually reside in the same country. Practical difficulties of traceability may be significant: the DAO hacker has still not been identified, despite having published communications with the Ethereum network. Given that it is possible to freeze*

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<sup>169</sup> It is often said that smart contracts are neither smart, nor contracts. For discussion of the misnomer, see Cheng Lim, Calum Sargeant and TJ Saw, ‘Smart Contracts: Bridging the Gap Between Expectation and Reality’ (*Oxford Business Law Blog*, 11 July 2016) <<https://www.law.ox.ac.uk/business-law-blog/blog/2016/07/smart-contracts-bridging-gap-between-expectation-and-reality>>

<sup>170</sup> Matthew Leising, *Out of the Ether: The Amazing Story of Ethereum and the \$55 Million Heist That Almost Destroyed It All* (Wiley 2020)

<sup>171</sup> Or, perhaps, many

<sup>172</sup> The callback function was unlimited, so by paying 1E into the pot, the hacker could repeatedly take 1E out, until acquiring Ether of a total value amounting to £55mn

<sup>173</sup> This may be better dealt with by a claim in tort/delict for insufficiently robust design, although such a claim may not be possible depending on how substantive law develops, and on whether Ethereum was actually insufficiently diligent in its design. It may also be affected by whether cryptoassets constitute property, on which see The LawTech Delivery Panel, ‘Legal Statement on Cryptoassets and Smart Contracts’ (2019).

*cryptoassets*,<sup>174</sup> there may conceivably be a situation in which disputed cryptoassets are located and held, but the new holder not identified, such that the country of habitual residence cannot be identified. If Art. 10(2) does not apply, Art. 10(3) would ask in which country the unjust enrichment took place. Blockchain systems are decentralised, hosted on multiple servers across the world, and available to anyone to access through the internet. If the enrichment is treated as taking place in the virtual space, it is difficult to localise to an individual geographic location (see *supra*).

#### Art. 11: Negotiorum Gestio

*Negotiorum gestio* may involve AI if the intervention in favour of the beneficiary is carried out by an AI system. This could occur if, for instance, the AI executes transactions that were not the intended output of the AI but are nonetheless in the beneficiary's interest; or if the intervener implements an AI system to carry out a transaction that is not authorised by the beneficiary. It is important to bear in mind that the intervener remains the human deployer of the AI system. If an AI system teaches itself to go beyond its authorised remit, there must be a question of how foreseeable that development was to someone in the intervener's position. Unless AI systems are attributed legal personality of their own (unlikely – see *supra*), they cannot be treated as an agent.

As Art. 11 follows the same structure of connecting factor rules as Art. 10, the possible AI-related issues are broadly the same. Presumably, interventions are less likely to happen anonymously than in unjust enrichment cases, so there should be fewer practical difficulties in identifying habitual residence for the purposes of Art. 11(2). As for Art. 11(3), *negotiorum gestio* also seems less likely to be limited to virtual benefits, so the difficulties of Art. 10(3) are less likely to arise.

#### Art. 12: Culpa in Contrahendo

*Culpa in contrahendo* is an autonomous concept limited to breaches of non-contractual obligation with a 'direct link with the dealings prior to the conclusion of a contract', such as violating the duty of disclosure and breakdown in contractual negotiations.<sup>175</sup> AI is impacting the world of pre-contractual dealings through the nascent development of automated negotiating tools, which currently operate as chatbots within limits set by the operating company, that make contact with potential clients and conclude deals on the company's behalf.<sup>176</sup> Errors of the sort set out in Section 2 may result in the negotiating chatbot making misrepresentations about the company.<sup>177</sup>

Art. 12(1) indicates the law of the contract, or the law that would have been applicable to the contract had it been entered into. In most cases, this should not pose particular AI-related difficulties, as the law of the contract will likely be specified and is not obviously different based on whether it was concluded through an AI or through human actors.<sup>178</sup> Provisions 12(2)(a)-(c) mirror the connecting factors identified in Arts. 4(1)-(3), and the pre-contractual context does not appear to cause any significant differences in application, so the same analysis as above will apply to these provisions.

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<sup>174</sup> In the UK, see *Robertson v Persons Unknown* (unreported), *AA v Persons Unknown* [2020] 4 WLR 35], [2019] EWHC 3556 (Comm); in Singapore see *B2C2 Ltd v Quoine Pte Ltd* [2019] SGHC(I) 3

<sup>175</sup> Recital (30)

<sup>176</sup> One of these tools, Pactum, is used by Walmart: <https://medium.com/pactum-ai/your-next-contract-negotiation-might-be-with-a-machine-99b9fe05ec9f>

<sup>177</sup> Art. 12 may even include innocent misrepresentations: Andrew Dickinson, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations* (2<sup>nd</sup> supp, 1 edn, OUP 2010) 12.04

<sup>178</sup> Rome I typically refers to places of habitual residence of the contracting parties, although some articles may be relevant, eg perhaps cases involving free choice of law under Art. 3.

## Arts. 16 and 26: Overriding Mandatory Provisions and Public Policy of the Forum

AI engages significant human rights considerations. As described above, personal data used to train machine learning algorithms raises significant privacy concerns, particularly as methods of inferring more sensitive information develop with advances in AI and the increasing breadth of data stored. Algorithmic bias can result in discriminatory results drawn on lines of protected characteristics, even where the AI system is instructed not to discriminate on excluded features, because of redundant encoding and discrimination by proxy. AI systems can facilitate mass surveillance, including by state authorities and other entities; track and analyse people's daily habits, including to retrace and de-anonymise data about individuals; and influence public discourse and electoral processes, for example by prioritising information seen by users of online platforms.<sup>179</sup> These concerns tend naturally towards being the subject of overriding mandatory provisions in domestic and EU legislation, and to engaging the public policy of the forum. As such, we may see more instances of these provisions applying to AI cases than we do for other subject matters.

### **Conclusion**

The growth of AI brings with it many legal challenges for substantive regimes, but the biggest issues for the application of Rome II lie in localising intangible damage, particularly involving virtual assets or virtual spaces; and the risk of liability gaps due to complex and opaque relations between components and parties. Rome II may be a limited tool in addressing this issue, particularly given the *desideratum* of uniform application, and the current unpredictability around how substantive AI law will develop in domestic systems and EU legislation. When deciding how Rome II should adapt to the rise of AI, we should consider the practicalities of how AI causes damage, how national and international legislation is likely to develop, and the EU principles governing this sector.

### **2.2.2 Business and Human Rights**

Over the past decades, transnational corporations have increasingly extended their activities yet the possibility to hold them accountable for human rights abuses is met with many obstacles, including the conflict-of-laws rules.<sup>180</sup>

In the European Union, courts dealing with cross-border tort cases apply the Rome II Regulation to determine the applicable law.

The provisions of Rome II developed here are the ones relevant to business and human rights litigation and have been discussed either in literature, case law, or by the respondents to the consultation.

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<sup>179</sup> EU White Paper on Artificial Intelligence [https://ec.europa.eu/info/sites/info/files/commission-white-paper-artificial-intelligence-feb2020\\_en.pdf](https://ec.europa.eu/info/sites/info/files/commission-white-paper-artificial-intelligence-feb2020_en.pdf) 11; regarding the potential influence of electoral processes, see the findings of the UK Information Commissioner's Office and fine of Facebook in relation to the Cambridge Analytica scandal, analysed in detail in the ICO's Report to Parliament dated 6 November 2018, 'Investigation into the use of data analytics in political campaigns': <https://ico.org.uk/media/action-weve-taken/2260271/investigation-into-the-use-of-data-analytics-in-political-campaigns-final-20181105.pdf>

<sup>180</sup> Schutter, 'Human Rights Due Diligence: The Role of States' (2012) *Report for the International Corporate Accountability Roundtable* (ICAR). Skinner, McCorquodale, and Schutter, (2013) 'The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business' (ICAR, CORE and ECCJ).

- **EU developments on mandatory corporate human rights due diligence**

On 11 September 2020, the Committee on Legal Affairs of the European Parliament published a report containing a draft directive on corporate due diligence and corporate accountability (“Draft Directive”).<sup>181</sup> Between October 2020 and February 2021, the European Commission carried out a public consultation for an Inception Impact Assessment on Sustainable Corporate Governance.<sup>182</sup> The initiative intends to “promote compliance with all relevant obligations under the EU Charter of Fundamental Rights and ensure the coherence of the EU’s internal and external policies in the area of human and labour rights”.<sup>183</sup> As part of the initiative, two studies were commissioned: one on human rights and environmental due diligence in the supply chain,<sup>184</sup> and one on board duties and sustainable corporate governance.<sup>185</sup> On 10 March 2021, the European Parliament adopted a resolution with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)).<sup>186</sup> The findings and recommendations that are relevant to the provisions of Rome II are detailed below (see in particular “Article 16: overriding mandatory provisions”).

Another relevant development in the field is the restrictive sanctions regime adopted by the European Union on 7 December 2020 to address serious human rights violations and abuses worldwide – the EU Global Human Rights Sanctions Regime. This sanctions regime comprises two legal acts: Council Decision (CFSP) 2020/1999<sup>187</sup> and Council Regulation (EU) 2020/1998<sup>188</sup>. This sanctions regime comprises two types of measures applicable all persons, entities and bodies under EU jurisdiction: financial sanctions and restrictions on movement (travel ban). The EU Global Human Rights Sanctions Regime has been welcomed as a positive step toward human rights protection and accountability, although some academics point out the need to clearly specify how the new regime will be applied and how it will relate to other existing sanctions frameworks.<sup>189</sup>

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<sup>181</sup> European Parliament Committee on Legal Affairs, Draft report with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)) available at <[https://www.europarl.europa.eu/doceo/document/A-9-2021-0018\\_EN.html](https://www.europarl.europa.eu/doceo/document/A-9-2021-0018_EN.html)>.

<sup>182</sup> European Commission, Inception Impact Assessment on Sustainable Corporate Governance (2020)4034032. Available at <<https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance>>.

<sup>183</sup> Ibid. at 5.

<sup>184</sup> Smit, et al., 'Study on due diligence requirements through the supply chain', (2020) European Commission. Available at <<https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en>>.

<sup>185</sup> EY, 'Study on directors' duties and sustainable corporate governance' (2020) European Commission. Available at <<https://op.europa.eu/en/publication-detail/-/publication/e47928a2-d20b-11ea-adf7-01aa75ed71a1/language-en>>.

<sup>186</sup> European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)) available at <[https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html)>.

<sup>187</sup> Council Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses, OJ L 410I, 7.12.2020, p. 13.

<sup>188</sup> Council Regulation (EU) 2020/1998 concerning restrictive measures against serious human rights violations and abuses, OJ L 410I, 7.12.2020, p. 1.

<sup>189</sup> Youngs, “The New EU Global Human Rights Sanctions Regime: Breakthrough or Distraction?” (*Carnegie Europe*, 14 December 2020) <<https://carnegieeurope.eu/2020/12/14/new-eu-global-human-rights-sanctions-regime-breakthrough-or-distraction-pub-83415>>. Eckes, “EU Human Rights Sanctions Regime: Ambitions, Reality and Risks”, Amsterdam Law School Research Paper No. 2020-64, Amsterdam Centre for European Law and Governance Research Paper No. 2020-07 (December 8, 2020), <<https://ssrn.com/abstract=3744856>>.

- **Article 4(1): *lex loci damni***

In transnational cases involving human rights abuses, under the general rule of Article 4(1) of the Rome II Regulation, the applicable law is the law of the country where the damage happened (*lex loci damni*). When multinational corporations carry out cross-border activities, human rights abuses committed by their subsidiaries or suppliers in developing countries (host states) will then usually be governed by the law of the host state. Although the advantage or disadvantage of the *lex loci damni* for the claimant depends on the host state involved, it can mean that the law applicable will be the law of a state with weak regulatory standards, poor rule of law or governance structures.<sup>190</sup> The content of the foreign applicable law will not in itself necessarily be less protective or elaborated regarding human rights, but the enforcement mechanisms may be lacking, the amount of damages available may be lower, and the statute of limitations to bring a claim might also be considerably shorter.<sup>191</sup>

For example, when considering the case of *Jabir and others v Kik*, which had been brought before the German courts, a study requested by the European Parliament pointed out that the fact that the law of the host State (Pakistan) was the applicable law under the general rule of Rome II “created major hurdles” for the claimants because of the lower health, safety and labour standards, weaker governance structure and enforcement mechanisms, and shorter statutes of limitation provided by Pakistani law.<sup>192</sup> In the 2020 Draft Directive on corporate due diligence and corporate accountability, the European Parliament concluded that “the application of the general rule in Article 4(1) of the Rome II Regulation can lead to significant problems for claimants who are victims of human rights abuses, particularly in cases where the companies are large multinationals operating in countries with low human rights standards, where it is almost impossible for them to obtain fair compensation.”<sup>193</sup>

- **Article 4(3): escape clause**

If the tort/delict is manifestly more closely connected with a specific country, Article 4(3) allows for the application of the law of that country. In business and human rights cases, the escape clause of Article 4(3) will usually not allow a departure from the *lex loci damni*, as illustrated by the *Jabir and others v Kik* case: the Dortmund court discarded the claimants’ argument that German law was applicable under the escape clause of Article 4(3) of Rome II. According to the court, there was a significantly closer connection of the

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<sup>190</sup> Wesche and Saage-Maaß, 'Holding Companies Liable for Human Rights Abuses Related to Foreign Subsidiaries and Suppliers before German Civil Courts: Lessons From *Jabir and Others V Kik*' (2016) *Human Rights Law Review*, 16/2, 370-85. See also Enneking, 'The Common Denominator of the *Trafigura* Case, Foreign Direct Liability Cases and the Rome II Regulation - an Essay on the Consequences of Private International Law for the Feasibility of Regulating Multinational Corporations through Tort Law' (2008) *European Review of Private Law*, 16/2, 283-311, at 303.

<sup>191</sup> Meeran, 'Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States' (2011) *City University of Hong Kong Law Review*, 3:1, 1-41, at 14. See also Wesche and Saage-Maaß at 374. Goldhaber, 'Corporate Human Rights Litigation in Non-U.S. Courts: A Comparative Scorecard' (2013) *UC Irvine Law Review*, 3, 127-49, at 132.

<sup>192</sup> Marx, Bright and Wouters, "Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries" (2019) Study requested by the European Parliament, DROI committee.

<sup>193</sup> European Parliament Committee on Legal Affairs, Draft report with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)) at 31.

case to Pakistani law than to German law because both the place of the tort and the claimants' habitual residence were located in Pakistan.<sup>194</sup>

Article 4(3) cannot be used to escape the application of the general rule of the place of injury even if the applicable foreign law violates fundamental human rights.<sup>195</sup> Such issues are to be determined with the intervention of overriding mandatory provisions (Article 16) or the public policy of the forum (Article 26).

- **Article 7: the environmental damage exception**

Article 7 allows claimants to choose between the *lex loci damni* and the law of the country in which the event giving rise to the damage occurred. Environmental damage such as water pollution or emission of air pollutants usually implies a cross-border impact, and Article 7 tackles the ubiquitous nature of environmental damage by considering both the place of the act and the place of the result. The "principle of ubiquity" extended in Article 7 has been commented on as adequately ensuring that the private interests of the victims coincide with the highest level of environmental protection, all the while limiting the incentive for a strategic implantation of polluting companies at the border of jurisdictions with laxer rules.<sup>196</sup>

Similarly, in the context of human rights abuses, applying exclusively the law of the place where the damage is sustained might give operators incentive to opt for subsidiaries or suppliers incorporated in countries where regulatory rules or enforcement mechanisms are laxer (such has been specifically pointed out by 20% of the consulted stakeholders who are experts in business and human rights). A conflict-of-laws rule similar to Article 7 and designed for business and human rights cases could adequately deter harmful activities of EU-based multinational corporations in host countries.<sup>197</sup> On the other hand, the principle of ubiquity has also been criticised as resulting in legal uncertainty for companies.<sup>198</sup>

In the *Akpan v Shell* case, a farmer and fisherman living in a village in Nigeria claimed that his livelihood had been harmed as a result of oil leaking from an installation operated by a wholly-owned subsidiary of Royal Dutch Shell Plc (headquartered in the Netherlands).<sup>199</sup> The *ratione temporis* requirement of Rome II was not met so the Dutch court applied Nigerian law as a result of the application of its domestic conflict-of-laws rules. Initially, the liability of the subsidiary was established but not the one of the parent company as Nigerian law did not allow for parent company liability in the particular circumstances. If Rome II had been applicable, Article 7 would have offered to the claimant the possibility to choose the law of the country in which the event giving rise to the damage occurred, namely Dutch law. Whether the application of Dutch

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<sup>194</sup> LG Dortmund, Urteil vom 10.01.2019 - 7 O 95/15, confirmed by OLG Hamm, decision of 21.05.2019 - 9 U 44/19 at 19.

<sup>195</sup> Calliess, *Rome Regulations: Commentary* (3rd edn.: Kluwer Law International, 2020) at 562.

<sup>196</sup> Boskovic, 'The Law Applicable to Violations of the Environment – Regulatory Strategies', in Fabrizio Cafaggi and Horatia Muir-Watt (eds.), *The Regulatory Function of European Private Law* (Edward Elgar Publishing, 2009); Muir Watt, 'Private International Law Beyond the Schism' (2011) *Transnational Legal Theory*, 2/3, 347–427, at 424; Hein, 'Something Old and Something Borrowed, but Nothing New? Rome II and the European Choice of Law Evolution' (2008) *Tulane Law Review* 82; Symeonides, 'Rome II and Tort Conflicts: A Missed Opportunity' (2008) *American Journal of Comparative Law* 56 at 38.

<sup>197</sup> Enneking at 312. See also Symeonides who goes further and suggests that "*Rome II would have been a better system if the drafters had adopted the same logic (behind Article 7) when drafting the general rule of Article 4(1)*" at 38.

<sup>198</sup> Rühl, "Human Rights in Global Supply Chains: Do We Need to Amend the Rome II Regulation?" (*EAPIL*, 9 October 2020) <<https://eapil.org/2020/10/09/human-rights-in-global-supply-chains-do-we-need-to-amend-the-rome-ii-regulation/>>.

<sup>199</sup> District Court of The Hague, *A.F. Akpan v. Royal Dutch Shell, plc*, case number C/09/337050 / HA ZA 09-1580, 30 January 2013.

law would have created different results as to liability remains however debated.<sup>200</sup> On appeal, the approach adapted by the Court of Appeal of the Hague differed. The Court *inter alia* referred to past cases on foreign direct liability, to the recurrence of oil spills and of legal actions over the last 60 years, and to the increased attention towards the consequences of these oil spills on humans and the environment, to conclude that it must have been “reasonably foreseeable” for the parent company that they would have had liability.<sup>201</sup> The Court ordered Shell to produce several documents for inspection, “assuming for now the possibility under Nigerian law under (very) special circumstances of a parent company’s liability for violation of a duty of care”.<sup>202</sup> On January 29, 2021, applying Nigerian law, the Court of Appeal of the Hague held Shell’s Nigerian subsidiary liable for the damage resulting from the leakage of the pipelines, and ordered the subsidiary to compensate farmers for damage to their land. The amount of the compensation has yet to be determined in a follow-up procedure.<sup>203</sup>

In their 2020 Draft Directive on corporate due diligence and corporate accountability, the European Parliament noted that “while the Rome II Regulation provides for special provisions in relation to certain sectors, including environmental damage, it does not include any special provision in relation to business-related human rights claims”.<sup>204</sup> The Draft Directive suggested that a new article 6a should be inserted in Rome II “so as to allow victims of business-related human rights violations to choose between the law of the country in which the damage occurred (*lex loci damni*), the law of the country in which the event giving rise to the damage occurred (*lex loci delicti commissi*) and the law of the place where the defendant undertaking is domiciled or, lacking a domicile in the Member State, where it operates.”<sup>205</sup> The European Parliament resolution of 10 March 2021 however does not contain the suggested amendment, and opted for the overriding mandatory provision approach (see below at Article 16).

- **Article 14(1): choice of law**

Under Article 14(1), the parties may agree to submit non-contractual obligations to the law of their choice: (a) by an agreement entered into after the event giving rise to the damage occurred; (b) or where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred.

In *Jabir and others v Kik*, claimants argued that previous out-of-court negotiations amounted to an implied choice of German statute of limitations law under Article 14(1)(a) of Rome II. The Dortmund court rejected the implied choice of law by pointing out that at the time, neither the parties nor their representatives were aware of the limitation periods applicable under Pakistani law. The court laid as a requirement that parties must be aware of all the implications of their choice for such choice to be valid. The Higher Regional Court of Hamm confirmed the conclusion of the Dortmund Court but developed its argumentation closer to the drafting of Rome II, referring to the requirement that an implied choice of law must be “demonstrated with reasonable certainty by the circumstances of the case”.<sup>206</sup>

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<sup>200</sup> Arguing that the application of Dutch law would have led to the liability of the parent company: Ryngaert 'Tort Litigation in Respect of Overseas Violations of Environmental Law Committed by Corporations: Lessons from the Akpan v. Shell Litigation in the Netherlands' (2013) *McGill International Journal of Sustainable Development Law and Policy*, 8 (2) at 256.

<sup>201</sup> The Hague Court of Appeal, case number 200.126.843-01 200.126.848-01, 18 December 2015 at 3.6.

<sup>202</sup> *Ibid.* at 6.10.

<sup>203</sup> The Hague Court of Appeal, decisions ECLI:NL:GHDHA:2021:132 and ECLI: NL: GHDHA: 2021: 133, 29 January 2021.

<sup>204</sup> European Parliament Draft Directive (2020/2129(INL)) at 31.

<sup>205</sup> *Ibid.*

<sup>206</sup> OLG Hamm, decision of 21.05.2019 - 9 U 44/19 at 19.

- **Article 16: overriding mandatory provisions**

Article 16 provides for the possibility, in exceptional circumstances, of applying the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation. Overriding mandatory provisions are to be understood as “national provisions with which compliance has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State”.<sup>207</sup>

Overriding mandatory provisions may play a part in business and human rights litigation and have been described as “promising” in that respect.<sup>208</sup> The recent national legislative initiatives on a mandatory corporate duty of care regarding human rights and the environment, as well as the discussions about mandatory due diligence at the European level, are of particular interest here. **France** is among those at the most advanced stage with the adoption of the “Duty of Vigilance” Law n° 2017-399, which came into effect in 2017. The French due diligence law implemented in the French Commercial Code the new article L.225-102-5 under which companies can be found liable if they breach their duty of care for human rights abuses and environmental damage. Whether this provision could intervene as an overriding mandatory provision under Article 16 of Rome II is debated.<sup>209</sup> The French bill initially provided for a penalty of up to 10 million euros (that could be tripled if the liability of the company was engaged on the basis of a breach of its obligations which caused damage). The French Constitutional Council deemed the provision unconstitutional and deleted it. Without this punitive feature, some authors are of the opinion that the French due diligence law will not qualify as an overriding mandatory provision.<sup>210</sup>

Due diligence initiatives gained momentum in other European countries:

In **Switzerland**, under the Swiss public referendum system of direct democracy, a coalition of civil society organisations launched the Responsible Business Initiative (RBI) in 2015, to include mandatory human rights due diligence as a fiduciary duty for companies within the Swiss constitution. Between 2017 and 2020, the Council of States and the National Council (respectively the Swiss Parliament's upper and lower houses) made a number of counterproposals to the initiative, including limitations on its scope of application and liability regime.<sup>211</sup> The Swiss Parliament ultimately adopted the Council of State's bill, which scales back the initial initiative.<sup>212</sup> The bill would apply to companies which, alone or together with one or more domestic or foreign companies controlled by them, exceed two of the following values in two consecutive financial years: a balance sheet total of 40 million Swiss francs, sales of 80 million Swiss francs, and 500 full-time positions on an annual average. The liability regime only applies to the damage to life and personal integrity or to the violation of the right to property. The liability of managers and directors of a company is expressly excluded. Liability for companies effectively controlled abroad is not regulated. Mandatory due diligence

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<sup>207</sup> Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453.

<sup>208</sup> Van Hoek, 'Transnational corporate social responsibility: Some Issues with regard to the liability of European corporations for labour law infringements in the countries of establishment of their suppliers', in Veldman, Pennings, and Konijn (eds.), *Social responsibility in labour relations* (Kluwer Law International, 2008), 147-70.

<sup>209</sup> Calliess at 788.

<sup>210</sup> Barsan, “Corporate accountability: non-financial disclosure and liability – A French perspective” (2017) ECFR 3 at 432; Parance, “La consécration législative du devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre” (2017) *Gazette du Palais* 15, p. 16.

<sup>211</sup> The parliamentary procedure can be consulted at <<https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaefft?AffairId=20170060>>.

<sup>212</sup> The official text of the bill is available in French at <<https://www.parlament.ch/centers/eparl/curia/2016/20160077/S2-4%20F.pdf>>.



is limited to the sectors of conflict minerals and child labour, and takes the shape of an obligation to report. In light of the limitations contained in the bill, the Civil society organisations did not support the bill, and did not withdraw their initiative. The RBI was rejected by a majority of cantons after a nationwide vote on November 29, despite winning the popular vote. The Council of State's bill will thus become law.

In **the Netherlands**, the Dutch Senate adopted the Child Labour Due Diligence Law in 2019.<sup>213</sup> The Dutch law applies to companies that sell or supply goods or services to Dutch end-users, including companies registered outside the Netherlands.<sup>214</sup> Such companies are under the obligation to determine whether there is a reasonable suspicion that child labour occurs in the supply chain, and to develop and implement an action plan if such a suspicion exists.<sup>215</sup> Companies must also issue a due diligence statement on their investigation and action plan.<sup>216</sup> A regulator is appointed, and is responsible for publishing the due diligence statement and filing complaints from victims and other stakeholders.<sup>217</sup> If there are concrete evidence that the company failed to comply, the Dutch law imposes a fine of EUR 4,100. Repeated non-compliance can lead to fines of up to EUR 870,000 (or alternatively 10% of the annual turnover) and criminal liability.

In September 2020, the Social and Economic Council of the Netherlands (SER), the Dutch government's main advisory body for social and economic policy, issued an advisory report called "Working together for Sustainable Supply Chain Impact", calling for mandatory human rights and environmental due diligence legislation. The report encourages in particular "the broadest and deepest possible application of these Guideline (the OECD Guidelines and UNGPs): for the broadest possible group of companies (including SMEs) and as deeply as possible at all stages of the due diligence process (including addressing identified risks and contributing to access to redress and remedy)."<sup>218</sup> In October 2020, the Dutch Minister for Foreign Trade and Development Cooperation, addressed a memorandum to the parliament setting out the results of the current policy in the field of international corporate social responsibility and presenting the new policy. The new policy contains a broad due diligence obligation, and replaces the transparency obligation of the current policy which held a limited effect on international corporate social responsibility. It is not yet been introduced as legislation.

In **Germany**, the government announced their intention to start working on a mandatory due diligence law in December 2019. On 3 March 2021, the Federal Cabinet passed an official government Draft Bill on corporate due diligence in supply chains ("*Sorgfaltspflichtengesetz*"),<sup>219</sup> which entered the parliamentary procedure on 22 April 2021. Under the Draft Bill, companies based in Germany with 3,000 or more employees must take steps to prevent human rights violations in their supply chains, establish complaint mechanisms, and report on their due diligence activities. The initial intent to establish civil liability in case of

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<sup>213</sup> *Wet zorgplicht kinderarbeid*, available in Dutch at <<https://www.eerstekamer.nl/9370000/1/j9vkvfj6b325az/vl3khw8f3a00/f=y.pdf>>.

<sup>214</sup> *Ibid.* Article 4.1.

<sup>215</sup> *Ibid.* Article 5.1.

<sup>216</sup> *Ibid.* Article 4.

<sup>217</sup> *Ibid.* Article 3.

<sup>218</sup> Social and Economic Council of the Netherlands (SER), "Working together for Sustainable Supply Chain Impact: Futureproof Policy for International RBC", Advice 20/08 (September 2020). Available at: <<https://www.ser.nl/-/media/ser/downloads/engels/2020/sustainable-chain-impact.pdf>>.

<sup>219</sup> *Sorgfaltspflichtengesetz* available in German on the website of the Federal Ministry of Labour and Social Affairs <https://www.bmas.de/DE/Service/Gesetze-und-Gesetzesvorhaben/gesetz-unternehmerische-sorgfaltspflichten-lieferketten.html>.

breach of the obligations did not make it to the Draft Bill. However, violations of the obligations set forth in the Draft Bill will be sanctioned with fines, which can amount to up to 2% of the average annual turnover for companies with more than 400 million euros annual turnover.

In **Norway**, the government appointed the Ethics Information Committee in 2018 to assess the adoption of a Supply Chain Transparency Act. The Committee issued a report in February 2020, followed by the draft proposal for an Act regulating companies' transparency about supply chains, duty to know and due diligence.<sup>220</sup> On 9 April 2021, the Norwegian government proposed a new legislation, Proposition 150 L (2020-2021) "Act on business transparency and work with fundamental human rights and decent work",<sup>221</sup> that would require around 8000 Norwegian companies to disclose what measures they take to ensure the protection of human rights in their value chains. If the Act is adopted, companies will be under the obligation to disclose the negative impacts and risks the company has identified through its due diligence activities, and the measures taken to cease or prevent negative impacts and mitigate risks of such impacts. Failure to comply with the disclosure obligation can lead to fines.

In **Belgium**, on 22 April 2021, the Federal Parliament voted in favour of a due diligence bill proposal to establish a duty of vigilance and a duty of responsibility for companies throughout their supply chains.<sup>222</sup> Under the Belgian bill, companies are required to adopt mechanisms that allow them to continuously identify, prevent, stop, minimize and remedy any potential and / or effective violation of human rights, and labour and environmental standards throughout their supply chains. The obligation also applies to their subsidiaries. Failure to comply with the obligations set forth in the bill may result in criminal penalties and / or exclusion from public procurement.

Mandatory provisions are typically applied in exceptional circumstances on a case by case basis, and their exact potential in corporate human rights abuses cases remains to be seen.<sup>223</sup> National initiatives on mandatory due diligence are positive efforts towards corporate accountability, but they also result in a fragmented legal framework leading to legal uncertainty and an uneven playing field for businesses.<sup>224</sup> In the 2020 European Commission study on due diligence requirements through the supply chain, almost all the companies consulted were in favour of a policy change to introduce a **general standard at the EU level**.<sup>225</sup> In that respect, some authors were in favour of classifying the provisions of the European Parliament

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<sup>220</sup> Norway Ethics Information Committee, 'Supply Chain Transparency: Proposal for an Act regulating Enterprises' transparency about supply chains, duty to know and due diligence', (2019). Available at <<https://www.regjeringen.no/contentassets/6b4a42400f3341958e0b62d40f484371/ethics-information-committee---part-i.pdf>>.

<sup>221</sup> Proposition 150 L (2020-2021) available in Norwegian at <<https://www.regjeringen.no/contentassets/c33c3faf340441faa7388331a735f9d9/no/pdfs/prp202020210150000dddpdfs.pdf>>.

<sup>222</sup> « Proposition de loi instaurant un devoir de vigilance et un devoir de responsabilité à charge des entreprises tout au long de leurs chaînes de valeur » available in French and Dutch at <<https://www.lachambre.be/FLWB/PDF/55/1903/55K1903001.pdf>>.

<sup>223</sup> Rubio and Yiannibas, *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union* (Routledge, 2017) at 56; Enneking at 304.

<sup>224</sup> The European Commission also highlighted in their Inception Impact Assessment on Sustainable Corporate Governance that the growing number of horizontal mandatory due diligence initiatives leads to additional costs and a lack of level playing field.

<sup>225</sup> Smit, et al. (2020), 'Study on due diligence requirements through the supply chain', (European Commission).

Draft Directive as imperative, and thus as overriding mandatory provisions in the meaning of Article 16 of Rome II, to ensure their application irrespective of the otherwise applicable law.<sup>226</sup> This approach was adopted in the European Parliament resolution of 10 March 2021.<sup>227</sup>

- **Article 17: rules of safety and conduct**

Under Article 17, in assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability. Although “account shall be taken” of the rules of safety and conduct, the application of article 17 is discretionary and the rules of safety and conduct shall be considered “as a matter of fact”, i.e. they cannot be applied as law.<sup>228</sup>

In transnational business and human rights cases, rules of safety and conduct may play a role as the court would be allowed to take into account its domestic behavioural standards that may be more stringent than those of the host state, even if the law of the latter is applicable.<sup>229</sup> Taking account of the rules does not mean they will apply and replace the applicable law. Safety and conduct rules are to be treated as a matter of fact to assess, for instance, “the seriousness of the fault or the author’s good or bad faith for the purposes of the measure of damages”.<sup>230</sup>

The practical application (and potential efficiency) of Article 17 to business and human rights cases is “an avenue worth exploring” but still remains to be seen.<sup>231</sup> Article 17 cannot be used to establish an alternative connection to the place where the event giving rise to the damage happened in case of corporate human rights abuses.<sup>232</sup>

- **Article 26: public policy**

Under Article 26, the application of a provision of the law of any country specified by the Rome II Regulation may be refused if such application is manifestly incompatible with the public policy (*ordre public*) of the forum. The public policy exception requires the court to engage in an examination of the applicable foreign law to determine whether it is “manifestly” incompatible with the public policy of the forum. Regarding business and human rights cases where the law of the host state is applicable, the public policy exception might work as a “minimum guarantee” of protection as human rights principles are part of the public policy of the forum.<sup>233</sup> All EU Member States must be a party to the ECHR and the European Social Charter, and will be bound by customary international law. In *Krombach v Bamberski*, the CJEU recognised that the public

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<sup>226</sup> Rühl, “Human Rights in Global Supply Chains: Do We Need to Amend the Rome II Regulation?” (*EAPIL*, 9 October 2020) <<https://eapil.org/2020/10/09/human-rights-in-global-supply-chains-do-we-need-to-amend-the-rome-ii-regulation/>>.

<sup>227</sup> European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)), Art. 20.

<sup>228</sup> Dickinson, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations* (Oxford University Press, 2008) at 641; Enneking at 305; Symeonides at 40-41: “This restrictive formulation reduces Article 17 to a mere evidentiary instruction of how to assess the tortfeasor’s culpability. Unfortunately, this minimalist conception prevents Article 17 from becoming the useful corrective tool that Rome II sorely needs.”

<sup>229</sup> Rubio and Yiannibas at 58; Symeonides at 40.

<sup>230</sup> Symeonides at 40.

<sup>231</sup> Van Hoek at 147-70; Enneking at 306.

<sup>232</sup> Calliess at 810.

<sup>233</sup> Calliess at 865: “Both EU law and other international instruments such as the European Convention on Human Rights will have to be respected as parts of the forum’s law. International human rights form a part of forum law as well and may thus prevent a foreign law violating such rights from being applied.”; see also Rubio and Yiannibas at 60; Enneking at 306; van Hoek at 167.

policy exception in the Brussels Convention could be invoked “in exceptional cases where the guarantees laid down in the legislation of the State of origin and in the Convention itself have been insufficient to protect the defendant from a manifest breach of his right to defend himself before the court of origin, as recognised by the ECHR”.<sup>234</sup>

A decision from the CJEU rendered in the context of the Brussels I Regulation limits the scope of application of the public policy exception by providing that it is not sufficient, to invoke a public policy exception, that a court considers the provisions of the applicable foreign law as wrong in their substance and conclusion.<sup>235</sup> In *Jabir and others v KiK*, the claimants submitted that the limitation rules under Pakistani law were incompatible with the public policy of the German and European legal systems. Additionally, the claimants concluded that a limitation period of only one year led to an infringement of the claimants’ fundamental national and European rights to a fair trial and effective legal protection. The Dortmund court discarded the public policy argument, pointing out that the German legal system provided for similarly short or even shorter limitation periods for certain claims.<sup>236</sup> Although the Higher Regional Court of Hamm confirmed the findings of the Dortmund court, it admitted that “a one-year limitation period, in particular in the event of death, is a very short limitation period which is, as far as can be seen, unknown in the European legal area”.<sup>237</sup>

In *Hamad Begum v Maran*, on application of Article 4 Rome II, the law of Bangladesh applied. A non-extendible one-year limitation period under Bangladeshi law rendered the claim statute-barred. The Court of Appeal however agreed that the question of whether it would cause undue hardship to impose the shorter limitation period under Bangladeshi law should be determined as a preliminary issue, allowing the claimant to rely on Article 26.<sup>238</sup> The English court seemed to extend the category of “public policy” to include “undue hardship” by reference to a statute (Foreign Limitation Periods Act) that did not apply in that case (being displaced by Rome II).

The practical application of the public policy exception to transnational business and human rights cases remains uncertain. Even though differences might exist between legal systems as to statutes of limitations or level of damages, those differences do not justify the automatic intervention of public policy.<sup>239</sup>

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<sup>234</sup> Case C-7/98, *D.Krombach v. A. Bamberski*, Judgement of the Full Court of 28 March 2000 [2000] ECR I-1395 at 44.

<sup>235</sup> Case C-38/98, *Renault v. Maxicar* (11 May 2000), [2000] ECR I-02973.

<sup>236</sup> In that respect, the Dortmund court cited statutes of limitation relating to damage to products and property (438 (1) No. 3 BGB and 548 BGB) and not personal injury or violations of human rights.

<sup>237</sup> OLG Hamm, decision of 21.05.2019 - 9 U 44/19 at 28.

<sup>238</sup> *Hamad Begum v Maran (UK) Limited* [2021] EWCA Civ 326.

<sup>239</sup> *Wesche and Saage-Maaß* at 375. The authors come to the same conclusion regarding overriding mandatory provisions (Article 16 of Rome II).

### 2.2.3 SLAPPs

Civil society organizations<sup>240</sup> and the EU Parliament<sup>241</sup> have called upon the EU Commission to take actions to fight against Strategic Lawsuits against Public Participation (SLAPPs). The Commission Work Programme 2021 announced “action to protect journalists and civil society against strategic lawsuits against public participation” in the form of an initiative against abusive litigation targeting journalists and civil society (legislative or non-legislative), in the last quarter of 2021<sup>242</sup>. A call to constitute an expert group has been made.

As instructed by the EU Commission, the present Study addresses the specific issue of the law applicable to claims in tort for defamation when they are used as SLAPPs. It draws conclusions as to the best way to tackle the issue against the backdrop of the Rome II Regulation.

#### Introduction and Definitions

The term SLAPPs was first coined in the late '80s by Canan and Pring.<sup>243</sup> In its original sense, the term only designated suits against citizens petitioning the government regarding a matter of public interest or concern. The right to “petition the government” is enshrined in the 1<sup>st</sup> Amendment of the US Constitution and is generally thought to encompass any actions directed at attempting to promote or discourage governmental action, and in most cases relates to activity that is also protected by the right to free speech, such as sit-ins or advocacy actions of different kinds. In later literature, especially outside of the US, SLAPPs has been extended to mean any suits that target citizens individually, or civil society organizations that are actively engaging in activities for the public interest.

In the EU context, SLAPPs have been defined as “groundless or exaggerated lawsuits and other legal forms of intimidation initiated by state organs, business corporations and individuals in power against weaker parties – journalists, civil society organisations, human rights defenders and others – who express criticism or transmit messages uncomfortable to the powerful, on a public matter”.<sup>244</sup>

Typical examples of victims of SLAPPs are journalists, protestors, activists and campaigners in matters of corruption, environmental protection, cultural and minority rights and other issues of public interest.

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<sup>240</sup> Greenpeace, *Ending Gag Lawsuits in Europe Protecting Democracy and Fundamental Rights*, 2020, available at: <https://storage.googleapis.com/planet4-eu-unit-stateless/2020/06/20200608-ending-SLAPPs-NGO-paper.pdf>. MainStrat, *Comparative study on the situation in the 27 EU countries as regards the law applicable to noncontractual obligations arising out of violations of privacy and rights relating to personality*, final report February 2009, available at <http://www.ejtn.eu/PageFiles/6333/Mainstrat%20Study.pdf>; Resource Centre for Media Freedom, SLAPPs: Strategic Lawsuits Against Public Participation, 2019, <https://www.rcmediafreedom.eu/Dossiers/SLAPPs-Strategic-Lawsuits-Against-Public-Participation>.

<sup>241</sup> See <https://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-media-freedom-and-pluralism>.

<sup>242</sup> European Commission, *Informal Commission Expert group Against SLAPPs*. Terms of reference, available at <https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3746>.

<sup>243</sup> *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22LAW & Soc'Y Rlv. 385 (1988) [hereinafter Canan & Pring 1]; Canan & Pring, *StrategicLawsuitsAgainst PublicParticipation*3, 5Soc.PROBS.506(1988)[hereinafterCanan&Pring2]. Subsequently, Canan and Pring's study was expanded to examine a total of 228 SLAPPs. See Pring, *SLAPPs, Strategic Lawsuits Against PublicParticipation*, 7 PACE ENVIL. L Rev. 3 (1989); Canan, *The SLPP from a SociologicalPerspective*, 7 PACE ENVt. L Rev. 23 (1989).

<sup>244</sup> European Commission, *Informal Commission Expert group Against SLAPPs*. Terms of reference, cit.

While SLAPPs can take many different forms, including non-purely legal strategies, a great majority of them involves claims in defamation. The purpose of such claims is to discredit the victim with the primary intent to weaken and ultimately shut down their actions on matters of public interest.

In addition, while most SLAPPs originate in a domestic context, the actual claim can take a cross-border dimension. This can happen as part of the claimant's strategy to make it more difficult and costly for the victim to defend (e.g. by suing them in a different jurisdiction, in a different language and/or based on the law of a different country), and also to take advantage of the law or practice of a country which may be more favourable to the claimant than the one that would be applied in the victim's home country.

### SLAPPs and the Rome II Regulation

EU law does not regulate SLAPPs and no Member States have specific rules on the topic.<sup>245</sup> The Rome II Regulation does not cover defamation.

Therefore, lacking any PIL or substantive EU measure on the matter, in cross-border SLAPPs based on defamation, each Member State resorts to its own conflict-of-laws rules and to the applicable substantive law, the content of which is different across jurisdictions. In addition, as highlighted by the Malta National Report, because defamation is covered by the Brussels Ibis Regulation, but is excluded from other rules that determine the applicable law (the Rome Regulations), this has inadvertently facilitated forum shopping in matters relating to defamation.

In some cases, SLAPPs may be submitted to third-country laws, which may lead to unsatisfactory outcomes with respect to EU standards of freedom of speech and other fundamental rights.<sup>246</sup>

Therefore, the current EU legal context allows ample room for manoeuvre regarding forum and law shopping tactics on the part of plaintiffs in cross-border SLAPPs.

Given this unsatisfactory situation, it seems that an **EU unified approach to the conflict-of-laws in SLAPPs based on defamation** could mitigate the difficulties of victims in a cross-border context.

As called for by different actors,<sup>247</sup> **defamation in itself, including outside the context of SLAPPs, should be included in the Rome II Regulation and a preference should be given to the law designating the law of the victim's habitual residence, without prejudice to Art. 14.**<sup>248</sup>

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<sup>245</sup> In some Member States, general rules protecting individuals in certain positions, such as university professors, may come in to play in the context of SLAPPs (see for example in France : Commission Mazeaud, "Rapport sur les procédures bâillons, 2017, available at [https://cache.media.enseignementsup-recherche.gouv.fr/file/2017/50/2/Rapport\\_Commission\\_Mazeaud\\_754502.pdf](https://cache.media.enseignementsup-recherche.gouv.fr/file/2017/50/2/Rapport_Commission_Mazeaud_754502.pdf)). Attempts to put the issue of SLAPPs at the legislative forefront have been done in Italy, with no legislation in place as of today: see AGCOM, Sistema dell'informazione: documento conclusivo della prima fase di consultazione pubblica, 5 March 2021, available at [https://www.agcom.it/documentazione/documento?p\\_auth=fLw7zRht&p\\_id=101\\_INSTANCE\\_FnOw5IVOIXoE&p\\_life\\_cycle=0&p\\_p\\_col\\_id=column-1&p\\_p\\_col\\_count=1&101\\_INSTANCE\\_FnOw5IVOIXoE\\_struts\\_action=%2Fasset\\_publisher%2Fview\\_content&101\\_INSTANCE\\_FnOw5IVOIXoE\\_assetEntryId=22074923&101\\_INSTANCE\\_FnOw5IVOIXoE\\_type=document](https://www.agcom.it/documentazione/documento?p_auth=fLw7zRht&p_id=101_INSTANCE_FnOw5IVOIXoE&p_life_cycle=0&p_p_col_id=column-1&p_p_col_count=1&101_INSTANCE_FnOw5IVOIXoE_struts_action=%2Fasset_publisher%2Fview_content&101_INSTANCE_FnOw5IVOIXoE_assetEntryId=22074923&101_INSTANCE_FnOw5IVOIXoE_type=document). But proper anti-SLAPPs statutes, such as the one known in some US federal States, Canada and Australia, do not exist. Explicit SLAPPs provisions have been tabled and to some extent, rejected in Malta (See Malta National Report).

<sup>246</sup> See also the analysis in Prévost, "Study on forms of liability and jurisdictional issues in the application of civil and administrative defamation laws in Council of Europe member states" Study by Council of Europe (2019), <https://rm.coe.int/liability-and-jurisdictional-issues-in-online-defamation-cases-en/168097d9c3>.

<sup>247</sup> See above, Synthesis.

<sup>248</sup> See above, Synthesis.

This solution would hinder plaintiffs in SLAPPs to artificially create the conditions for submitting the claim to a law of a country with which the victim is not familiar. In addition, because the rule seems to be appropriate for any claim in defamation, it does not require the victim to prove that the claim is a SLAPP, which is arguably a very difficult proof to provide. Furthermore, since the rule would be uniform across Europe, it would also contribute to reduce forum shopping within the EU. Finally, unlike other proposals for a unified rule on SLAPPs, this rule would have the advantage of being generally acceptable in the EU and also possible to implement procedurally.<sup>249</sup>

By contrast, a few open issues would remain. First, as it has been argued, victims of SLAPPs should qualify for a specific PIL protection as they are the “weak party” in the relationship<sup>250</sup> (i.e., the claim). For some weak parties, such as consumers<sup>251</sup> and commercial agents<sup>252</sup>, the EU provides a certain protection also with regard to the application of the law of a third-country laws, when it undermines the protection granted by EU law to the weaker party. The proposed solution would not include such a “special” protection for SLAPPs victims, which would be particularly relevant should the EU adopt specific anti-SLAAPs legislation. Second, the rule does not cover SLAPPs based on torts other than defamation, which are nonetheless, beyond the scope of this Study.

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<sup>249</sup> See the two proposals, which the author considers unviable, for a “reverse Article 7 rule” on SLAPPs (i.e. a rule giving the option between two laws to the victim, who is a defendant, which is procedurally difficult to implement), and the proposal for the adoption of the English “double actionability” rule, which is deemed not generally acceptable in continental Europe (Eduardo Álvarez-Armas, “Rome II In the Face Of Human-Rights Challenges: the Law Applicable To SLAPPs and To Human-Rights-Related Torts”, CeDIE Working Papers, 1/2021, [https://alfresco.uclouvain.be/alfresco/service/guest/streamDownload/workspace/SpacesStore/adf6b278-76e6-45c7-babc-e0afd7bfdac5/2021\\_01\\_AlvarezArmas.pdf?guest=true](https://alfresco.uclouvain.be/alfresco/service/guest/streamDownload/workspace/SpacesStore/adf6b278-76e6-45c7-babc-e0afd7bfdac5/2021_01_AlvarezArmas.pdf?guest=true)). See also Eduardo Álvarez-Armas, Álvarez-Armas on potential human-rights-related amendments to the Rome II Regulation (I): The law applicable to SLAPPs, conflict-of-laws.net, January 2021, <https://conflictoflaws.net/2021/alvarez-arms-on-potential-human-rights-related-amendments-to-the-rome-ii-regulation-i-the-law-applicable-to-slapps/>.

<sup>250</sup> See Eduardo Álvarez-Armas, *Ibid.*

<sup>251</sup> Notably, under Art. 6(2) of the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

<sup>252</sup> Judgment of the Court (Fifth Chamber) of 9 November 2000, *Ingmar GB Ltd v Eaton Leonard Technologies Inc.* Case C-381/98, ECLI:EU:C:2000:605.

## 2.3 National Reports



# Austria

## Executive Summary

- The Rome II Regulation is the subject of extensive discussion in Austrian courts and academia. In general, the Regulation is perceived as a balanced and appropriate legal instrument for determining the applicable law.
- With regard to the Regulation's scope, further clarification seems useful. In particular, contracts having a protective effect in favour of third parties should be clearly assigned to either the Rome I or the Rome II Regulation (see Q 3).
- Concerning the determination of the law applicable to purely financial losses, legal certainty and predictability could be improved by expressly defining the respective connecting factors within the Regulation. In this context, it should also be considered whether a uniform determination of the applicable law is possible in the case of mass or dispersed damages. (see Q 6 a.).
- In case of a reform of Rome II, it also seems advisable to clarify whether the determination of the applicable law according to Art. 5 Rome II only concerns such situations where the damage has occurred due to a defective product or whether damages caused by faultless products are also covered (see Q 7).
- From the Austrian point of view, a reform should also address the interaction of the Rome II Regulation with other legislative acts of the European Union. Despite the provision of Art. 27 of the Rome II Regulation, the relationship to the e-Commerce Directive (see Q 8) and the GDPR (see Q 29, 30) remains largely unclear.
- With regard to the law applicable to environmental damage, an explicit provision appears to be useful to specify whether Art. 7 Rome II Regulation also covers claims for pure financial loss (see Q 9).
- The uniform application of the Regulation would also be promoted by including an autonomous definition of the concept of intellectual property. (see Q 10).
- The relationship between Art. 4 and Art. 12 of Rome II could be simplified by adding a more precise definition of the scope of application of these provisions (see Q 14).
- Explicit rules defining the requirements for the validity and form of a choice of law under Art. 14 Rome II are lacking (see Q 15).
- In the absence of an explicit rule in Art. 16 Rome II Regulation, it is unclear whether, which and how foreign overriding mandatory rules can be taken into account (see Q 19).
- The relationship between the Rome II Regulation and the Hague Convention on Traffic Accidents is unclear in some cases and could be further clarified by more comprehensive rules (see Q 22). A reform of the Rome II Regulation could also consider how the issue of forum shopping might be addressed (see Q 26).

## 1. Introduction

In Austria, the Rome II Regulation is a much applied and familiar legal text to most practitioners, specifically to those engaged in cross-border legal issues. Larger businesses that are involved in much cross-border trading and generally have considerable expertise in legal questions are also aware of the Rome II Regulation. Among smaller businesses and ordinary citizens, the Rome II Regulation is largely unknown.

In legal practice, the Rome II Regulation is applied constantly. The "Rechtsinformationssystem des Bundes," where all of the judgments of the final instance court – the Austrian Supreme Court (OGH) – are published, contains over 200 judgments featuring the word "Rom II". Given this rather huge amount of cases for a final instance court, it can be inferred that the Regulation is applied constantly. Nevertheless, there are no reliable statistics on this matter.

In academia, the picture is mixed. Some commentaries already contain a section on the Rome II Regulation, such as the "KBB Kurzkomentar zum ABGB" which is widely used among practitioners. There is also more specific literature, for instance, the "Handbuch für Internationales Privatrecht" by Lurger/Melcher or the book "Rom II-VO" by

Beig/Graf-Schimek/Grubinger/Schacherreiter. However, major commentaries such as the Schwimann/Kodek "ABGB Praxiskommentar" or the "ABGB-Kommentar" by Rummel/Lukas are still missing the Rome II Regulation.

There have been some doctrinal discussions in Austria with regard to the Rome II Regulation. Most of them are specific to individual articles and therefore presented in detail below. One major issue concerns the relationship of the 1971 Hague Convention on the law applicable to traffic accidents and the Rome II Regulation. The parallel existence of the two with the precedence of the Hague Convention, as allowed in Art. 28(1) Rome II, is often seen critically.<sup>253</sup> The 1971 Hague Convention is a very complicated instrument which also deviates from the Rome II Regulation and thus enables forum shopping within the EU. Moreover, the lack of uniformity in EU law is criticised.

On the political level, the Rome II Regulation has not caused noteworthy debates.

## 2. Analysis of the Rome II Regulation

### 2.1 Chapter I – Scope and Interpretation

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

1. *The determination of the material scope of application of the Rome II Regulation, including any difficulties in applying the category of "civil and commercial matters" or in defining the exact scope of any excluded matters (Art. 1(1)-(2))*

In Austria, the interpretation is recognised as being carried out autonomously, in accordance with the Rome I and the Brussels I Regulation (recast); the relevant case law of the Court of Justice of the European Union (CJEU) regarding the Brussels I Regulation (recast) may also be consulted.<sup>254</sup>

The notion of "civil and commercial matters" constituting the outer limit of the material scope is seen as emphasising the demarcation to public law.<sup>255</sup> The concept of "civil and commercial matters" does not cover official and state liability, including the personal liability of those acting on behalf of the state (*acta iure imperii*). However, claims attributable to private economic activity of the state in question are covered by the material scope of the Rome II Regulation (*acta iure gestionis*).

Furthermore, in the demarcation of the scope of application of the Rome I Regulation and in the sense of the *Tacconi* decision, there is agreement that claims should be classified as non-contractual if they result from obligations which were not voluntarily assumed.<sup>256</sup>

Unusual for the German-speaking country, Austrian scholars consider contracts with protective effect for the benefit of third parties to fall within the material scope of the Rome II Regulation.<sup>257</sup> This conclusion is being supported by the argument that the obligations incurred are based on a legal order – as it is the case for the law of tort.

2. *The determination of the temporal scope of application of the Rome II Regulation (Arts. 31-32)*

With regard to the temporal scope of the Rome II Regulation, two questions are discussed in more detail in Austrian literature.

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<sup>253</sup> See eg Neumayr, in Koziol/Bydlinski/Bollenberger (eds), *ABGB Kurzkomentar* (6th edn, Verlag Österreich 2020) Art 28 Rom II-VO para 2; Adensamer, 'Der Verkehrsunfall im Licht der Rom-II-Verordnung' (2006) 219 *Zeitschrift für Verkehrsrecht* 523, 525; Laimer, 'Gerichtsstand und anwendbares Recht bei Verkehrsunfällen im Ausland' (2012) 239 *Zeitschrift für Verkehrsrecht* 450, 453; Rudolf, 'Internationaler Verkehrsunfall' (2008) 261 *Zeitschrift für Verkehrsrecht* 528, 531.

<sup>254</sup> Rudolf, 'Europäisches Kollisionsrecht für außervertragliche Schuldverhältnisse – Rom II-VO' (2010) 36 *Österreichische Juristen-Zeitung* 300.

<sup>255</sup> Neumayr, in Koziol/Bydlinski/Bollenberger (eds), *ABGB Kurzkomentar* (6th edn, Verlag Österreich 2020) Art 1 Rom II-VO para 3.

<sup>256</sup> Lurger/Melcher, *Handbuch Internationales Privatrecht* (1st edn, Verlag Österreich 2017) 306.

<sup>257</sup> Lurger/Melcher, *Handbuch Internationales Privatrecht* (1st edn, Verlag Österreich 2017) 306f.

First, disputes arise as to which facts are covered by the Rome II Regulation from a temporal perspective. To this extent, the German language version of Arts. 31 and 32 of the Rome II Regulation is not precisely drafted and hence interpreted differently by Austrian academics. However, this concerns only the dogmatic construction of the temporal scope, but not the temporal scope as such. In the latter respect, the Austrian literature follows the CJEU, who has ruled that the Rome II Regulation applies to situations occurring after 11 January 2009.<sup>258</sup>

Second, for the types of claims covered by Rome II, it is discussed in detail what is to be seen as the event giving rise to the damage on which Art. 31 of Rome II is based for determining the scope of Regulation. In the case of *negotiorum gestio*, for which the applicable law is determined in accordance with Art. 11 Rome II, the Austrian Supreme Court decided that the point in time to be taken into account is the time at which the relevant effort was made or the action in question was taken.<sup>259</sup>

3. *The characterization of the concept of "non-contractual obligations", its relationship to the concept of "contractual obligations" and any difficulties in relation to characterisation (Arts. 1(1), 2)*

Whether an obligation is to be classified as non-contractual is to be determined by way of an autonomous interpretation.<sup>260</sup> In any case, those categories of claims which are expressly listed in Art. 2(1) Rome II and regulated in the subsequent provisions are classified as claims arising from a non-contractual obligation.<sup>261</sup>

The classification of a legal relationship as a non-contractual obligation is guided by the case law of the CJEU, in particular on European civil procedural law, and is based on the question whether the claims arise from an obligation that was undertaken voluntarily or not.<sup>262</sup> For example, the injunction of a consumer protection association against the use of general terms and conditions is classified as a tort.<sup>263</sup> In detail, however, the classification as a contractual or non-contractual obligation is disputed, such as the classification of a contract with protective effect for third parties.<sup>264</sup> This legal institution gives a third party a contractual claim against the debtor of a contract, although the third party is not a party to the contract.

Further, there are also obligations which are neither covered by Rome I nor Rome II even though they are not excluded under Art. 1(2) Rome I or Art. 1(2) Rome II but are not considered as an obligation. Examples for these types of obligations are the challenge of creditors in the case of insolvency of the debtor<sup>265</sup> or the liability of the transferee of the business or assets<sup>266</sup>.

4. *The universal application of the Regulation (Art. 3)*

There are no relevant unanswered questions in Austrian practice or academia with regard to Art. 3 of the Regulation.

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<sup>258</sup> Neumayr, in Koziol/Bydlinski/Bollenberger (eds), *ABGB Kurzkomentar* (6th edn, Verlag Österreich 2020) Art 32 Rom II-VO para 1; Lurger/Melcher, *Handbuch Internationales Privatrecht* (1st edn, Verlag Österreich 2017) 304f.

<sup>259</sup> OGH 27.5.2015, 6 Ob 29/15f.

<sup>260</sup> Lurger/Melcher, *Handbuch Internationales Privatrecht* (1st edn, Verlag Österreich 2017) 306.

<sup>261</sup> Neumayr, in Koziol/Bydlinski/Bollenberger (eds), *ABGB Kurzkomentar* (6th edn, Verlag Österreich 2020) Art 1 Rom II-VO para 4.

<sup>262</sup> Beig, 'Grenze und Zusammenspiel zwischen Vertrag und Delikt' in Beig/Graf-Schimek/Grubinger/Schacherreiter (eds), *Rom II-VO Neues Kollisionsrecht für außervertragliche Schuldverhältnisse* (1st edn, Manz 2008) 41f; Lurger/Melcher, *Handbuch Internationales Privatrecht* (1st edn, Verlag Österreich 2017) 306.

<sup>263</sup> OGH 14.12.2017, 2 Ob 155/16g.

<sup>264</sup> Neumayr, in Koziol/Bydlinski/Bollenberger (eds), *ABGB Kurzkomentar* (6th edn, Verlag Österreich 2020) Art 1 Rom II-VO para 5.

<sup>265</sup> Lurger/Melcher, *Handbuch Internationales Privatrecht* (1st edn, Verlag Österreich 2017) 306.

<sup>266</sup> OGH 29.10.2013, 3 Ob 183/13b.

5. *The approach to interpretation of the Rome II Regulation, and in particular its relationship to other EU private international law instruments (including the recast Brussels I Regulation and the Rome I Regulation) (Recital (7))*

In Austria, the interpretation of the Rome II Regulation is based on the principles developed for secondary Union law. This means that terms are to be interpreted independently of the *lex fori* or *lex causae*, thus autonomously.<sup>267</sup>

It is further recognised that the interpretation of Rome II must also take into account the interpretation of corresponding terms in other regulations. Hence, on the one hand the Rome II Regulation should be interpreted in such a way that the material scope of application of the Brussels I Regulation (recast), the Rome I Regulation and the Rome II Regulation are harmonised.<sup>268</sup> On the other hand - also with reference to Recital 7 of the Rome II Regulation -, for the interpretation of the terms contractual and non-contractual obligation, recourse is made to the principles developed by the CJEU in relation to Art. 7 of the Brussels I Regulation (recast).<sup>269</sup>

## 2.2 Chapter II – Tort/Delict

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to the implementation of:*

6. *The general conflict-of-laws rule for tort/delict, and difficulties that have arisen in your Member State with respect to its application (Art. 4), and in particular:*

a. *the approach to identifying the place of direct damage in Art. 4(1)*

No cases have been reported on this provision. There seem to be no practical problems in applying Art. 4(1) Rome II. Two references for preliminary rulings regarding the localisation of financial loss submitted by Austrian courts in the context of the Brussels I Regulation (recast) have been decided upon by the CJEU (see below d). These decisions might have an incidence on the determination of the applicable law under Art. 4(1) Rome I (see Preamble 7 Rome I).

b. *the approach to the first rule of displacement in Art. 4(2) in cases involving multiple parties or claims*

There seem to be no practical problems in applying this provision. No cases have been reported.

c. *the approach to the escape clause in Art. 4(3), and*

Austrian courts tend to interpret the escape clause in Art. 4(3) strictly. This is illustrated by a decision of the Austrian Supreme Court of 2019.<sup>270</sup> The case concerned the liability of a notary who had issued wrong certificates regarding the stock in a deposit of gold. Although there was some – not identified – connection to Switzerland, the Austrian Supreme Court held that the case must be decided under the law of Austria. A manifestly closer connection to Switzerland was ruled out on the ground that the notary had issued the certificates to a bank in Austria and the claimant made the investments in question in Austria.

d. *the suitability of this set of rules to govern cases of prospectus liability or other financial market torts*

Two references for preliminary rulings regarding the localisation of financial loss have been submitted by Austrian courts in the context of the Brussels I Regulation (recast) and were decided upon by the CJEU.<sup>271</sup> In both cases the Austrian court favoured the localisation of economic or financial loss at the domicile of the investor. The rulings of the

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<sup>267</sup> Neumayr, in Koziol/Bydlinski/Bollenberger (eds), *ABGB Kurzkomentar* (6th edn, Verlag Österreich 2020) Art 1 Rom II-VO para 4.

<sup>268</sup> Neumayr, in Koziol/Bydlinski/Bollenberger (eds), *ABGB Kurzkomentar* (6th edn, Verlag Österreich 2020) Art 1 Rom II-VO para 1.

<sup>269</sup> Beig, 'Grenze und Zusammenspiel zwischen Vertrag und Delikt' in Beig/Graf-Schimek/Grubinger/Schacherreiter (eds), *Rom II-VO Neues Kollisionsrecht für außervertragliche Schuldverhältnisse* (1st edn, Manz 2008) 40; see also Rudolf, 'Europäisches Kollisionsrecht für außervertragliche Schuldverhältnisse – Rom II-VO' (2010) 36 Österreichische Juristen-Zeitung 300.

<sup>270</sup> OGH 24.1.2019, 6 Ob 233/18k.

<sup>271</sup> CJEU 28.1.2015, *Harald Kolassa v Barclays Bank*, C-375/13, ECLI:EU:C:2015:37; CJEU 12.9.2018, *Helga Löber v Barclays Bank*, C-304/17, ECLI:EU:C:2018:701.

CJEU, however, were more nuanced. The court held that the damage occurs at the domicile of the investor only where this place coincides with the place of establishment of the bank which manages the investor's account.<sup>272</sup>

The transfer of these rulings to the Rome II Regulation in line with the principle of parallel interpretation (see Recital 7 Rome II) risks causing a considerable fragmentation of the applicable law. Two Austrian authors who have dealt with this problem think that it can be solved through the use of Art. 17 Rome II Regulation.<sup>273</sup> In their view, this provision allows for the application of public law standards regarding prospectuses, whether they originate from the EU or third countries. Where the standards are complied with, any liability should be excluded according to the authors. If the prospectus has been published in several markets, including those of a third country, the result would be a "multilateral connection" of prospectus law. The two authors do not find this result problematic, as it corresponds to the mosaic theory which can also be found in other areas of the law.

7. *The rule on product liability (Art. 5) and, where relevant, the interaction with the application of 1973 Hague Convention on the Law Applicable to Products Liability;*

Austria has not signed the 1973 Hague Convention on the Law Applicable to Products Liability, so Art. 5 Rome II applies before Austrian courts. The Austrian Supreme Court had to deal with the burden of proof regarding the connecting factors listed in Art. 5(1) 1 lit. (a)–(c) Rome II.<sup>274</sup> It ruled that this burden has to be borne by the party alleged to be liable.

The literature discusses whether the conflicts rules of Art. 5 Rome II only apply to defective products or also to damage resulting from functioning products. In light of the purpose of the provision, a restrictive interpretation in the first sense is suggested.<sup>275</sup> If this should indeed be the view of the EU legislator, a clarification to this effect would be helpful.

8. *The specific rule on unfair competition (Art. 6)*

The interpretation of Art. 6(1) Rome II and its relation to the E-commerce Directive is the subject of diverging opinions by two different chambers of the Austrian Supreme Court. Without mentioning the Rome II Regulation, the seventh chamber of the Court has ruled in 2012 that the country-of-origin principle underlying the E-commerce Directive and the transposing Austrian Act (the "E-Commerce Act"<sup>276</sup>) would govern the civil liability of a host provider.<sup>277</sup> In the view of the chamber, in Austrian law this principle would have a conflict-of-laws dimension despite the CJEU's ruling in *eDate Advertising*<sup>278</sup> to the contrary.

In two rulings, the fourth chamber of the same court, which is specialising in intellectual property law, has taken a decidedly different position.<sup>279</sup> In its view, Art. 6 of the Rome II Regulation takes precedence over the E-commerce Directive and the transposing Austrian Act. The law applicable to behaviour on the internet allegedly amounting to unfair competition would therefore be the law of the market affected and not that of the country of origin of the e-commerce service provider.

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<sup>272</sup> CJEU 28.1.2015, *Harald Kolassa v Barclays Bank*, C-375/13, ECLI:EU:C:2015:37.

<sup>273</sup> Winner/Schmidt, 'Grenzüberschreitende Haftung für fehlerhafte Prospekte' in Zetzsche/Lehmann (eds), *Grenzüberschreitende Finanzdienstleistungen* (1st edn, Mohr Siebeck 2018) 409, 433. Generally on this issue: Bea Verschraegen, *Internationales Privatrecht: Ein systematischer Überblick* (1st edn, Manz 2012) paras 722ff.

<sup>274</sup> OGH 8.4.2014, 3 Ob 8/14v.

<sup>275</sup> Lurger/Melcher, *Handbuch Internationales Privatrecht* (1st edn, Verlag Österreich 2017) 328; Bea Verschraegen, *Internationales Privatrecht: Ein systematischer Überblick* (1st edn, Manz 2012) para 640.

<sup>276</sup> Bundesgesetz, mit dem bestimmte rechtliche Aspekte des elektronischen Geschäfts- und Rechtsverkehrs geregelt werden (E-Commerce-Gesetz - ECG) 28.9.2020, BGBl. I Nr. 152/2001.

<sup>277</sup> OGH 9.8.2011, 17 Ob 6/11y.

<sup>278</sup> CJEU 25.10.2011, *eDate Advertising GmbH v X and Olivier Martinez and Robert Martinez v MGN Limited*, Joined Cases C-509/09 and C-161/10, ECLI:EU:C:2011:685.

<sup>279</sup> OGH 23.5.2013, 4 Ob 29/13p; OGH 17.12.2013, 4 Ob 153/13y. See also Barth/Dokalik/Potyka (eds), *ABGB: Taschenkommentar* (26th edn, Manz 2018) Art 6 Rom II-VO p. 1228.

The dispute, which has not yet been resolved until this day, illustrates the continuing struggle to elucidate the relationship between the Rome II Regulation and the E-commerce Directive. A clarification of this relation in the text or the Preamble of the Regulation would be welcome.

The Austrian Supreme Court furthermore had to address the interpretation of Art. 6(2) Rome II in a case in which a company had used the engineering drawings of a competitor and presented them as its own to potential customers.<sup>280</sup> The question arose whether Art. 6(2) in conjunction with Art. 4(1) Rome II would point to the law of the affected market and therefore result in the application of the same law as Art. 6(1) Rome II or not. The result in the specific case would have been either the application of Brazilian law as the law of the affected market or the application of Austrian and Swiss law as the laws where the victims of the alleged unfair competition were based. Despite Recital 21, according to which “[t]he special rule in Article 6 is not an exception to the general rule in Article 4(1) but rather a clarification of it”, the Austrian Supreme Court took the view that Arts. 6(1) and 4(1) Rome II would not lead to identical results. The main argument of the court was that otherwise it would have sufficed for the EU legislator to merely refer to Art. 4(2) and (3) in Art. 6(2) Rome II. Instead, the court opined that Art. 6(2) in conjunction with Art. 4(1) would point to the law of the place of business of the competitor claiming damage from unfair competition.<sup>281</sup> This interpretation is sufficiently aligned with the text of the Regulation and therefore does not seem to require an explicit clarification via a reform.

#### *9. The specific rule on **environmental damage** (Art. 7)*

No cases have been reported with regard to that provision, the application of which does not seem to have raised problems in practice.

The literature discusses the question whether behaviour affecting an environmental resource may fall under this provision where such behaviour has caused pure economic loss but not ecological damage.<sup>282</sup> An example case would be economic damage caused by noise, such as the economic cost of installing noise protection. The answer to this question remains open and could be clarified through a reform of Art. 7 or a Recital.

#### *10. The specific rule on **infringements of intellectual property rights** (Arts. 8, 13)*

The application of this provision in practice only caused minor problems. The Austrian Supreme Court has ruled that it is for the claimant to clarify the question for which country it claims protection.<sup>283</sup> In case of doubt, it shall be assumed that protection is claimed only for domestic infringements.<sup>284</sup>

The Austrian literature takes the view that preliminary questions regarding the existence and reach of intellectual property rights must be decided under national conflict rules.<sup>285</sup> It is not sure whether this interpretation is in line with the intention of the Regulation’s drafters. Some clarifying words either in the text or in the Preamble of the Regulation are in order.

#### *11. The specific rule on **industrial action** (Art. 9)*

No cases have been reported with regard to that provision, the application of which does not seem to have raised problems in practice.

### 2.3 Chapter III – Unjust Enrichment, *Negotiorum Gestio* And *Culpa In Contrahendo*

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to the implementation of:*

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<sup>280</sup> OGH 20.9.2011, 4 Ob 12/11k.

<sup>281</sup> OGH 20.9.2011, 4 Ob 12/11k, p. 20.

<sup>282</sup> Lurger/Melcher, *Handbuch Internationales Privatrecht* (1st edn, Verlag Österreich 2017) 344f.

<sup>283</sup> OGH 9.8.2011, 17 Ob 6/11y, p. 8.

<sup>284</sup> OGH 9.8.2011, 17 Ob 6/11y, p. 8.

<sup>285</sup> Lurger/Melcher, *Handbuch Internationales Privatrecht* (1st edn, Verlag Österreich 2017) 348f.

12. The specific rule on **unjust enrichment** (Art. 10), including its relationship with the general rule for tort/delict in Art. 4.

The rule on unjust enrichment has not caused major problems in Austrian legal practice.<sup>286</sup> Nevertheless, the precise scope of the concept “unjust enrichment” is sometimes unclear. For example, In the Austrian literature, the prevailing view is that Art. 10 applies to recourse claims of a party that has voluntarily settled debt of a third party.<sup>287</sup> Others stress that internationally, these cases are sometimes treated using the rules of subrogation.<sup>288</sup>

It is also unclear in which cases a “relationship existing between the parties” can be found. The prevailing view among scholars is that maintenance, inheritance and property obligations qualify as a relationship in this sense.<sup>289</sup> Furthermore, it is stressed that the relationship can also be void or just of a precontractual nature.<sup>290</sup> With regard to the word “existing” relationship, it is discussed whether this condition is met where the relationship between the parties, such as a contract or a tort, arises in the same moment the unjust enrichment occurs.<sup>291</sup>

13. The specific rule on **negotiorum gestio** (Art. 11)

The application of Art. 11 was largely trouble-free. Only minor problems occurred. In the case law, the relationship between the exclusion of certain areas in Art. 1(2) Rome II with Art. 11 seems to be unclear. The Austrian Supreme Court applied Art. 11 to a pro rata recovery against the other spouse for loan instalments paid for the marital home, although Art. 1(2) lit. (a) of this Regulation excludes non-contractual obligations arising out of family relationships.<sup>292</sup> Consequently, the judgment has been criticised by some scholars.<sup>293</sup>

In parallel to Art. 10, there is also considerable controversy as to how the word “existing” legal relationship should be interpreted. Some argue in favour of applying the rule to relationships which arise in the same moment as the *negotiorum gestio*.<sup>294</sup>

According to Art. 11(3) in cases where the law applicable cannot be determined on the basis of Art. 11(1) or (2), the law of the country in which the act was performed shall be applied. In this context it is discussed whether this means the country where the action took place or the country of fulfilment.<sup>295</sup> Scholars arguing in favour of the country where the action took place run into problems when determining this country in cases of multiple actions. Some refer to the

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<sup>286</sup> Extensively: Schacherreiter, ‘Bereicherungsrecht und GoA nach Rom II’ in Beig/Graf-Schimek/Grubinger/Schacherreiter (eds), *Rom II-VO Neues Kollisionsrecht für außervertragliche Schuldverhältnisse* (1st edn, Manz 2008) 70ff.

<sup>287</sup> Rudolf, ‘Europäisches Kollisionsrecht für außervertragliche Schuldverhältnisse – Rom II-VO’ (2010) 36 *Österreichische Juristen-Zeitung* 300, 306.

<sup>288</sup> Lurger/Melcher, *Handbuch Internationales Privatrecht* (1st edn, Verlag Österreich 2017) 357; extensively: Schacherreiter, ‘Bereicherungsrecht und GoA nach Rom II’ in Beig/Graf-Schimek/Grubinger/Schacherreiter (eds), *Rom II-VO Neues Kollisionsrecht für außervertragliche Schuldverhältnisse* (1st edn, Manz 2008) 87ff.

<sup>289</sup> Neumayr, in Koziol/Bydlinski/Bollenberger (eds), *ABGB Kurzkomentar* (6th edn, Verlag Österreich 2020) Art 10 para 4.

<sup>290</sup> Rudolf, ‘Europäisches Kollisionsrecht für außervertragliche Schuldverhältnisse – Rom II-VO’ (2010) 36 *Österreichische Juristen-Zeitung* 300, 306.

<sup>291</sup> Lurger/Melcher, *Handbuch Internationales Privatrecht* (1st edn, Verlag Österreich 2017) 358.

<sup>292</sup> OGH 27.5.2015, 6 Ob 29/15f. See Barth/Dokalik/Potyka (eds), *ABGB: Taschenkommentar* (26th edn, Manz 2018) Art 11 Rom II-VO p. 1231.

<sup>293</sup> Andrae, ‘Erneut zum Begriff „eheliche Güterstände“’ (2017) 37 *IPRax* 526, 527ff.

<sup>294</sup> Lurger/Melcher, *Handbuch Internationales Privatrecht* (1st edn, Verlag Österreich 2017) 363.

<sup>295</sup> Schacherreiter, ‘Bereicherungsrecht und GoA nach Rom II’ in Beig/Graf-Schimek/Grubinger/Schacherreiter (eds), *Rom II-VO Neues Kollisionsrecht für außervertragliche Schuldverhältnisse* (1st edn, Manz 2008) 86.

country of the first action, others argue in favour of the country where the most relevant actions took place and again others apply a different law for every action.<sup>296</sup>

#### 14. The specific rule on *culpa in contrahendo* (Art. 12)

With regard to the rule on *culpa in contrahendo*, some minor debates exist. One of them concerns the relationship between Art. 12 Rome II and Art. 4 of this Regulation, which is rather unclear.<sup>297</sup> Most scholars differentiate in the way that Art. 12 applies if a breach of duty was related to a duty specific to the transaction and Art. 4 applies if the duty was rather related to the general integrity of one's right.<sup>298</sup>

Furthermore, the relationship of the different alternatives in Art. 12(2) Rome II are debated. One could argue that they are of equal rank as the wording suggests. Contrary to the wording, some scholars argue, however, that the alternatives are not equal. To support this thesis, scholars point to the systematic context and the rationale of Art. 12.<sup>299</sup>

## 2.4 Chapter IV – Freedom of Choice

Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:

#### 15. The implementation in legal/business practice and by courts of the rule on **freedom of choice**, any difficulties therein and **any discussion that has been carried out in your Member State regarding possible reasons which would justify the need to rethink it** (Art. 14)

The freedom of choice clause has been generally welcomed in practice and academia as it fits well with the general principles of private international law. Nonetheless, some minor uncertainties remain.

In the context of the choice of law, the meaning of “freely negotiated” in Art. 4(1) lit. (b) Rome II is unclear. It is discussed whether standard clauses or general terms and conditions can be classified as freely negotiated, and if so, under what circumstances.<sup>300</sup>

The Rome II Regulation itself does not contain any provisions dealing with the validity and form of the choice of law. Also, the standards for such assessments are not clear. Consequently, it is disputed whether Art. 3(5), (10), (11) and (13) Rome I have to be applied by analogy to Art. 14 Rome II or whether it is better to apply the *lex fori* in this context.<sup>301</sup>

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<sup>296</sup> Lurger/Melcher, *Handbuch Internationales Privatrecht* (1st edn, Verlag Österreich 2017) 363f; Fötschl, ‘Erbensuche Made in Austria: Ein Exportschlager?’ (2014) *ecolex* 405, 407; Rudolf, ‘Europäisches Kollisionsrecht für außervertragliche Schuldverhältnisse – Rom II-VO’ (2010) 36 *Österreichische Juristen-Zeitung* 300, 307.

<sup>297</sup> Beig, ‘Grenze und Zusammenspiel zwischen Vertrag und Delikt’ in Beig/Graf-Schimek/Grubinger/Schacherreiter (eds), *Rom II-VO Neues Kollisionsrecht für außervertragliche Schuldverhältnisse* (1st edn, Manz 2008) 48ff.

<sup>298</sup> Lurger/Melcher, *Handbuch Internationales Privatrecht* (1st edn, Verlag Österreich 2017) 365f; Bea Verschraegen, *Internationales Privatrecht: Ein systematischer Überblick* (1st edn, Manz 2012) para 683. Slightly different and referring to the interest which was violated: Neumayr, in Koziol/Bydlinski/Bollenberger (eds), *ABGB Kurzkomentar* (6th edn, Verlag Österreich 2020) Art 12 para 1; Rudolf, ‘Europäisches Kollisionsrecht für außervertragliche Schuldverhältnisse – Rom II-VO’ (2010) 36 *Österreichische Juristen-Zeitung* 300, 307.

<sup>299</sup> Neumayr, in Koziol/Bydlinski/Bollenberger (eds), *ABGB Kurzkomentar* (6th edn, Verlag Österreich 2020) Art 12 para 3; Lurger/Melcher, *Handbuch Internationales Privatrecht* (1st edn, Verlag Österreich 2017) 366.

<sup>300</sup> Neumayr, in Koziol/Bydlinski/Bollenberger (eds), *ABGB Kurzkomentar* (6th edn, Verlag Österreich 2020) Art 14 para 4; Lurger/Melcher, *Handbuch Internationales Privatrecht* (1st edn, Verlag Österreich 2017) 315.

<sup>301</sup> Lurger/Melcher, *Handbuch Internationales Privatrecht* (1st edn, Verlag Österreich 2017) 316f. In favour of applying the *lex fori*: Bea Verschraegen, *Internationales Privatrecht: Ein systematischer Überblick* (1st edn, Manz 2012) para 626.



Furthermore, it is discussed whether the choice of law can only refer to the entire non-contractual obligation or whether it can also be restricted to parts of it, such as the amount of damages.<sup>302</sup>

## 2.5 Chapter V – Common Rules

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

*16. The scope of the exclusion of 'evidence and procedure' in Art. 1(3) and any difficulties in relation to that exclusion or to questions of formal validity or the burden of proof (Arts. 21-22)*

The scope of the exclusion in Art. 1(3) Rome II Regulation and its relation to Arts. 21 and 22 Rome II Regulation is barely discussed in Austria.

In general, the practical relevance of Art. 21 Rome II Regulation is doubted in Austrian literature.<sup>303</sup>

Art. 22 Rome II Regulation is in principle interpreted broadly by Austrian scholars. Under Art. 22 Rome II Regulation, the *lex causae* determines substantive legal presumptions and the distribution of the burden of proof and assertion and the legal consequences of non liquet. Whether the possibility of *prima facie* evidence is also based on the *lex causae* is disputed.<sup>304</sup> However, under Art. 1(3) Rome II Regulation procedural presumptions are excluded from the scope of application of the Rome II Regulation.

*17. The approach in your Member State to questions of pleading, proof and application to individual cases of the substantive rules of the law applicable under the Rome II Regulation governing non-contractual obligations.*

If Austrian judges reach the conclusion that foreign law is applicable to the matter in question, they have to determine the foreign law ex officio in accordance with § 4(1) IPRG.<sup>305</sup>

For the purpose of determination of the foreign law § 4(1) IPRG mentions the cooperation of the parties involved, information from the Federal Ministry of Justice and expert opinions as permissible aids.

In addition to the legal text, Austrian judges have to consult the relevant case law for the purpose of determination, as the foreign law is to be applied in accordance with the practice of the respective member state.<sup>306</sup>

If it is not possible to determine the foreign law within a reasonable period of time, Austrian substantive law may be applied in accordance with § 4(2) IPRG. The reasonable period of time is to be measured generously, if the urgency of the individual case does not dictate the opposite (e.g. preliminary injunctions).<sup>307</sup>

*18. The delimitation of the scope of the applicable law (Art. 15(a)-(h)), including any difficulties as its relationship to the issues addressed at points 16 17 above)*

There is no reported Austrian case law on this provision. The literature identifies problems caused by the strongly diverging length of the limitation periods within the Member States of the European Union.<sup>308</sup> It is bemoaned that this would cause legal uncertainty.<sup>309</sup> A reform of the Rome II Regulation is unlikely to change this situation. The only

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<sup>302</sup> Neumayr, in Koziol/Bydlinski/Bollenberger (eds), *ABGB Kurzkomentar* (6th edn, Verlag Österreich 2020) Art 14 para 2.

<sup>303</sup> Neumayr, in Koziol/Bydlinski/Bollenberger (eds), *ABGB Kurzkomentar* (6th edn, Verlag Österreich 2020) Art 21 Rom II-VO para 1.

<sup>304</sup> Neumayr, in Koziol/Bydlinski/Bollenberger (eds), *ABGB Kurzkomentar* (6th edn, Verlag Österreich 2020) Art 22 Rom II-VO para 1.

<sup>305</sup> Bundesgesetz vom 15. Juni 1978 über das internationale Privatrecht (IPR-Gesetz – IPRG) 30.9.2020, BGBl. Nr. 304/1978, § 4 (1).

<sup>306</sup> Zöchling-Jud/Aspöck, *Internationales Privatrecht* (3rd edn, LexisNexis 2015) 17.

<sup>307</sup> OGH 20.9.2017, 3Ob104/17s, para 2.2.

<sup>308</sup> Lurger/Melcher, *Handbuch Internationales Privatrecht* (1st edn, Verlag Österreich 2017) 313.

<sup>309</sup> Lurger/Melcher, *Handbuch Internationales Privatrecht* (1st edn, Verlag Österreich 2017) 313.

possible remedy would be a harmonisation of substantive laws, which seems to be however outside the competence of the European Union.

*19. The application of the rule on overriding mandatory provisions (Art. 16)*

The importance of overriding mandatory provisions for non-contractual obligations is considered rather low in the Austrian literature.

In this context, Art. 16 Rome II Regulation is examined in particular with regard to the parallel provision in Art. 9 Rome I Regulation. Especially, the legal definition of the overriding mandatory rule in Art. 9(1) Rome I Regulation is used in addition to the case law of the European Court of Justice to determine whether there is an overriding mandatory rule within the meaning of Art. 16 Rome II Regulation.<sup>310</sup>

However, amongst Austrian scholars it is still unclear whether and how foreign overriding mandatory rules that are not covered by Art. 16 Rome II Regulation can be taken into account and whether overriding mandatory rules of the *lex causae* are always invoked by means of the reference of the Rome II Regulation.<sup>311</sup>

*20. The application of the specific rule on direct action against the insurer of the person liable (Art. 18)*

Pursuant to the principle of the most favourable law, the damaged party can bring a direct action against the insurer, if the statute applicable to either the tort claim or the insurance contract allows for such an action.<sup>312</sup> However, Austrian literature unanimously supports the view that a choice of law concerning the tort claim can only affect the insurer if he agrees to this choice.<sup>313</sup> Yet, only the possibility of direct action is regulated by the Rome II Regulation, whereas the objections the insurer can raise if and when he is sued (e.g. the maximum liability or the right to refuse payment) are determined by the law governing the insurance contract according to Art. 7 of the Rome I Regulation.<sup>314</sup>

Although Art. 18 Rome II was primarily intended for road traffic accidents, its practical use – at least for intra-European cases – was questioned due to the introduction of Directive 2000/26/EC<sup>315</sup>, in which the possibility of direct action in insurance contracts became compulsory according to Art. 3.<sup>316</sup>

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<sup>310</sup> Neumayr, in Koziol/Bydlinski/Bollenberger (eds), *ABGB Kurzkomentar* (6th edn, Verlag Österreich 2020) Art 16 Rom II-VO paras 3f.

<sup>311</sup> Arif, 'Eingriffsnormen und öffentlich-rechtliche Genehmigungen unter der Rom II-VO' (2011) 34 *Zeitschrift für Europarecht, Internationales Privatrecht & Rechtsvergleichung* 258, 262f.

<sup>312</sup> CJEU 9.9.2015, *Eleonore Prüller-Frey v Norbert Brodnig and Axa Versicherung AG*, C-240/14, ECLI:EU:C:2015:567.

<sup>313</sup> Lurger/Melcher, *Handbuch Internationales Privatrecht* (1st edn, Verlag Österreich 2017) 368f; Neumayr, in Koziol/Bydlinski/Bollenberger (eds), *ABGB Kurzkomentar* (6th edn, Verlag Österreich 2020) Art 18 Rom II-VO para 1; Loacker, 'IPR: Anwendungsbereich des Montrealer Übereinkommens – Anwendbares Recht bei Direktklagen gegen Versicherer' (2015) 26 *Europäische Zeitschrift für Wirtschaftsrecht* 795.

<sup>314</sup> Lurger/Melcher, *Handbuch Internationales Privatrecht* (1st edn, Verlag Österreich 2017) 368f; Neumayr, in Koziol/Bydlinski/Bollenberger (eds), *ABGB Kurzkomentar* (6th edn, Verlag Österreich 2020) Art 18 Rom II-VO para 2.

<sup>315</sup> Directive 2000/26/EC of the European Parliament and of the Council of 16 May 2000 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles and amending Council Directives 73/239/EEC and 88/357/EEC [2000] OJ L181/65 (Fourth motor insurance Directive).

<sup>316</sup> Neumayr, in Koziol/Bydlinski/Bollenberger (eds), *ABGB Kurzkomentar* (6th edn, Verlag Österreich 2020) Art 18 Rom II-VO para 1; Thiede, 'Straßenverkehrsunfall mit Auslandsbezug (Teil 2) - Direktklage, Vierte KH-Richtlinie und Grüne-Karte-System' (2014) 9 *Zivilrecht aktuell* 103.

21. *The application the specific rule on subrogation (Art. 19)*

The application of the rule on subrogation in Art. 19 has not led to any problems in Austrian practice or academia. The rule has inter alia been applied to cases of liability insurer as well as to motor vehicle insurers.<sup>317</sup>

22. *The application of the specific rule on multiple liability (Art. 20)*

With regard to the application of Art. 20 there is far-reaching consensus in Austrian literature and practice. The phrase the “same claim” in Art. 20 Rome II is interpreted in such a way that it is neither required that the claims are based on the same legal ground nor that they are subject to the same law. However, they must be of equal rank.<sup>318</sup>

As Austria is part of the 1971 Hague Convention on the law applicable to traffic accidents, the interplay between the Hague Convention and Art. 20 Rome II must be determined. The question of a right to compensation of one debtor against the other debtor is regulated only under Rome II. With regard to Art. 20 the question arises as to whether “the law applicable to that debtor's non-contractual obligation towards the creditor” is to be determined according to the Hague Convention which governs the claim or according to the hypothetical law applicable under the Rome II Regulation. The applicable law under Rome II is only hypothetical in this case as Art. 28(1) Rome II grants priority to the Hague Convention in these cases. The Austrian Supreme Court has not answered this question so far.<sup>319</sup> Most scholars prefer the solution referring to the Hague Convention.<sup>320</sup>

## 2.6 Chapter VI – Other Provisions

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

23. *The implementation of the concept of habitual residence in the Rome II Regulation, with reference both to persons covered by Art. 23 and natural persons acting otherwise than in the course of business*

In Austrian literature, the concept of habitual residence is interpreted autonomously.<sup>321</sup> The place of habitual residence is generally understood to be the place where a person has his actual centre of life, with the actual and expected duration of the residence being of particular importance.<sup>322</sup> In this respect, it is disputed whether recourse to Recital 7 of the Rome II Regulation and to the existing case-law of the CJEU is possible.<sup>323</sup> In any case, it is agreed that each person may have only one habitual residence.<sup>324</sup>

24. *The application of and any difficulties with the specific rules on exclusion of renvoi (Art. 24) and States with more than one legal system (Art. 25)*

The application of Art. 24 and of Art. 25 Rome II Regulation has not caused any problems in Austria and there have been no relevant cases so far.

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<sup>317</sup> OGH 21.10.2015, 2 Ob 35/15h; OGH 25.5.2016, 2 Ob 65/16x.

<sup>318</sup> Neumayr, in Koziol/Bydlinski/Bollenberger (eds), *ABGB Kurzkomentar* (6th edn, Verlag Österreich 2020) Art 20 Rom II-VO para 1; Lurger/Melcher, *Handbuch Internationales Privatrecht* (1st edn, Verlag Österreich 2017) 371.

<sup>319</sup> OGH 21.10.2015, 2 Ob 25/15h.

<sup>320</sup> Lurger/Melcher, *Handbuch Internationales Privatrecht* (1st edn, Verlag Österreich 2017) 371.

<sup>321</sup> Neumayr, in Koziol/Bydlinski/Bollenberger (eds), *ABGB Kurzkomentar* (6th edn, Verlag Österreich 2020) Art 4 Rom II-VO para 6.

<sup>322</sup> Heiss/Loacker, ‘Die Vergemeinschaftung des Kollisionsrechts der außervertraglichen Schuldverhältnisse durch Rom II’ (2007) 129 *Juristische Blätter* 613, 619f.

<sup>323</sup> Rudolf, ‘Europäisches Kollisionsrecht für außervertragliche Schuldverhältnisse – Rom II-VO’ (2010) 36 *Österreichische Juristen-Zeitung* 300, 301; Heiss/Loacker, ‘Die Vergemeinschaftung des Kollisionsrechts der außervertraglichen Schuldverhältnisse durch Rom II’ (2007) 129 *Juristische Blätter* 613, 619f.

<sup>324</sup> Neumayr, in Koziol/Bydlinski/Bollenberger (eds), *ABGB Kurzkomentar* (6th edn, Verlag Österreich 2020) Art 4 Rom II-VO para 6.

Even though Art. 24 Rome II Regulation excludes the private international law of the *lex causae* from the scope of reference, Austrian scholars assume that, where the parties choose the applicable law by way of choice of law, they are allowed to choose a legal system including its private international law. However, it is considered that this question is of limited practical relevance.<sup>325</sup>

*25. The application of and any difficulties with the specific rule on public policy of the forums (Art. 26)*

No major difficulties in the application of Art. 26 Rome II Regulation have so far arisen in the Austrian literature.

With regard to the scope of application of Art. 26 Rome II, there is broad consensus that, in view of the wording of the German version ("obviously incompatible") and Recital 32 of the Rome II Regulation, high requirements must be met for the existence of an infringement of the *ordre public* of the *lex fori*.<sup>326</sup>

The scope of application of Art. 26 of this Regulation is further limited by the caselaw of the CJEU and the requirements of the law of the European Union, although Art. 26 serves to protect the fundamental principles of the *lex fori*.<sup>327</sup>

*26. Practical interaction between the Rome II Regulation and other EU and international legal instruments, in specific areas such as environmental damages, intellectual property rights or data protection (Arts. 27, 28, 29)*

With regard to Art. 27 Rome II Regulation, there is a debate in the Austrian literature as to exactly which provisions of Union law are covered by it. This discussion is closely linked to the general question in European private international law of the relation of the Rome Regulations to substantive Union law. In this context, it is discussed whether Art. 27 Rome II only applies to Union law with a special conflict rule or whether a provision defining the territorial scope of application within unified substantive Union law is already sufficient.<sup>328</sup>

Art. 28 Rome II Regulation is of particular practical importance in Austria. According to this provision, the 1971 Hague Convention on the law applicable to traffic accidents ratified by Austria is to be applied as a matter of priority over the Rome II Regulation.<sup>329</sup> This allows forum shopping to a certain extent on the basis of the different jurisdiction provided for in Arts. 4(1), 7(2) and 13(2) of the Brussels I Regulation (recast). However, courts of States that have not ratified the Hague Convention apply the conflict-of-laws rules of the Rome II Regulation instead of the Hague Convention. The laws that the Rome II Regulation declares as applicable partially diverge from those designated by the Convention.<sup>330</sup>

## 2.7 Comments on other Practical Problems

*These areas are of particular interest for the Commission. Please be as precise as possible regarding any issue that has been reported on:*

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<sup>325</sup> Neumayr, in Koziol/Bydlinski/Bollenberger (eds), *ABGB Kurzkommentar* (6th edn, Verlag Österreich 2020) Art 24 Rom II-VO para 1.

<sup>326</sup> Neumayr, in Koziol/Bydlinski/Bollenberger (eds), *ABGB Kurzkommentar* (6th edn, Verlag Österreich 2020) Art 26 Rom II-VO para 1.

<sup>327</sup> Lurger/Melcher, *Handbuch Internationales Privatrecht* (1st edn, Verlag Österreich 2017) 315.

<sup>328</sup> Lurger/Melcher, *Handbuch Internationales Privatrecht* (1st edn, Verlag Österreich 2017) 230f and 310f.

<sup>329</sup> Neumayr, in Koziol/Bydlinski/Bollenberger (eds), *ABGB Kurzkommentar* (6th edn, Verlag Österreich 2020) Art 28 Rom II-VO para 2; Bea Verschraegen, *Internationales Privatrecht: Ein systematischer Überblick* (1st edn, Manz 2012) paras 619ff and 702ff.

<sup>330</sup> Laimer, 'Gerichtsstand und anwendbares Recht bei Verkehrsunfällen im Ausland' (2012) 239 *Zeitschrift für Verkehrsrecht* 450, 453f.

27. *The impact of the application of the 1971 Hague Convention on the law applicable to traffic accidents on legal certainty (where relevant for your Member State)*

As Austria is one of the EU states that has ratified the 1971 Hague Convention, Austrian courts do not apply the Rome II Regulation with respect to traffic accidents, even if all affected countries are EU Member States.<sup>331</sup> Since the criteria for the determination of the applicable law under the Hague Convention and the Rome II Regulation differ in some respects, the possibility of forum shopping still exists within the EU.<sup>332</sup> This is heavily criticised because of its impact on the uniformity of law in Europe,<sup>333</sup> particularly due to the lack of a central court deciding on matters of the convention,<sup>334</sup> and in the incentive it gives for a "race to the court".<sup>335</sup>

28. *Any other practical problems with respect to the application or interpretation of the Rome II Regulation, including but not limited to the suitability of the mosaic approach*

Austrian courts consistently apply the mosaic theory, according to which, dispersed damage need to be adjudged separately according to the law of the country in which the damage occurs, on Art. 4<sup>336</sup> and Art. 6<sup>337</sup> and Art. 8.<sup>338</sup> Additionally, Austrian literature is also in favour of applying said theory on dispersed damages in the scope of application of Art. 9.<sup>339</sup> For the courts and other legal professionals, this situation is not just impractical, but poses significant and sometimes insurmountable difficulties.<sup>340</sup> In spite of that, a uniform assessment of the case under one

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<sup>331</sup> OGH 26.6.2018, 2 Ob 103/17m.

<sup>332</sup> Neumayr, in Koziol/Bydlinski/Bollenberger (eds), *ABGB Kurzkomentar* (6th edn, Verlag Österreich 2020) Art 28 Rom II-VO para 2; Adensamer, 'Der Verkehrsunfall im Licht der Rom-II-Verordnung' (2006) 219 *Zeitschrift für Verkehrsrecht* 523, 525; Laimer, 'Gerichtsstand und anwendbares Recht bei Verkehrsunfällen im Ausland' (2012) 239 *Zeitschrift für Verkehrsrecht* 450, 453.

<sup>333</sup> Rudolf, 'Internationaler Verkehrsunfall' (2008) 261 *Zeitschrift für Verkehrsrecht* 528, 531.

<sup>334</sup> Laimer, 'Gerichtsstand und anwendbares Recht bei Verkehrsunfällen im Ausland' (2012) 239 *Zeitschrift für Verkehrsrecht* 450, 453.

<sup>335</sup> Laimer, 'Gerichtsstand und anwendbares Recht bei Verkehrsunfällen im Ausland' (2012) 239 *Zeitschrift für Verkehrsrecht* 450, 453.

<sup>336</sup> Neumayr, in Koziol/Bydlinski/Bollenberger (eds), *ABGB Kurzkomentar* (6th edn, Verlag Österreich 2020) Art 4 Rom II-VO para 4; Heiss/Loacker, 'Die Vergemeinschaftung des Kollisionsrechts der außervertraglichen Schuldverhältnisse durch Rom II' (2007) 129 *Juristische Blätter* 613, 625; Rudolf, 'Europäisches Kollisionsrecht für außervertragliche Schuldverhältnisse – Rom II-VO' (2010) 36 *Österreichische Juristen-Zeitung* 300, 302.

<sup>337</sup> OGH 9.8.2011, 17 Ob 6/11y; OGH 20.9.2011, 4 Ob 12/11k; Wiltschek/Horak, *UWG* (8th edn, Manz 2016) 1328; Rudolf, 'Europäisches Kollisionsrecht für außervertragliche Schuldverhältnisse – Rom II-VO' (2010) 36 *Österreichische Juristen-Zeitung* 300, 304; Walter, 'Seidentuch mit Reproduktion des "Hundertwasser-Krawina-Hauses" - freie/unfreie Nachschöpfung' (2013) *Zeitschrift für Medien- und Kommunikationsrecht* 81; Cach, 'Das Verhältnis zwischen Art 6 Rom II-VO und § 20 E-Commerce-Gesetz - Disharmonie im Internationalen Privatrecht?' 25 *Zeitschrift für Europarecht, Internationales Privatrecht & Rechtsvergleichung* 2014, 219; However, on subsection 3 only if the *lex fori* is not chosen pursuant to Art 6 subsection 3 lit b: Heiss/Loacker, 'Die Vergemeinschaftung des Kollisionsrechts der außervertraglichen Schuldverhältnisse durch Rom II' (2007) 129 *Juristische Blätter* 613, 630; Neumayr, in Koziol/Bydlinski/Bollenberger (eds), *ABGB Kurzkomentar* (6th edn, Verlag Österreich 2020) Art 6 Rom II-VO para 3.

<sup>338</sup> Heiss/Loacker, 'Die Vergemeinschaftung des Kollisionsrechts der außervertraglichen Schuldverhältnisse durch Rom II' (2007) 129 *Juristische Blätter* 613, 635; Rudolf, 'Europäisches Kollisionsrecht für außervertragliche Schuldverhältnisse – Rom II-VO' (2010) 36 *Österreichische Juristen-Zeitung* 300, 305.

<sup>339</sup> Neumayr, in Koziol/Bydlinski/Bollenberger (eds), *ABGB Kurzkomentar* (6th edn, Verlag Österreich 2020) Art 9 Rom II-VO para 1; Rudolf, 'Europäisches Kollisionsrecht für außervertragliche Schuldverhältnisse – Rom II-VO' (2010) 36 *Österreichische Juristen-Zeitung* 300, 305.

<sup>340</sup> Heiss/Loacker, 'Die Vergemeinschaftung des Kollisionsrechts der außervertraglichen Schuldverhältnisse durch Rom II' (2007) 129 *Juristische Blätter* 613, 625.

law is only permitted by the Austrian courts, if the damage cannot be separated, in which case the strictest law applies.<sup>341</sup>

### 3. Comments on areas of interest

*These areas are of particular interest for the Commission. Please be as precise as possible regarding any issue that emerged in your Member State regarding:*

*29. The exclusion of violations of privacy and rights relating to personality, including defamation, from the scope of the Rome II Regulation and any difficulties arising out from differences among Member States' rules in cross-border situations*

The exclusion of violations of privacy and rights relating to personality, including defamation, from the scope of the Rome II Regulation under Art. 1(2) lit. (g) Rome II Regulation is criticised in Austrian literature.<sup>342</sup> With regard to this exclusion, in particular the disadvantages of a divergence of the conflict-of-laws provisions and the applicable law are emphasised in the case of an assault by a physical act. In this situation, the physical act may lead to both physical injury and violation of personal rights.<sup>343</sup> By excluding violations of privacy and rights relating to personality, different conflict-of-law provisions and thus possibly different laws are applicable to the case. This may lead to problems of adaptation, which must be solved by means of private international law.

*30. Any comment regarding the Interplay of the Rome II Regulation with the treatment of defamation and data protection, and, in these areas, the relevance of Strategic Lawsuits Against Public Participation (SLAPPs)*

The interplay of the Rome II Regulation with the treatment of defamation and data protection is only rarely discussed in Austria. Insofar as this relationship is examined in more detail, the debate is focused on the question whether Art. 3 GDPR can be classified as a conflict-of-laws rule and an overriding mandatory rule. The relationship between the GDPR and the general European conflict-of-laws rules is also addressed.<sup>344</sup>

*31. The extent to which Rome II Regulation has been applied to corporate abuses against human rights and lays down an effective set of rules to regulate non-contractual liability;*

This question does not seem to have caused practical problems in Austrian court litigation nor a debate in the Austrian literature.

*32. The impact of the development of artificial intelligence on the Rome II Regulation, and in particular on the suitability of the rules that it contains to regulate non-contractual liability.*

Questions concerning artificial intelligence are just coming up and have therefore not played an important role in practice yet. Also, in academia scholars are just starting to do research with regard to the relationship of private international law and artificial intelligence. In the future, more research can be expected, particularly with regard to the identification of the tortfeasor in cases involving artificial intelligence, the applicability of Art. 5 Rome II to artificial intelligence and questions relating to a choice of law.

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<sup>341</sup> OGH 9.8.2011, 17 Ob 6/11y; OGH 20.9.2011, 4 Ob 12/11k; Horak, 'Anwendbares Urheber- und Lauterkeitsrecht nach der Rom II-VO' (2012) 30 *ecolex* 65, 65ff.

<sup>342</sup> Heiss/Loacker, 'Die Vergemeinschaftung des Kollisionsrechts der außervertraglichen Schuldverhältnisse durch Rom II' (2007) 129 *Juristische Blätter* 613, 619f.

<sup>343</sup> Lurger/Melcher, *Handbuch Internationales Privatrecht* (1st edn, Verlag Österreich 2017) 309.

<sup>344</sup> Melcher, 'Es lebe das Territorialitätsprinzip?' in Gössl (ed), *Politik und Internationales Privatrecht* (1st edn, Mohr Siebeck 2017) 137f.

#### 4. List of national case law

<u>Court or tribunal</u>	<u>Case name and reference number</u>  <u>Reference to decision of the Court of Justice if applicable</u>	<u>Date</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings (only for key cases)</u>
OGH	4 Ob 225/14p	11.8.2015	Art. 1	Determination of the relevant facts <i>ex officio</i> ; perception of errors in appeal proceedings against the will of the parties	
OGH	6 Ob 233/18k	24.1.2019	Art. 4	Narrow interpretation of Art. 4(3), particularly given the foreseeability for the author of an audit report that it can lead to investments in other countries	
OGH	3 Ob 8/14v	8.4.2014	Art. 5	Burden of proof concerning the exception stipulated in the second sentence of Art. 5(1)	
OGH OGH	2 Ob 204/14k 2 Ob 155/16g	9.4.2015 14.12.2017	Art. 6 Art. 6	Referral to CJEU (C-191/15 <i>VKI/Amazon</i> ); separation of the right of injunction itself (Art. 6 Rome II) and the justification for it in the contractual inadmissibility of the GTC (Rome I, including	

				consumer protection provisions)	
OGH	17 Ob 6/11y	9.8.2011	Art. 6	Application of the mosaic approach with the application of several laws if the market of several countries is affected; application of the strictest law in the case of indivisibility	
OGH	4 Ob 82/12f	10.7.2012	Art. 6	Necessity of orientation towards a country's consumers for affecting the market in this country in the sense of Art. 6 in case of an online trademark infringement	
OGH	4 Ob 12/11k	20.9.2011	Art. 6 and 31	Reference in Art. 6(2) is not the market location, but the relevant main or branch office; temporal scope of application of the Rome II Regulation on actions for injunctive relief	<p>This case deals with two different aspects: The first issue is what the reference to Art. 4 in Art. 6(2) actually means. The court finds that should not be understood as referring to the country of the affected market, as the reference to Art. 4 would be useless in that case or a reference to specific sections of Art. 4 would have sufficed. Rather, it must refer to the main or branch office that was affected by the act of unfair competition.</p> <p>The second issue that arose was the temporal application of the Rome II Regulation for injunctive relief. As a claim for injunctive relief is has a forward-looking orientation, it is not necessary for its application that the event</p>



					causing the risk of recurrence happened after the 11.1.2009.
OGH	7 Ob 189/11m	9.5.2012	Art. 6	Classification of Art. 3 of directive 2000/31/EC as a rule of conflict of laws	
OGH	4 Ob 29/13p	23.5.2013	Art. 6	Correction of 7 Ob 189/11m, classification of Art. 3 of directive 2000/31/EC as a substantive norm	After the CJEU decided that Directive 2000/31/EC does not require its implementation as a rule of conflict of laws, the Austrian Supreme Court nevertheless classified the Austrian norm that implemented the directive as such. It then overturned the jurisprudence this judgment and saw it as a substantive norm. In effect, this means that the Rome II Regulation determines the choice of laws. Only afterwards, it is checked that the applied law does not impose stricter rules than the laws in the country of origin. Rules in the applicable law according to the Rome II Regulation which are more lenient than the ones in the law of the country of origin would nevertheless be applied.
OGH	6 Ob 29/15f	27.5.2015	Art. 11 and 31	Rejection of marriage as a closer connection in the sense of Art. 11; relevant criterion for temporal applicability of the Rome II Regulation in the case of <i>negotiorum gestio</i>	
OGH	2 Ob 71/18g	16.5.2018	Art. 15	Scope of the applicable law with relation to the	

				requirement of a direct causal relationship to the legal violation	
OGH	2 Ob 40/15v	21.10.2015	Art. 16	Classification of norms regulating the compensation of victims if they cannot claim it from an insurer as overriding mandatory principles	
OGH	2 Ob 35/15h	21.10.2015	Art. 19	Limits on the applicability of the 1971 Hague Convention regarding the recoveries from insurers and between the parties	
OGH	3 Ob 42/14v	21.5.2014	n/a	Determination when offset is possible by the <i>lex fori</i>	

# Belgium

## Executive Summary

- The findings of this National Report are based on **reported** caselaw: due to the absence of a comprehensive publicly available caselaw database, the findings of this National Report may not have taken into account all judgments rendered by Belgian courts and tribunals on the Rome II Regulation (see Introduction, p. 3)
- There appears to be sufficient awareness in Belgian legal practice about the relevance of the Rome II Regulation and about its rules (see Introduction, p. 3).
- There is no statistical information about the application of the Rome II Regulation in Belgium (see Introduction, p. 3).
- It is contested whether the Belgian law on unfair market practices should apply as an overriding mandatory provision under Art 16 Rome II. We are of the view that this approach no longer holds sway pursuant to Art 6 Rome II Regulation (see p. 4).
- Among the limited amount of reported cases where Belgian courts have engaged with the general rule in Art 4 of the Rome II Regulation, only a few instances show an insufficient understanding of the relationship between its three paragraphs (see p. 4).
- There are instances where Belgian courts have disregarded the primacy of the special rules of the Rome II Regulation, in particular in cases dealing with copyright infringements (p. 8).
- The rules on non-contractual obligations in the 2004 Belgian Code of Private international Law provided an important source of inspiration for the drafting of the Regulation. As a possible consequence, the articulation between the two instruments does not seem to have caused significant difficulties in practice (p. 10).
- There are instances, however, where Belgian courts sequentially refer to several instruments on conflict of laws (for instance, a joint reference to an article of the Rome II Regulation and a corresponding provision of the Belgian Code of Private International Law) (p. 7-9).
- Belgian courts are familiar with the application of the 1971 Hague Traffic Accidents Convention and its prevalence on the conflict rules of the Rome II Regulation (p. 10).

## 1. Introduction

*How aware of the Rome II Regulation are practitioners, businesses and citizens in your Member State?*

It is difficult for us to assess accurately whether practitioners and private stakeholders are aware of the Rome II Regulation based on a desktop review of the relevant case law and literature. The relatively limited applications of the Regulation in court decisions indicate that whenever necessary, parties do plead about the relevant points under the Rome II Regulation. Moreover, there is nothing in the sources we consulted that suggested that there is a blind spot in terms of the knowledge about the Rome II Regulation: its entry into force has been reported widely in both academically and practically oriented journals, and its basic structure has been outlined extensively.

*Is the Rome II Regulation generally known and applied by courts in your Member State?*

Importantly, it should be noted that our survey had to deal with the limits of the Belgian court organisation: decisions are not published systematically (yet) by the Belgian government (G Van Calster, M Poesen, 'Optional Choice of Court Agreements in Belgium: Legal Uncertainty despite a Modern Legal Framework' in M Keyes, *Optional Choice of Court Clauses* (2019 Springer) 87-88), and judgments are generally succinct - containing little general, theoretical information. Cases that are deemed of interest to legal science are usually picked up either by law reviews that are only available to those who have a paying subscription, or by [IPR.be/DIP.be](https://ipr.be/DIP.be) - an open access journal dedicated to private international law. Of course, this modus operandi does not warrant that cases are published systematically. Recently, the Belgian courts launched a new platform, "Juportal" (<https://iubel.be/home/welkom>), which for now only duplicates the limited database contained in its predecessor "Juridat", but will be expanded in the future to include all decisions given by the Belgian courts.

According to the findings of our survey of Belgian databases, Belgian courts are generally aware of the Rome II Regulation. However, they sometimes appeared to be misguided about the interplay between the Regulation and other instruments, such as the 2004 Belgian Code of Private International Law or international treaties (see below).

*Are there any relevant statistics regarding the application of the Rome II Regulation in your Member State?*

Although Belgium keeps basic statistical data about the number of new, pending, and finished cases in its courts, there are no data about the application of the Rome II Regulation specifically. Our survey of Belgian databases suggests that Rome II cases take up a limited share in the work of the Belgian courts. Remarkably, we were unable to find any Supreme Court (Hof van Cassatie/Cour de Cassation) jurisprudence on the Rome II Regulation

*How important is the doctrinal discussion on the Rome II Regulation in your Member State?*

The entry into force and basic layout of the Regulation have been reported on extensively in Belgian literature. However, the doctrinal debate is rather limited. Decisions of the CJEU are most frequently commented on in legal literature, while Belgian case law features less prominently.

*Are there specific issues concerning the Rome II Regulation that have caused debate at a doctrinal or political level?*

Over the span of the Rome II Regulation's life, two topics have drawn attention in Belgian legal scholarship. Firstly, the law applicable to unfair market practices under Art 6(1) Rome II. Secondly, the characterisation/qualification of pre-contractual liability/culpa in contrahendo.

Unfair competition received relatively extensive attention because this area of the law traditionally has been strictly regulated in Belgium. Given the strict Belgian legislative framework in this area, national courts had often promoted the relevant legislation to the status of *loi de police*/ overriding mandatory law before the entry into force of the Rome II Regulation (P Wautelet, 'Quelques observations sur la protection internationale du consommateur en Europe et la détermination de la loi applicable à une pratique anticoncurrentielle' [2006] Tijdschrift voor Belgisch handelsrecht/Revue de droit commercial belge 993, para 2). Most of the examples predate the Rome II Regulation, we found one case in which a Belgian court indeed accepted the Belgian law on unfair market practices applied as an overriding mandatory provision under Art 16 Rome II. Wautelet and others observed that this approach no longer holds sway in the context of the Rome II Regulation (see below, Art 6 Rome II).

Culpa in contrahendo has been studied and commented on by Bart Volders (*Afgebroken Contractonderhandelingen in het Internationaal Privaatrecht* (2008 Larcier)). Yet this research was not conducted due to specific issues in Belgian practice. The commentator approved of the accessory attachment to the putative *lex contractus* taken in Art 12 Rome II, because this rule is easy to apply and promotes legal certainty (B Volders, 'Culpa in Contrahendo in the Conflict of Laws' (2007) 9 Yearbook of private international law 127, 133). Limited case law in Belgium seems to confirm the ease of application of Art 12 Rome II (see below).

## 2. Analysis of the Rome II Regulation

### 2.1 Chapter I – Scope and Interpretation

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to :*

1. *The determination of the material scope of application of the Rome II Regulation, including any difficulties in applying the category of "civil and commercial matters" or in defining the exact scope of any excluded matters (Art. 1(1)-(2))*

To the best of our knowledge, there were no relevant resources available on this topic.

2. *The determination of the temporal scope of application of the Rome II Regulation, Arts 31-32)*

To the best of our knowledge, there were no relevant resources available on this topic.

3. *The characterization of the **concept of "non-contractual obligations"**, its relationship to the concept of "contractual obligations" and any difficulties in relation to characterisation (Arts. 1(1), 2)*

Our review of Belgian case law and doctrinal writings did not reveal particular difficulties with the characterization of the concept of "non-contractual obligations" in the specific setting of the application of the Rome II Regulation. There

are excellent illustrations of an articulated application of the Rome II application in, for instance, a case of *culpa in contrahendo* where the seized court (the Commercial Tribunal of Dendermonde) sets out the steps to identify Article 12 Rome II as the relevant article and applies it with regards to the intended contractual relationship between the parties, i.e. a prospective sales agreement (Kh. Dendermonde, 29 December 2011).

However, difficulties may arise out of the uncertain demarcation of civil liability for jurisdictional purposes in recent times. The CJEU case law on the dividing line between Article 7(1) and 7(2) Brussels Ibis has indeed experienced some remarkable oscillations and this may consequently affect the characterisation of an international civil liability case for the determination of the applicable law. For instance, in an unpublished judgment of 9 May 2019 (2016/AR/1478), the Antwerp Court of Appeal held that an *actio pauliana* (an anti-avoidance action as provided by the Belgian civil code) was subject to the Rome II Regulation. In doing so, the judgment deviated from the CJEU's *Reichert* case law on Art 7(2) Brussels Ibis, according to which the *action paulienne* (a similar French anti-avoidance action) was not a matter relating to tort, for it did not turn on the defendant's liability. Nor does the judgment consider C-337/17 *Feniks*, according to which an *actio pauliana* under Polish law was contractual in nature for the purpose of Art 7(1) Brussels Ibis insofar as it protected the claimant's contractual interests. The judgment did not entertain why it did not accord any weight to the *Reichert* or *Feniks* decisions. It is unclear whether the court was aware of Recital 7 of the Rome II Regulation, which provides for the consistency of interpretation between Brussels Ibis and Rome II.

#### 4. *The universal application of the Regulation (Art. 3)*

To the best of our knowledge, there were no relevant resources available on this topic.

#### 5. *The approach to interpretation of the Rome II Regulation, and in particular its relationship to other EU private international law instruments (including the recast Brussels I Regulation and the Rome I Regulation)/(Recital (7))*

(See question 3 above).

## 2.2 Chapter II - Tort/Delict

Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to the implementation of:

6. *The general conflict-of-laws rule for tort/delict, and difficulties that have arisen in your Member State with respect to its application (Art. 4), and in particular:*
  - a. *the approach to identifying the place of direct damage in Art 4(1)*
  - b. *the approach to the first rule of displacement in Art 4(2) in cases involving multiple parties or claims*
  - c. *the approach to the escape clause in Art 4(3), and*
  - d. *the suitability of this set of rules to govern cases of **prospectus liability or other financial market torts***

Within the limited amount of cases having been reported where Belgian courts have engaged with the general rules in the Rome II Regulation, there are a few instances of straightforward application of the relevant connecting factors, in accordance with the CJEU's case-law understanding of relevant notions (as for instance, Tribunal de commerce d'Eupen, 19 September 2013: interplay of Articles 4(1) & 4(3); Non-contractual liability of a bank arising from banking operations; location of damage; rejection of arguments on a "manifestly closer connection"). However, there are also examples of problematic engagement with the general rules in the regulation.

Firstly, we have found 2 instances of major misunderstanding/misapplication of Arts. 4(1) & 4(3), where the general rule of Rome II should either not have been applied to begin with, or else the specific rule in Art. 8 should have been applied instead. Both cases feature significant misunderstandings of the way private international law, public international law and EU law operate, notably when it comes to the interplay of sources (they involve the interplay with the Berne Convention), they resemble somewhat on a factual basis, and come from the same court (For further details, please see the answer to question 10 below and the relevant case summaries).

Additionally, we have found an unpublished decision of 9 May 2019 (see above), where the Antwerp court of appeal located the 'place of direct damage' under Art 4(1) of an *actio pauliana* in the location where the detrimental effects of the allegedly fraudulent action were felt. In this case, a Belgian company had sold shares. A French creditor of the

company brought an *actio pauliana* against the share purchase agreement, alleging the applicability of French law. The Court held that the 'direct damage' occurred in Belgium, since this is the location where the Belgian company's assets were diminished to the detriment of the French creditor. Not entirely convincingly, the judgment also applied Art 4(3) Rome II by observing that the action had the closest link to Belgium anyway. The judgment therefore did not seem to be aware of the exceptional nature of Art 4(3) Rome II.

7. *The rule on product liability (Art. 5) and, where relevant, the interaction with the application of 1973 Hague Convention on the Law Applicable to Products Liability*

To the best of our knowledge, there were no relevant resources available on Article 5. Moreover, Belgium is not a party to the 1973 Hague Product Liability Convention.

8. *The specific rule on unfair competition (Art. 6)*

There have been a number of cases about unfair competition, two of which are particularly interesting:

Rechtbank van Koophandel Antwerpen 7 April 2017: Here, Nike had repudiated a Belgian distributor. The distributor then pursued Nike in Belgium for breach of competition law (refusal to make contract, abuse of dominant position). Nike alleged that Dutch law applied under a choice of law clause in its General Terms and Conditions (GTCs). The commercial court held however that the GTCs only applied to contracts concerning specific orders that were placed by the Belgian distributor, but not to the distributor's competition claim. Consequently, the commercial court held that Belgian law applied to the claim pursuant to Art 6(3) Rome II. Of course, the commercial court could have entertained the choice of law issue more briefly: Art 6(4) Rome II does not allow a choice of law in matters covered by Art 6 Rome II.

Cour d'appel de Liège, 23 April 2013 (see tribunal de commerce de Namur 10 March 2010): The court of appeal held that a consumers association's action against an airline company's terms and conditions (TCs) is a non-contractual matter. The judgment considered the relevant Belgian legislation on unfair market practices as an overriding mandatory rule (Art 16 Rome II) and even if that was not the case, it still considers Belgian Law as applicable by virtue of Art 6(1) Rome II. Unlike the CJEU later in *Amazon v Henkel*, the court of appeal did not consider the aspect of the action concerning the validity of the TCs against the backdrop of the Rome I Regulation.

Thalia Kruger (T Kruger, Tribunal de commerce Namur 10 March 2010 (note) [2011] *Droit de la consommation - Consumentenrecht* 59, para 30) raised an interesting point of reflection about Art 6(1) Rome II. She observed that the unfairness of the TCs of airline companies indeed impacted on the Belgian market, but also on other markets. Does this mean that national courts should apply a so-called 'mosaic approach', according to which they must apply multiple laws at once? Kruger noted that the Rome II Regulation does not provide a solution for a situation in which the markets of multiple countries are affected by unfair market practices. She also raised that Belgian courts must not accept too lightly that a *loi de police*/overriding mandatory provision in the sense of Art 16 Rome II displaces the multilateral conflict rule of Art 6 Rome II. As Wautelet observed (P Wautelet, 'Concurrence déloyale et actes restreignant la libre concurrence' [2008] *Tijdschrift voor Belgisch Handelsrecht/Revue de droit commercial belge* 502, 509), Belgian courts traditionally have accepted that the Belgian legislation covering unfair market practices was overriding mandatory law (see Wautelet [2006], *supra*, para 2). However, the EU legislature preferred to adopt a multilateral rule for unfair competition exactly in order to avoid the use of unilateral conflict of laws techniques such as overriding mandatory law. Belgian courts therefore must not have recourse to Art 16 Rome II too lightly.

The other cases we found related to acts of unfair competition that only harmed one competitor, which were straightforward applications of Art 6 Rome II (burgerlijke rechtbank Brussel 20 April 2018; rechtbank van koophandel Dendermonde 24 January 2014).

Wauhelet discussed an issue of delineation between unfair competition (Art 6(1) - (2) Rome II) and the restriction of free competition (Art 6(3) Rome II). He gave the example of the Belgian provision concerning the refusal to sell. Such a refusal constitutes both an unfair market practice and a violation of competition law under Belgian law (Wauhelet [2008], *supra*, 507-508). He argued that one must look at the *substance* of an action to decide whether it concerned unfair competition or a restriction of free competition. In doing so, he rejected drawing a distinction according to whether the legal basis relied on aims protecting the competitiveness of markets as opposed to protecting private businesses from unfair practices by competitors. In a similar vein, the method of enforcement of a legal basis (competition law: enforced by public agency vs. law on unfair market practices: enforced by courts) was unworkable, too.

9. *The specific rule on **environmental damage** (Art. 7)*

To the best of our knowledge, there were no relevant resources available on this topic.

10. *The specific rule on **infringements of intellectual property rights** (Arts. 8, 13)*

Our search did not yield any results with regard to the application of Article 13. In other words, there are no reported cases where an infringement of intellectual property rights arose in the context of acts other than torts or delicts.

Article 8, on the other hand, gave rise to a few interesting judgments:

The Brussels Court of Appeal decided that Belgian law was applicable to a trademark infringement claim based on a Benelux trademark. It invoked Article 8(1) Rome II and left undiscussed whether the Regulation prevailed on the Benelux Convention on Intellectual Property Rights on the basis of Article 28(2) of the Rome II Regulation. According to the Brussels Court, Belgian law was applicable because the protection sought by the claimants covered the Benelux territory and was requested from the Belgian courts. It went on to assess that the referred Benelux Convention was part of Belgian law and as such applicable to the substantive questions on alleged trademark infringement (Brussels, 31 January 2011).

A judgment of the Brussels Court of Appeal of 5 May 2011 arising from a claim filed by Copiepresse (i.e. a Belgian association in charge of collecting revenues from copyrights) against Google Inc. for an alleged infringement of copyrights held by authors represented by Copiepresse by Google's news service and the use of "cache". With regard to the governing law, this judgment is quite interesting as it takes the view that the Berne Convention contains conflict rules and, as such, can be used to determine the applicable law to this situation. According to the Court, the relevant provision would be Article 5(3) of the Berne Convention. Priority to more specific international treaties containing choice of law provisions is fully in line with Article 28 Rome II but it is a controversial issue whether the Berne Convention contains relevant rules on the law applicable to the infringement of copyrights. Perhaps because of such controversy, the Brussels Court went on to refer to the Rome II Regulation, but rather Article 4 and not Article 8. The latter provision is explicitly ruled out by the Brussels Court because it is formulated in similar terms to the Berne Convention and, as such, is considered of little additional guidance. The Brussels Court concludes that Belgian law is applicable pursuant to Article 4(3) as it is with Belgium that this case has the closest connection.

The Brussels Court applied Article 5(3) of the Berne Convention again to decide the applicable law to an alleged copyright infringement by a Luxembourgish company in a case filed before the Belgian courts by the Belgian right holder (Brussels, 3 October 2013).

In both instances, the Brussels Court appears to see Article 5(3) of the Berne Convention as a conflict of law rule, which is debatable. If, in accordance with the prevailing view, Article 5(3) of the Berne Convention is void of relevance for the determination of the applicable law, the Rome II Regulation emerges as the relevant legal source, provided the Regulation is *ratione temporis* applicable, which does not appear to be the case for the 2011 judgment.

Where applicable, Article 8(1) Rome II prevails on the general rule of Article 4 Rome II. Using the general rule of the Regulation for copyright infringement cases does not take into account the hierarchy between specific conflict of law rules and the general rule of the Regulation.

11. *The specific rule on **industrial action** (Art. 9)*

To the best of our knowledge, there were no relevant resources available on this topic.

## 2.3 Chapter III - Unjust Enrichment, *Negotiorum Gestio* And *Culpa In Contrahendo*

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to the implementation of:*

12. *The specific rule on **unjust enrichment** (Art. 10), including its relationship with the general rule for tort/delict in Art. 4.*

To the best of our knowledge, there were no relevant resources available on this topic.

13. *The specific rule on **negotiorum gestio** (Art. 11)*

To the best of our knowledge, there were no relevant resources available on this topic.

14. *The specific rule on **culpa in contrahendo** (Art. 12)*

Our analysis of the reported cases reveals no problems on the application of Article 12. Quite to the contrary, as stated above (in response to question 3), there are examples of excellent applications of this sophisticated provision by the Belgian courts (see, for instance, Kh. Dendermonde, 29 December 2011 with adequate consideration to the primacy of EU Regulations over the Belgian Code, the distinction between Chapter II and III of the Regulation and the interplay between Rome I and Rome II with regard to precontractual liability).

## 2.4 Chapter IV - Freedom of Choice

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

15. *The implementation in legal/business practice and by courts of the rule on **freedom of choice**, any difficulties therein and **any discussion that has been carried out in your Member State regarding possible reasons which would justify the need to rethink it** (Art. 14)*

It is interesting to note that Belgian conflict of laws accepts freedom of choice in cases of non-contractual obligations that fall outside the scope of application of Rome II. Indeed, Article 101 of the Belgian Code of Private International Law allows for a choice of law agreed upon by the parties provided three conditions are met: 1) the choice occurs once the dispute has arisen; 2) the choice is explicit and 3) the rights of third parties are not prejudiced by the choice.

The rule in Article 14 Rome II Regulation is quite in line with Article 101 of the Belgian Code. Consequently, freedom of choice under the referred conditions appears to be accepted by case law and doctrinal writings in Belgium (see, for all, M. Traest, "Het recht van toepassing (...)” in Kluwer, 2018). We are unaware of discussions recommending a revisited Art. 14, either to limit its application or to expand it.

## 2.5 Chapter V - Common Rules

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

16. *The scope of the exclusion of 'evidence and procedure' in Art 1(3) and any difficulties in relation to that exclusion or to questions of formal validity or the burden of proof (Arts. 21-22)*

To the best of our knowledge, there were no relevant resources available on this topic.

17. *The approach in your Member State to questions of pleading, proof and application to individual cases of the substantive rules of the law applicable under the Rome II Regulation governing non-contractual obligations.*

To the best of our knowledge, there were no relevant resources available on this topic.

18. *The delimitation of the scope of the applicable law (Art. 15(a)-(h)), including any difficulties as its relationship to the issues addressed at points 16 17 above)*

To the best of our knowledge, there were no relevant resources available on this topic.

19. *The application of the rule on **overriding mandatory provisions** (Art. 16)*

The two core cases involving overriding mandatory provisions (Cour d'appel de Liège, 23 April 2013 and Tribunal de commerce de Namur, 10 March 2010, referred to above, in question 8, and reprised in further detail in the case summary) are socially significant but are in general relatively straightforward in their understanding and application of the notions, even if they did so in diverging senses. (The appeals level court overturned the trial-level decision on this point, finding that the relevant legislation amounted to overriding mandatory provisions, while the trial-level court had not done so: see the doctrinal criticism levelled against this decision above).

20. *The application of the specific rule on **direct action against the insurer** of the person liable (Art. 18)*

To the best of our knowledge, there were no relevant resources available on this topic.

21. *The application of the specific rule on **subrogation** (Art. 19)*

In line with other case law, Belgian courts (e.g. the Antwerp Police Tribunal) tend to avoid an analysis of conflict of instruments (e.g. the hierarchy between Rome II and the Belgian Code of Private International Law) by referring



sequentially to both instruments. Fortunately, the specific rule on subrogation in Art. 19 Rome II and Art. 107 of the Belgian Code on legal subrogation use the same connecting factor (“the law which governs the third person's duty to satisfy the creditor”), so both determine that Belgian law is applicable to a case of legal subrogation between a Belgian agency (as subrogated party) and the Belgian victim further to a traffic accident that occurred in Germany (Antwerp Police Tribunal, 13 May 2015).

22. *The application of the specific rule on **multiple liability** (Art.20)*

To the best of our knowledge, there were no relevant resources available on this topic.

## 2.6 Chapter VI - Other Provisions

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

23. *The implementation of the concept of habitual residence in the Rome II Regulation, with reference both to persons covered by Art 23 and natural persons acting otherwise than in the course of business*

To the best of our knowledge, there were no relevant resources available on this topic.

24. *The application of and any difficulties with the specific rules on exclusion of renvoi (Art.24) and States with more than one legal system (Art.25)*

To the best of our knowledge, there were no relevant resources available on this topic.

25. *The application of and any difficulties with the specific rule on public policy of the forums (Art. 26)*

To the best of our knowledge, there were no relevant resources available on this topic.

26. *Practical **interaction between the Rome II Regulation and other EU and international legal instruments**, in specific areas such as **environmental damages, intellectual property rights or data protection** (Arts. 27, 28, 29)*

Possible conflict of instruments (e.g. between international legal instruments in the area of intellectual property and the Rome II Regulation, see Answers to Q6 and Q10) tend to be addressed by avoiding an analysis of the hierarchy between such international instruments.

Insufficient attention for the rule on Article 28 of the Rome II Regulation may be remediated by a new provision on the articulation between other international instruments and the Rome II Regulation. Several policy choices will have to be made: should priority still be given to international instruments such as the HCCH Conventions on Traffic Accidents or Product Liability? Should a Benelux IP Treaty with specialised provisions on governing law be treated differently because it does not affect non-EU Contracting States? It seems to the drafters of this Report that further work is needed on the articulation of different conflict of laws schemes applicable in Belgium and other Member States.

## 2.7 Comments on other Practical Problems

*These areas are **of particular interest** for the Commission. Please be as precise as possible regarding any issue that has been reported on:*

27. *The impact of the application of the **1971 Hague Convention** on the law applicable to traffic accidents on legal certainty (where relevant for your Member State)*

The Belgian ‘police tribunals’ (politierechtbank/tribunal de police - which have jurisdiction over the civil and criminal claims arising out of traffic accidents) faithfully apply the 1971 Hague Convention over the Rome II Regulation in those cases falling in the Convention’s scope of applicability. (See Politierechtbank West-Vlaanderen, Afdeling Brugge 18 June 2014; Politierechtbank Brugge 27 January 2012; Politierechtbank Brugge 16 September 2011).

28. *Any other practical problems with respect to the application or interpretation of the Rome II Regulation, including but not limited to **the suitability of the mosaic approach***

(See above p. 6 - response to question 8)

### 3. Comments on areas of interest

*These areas are of particular interest for the Commission. Please be as precise as possible regarding any issue that emerged in your Member State regarding:*

29. *The exclusion of violations of privacy and rights relating to personality, including defamation, from the scope of the Rome II Regulation and any difficulties arising out from differences among Member States' rules in cross-border situations*

Legal scholarship in Belgium has qualified the exclusion of violations of privacy or defamation as a 'political choice' (B. VOLDERS, 'Europees conflictenrecht voor niet-contractuele verbintenissen' in *Nieuw internationaal privaatrecht: meer Europees, meer globaal* (2009 Kluwer 2009) para 7). The Belgian courts continue to apply the provisions of residual private international law contained in the 2004 Code of Private International law (a translation of which can be found [here](#)). However, we have not been able to trace any application in practice. Interestingly, the Code contains a bespoke conflict rule for defamation and libel (Article 99, § 2). This provision is generous. It allows the victim to rely on either the *lex delicti commissi*, or the *lex loci damni*. The latter option is subject to a limitation, though. A victim cannot rely on the *lex loci damni* if the person who caused the damage could not have foreseen that the damage would occur in that location.

30. *Any comment regarding the Interplay of the Rome II Regulation with the treatment of defamation and data protection, and, in these areas, the relevance of Strategic Lawsuits Against Public Participation (SLAPPs)*

Research in the core Belgian case-law databases has not provided any result involving both so-called "SLAPPs" and the Rome II Regulation.

However, some preliminary evidence on an extremely small sample of SLAPP cases against Belgian NGO and civil society actors pursued in other jurisdictions can be found on the internet. Publicly available information on these cases is insufficient to ascertain whether choice-of-law issues had any bearing in having these cases "forum shopped" towards other jurisdictions. The two examples found are the following: X v. Shipbreaking Platform (Brussels-based NGO), SLAPP introduced in India in 2017<sup>345</sup>; and SOCFIN v. FIAN Belgium, SOS Faim Belgique, and others, SLAPP introduced in Luxembourg in 2019<sup>346</sup>.

Furthermore, we found references on the internet to a threatened lawsuit that was meant to be introduced in Belgium by Sandstone (private intelligence firm based in Luxembourg) against the EUobserver in 2020<sup>347</sup>. However, it has not been possible to ascertain whether the threat has been fulfilled.

As regards academic resources, research in the three main Belgian legal databases has not yielded results on private-international-law aspects of SLAPPs. However, one of the authors of this report has recently published a working paper on the law applicable to SLAPPs (<https://uclouvain.be/fr/instituts-recherche/juri/cedie/cahiers-du-cedie.html> - cahier n°2021/1).

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<sup>345</sup> Greenpeace European Unit (O. Reyes, rapporteur), "Sued into silence - How the rich and powerful use legal tactics to shut critics up", Brussels, July 2020, p. 26 (<https://storage.googleapis.com/planet4-eu-unit-stateless/2020/07/20200722-SLAPPs-Sued-into-Silence.pdf>, accessed on October 15th 2020): "[...] *Shipbreaking Platform, a Brussels-based NGO that campaigns for clean and safe ship recycling, is one such example. In 2017, a €12.5 million case was lodged in an Indian court against the NGO, in addition to receiving legal threats in the US and Belgium. The case is brought against Shipbreaking Platform itself, a number of current and ex staff, individual board members in the US and India, and two organisations that are members of the Shipbreaking Platform's network. This targeting of individuals as well as organisations is typical of SLAPP cases. [...]*"

<sup>346</sup> <http://www.fian.be/Des-ONG-de-solidarite-Nord-Sud-et-de-defense-des-droits-humains-denoncent-les-1373?lang=fr>, accessed on October 15th 2020 - Defamation lawsuit introduced in Luxembourg, place of the corporation's domicile against 11 defendants (both NGOs and individuals), all of which but one (SOS Faim Luxembourg) would seem to be domiciled in Belgium.

<sup>347</sup> <https://www.ecpmf.eu/stop-use-of-slapps-concerns-about-legal-threats-against-euobserver/>

31. *The extent to which Rome II Regulation has been applied to **corporate abuses against human rights** and lays down an effective set of rules to regulate non-contractual liability;*

Research in the core Belgian case-law databases has not provided any result involving both so-called "transnational human-rights litigation" against corporate actors and the Rome II Regulation.

However, one of the authors of this report, due to his professional involvement in the matter, is aware of the imminent introduction of a climate-change lawsuit by a Belgian NGO against a private corporation before the Belgian courts. This lawsuit will involve the application of the Rome II Regulation.

32. *The impact of the development of **artificial intelligence** on the Rome II Regulation, and in particular on the suitability of the rules that it contains to regulate non-contractual liability.*

For the purposes of this question, we understood artificial intelligence (AI) to refer to "systems characterized by the simulation of intelligent behaviour in computers". It is indeed a hot topic in many areas of (EU) law and, as such, should be addressed in (EU) Private International Law (and in the context of the Rome II Regulation for the purposes of this report).

The interface between EU PIL rules and artificial intelligence is bi-directional: it can be meant to refer to whether the use of AI driven devices has triggered difficulties in the application of the rules that such EU PIL instruments contain (here, the Rome II regulation specifically) or it could also refer to the use of AI technology in order to facilitate the application of EU PIL. It is understood that this answer should focus on the first aspect.

We are unaware of case law developments relating to AI-driven torts and have not found Belgium-based literature relating to this issue yet.

#### 4. List of national case law

<u>Court or tribunal</u>	<u>Case name and reference number</u>  <u>Reference to decision of the Court of Justice if applicable</u>	<u>Date</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings (only for key cases)</u>
Hof van beroep Antwerpen	2016/AR/1478	9 May 2019	Art 4(3)	Actio pauliana	French creditors file an actio pauliana to reverse the sale of stocks by a Belgian company. The direct damage is located in Belgium and, as a consequence, Belgian law applies..
Cour d'appel de Bruxelles (9e ch.)	<i>S.A. R.T.L. Belgium, Société de droit luxembourgeois C.L.T.-U.F.A. et I.B.S.R. /D.</i>	3 October 2013	8; 4(1)	Territorial scope of authors' rights; interplay between the Bern Convention and Rome II.	The decision shows poor understanding of PIL, amongst other problems: i) it considers that Art. 5 of the Bern Convention contains choice-of-law rules (which Belgian academics consider not to be the case: M. Fallon, "La relation du règlement Rome II avec d'autres règles de conflit de lois" referred in the literature review); ii) it goes on to suggest that should the Bern Convention not be sufficiently clear to solve the conflict of laws, then Rome II would apply (thus, incoherent: if the Bern Convention had had choice-of-law provisions then resort to Rome II would not have been possible); iii) ends up suggesting the application of Art. 4(1) Rome II because (allegedly) Art. 8 Rome II would not be sufficiently clear in cases of "délits complexes" (complex torts).

					(N. B. Refers to the judgment of C.A. Brussels, 11 May 2011, mentioned below)
Cour d'appel de Liège (7e ch.)	<i>Easyjet / Test-Achats</i>  <i>2011/RG/1202</i>	23 April 2013	16; 6(1)	Overriding Mandatory provisions; Act of unfair competition affecting consumers in the Belgian market.	A consumers association's action against a company's terms and conditions is a non-contractual matter; the judgment considers the relevant Belgian legislation as an overriding mandatory rule (Art. 16 Rome II) and even if that was not the case, it still considers Belgian Law as applicable by virtue of Art. 6 Rome II.
Hof van Beroep Brussel	<i>Sabam</i> AR 2010/AR/3096; 2010/AR/3111	11 July 2013	8(1)	Territorial scope of authors' rights; interplay with residual private international law and Bern Convention.	Composer A of musical piece deposited work with Belgian composers association (SABAM). Other composer B plagiarises piece. Composer A's work is not protected abroad though. He argues that SABAM should have taken the necessary measures to ensure that the musical piece was protected abroad. Court held that protection of authors' rights is strictly territorial. Refers to Art 93 CODIP, Art 8(1) Rome II (which does not seem to be applicable here, plagiarism happened in the 1990's), and Art 4(2) Bern Convention. Confirms explicitly that Art 4(2) Bern Convention contains a 'conflict rule'.
Cour d'appel de Bruxelles (9e ch.)	<i>Google Inc. c. Copiepresse, Société de droit d'auteur des journalistes, &amp; Assucopie</i>  <i>2007/AR/1730</i>	5 May 2011	8; 4(1); 4(3)	Territorial scope of authors' rights; interplay between the Bern Convention and Rome II & the Belgian Code on Private International Law.	Dispute between Belgian press-related entities and Google in respect of Google news. Court considers that : i) Art. 5 of the Bern Convention contains choice-of-law rules (which Belgian academics consider not to be the case: M. Fallon, "La relation du règlement Rome II avec d'autres règles de conflit de lois" referred in the literature review); ii) it goes on to suggest that should the Bern Convention not be sufficiently clear to solve the conflict of laws, then Rome II would apply (thus, incoherent: if the Bern Convention had had

					choice-of-law provisions then resort to Rome II would not have been possible); iii) ends up suggesting the application of Art. 4(1) or even Art. 4(3) Rome II because Art. 8 reprises the same "terms" as the Bern Convention.
Hof van Beroep Antwerpen	NVD./NVM. 2009/AR/2316	25 March 2010	4(2); 4(3); 6(2)	Act of unfair competition affects exclusively the interests of a specific competitor.	<p>Belgian company D. sued Belgian company M. for unfair competition. In a letter, M.'s Danish lawyer disclosed a judgment, which was handed down in D.'s disadvantage, to a Danish customer to convince the customer not to make a contract with D. Company D. asked Court for injunction with the aim of forbidding company M. to further spread the disadvantageous judgment.</p> <p>D. argued that the Belgian Market Practices Law applied to its claim. The Court applied Art 6(2) Rome II, according to which Art 4 Rome II applies if the act of unfair competition affects only one competitor. Then it applied Art 4(2) Rome II: Belgian law was applicable since company D. and M. are both incorporate in Belgium. The Court swept company M.'s argument that Danish law should be applied the dispute has a closer connection with Denmark (Art 4(3) Rome II) off the table. Even though the lawyer who sent the letter and the customer were both located in Denmark, the lawyer acted on behalf of Belgian company M., the <i>action de cessation</i> is brought in Belgium, and an eventual court injunction has to be enforced in Belgium.</p>

Hof van beroep Antwerpen	<i>NV C./NV H., BVBA J., BV P. and NV AXA Belgium</i> 2006/AR/2468	18 May 2009	2(1)	Characterisation of <i>action directe</i>	The factual constellation here is the same as <i>Handte v TMCS</i> . The Court applied the Rome Convention to an <i>action directe</i> (under the Belgian law on sales of goods) brought by the sub-buyer against the manufacturer. The case predates the entry into force of the Rome Regulations, but the issue of characterisation is relevant nonetheless.
Rechtbank van Koophandel Antwerpen	<i>Euro Shoe/Nike</i> A/16/02749	7 April 2017	6(3)	Choice of law in general terms and conditions; law applicable to unfair competition	Nike repudiated Belgian distributor. Distributor pursues Nike in Belgium for breach of competition law (refusal to make contract, abuse of dominant position). Court held that Belgian law applied to the claim pursuant to Art 6(3) Rome II. Nike alleged that Dutch law applied under a choice of law clause in its GTC's. Court held however that GTC only applied to specific orders that were placed by the Belgian distributor, not to the distributor's competition claim.
Burgerlijke Rechtbank Brussel	B.I. & B.A. v. A&A.G. ( <a href="mailto:tijdschrift@jpr.be">tijdschrift@jpr.be</a> 2018, nr. 2, p. 33)	20 April 2018	6(2)	Act of unfair competition affects exclusively the interests of a specific competitor	Company B provided services to customer E of company A. At one point, A started providing services to E after a company reshuffle, without formally rescinding the agreement it had made with B. A had attracted the employees of B, thus benefiting from the know-how they had acquired when working for B.  The Court held that this was a case of unfair competition in the sense of Art 6 Rome II. However, as the anti-competitive behaviour only affected one competitor, it applied the general conflicts rule of Art 4 Rome II pursuant to Art 6(2) Rome II.

Tribunal de Commerce d'Eupen (1e ch.)	Oberbank / Group C AG  132/2011	19 September 2013	4(1); 4(3)	Non-contractual liability of a bank arising from banking operations; location of damage; rejection of arguments on a "manifestly closer connection"	A corporation tries to engage the tortious liability of a bank as regards certain bills of exchange issued by one of the bank's clients. Since the payment of the instruments by the bank was generally made to the creditor's Belgian account, the damage resulting from the lack of payment occurred in Belgium. Straightforward application of Art. 4(1). Discussion on Art. 4(3): the court considers that alleged "manifestly closer connections" to Austria have not been demonstrated by evidence.
Rechtbank van Koophandel Dendermonde	N.V. Luxafoil v. B.V. De KOCK Glasfolie Nr.A/12/0904	24 January 2013	6(2)	Act of unfair competition exclusively affects the interests of a specific competitor.	French company in the glazing industry spread negative publicity about a Belgian competitor over the internet (including Dutch and Belgian websites). The latter started proceedings in the Belgian courts, alleging unfair competition. As the negative publicity exclusively targeted the Belgian company, the court held that Art 6 Rome II was not applicable. It hence applied Art 4(1) Rome II instead, concluding that Belgian law was applicable as the damage occurred in Belgium.
Rechtbank van Koophandel Dendermonde	BVBA N. t/ Vennootschap naar Nederlands recht BV M.	29 December 2011	12	Precontractual information duty	The law governing the contract is applicable to such claim pursuant to Art. 12(1) Rome II.
Tribunal de Commerce de Namur (3e ch.)	<i>A.S.B.L. Test-Achats / Easyjet</i>  [Reference not published in academic journal]	10 March 2010	16; 6(1)	Overriding Mandatory provisions; Act of unfair competition affecting consumers in the Belgian market.	A consumers association's action against a company's terms and conditions is a non-contractual matter; the judgment does not consider the relevant Belgian legislation as an overriding mandatory rule (Art. 16 Rome II) [Cf. Appeal level decision <i>supra</i> ]. The Court considers



					Belgian Law as applicable by virtue of Art. 6 Rome II.  [This is the trial-level decision corresponding with 2011/RG/1202 above]
Politierechtbank Antwerpen	<i>V.W., VAPH, KBC Verzekeringen nv, Fidea nv</i>  04AA955	13 May 2015	19	Subrogation of government agency into rights of traffic accident victim	Flemish agency for people with a disability (VAPH) is subrogated into rights of traffic accident victim. Brings recourse action against tortfeasor's insurer. Court holds that 1971 Hague Convention is inapplicable. Then refers to both CODIP & Rome II to conclude that Belgian law applies (i.e. the law that applies to the Agency's duty to compensate the victim).
Politierechtbank West-Vlaanderen, Afdeling Brugge	<i>Openbaar Ministerie t/ W.T. en M.L.S.</i>	18 June 2014	28	1971 Hague Convention has priority over the Rome II Regulation	In these three decisions, the Police tribunal applied the 1971 Hague Convention over the Rome II Regulation in disputes concerning non-contractual obligation arising out of traffic accidents, as Belgium is a contracting state to this Convention.
Politierechtbank Brugge	<i>K.D./MMA IARD</i>  11A212	27 January 2012	28	1971 Hague Convention has priority over the Rome II Regulation	
Politierechtbank Brugge	<i>J.M. t/ NVA.S.</i>	16 September 2011	28	1971 Hague Convention has priority over the Rome II Regulation	

# Bulgaria

## Executive Summary

- Prior to 2005, when Bulgarian Private International Law Code (BPILC) entered into force, non-contractual obligations in international civil and commercial matters were regulated with many conflict-of-law provisions spread in various legislative acts.
- The Bulgarian Private International Law Code, which is strongly influenced by Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("ROME II")/\* COM/2003/0427 final - COD 2003/0168 \*/<sup>348</sup> and with almost identical provisions, has been the first comprehensive legislative act in the field of International Private Law, including non-contractual obligations, in Bulgaria.
- With the 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 (hereafter, the Rome II Regulation) entering into force, the application of the BPILC was limited only to cases and matters which fall outside the scope of the Rome II Regulation. Nevertheless, the BPILC together with the Rome II Regulation are considered as key milestones in reformation of Bulgarian Private International Law on non-contractual obligations<sup>349</sup>.
- The Rome II Regulation is known to both Bulgarian legal scholars and practitioners.
- In general, Bulgarian doctrine supports the approach of the European Union legislator regarding the applicable law in non-contractual obligations. Additionally, a few suggestions for improvement of the rules have been discussed in the legal literature, namely:
  - Bulgarian versions of Art. 7, 8 and 14 need to be aligned with the versions in other languages. More details can be found in the respective paragraphs of this report.
  - *Lex communis habitationis* as per Art. 4 (2) could lead to unjust outcome in cases involving multiple parties or claims some of them with habitual residence in the same, and some – in different countries. To avoid this, it has been suggested in these cases Art. 4 (1) to apply i.e. *lex loci damni* instead of *lex communis habitationis*.
  - An amendment of the Regulation is recommended in the sense that under Art. 4 (2) *lex communis habitationis* would be the one of the person who suffered the damage and the person who directly caused the damage i.e. "the person claimed to be liable" to be replaced by "the person who caused the damage".
  - It has been suggested that in the definition of Art. 23 of the Rome II Regulation of the habitual residence of companies and other bodies (corporate or unincorporated), the approach of the EU legislator i.e. "place of central administration" is criticized and the alternative option "main place of operations/activity" is proposed as a more suitable one.
- More details about these proposals can be found in the respective paragraphs of this report.
- Bulgarian courts are well aware of the existence and the content of the Rome II Regulation, and have applied it in multiple cases. When interpreting the provisions of the Rome II Regulation, the courts in Bulgaria often refer to the relevant case law of the European Court of Justice (ECJ), which reveals certain level of knowledge and preparation of Bulgarian legal practitioners in the field of the EU legislation governing non-contractual obligations.

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<sup>348</sup> <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:52003PC0427> [lastly retrieved on September 30, 2020]

<sup>349</sup> Mouseva, Boryana *Delict in private international law*, Sofia, Sibi, 2011, p.289

## 1. Introduction

- *How aware of the Rome II Regulation are practitioners, businesses and citizens in your Member State?*
- *Is the Rome II Regulation generally known and applied by courts in your Member State?*
- *Are there any relevant statistics regarding the application of the Rome II Regulation in your Member State?*
- *How important is the doctrinal discussion on the Rome II Regulation in your Member State?*
- *Are there specific issues concerning the Rome II Regulation that have caused debate at a doctrinal or political level?*

The review of the relevant Bulgarian legal publications and case law, performed for the purposes of this report, has revealed that Bulgarian legal scholars and practitioners are certainly aware of the existence and the content of the Rome II Regulation.

A few extensive commentaries and books on the Rome II Regulation have been published<sup>350</sup> and they contain detailed and critical analysis of the provisions of the Regulation together with recognition of both actual and potential problems of their application in the practice, which will be discussed later in the report.

Despite the lack of official statistics on the application of the Rome II Regulation in Bulgaria, other reliable sources of relevant case law information confirm awareness also among the judges across the country which have applied the provision of the Rome II Regulation in multiple cases<sup>351</sup>. The majority of judgements are related to damages caused in road accidents.

## 2. Analysis of the Rome II Regulation

### 2.1 Chapter I – Scope and Interpretation

1. *The determination of the material scope of application of the Rome II Regulation, including any difficulties in applying the category of “civil and commercial matters” or in defining the exact scope of any excluded matters (Art. 1(1)-(2))*

Bulgarian legal literature and case law do not identify any particular difficulties for defining the scope of the Rome II Regulation. It is considered that the following hypotheses fall outside the scope of the Rome II Regulation:

- The relations arising out of events or actions taking place on the ship or related to her, on a high sea or on a waterway, in which no country exercises sovereignty, shall be regulated by the law of the flag (i.e. *lex banderae*) - Art. 13 of Bulgarian Merchant Shipping Code<sup>352</sup>.

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<sup>350</sup> Todorov, Todor Private International Law: The European Union and the Republic of Bulgaria 3rd revised. and extended edition, Sofia: Sibi, 2010; Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011; Stancheva-Mincheva, Vesela Commentary on the Code of Private International Law: comparison with acts of European law, Sofia: Sibi, 2010.

<sup>351</sup> For instance, the legal database Ciela (<https://www.ciela.net/?i18n-id=2>) contains details about 106 cases with reference to Regulation 864/2007 and/or Rome II Regulation, among which are judgements of the Bulgarian Supreme Court of Cassation, the Courts of Appeal in Varna and Sofia, and many judgements of the District and Regional Courts.

<sup>352</sup> Todorov, Todor Private International Law: The European Union and the Republic of Bulgaria 3rd revised. and extended edition, Sofia: Sibi, 2010, p.403; On contrary opinion – see Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.204, same for delict in open air.

- If the collision occurs on high sea or a waterway in which no country exercises sovereignty, the law of the country shall apply before the court or the arbitration of which the dispute is considered (i.e. *lex fori*) - Art. 14 (2) of Bulgarian Merchant Shipping Code.

Whether or not the Rome II Regulation revoked these special provisions is a disputable topic in the legal publications. Some authors do not exclude a broader interpretation of the provisions of the Regulation in the sense that these special provisions of the Bulgarian Merchant Shipping Code have been revoked by the Rome II Regulation. The authors even consider that preliminary ruling on this matter may be needed and expected<sup>353</sup>. Other authors see the above provision as special law to the general law of the Rome II Regulation (and the Bulgarian Private International Law Code)<sup>354</sup>.

#### 2. *The determination of the temporal scope of application of the Rome II Regulation, Arts 31-32*

This aspect of the Rome II regulation does not seem to have raised any particular problems so far. Bulgarian legal authors are in accord that the Bulgarian Private International Law Code shall apply to all events with international aspect giving rise to damages that occurred prior to 11.01.2009, whereas the Rome II Regulation shall govern relevant events that occurred after 11.01.2009<sup>355</sup>.

#### 3. *The characterization of the concept of "non-contractual obligations", its relationship to the concept of "contractual obligations" and any difficulties in relation to characterisation (Arts. 1(1), 2)*

No particular difficulties related to the concept of non-contractual obligations and their distinction from contractual obligation have been described and discussed either in Bulgarian legal doctrine or in case law.

#### 4. *The universal application of the Regulation (Art. 3)*

The universal application of the Rome II Regulation means that its rules apply regardless of whether the relevant event is related to any Member State in personal (i.e. parties involved have habitual residence in the EU) or territorial aspect (the act or damage occur in the territory of the EU). This also means that the rules of the Regulation may refer to the law of a non-Member State as applicable to the non-contractual obligation<sup>356</sup>.

Some legal scholars, though, express doubts about the competence of the European Union (the EU) to regulate obligations related to tort and delict that occurred outside the territory of the EU and give as an example of such potential problematic application acts causing damage between a Bulgarian citizen and citizen of Libya that occurred on Libyan territory.

Furthermore, pursuant Art. 18 (1) of Bulgarian Private International Law Code the Bulgarian courts shall have jurisdiction over actions on damage sustained as a result of a tort or delict save in the cases covered under Art. 4 of the Code and where the harmful act was committed in the Republic of Bulgaria or where the damage or part thereof occurred in the Republic of Bulgaria. Some concerns were expressed in the legal literature that it is unclear what part of the damages must have occurred in Bulgaria for justifying the competence of Bulgarian courts. The legal authors think that it must be such part and type of damage that could justify sufficient connection between the claim and Bulgarian courts<sup>357</sup>.

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<sup>353</sup> Todorov, Todor Private International Law: The European Union and the Republic of Bulgaria 3rd revised. and extended edition, Sofia: Sibi, 2010, p.403

<sup>354</sup> Stancheva-Mincheva, Vesela Commentary on the Code of Private International Law: comparison with acts of European law, Sofia: Sibi, 2010, p.506

<sup>355</sup> Todorov, Todor Private International Law: The European Union and the Republic of Bulgaria 3rd revised. and extended edition, Sofia: Sibi, 2010, p.403; Stancheva-Mincheva, Vesela Commentary on the Code of Private International Law: comparison with acts of European law, Sofia: Sibi, 2010, p.498; Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.20.; Judgement 1342/ 15.08.2014 civil case 3414/2010 Sofia City court.

<sup>356</sup> Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011 p. 20; also Judgement 8048/30.11.2017 civil case3593/2017 Sofia City court – the law applicable to the delict was the law of Serbia.

<sup>357</sup> Todorov, Todor Private International Law: The European Union and the Republic of Bulgaria 3rd revised. and extended edition, Sofia: Sibi, 2010, p.402

Outside the scope of the Rome II Regulation are the obligations arising out of a violation of rights relating to the personality and rights related to protection of personal data by the mass communication media to which Art. 108 (1) of Bulgarian Private International Law Code would apply<sup>358</sup>.

5. *The approach to interpretation of the Rome II Regulation, and in particular its relationship to other EU private international law instruments (including the recast Brussels I Regulation and the Rome I Regulation) (Recital (7))*

Bulgarian authors make with confidence reference to the ECJ case law, namely C-292/05, in order to explain that outside the scope of the Rome II Regulation fall claims that are neither civil nor commercial, hence the Brussels I Regulation (R 44/05) would not be applicable to them as well. It has been clarified that the solution in this ECJ case law was announced prior to the Rome II Regulation, which has reconfirmed it<sup>359</sup>.

Furthermore, it is reaffirmed that the Rome II Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to non-contractual obligations (Art. 28 (1)). However, it is deemed that the Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation (Art. 28 (2))<sup>360</sup>.

## 2.2 Chapter II - Tort/Delict

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to the implementation of:*

6. *The general conflict-of-laws rule for tort/delict, and difficulties that have arisen in your Member State with respect to its application (Art. 4), and in particular:*

a. *the approach to identifying the place of direct damage in Art 4(1)*

Bulgarian legal doctrine accepts positively this legislative approach as it is associated with the modern trends in the liability for tort/delict, namely that the liability no longer has characteristics of and aim at punishing person that committed the tort/delict, but has compensatory character, i.e. to rectify the damage<sup>361</sup>. It is beneficial for persons that suffered damage when the damage is rectified/compensated in the place where they occurred<sup>362</sup>.

Furthermore, as the Regulation does not contain provisions for situations when the damage occurred in more than one country, therefore Bulgarian authors suggest that so called "distributive principle" would apply to such scenario, namely liability and damages will be defined in each of countries independently/separately. The argumentation for this approach has been taken from ECJ case law C-68/98 regarding Art. 5 (1) p.3 of Brussels Convention, replaced by Regulation 44/01)<sup>363</sup>.

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<sup>358</sup> Todorov, Todor Private International Law: The European Union and the Republic of Bulgaria 3rd revised. and extended edition, Sofia: Sibi, 2010, p.404; Stancheva-Mincheva, Vesela Commentary on the Code of Private International Law: comparison with acts of European law, Sofia: Sibi, 2010, p.537

<sup>359</sup> Todorov, Todor Private International Law: The European Union and the Republic of Bulgaria 3rd revised. and extended edition, Sofia: Sibi, 2010, p.405

<sup>360</sup> Todorov, Todor Private International Law: The European Union and the Republic of Bulgaria 3rd revised. and extended edition, Sofia: Sibi, 2010, p.407

<sup>361</sup> Stancheva-Mincheva, Vesela Commentary on the Code of Private International Law: comparison with acts of European law, Sofia: Sibi, 2010, p.501; Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.38

<sup>362</sup> Todorov, Todor Private International Law: The European Union and the Republic of Bulgaria 3rd revised. and extended edition, Sofia: Sibi, 2010, p.410

<sup>363</sup> Todorov, Todor Private International Law: The European Union and the Republic of Bulgaria 3rd revised. and extended edition, Sofia: Sibi, 2010, p.411; Stancheva-Mincheva, Vesela Commentary on the Code of Private

Finally, some Bulgarian scholars understand *locus damni* under Art. 4 (1) as *locus injuriae*<sup>364</sup>.

b. *the approach to the first rule of displacement in Art 4(2) in cases involving multiple parties or claims*

Bulgarian legal authors suggest that the application of Art. 4 (2) could lead to unjust outcome in cases involving multiple parties or claims, some of them with habitual residence in the same, but the others in different countries (due to differences in applicable law, some of the parties may be treated more favourably than the others). To avoid this, it is suggested in the above described cases Art. 4 (1) to apply, i.e. *lex loci damni* instead of *lex communis habitationis* 365.

Furthermore, it has been pointed out that the citizenship of the involved parties plays no role for deciding on the applicable law. What is relevant for this matter is where parties have their "habitual residence", as defined in Art. 23 of the Rome II Regulation<sup>366</sup>. Irrelevant are however the facts that (i) the habitual residence is illegal<sup>367</sup>, (ii) the factual duration of the residence is very short provided all the circumstance affirm undoubtedly the intention of the party to reside longer term in the particular place (for instance if the person rented a flat and found a job in a certain city, it is shown as intention of this person to have this city as their habitual residence)<sup>368</sup>.

In addition, the authors indicate that pursuant Art. 4 (2) "the person claimed to be liable" is a broader concept than the concept of a person who caused the damage, as it includes also the situation in which one person bears liability for another person who actually caused the damages (i.e. a parent for acts of minors)<sup>369</sup>. This solution of the Rome II Regulation however is criticized by some Bulgarian scholars who suggest an amendment of the Regulation in the sense that under Art. 4 (2) *lex communis habitationis* would be the one of the person who suffered the damage and the person who actually caused the damage i.e. "the person claimed to be liable" to be replaced by "the person who caused the damage" <sup>370</sup>. Arguments for this suggestion are taken from: Art. 15 (g) of the Rome II Regulation pursuant which the law applicable to non-contractual obligations under the Regulation shall govern also the liability for the acts of another person; furthermore, the person suffered damages would expect to receive the same remedy regardless the damage is cause by a person action on their own behalf or on behalf of someone else and finally, the person who takes benefits from the fact that someone else is acting on their behalf must take also the risks arising from these acts and of these risks is the application of the law of the person who directly caused the damage and the person who suffered the damage<sup>371</sup>.

Often *lex communis habitationis* is actually also *lex fori*, which decreases the administrative and financial burden of the parties, as they will not have to incur additional expenses for establishing the content of the applicable foreign law<sup>372</sup>.

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International Law: comparison with acts of European law, Sofia: Sibi, 2010, p.504; Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.49.

<sup>364</sup> Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.45. – who is making a reference to distinction between *Verletzungsort/Erfolgort* and *Schadensort* made German International Private Law and thinks that pursuant Article 4 (1) of the Rome II Regulation, the applicable law is *Verletzungsort*, not *Schadensort*.

<sup>365</sup> Todorov, Todor Private International Law: The European Union and the Republic of Bulgaria 3rd revised. and extended edition, Sofia: Sibi, 2010, p.410

<sup>366</sup> Todorov, Todor Private International Law: The European Union and the Republic of Bulgaria 3rd revised. and extended edition, Sofia: Sibi, 2010, p.412; Stancheva-Mincheva, Vesela Commentary on the Code of Private International Law: comparison with acts of European law, Sofia: Sibi, 2010, p.508; Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.58

<sup>367</sup> Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.61

<sup>368</sup> Stancheva-Mincheva, Vesela Commentary on the Code of Private International Law: comparison with acts of European law, Sofia: Sibi, 2010, p.508

<sup>369</sup> Stancheva-Mincheva, Vesela Commentary on the Code of Private International Law: comparison with acts of European law, Sofia: Sibi, 2010, p.510

<sup>370</sup> This is the solution of Article 105 (2) of Bulgarian International Private Law code.

<sup>371</sup> Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.64

<sup>372</sup> Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.56

The definition of Art. 23 of the Rome II Regulation of the habitual residence of companies and other bodies (corporate or unincorporated), namely their place of central administration, is criticized in Bulgarian legal literature. By differentiating "central administration", i.e. where the decisions about the company are taken from "main place of operations/activity", the authors argue that very often the exact place of central administration, especially in big companies operating globally, is difficult to find as it is more "inner" information of the companies and not so visible for the public, whereas the place(s) where the company operates and has its activity is more easily identifiable<sup>373</sup>.

Finally, Bulgarian authors that distinguish the moment of injury from the moment of occurring of damage, suggest restrictive interpretation of the Art. 4 (2) when it comes to the wording "at the time when the damage occurs", i.e. in the sense this is the moment of injury, no matter that the damage may occur later<sup>374</sup>. The time of the act that caused the injury/damage is irrelevant<sup>375</sup>.

*c. the approach to the escape clause in Art 4(3),*

Until recently *lex proxima* was unknown to Bulgarian legislation of delicts that recognized *lex loci delicti (lex loci damni)* and *lex communis habitationis*, however the approach has been well known among Bulgarian legal scholars<sup>376</sup>.

In general, the arguments "Pros" *lex proxima* summarized in Bulgarian doctrine are: the approach provides flexibility and neutrality; and arguments "Cons" – the approach causes unpredictability, which increases legal uncertainty, leaves a room for "forum shopping" and increases probability of applicability of *lex fori* (as courts tend to apply the law they know the best). Nevertheless, it is considered that in Art. 4 (3) of the Rome II Regulation these advantages and disadvantage of *lex proxima* are well balanced<sup>377</sup>.

The view is that the approach will have very limited application in the practice. There are two hypotheses in which the Art. 4 (3) will apply, namely: (i) when the delict is connected with another (pre-existing) legal relationship between the parties ("accessory connection mechanism") existing either by contract or by law. Examples of application when the tort/delict is connected with a contract<sup>378</sup> are: for delict between employees of one and the same employer or between partners in a company, contract for carriage of travellers or cargo (in accordance with the international transport conventions CMR, COTIF, CIV, CIM), or a sale contract when the damage is caused by the subject matter of the contract (in which case Art. 4(3) will derogate Art. 5 of the Rome II Regulation)<sup>379</sup> and even hitch-hike contract<sup>380</sup>; examples when the law applicable to the legal relationship based on the law will be applicable also to the tort/delict are: delict between spouses or between parents and children<sup>381</sup> or when the delict is connected with another delict<sup>382</sup>, (ii) other cases "manifestly more closely connected" – in these cases pursuant Art. 4 (3) *lex loci delicti (lex loci damni)* and *lex communis habitationis* could be replaced by *lex loci actus* or *lex communis patriae*<sup>383</sup>.

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<sup>373</sup> Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.65-67

<sup>374</sup> This position is accepted also in the case law - Judgement 8048/ 30.11.2017, civil case 3593/2017 Sofia City Court

<sup>375</sup> Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.68

<sup>376</sup> Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.72-74

<sup>377</sup> Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.74-75

<sup>378</sup> Todorov, Todor Private International Law: The European Union and the Republic of Bulgaria 3rd revised. and extended edition, Sofia: Sibi, 2010, p.412

<sup>379</sup> Stancheva-Mincheva, Vesela Commentary on the Code of Private International Law: comparison with acts of European law, Sofia: Sibi, 2010, p.511-512; Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.79-80

<sup>380</sup> Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.80

<sup>381</sup> Stancheva-Mincheva, Vesela Commentary on the Code of Private International Law: comparison with acts of European law, Sofia: Sibi, 2010, p.512

<sup>382</sup> Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.81

<sup>383</sup> For instance in car accidents in abroad - Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.83

Furthermore, legal authors express the opinion that when assessing the connection between the tort/delict and certain law, legal expectations of the involved parties about the law applicable to their relationship should be taken into consideration<sup>384</sup>. It may happen that the country with which the tort/delict is “manifestly more closely connected” is the country where the event giving rise to the damage occurred (*lex loci delicti commissi*)<sup>385</sup>.

The Art. 4 (3) would be applied by the courts *ex officio*<sup>386</sup>.

*d. the suitability of this set of rules to govern cases of **prospectus liability or other financial market torts***

No particular difficulties related to the suitability of this set of rules to govern cases of prospectus liability or other financial market torts have been described and discussed either in Bulgarian legal doctrine or in case law.

*7. The rule on **product liability** (Art. 5) and, where relevant, the interaction with the application of **1973 Hague Convention on the Law Applicable to Products Liability**;*

As is known, the legislation of the EU Member States regarding the product liability is now harmonized<sup>387</sup>, therefore, Bulgarian doctrine takes the view that the conflict-of-law provisions of the Rome II Regulation would be applicable only to non-harmonized cases<sup>388</sup>.

Traditionally, even prior to the transposition of Directive 85/374 into Bulgarian legislation, in Bulgarian legal doctrine and case law the liability for damage caused by defective product has been qualified as delict liability (not as a contractual one)<sup>389</sup>.

Although the Rome II Regulation does not explicitly state a requirement, the product caused the damage to be defective, the systematic interpretation of its provision in connection with the provisions of Directive 85/374 leads some Bulgarian authors to the conclusion that such a requirement should exist, i.e. the product should not provide safety expected under the circumstances<sup>390</sup>.

Furthermore, there is an opinion in the legal literature that Art. 5 of the Rome II Regulation would apply to both B2C and B2B delicts, i.e. the person sustaining the damage could be consumer or trader<sup>391</sup>.

Bulgaria is not a party to the 1973 Hague Convention on the Law Applicable to Products Liability, however the Convention influenced the product liability provision of the Bulgarian Private International Law Code (Art. 106)<sup>392</sup>.

*8. The specific rule on **unfair competition** (Art. 6)*

The Rome II Regulation does not contain a definition of unfair competition, yet per argument of para. 11 of the Preamble, it can be concluded it must be an autonomous concept, i.e. not connected with the legal theory of any

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<sup>384</sup> Todorov, Todor Private International Law: The European Union and the Republic of Bulgaria 3rd revised. and extended edition, Sofia: Sibi, 2010, p.412

<sup>385</sup> Stancheva-Mincheva, Vesela Commentary on the Code of Private International Law: comparison with acts of European law, Sofia: Sibi, 2010, p.511

<sup>386</sup> Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.76

<sup>387</sup> Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products

<sup>388</sup> Todorov, Todor Private International Law: The European Union and the Republic of Bulgaria 3rd revised. and extended edition, Sofia: Sibi, 2010, p.414; Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.110

<sup>389</sup> Interpretation Judgement of Bulgarian Supreme Court 54/23.06.1986 - Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.111

<sup>390</sup> Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.114

<sup>391</sup> Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.116

<sup>392</sup> This provision is considered derogated by the Rome II Regulation - Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p. 110.



particular Member State. Some Bulgarian authors therefore suggest referencing to the Paris Convention for the Protection of Industrial Property Art. 10 bis (2) and (3) as an autonomous definition for unfair competition<sup>393</sup>.

When it comes to the concept of restriction of free competition, some authors consider para 23 of the Preamble of the Rome II Regulation providing clear guidance on the content of this concept, and additionally clarify that the list of hypotheses of restriction of competition in the paragraph, which refer to Art. 81 and 82 of the Treaty of EC (Art.101 and 102 of the TFEU) or by the law of Member States, is not exhaustive<sup>394</sup>.

The approach chosen by the European Union legislator, i.e. the law of the affected market (*lex loci competitionis*) to be the default for claims for unfair competition is supported in Bulgarian legal doctrine as it takes into consideration all interests that competition law aims to protect, namely of interests of competitors, of consumers and of market itself<sup>395</sup>.

In the hypothesis of Art. 6 (2) of the Rome II Regulation, when only one competitor is affected, for instance in case of illegally obtaining confidential information of competitor, solicitation of competitor's employees, influencing clients to terminate their contracts with the competitor, the applicable law will be *lex proximus, lex communis habitationis or lex loci delicti* (pursuant Art. 6 (2) in connection with Art. 4).

When the affected market actually covers more than one country, among which could be also non- Member States<sup>396</sup>, then *lex fori* of the seized court could apply (Art. 6 (3) b).

#### 9. The specific rule on **environmental damage** (Art. 7)

There are three points regarding the environmental damage worth mentioning, namely:

Firstly, as per the opinion in legal doctrine if the Bulgarian law is applicable, the claim for damages and the claim for injunction (to cease the breach and rectify the pollution) can be cumulatively brought even though each one of them could be governed by different law, for example if a Greek claimant sues a Bulgarian pollutant for cross-border pollution, then the claim for damages governed by Greek law (*lex loci damni*) can be joint with the claim for ceasing the breach, to which Bulgarian law will apply<sup>397</sup>.

Secondly, some Bulgarian authors emphasize a variation between Bulgarian and English/German wording in the Art. 7 of the Rome II Regulation. More specifically, Bulgarian wording states that "*увреждане на околната среда или претърпени имуществени или неимуществени вреди в резултат на такова увреждане*" ("environmental damage or pecuniary and non-pecuniary damage as a result of such damage"), whereas the English version speaks about "environmental damage or damage sustained by persons or property as a result of such damage", and the German one – "*Umweltschädigung oder einem aus einer solchen Schädigung herrührenden Personen- oder Sachschaden*"<sup>398</sup>. The variation in the language versions is obvious and must be taken into consideration in law application as it could cause practical problems.

And finally, traditionally in Bulgarian Law the liability for environmental damage is a fault one (Art. 170 of the Environment Protection Law), whereas pursuant the Rome II Regulation it seems to be strict liability<sup>399</sup>. This leads to different legal regimes depending on whether the liability is only for "domestic" pollution or for cross-border one. Bulgarian legal doctrine supports amendment of domestic law and changing the fault liability to a strict one, same as under the Rome II Regulation.

#### 10. The specific rule on **infringements of intellectual property rights** (Arts. 8, 13)

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<sup>393</sup> Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.136

<sup>394</sup> Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.139

<sup>395</sup> Stancheva-Mincheva, Vesela Commentary on the Code of Private International Law: comparison with acts of European law, Sofia: Sibi, 2010, p.525

<sup>396</sup> Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.150

<sup>397</sup> Todorov, Todor Private International Law: The European Union and the Republic of Bulgaria 3rd revised. and extended edition, Sofia: Sibi, 2010, p.415

<sup>398</sup> Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.159-160

<sup>399</sup> Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.158

The rule is *lex loci protectionis*, i.e. law of the country for which protection is claimed (Art. 8 (1)), and this approach is accepted and supported in Bulgarian legal doctrine as it follows the principle of territorial protection of Intellectual Property (IP) rights<sup>400</sup>.

When a non-contractual obligation arises from an infringement of a unitary Community intellectual property right (see Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark), the law applicable shall, for any question that is not governed by the relevant Community instrument, be the law of the country in which the act of infringement was committed, i.e. *lex loci actus*.

According to some authors, the Bulgarian version of Art. 8 of the Rome II Regulation differs from versions in other languages, i.e. English and German, namely Bulgarian version states "правото на държавата, в която се търси закрилата на тези права" ("law of the country in which protection is claimed"), whereas the English version states "the law of the country for which protection is claimed". The Bulgarian version may lead to the incorrect conclusion that the law is *lex fori* (where the claim has been brought), which would be against the Rome II Regulation rule<sup>401</sup>.

#### 11. The specific rule on industrial action (Art. 9)

This rule would be applicable in cases similar to the example given by the legal author, namely for a claim for damages caused by the strike of personnel of a Bulgarian port to a foreign buyer whose goods were not loaded to the ships on time<sup>402</sup>.

Lex loci actus is the default, however it can be derogated by *lex communis habitationis* or by the law chosen by the parties (pursuant Art. 14) when certain conditions are met<sup>403</sup>.

Lex loci actus would be applied ex-officio by the courts<sup>404</sup>.

According to Bulgarian authors, Art. 9 of the Rome II Regulation deviates three times from the principle of autonomous concepts under the Regulation, namely: (i) the legal status of trade unions or of the representative organisations of workers is provided by the law of the Member States – para. 28 of the Preamble; (ii) the concept of industrial action, such as a strike action or lock-out, is governed by each Member State's internal rules – para. 27 of the Preamble, and (iii) the conditions relating to the exercise of such [industrial] action are in accordance with national law – para. 28 of the Preamble<sup>405</sup>.

### 2.3 Chapter III - Unjust Enrichment, *Negotiorum Gestio* And *Culpa In Contrahendo*

Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to the implementation of:

#### 12. The specific rule on **unjust enrichment** (Art. 10), including its relationship with the general rule for tort/delict in Art. 4.

Per argument of para. 11 of the Preamble of the Rome II Regulation, for the purposes of this Regulation some concepts in it should be understood as autonomous concepts. Bulgarian authors however express doubts about how this would work in practice, given that, for instance Bulgarian courts know only the Bulgarian concept of non-contractual

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<sup>400</sup> Todorov, Todor Private International Law: The European Union and the Republic of Bulgaria 3rd revised. and extended edition, Sofia: Sibi, 2010, p.417; Stancheva-Mincheva, Vesela Commentary on the Code of Private International Law: comparison with acts of European law, Sofia: Sibi, 2010, p.548; Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.170

<sup>401</sup> Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.168-169

<sup>402</sup> Todorov, Todor Private International Law: The European Union and the Republic of Bulgaria 3rd revised. and extended edition, Sofia: Sibi, 2010, p.416

<sup>403</sup> Stancheva-Mincheva, Vesela Commentary on the Code of Private International Law: comparison with acts of European law, Sofia: Sibi, 2010, p.549; Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.188

<sup>404</sup> Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.190

<sup>405</sup> Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.184-188

obligation, unjust enrichment, etc., and they would tend to apply only those concepts. This could result in application of the Bulgarian law for qualification of an event as unjust enrichment, when assessing the applicability of the conflict-of-law provision of Art. 10 of the Rome II Regulation<sup>406</sup>.

Art. 10 of the Rome II Regulation have already been invoked in a couple of Bulgarian cases<sup>407</sup>.

### *13. The specific rule on **negotiorum gestio** (Art. 11)*

No particular difficulties related to the specific rule on **negotiorum gestio** (Art. 11) have been described and discussed either in legal doctrine or in case law<sup>408</sup>.

### *14. The specific rule on **culpa in contrahendo** (Art. 12)*

*Culpa in contrahendo* is also considered an autonomous concept and for its definition a reference to the ESJ case law (namely, C-334/00) is made in Bulgarian legal literature<sup>409</sup>.

Some authors share the view that Art. 12 (1) of Rome II Regulation represents actually a reference to Regulation 593/08 (Rome I) and 1980 Rome Convention on the law applicable to contractual obligations<sup>410</sup>.

## 2.4 Chapter IV - Freedom of Choice

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

### *15. The implementation in legal/business practice and by courts of the rule on **freedom of choice**, any difficulties therein and **any discussion that has been carried out in your Member State regarding possible reasons which would justify the need to rethink it** (Art. 14)*

This concept has very limited impact in the legal practice – almost no application<sup>411</sup>. The probable explanation is that once the damage has occurred, and if the involved parties have a will to reach an agreement, they would settle their dispute on damages directly rather than first concluding an agreement on choice of law<sup>412</sup>.

Some authors criticize the naming of Chapter IV (and Art. 14) of the Rome II Regulation (version in Bulgarian), i.e. “Свобода на договаряне” (which means “Freedom of contract”). They suggest “Свобода на избор” (“Freedom of choice”) would be correct as freedom of contract and freedom of choice are two different concepts and the latter is the relevant one for the international delicts<sup>413</sup>.

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<sup>406</sup> Todorov, Todor Private International Law: The European Union and the Republic of Bulgaria 3rd revised. and extended edition, Sofia: Sibi, 2010, p.418

<sup>407</sup> Judgement 963/23.05.2019 civil case 56/2019 Sofia City Court; Ruling 179/ 13.01.2020 civil case 2576/2019 Sofia City Court.

<sup>408</sup> See Ruling 500/ 28.08.2018 civil case 379/2018 District Court - Dobrich

<sup>409</sup> Todorov, Todor Private International Law: The European Union and the Republic of Bulgaria 3rd revised. and extended edition, Sofia: Sibi, 2010, p.422

<sup>410</sup> Todorov, Todor Private International Law: The European Union and the Republic of Bulgaria 3rd revised. and extended edition, Sofia: Sibi, 2010, p.423

<sup>411</sup> Todorov, Todor Private International Law: The European Union and the Republic of Bulgaria 3rd revised. and extended edition, Sofia: Sibi, 2010, p.425; in the available sources only one judgement has been found: Judgement 48/ 23.07.2020 civil case 199/2019 Supreme Court of Cassation

<sup>412</sup> Todorov, Todor Private International Law: The European Union and the Republic of Bulgaria 3rd revised. and extended edition, Sofia: Sibi, 2010, p.425

<sup>413</sup> “Freedom of choice” is the right of the parties to opt out for the law of another country i.e. to choose that both dispositive and overriding mandatory provisions (imperative) rules of the applicable law will be replaced by both dispositive and imperative rules of the chosen law, where as “freedom of contract” means the right of the parties to choose to deviate only from the dispositive rules of the law, but still all imperative rules will remain applicable - Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.87-88

Although the Rome II Regulation does not explicitly state so, in Bulgarian legal doctrine it is accepted that the Regulation allows the parties of delict relationship to choose only state law (rules enacted by state authorities), but not *soft law*. Nevertheless, it is supported opinion that the freedom of choice could entail also the right of parties to choose, within the limits set by overriding mandatory provisions of the chosen applicable law, also *soft law*, such as the Principles of European Tort Law<sup>414</sup>.

Legal authors foresee practical difficulties caused by the requirement of the freedom of choice not to be applied in prejudice of the rights of third parties (Art. 14 last para.). This may create a "split" of the rules applicable to the delict, namely one set of legal rules will be applicable between the parties (the law they have chosen) and another set of rules would apply to the relationships between the parties and any third parties (such as insurers, family members/heirs, creditors, etc.). In this situation, the court hearing the case could face difficulties to establish and apply multiple legal regimes to one and the same delict<sup>415</sup>.

Finally, some authors suggest interpretation by analogy in law of the Rome II Regulation in the sense that the freedom of choice cannot have as a result to deprive the weaker party of the protection afforded to them by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable (analogy in law with Art. 6 para. 2 and Art. 8 para. 1 of the Rome I Regulation)<sup>416</sup>.

## 2.5 Chapter V - Common Rules

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

*16. The scope of the exclusion of 'evidence and procedure' in Art 1(3) and any difficulties in relation to that exclusion or to questions of formal validity or the burden of proof (Arts. 21-22)*

The position taken in Bulgarian doctrine is that burden of proof and presumptions are governed by the law applicable to the delict (i.e. by substantive law), whereas all other procedural aspects of evidences are governed by *lex fori* i.e. procedural law of the seized court<sup>417</sup>.

*17. The approach in your Member State to questions of pleading, proof and application to individual cases of the substantive rules of the law applicable under the Rome II Regulation governing non-contractual obligations.*

Bulgarian Private International Law Code contains provisions on establishment of content of foreign applicable law, its interpretation and application as well as some special rules on public policy mandatory rules and reciprocity.

Pursuant Art. 43 of BPILC the court or another authority applying the law shall of its own motion establish the content of the foreign law. The said court may resort to the methods provided for in international treaties, may request information from the Ministry of Justice or from another body, as well as request opinions from experts and specialized institutions<sup>418</sup>. The parties may present documents establishing the content of the provisions of foreign law on which they base their motions or objections, or otherwise assist the court or another authority applying the law. Upon choice of applicable law, the court or another authority applying the law may order the parties to assist in the establishment of the content of the said law. The party that invokes foreign law bears the expenses for its establishment. As these are

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<sup>414</sup> Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.99

<sup>415</sup> Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.104

<sup>416</sup> Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.105

<sup>417</sup> Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.242

<sup>418</sup> The European Convention on Information on Foreign Law is in force for Bulgaria - Stancheva-Mincheva, Vesela Commentary on the Code of Private International Law: comparison with acts of European law, Sofia: Sibi, 2010, p.79.

proceeding expenses, they can be imposed on the other party, if they lose the case<sup>419</sup>. Not only the foreign law rules, but also relevant foreign case law must be established<sup>420</sup>.

Furthermore, according to Art. 44 of BPILC the foreign law shall be interpreted and applied as it is interpreted and applied in the state which created the said law. Non-application of a foreign law, as well as its misinterpretation and misapplication, shall be a ground for appeal.

In addition, Art. 45 of BPILC states that a provision of a foreign law determined as applicable by the Code shall not apply only if the consequences of such application are manifestly incompatible with Bulgarian public policy. Incompatibility shall be evaluated while taking account of the extent of connection of the relationship with Bulgarian public policy and the significance of the consequences of application of the foreign law. Where an incompatibility referred to in previous paragraph is established, another appropriate provision of the same foreign law shall be applied. In the absence of such a provision, a provision of Bulgarian law shall apply, if necessary for settlement of the relationship.

When it comes to special mandatory rules, Art. 46. (1) BPILC provides that the provisions of the Code shall not affect the application of the mandatory rules of Bulgarian law which, considering their subject matter and purpose, must be applied notwithstanding the referral to a foreign law. The court may have regard to the mandatory rules of another state with which the relationship has a close connection if the said rules, according to the law of the state that created them, must be applied notwithstanding what law has been determined as applicable by a conflict of laws rule of the Code. To decide whether to take into account such special mandatory rules, the court must have regard to the nature of the said rules and the subject matter thereof, as well as to the consequences of the application or non-application thereof.

And finally, Art. 47 of BPILC proclaims that the application of a foreign law shall be independent of any requirement of reciprocity. In case a statutory instrument requires reciprocity, the existence of such reciprocity shall be presumed until the contrary is established.

*18. The delimitation of the scope of the applicable law (Art. 15(a)-(h)), including any difficulties as its relationship to the issues addressed at points 16 17 above)*

The very broad scope of Art. 15 aims at: (i) identical outcome of judgement for the same factual situations regardless of whether they are domestic or with international aspect (ensuring legal certainty); (ii) international harmonisation of judgement – regardless of seized court (of which country) the applicable law will be the same; (iii) taking into consideration the legal expectation of the parties involved (that all aspects of the delict will be governed by the applicable law as a whole, not only some of the aspects).

There are two practical obstacles for this very broad scope – so called “preliminary questions” that may be governed by the law different from the law applicable to the delict (for instance, the questions about the ownership of the good/product that caused the damage, which will be governed by *lex rei sitae*) and the concurrence between contractual and delict liability<sup>421</sup>.

The list of topics in Art. 15 of the Rome II Regulation is not exhaustive and it includes:

a) the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them – according to Bulgarian legal literature this entails also the questions about unlawfulness of the act caused damage<sup>422</sup>, type of liability (strict or fault), definition of fault<sup>423</sup>, causal link between event and damage<sup>424</sup>, ability to bear

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<sup>419</sup> Stancheva-Mincheva, Vesela Commentary on the Code of Private International Law: comparison with acts of European law, Sofia: Sibi, 2010, p.81.

<sup>420</sup> Stancheva-Mincheva, Vesela Commentary on the Code of Private International Law: comparison with acts of European law, Sofia: Sibi, 2010, p.82

<sup>421</sup> Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.210-212

<sup>422</sup> Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.226

<sup>423</sup> Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.227

<sup>424</sup> Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.229

delict liability (“*деликтоспособността*”) that would be governed by the law applicable to the delict, not by the law applicable to the person liable for delict<sup>425</sup>;

(b) the grounds for exemption from liability, any limitation of liability and any division of liability – legal authors list in this category *force majeure*, fundamental change of circumstances, fault of victim or third parties;

(c) the existence, the nature and the assessment of damage or the remedy claimed – more specifically, whether it includes pecuniary or non-pecuniary damage, direct damage, loss of profits, exemplary or punitive damages, claim for which can be rejected based on public order considerations (see para 32 of the Preamble), etc.;

(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 – for example – levy, injunction<sup>426</sup>;

(e) the question whether or not a right to claim damages or a remedy may be transferred, including by inheritance – some authors however think that the circle of heirs will be governed by the law applicable to the inheritance of the deceased, and not by the law applicable to the delict<sup>427</sup>;

(f) persons entitled to compensation for damage sustained personally - the preliminary questions whether a person has a status of a spouse, born or adopted child will be governed by the law under which this relationship occurred and not as per *lex loci delicti*<sup>428</sup>;

(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 - the set-off is not covered by the provisions of the Rome II Regulation, therefore Bulgarian doctrine suggests that it will be governed by the law applicable to the “passive claim”<sup>429</sup>. Agreements for debt remission or settlement will be governed by the Rome I Regulation<sup>430</sup>. The eligibility of agreements of exclusion or limitation of liability for damage caused by the delict must be governed by the law applicable to the delict, however the agreements themselves (their conclusion, validity, interpretation and performance) will be governed by the law chosen by the parties or by the Rome I Regulation<sup>431</sup>.

#### 19. The application of the rule on *overriding mandatory provisions* (Art. 16)

No particular difficulties related to the rule on *overriding mandatory provisions* (Art. 16) have been described and discussed either in Bulgarian legal doctrine or in case law.

#### 20. The application of the specific rule on *direct action against the insurer of the person liable* (Art. 18)

Art. 18 governs only the right of the person having suffered damage to bring his or her claim directly against the insurer; to insurer’s liability the law applicable to the insurance contract will apply<sup>432</sup>. This provision is very often used in practice and there is a plenty of judgements in this regard in Bulgarian court practice.

#### 21. The application the specific rule on *subrogation* (Art. 19)

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<sup>425</sup> Todorov, Todor Private International Law: The European Union and the Republic of Bulgaria 3rd revised. and extended edition, Sofia: Sibi, 2010, p.427; Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.213

<sup>426</sup> Todorov, Todor Private International Law: The European Union and the Republic of Bulgaria 3rd revised. and extended edition, Sofia: Sibi, 2010, p.427

<sup>427</sup> Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.222

<sup>428</sup> Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.221

<sup>429</sup> Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.236

<sup>430</sup> Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.236

<sup>431</sup> Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.240

<sup>432</sup> Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.252

No particular difficulties related to the specific rule on subrogation (Art. 19) have been described and discussed either in Bulgarian legal doctrine or in case law<sup>433</sup>.

22. *The application of the specific rule on **multiple liability** (Art.20)*

No particular difficulties related to the specific rule on **multiple liability** (Art. 20) have been described and discussed either in Bulgarian legal doctrine or in case law.

## 2.6 Chapter VI - Other Provisions

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

23. *The implementation of the concept of habitual residence in the Rome II Regulation, with reference both to persons covered by Art 23 and natural persons acting otherwise than in the course of business*

As mentioned above, *lex communis habitationis* as per Art. 4 (2) could lead to unjust outcome in cases involving multiple parties or claims some of them with habitual residence in the same and some – in different countries. To avoid this, it has been suggested in these cases Art. 4 (1) to apply i.e. *lex loci damni* instead of *lex communis habitationis*.

24. *The application of and any difficulties with the specific rules on exclusion of renvoi (Art.24) and States with more than one legal system (Art.25)*

No particular difficulties related to these specific rules have been described and discussed either in Bulgarian legal doctrine or in case law.

25. *The application of and any difficulties with the specific rule on public policy of the forums (Art. 26)*

This provision has very limited practical importance and is rarely used in the legal practice<sup>434</sup>. Theoretically, it could be applied and the public policy argument could be invoked when: (i) the claim aims at results different from compensation of damages suffered, i.e. in case of punitive or exemplary damages; (ii) for extremely long prescription period or even for lack of prescription period, or (iii) to protect rights and freedoms from the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>435</sup>.

A Bulgarian court invoked this clause when the law applicable to the delict, i.e. (Greek law) provided for a maximum cap of the compensation for non-pecuniary damage, whereas such did not (and still does not) exist in the relevant Bulgarian law. The court assessed the compensation cap as manifestly incompatible with the public policy of the forum and did not apply it<sup>436</sup>.

26. *Practical **interaction between the Rome II Regulation and other EU and international legal instruments, in specific areas such as **environmental damages, intellectual property rights or data protection** (Arts. 27, 28, 29)***

The available sources do not indicate any practical problems in Bulgaria with regards to the interaction between the Rome II Regulation and other EU and international legal instruments in the mentioned specific areas.

## 2.7 Comments on other Practical Problems

*These areas are **of particular interest** for the Commission. Please be as precise as possible regarding any issue that has been reported on:*

27. *The impact of the application of the **1971 Hague Convention** on the law applicable to traffic accidents on legal certainty (where relevant for your Member State)*

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<sup>433</sup> Judgement 619/ 02.04.2019 civil case 1676/2018 Sofia City Court

<sup>434</sup> Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.282.

<sup>435</sup> Mouseva, Boryana Delict in private international law, Sofia, Sibi, 2011, p.283-288

<sup>436</sup> Judgement 1478/ 28.02.2019 civil case 6229/2015 Sofia City Court.

Bulgaria is not a party to the 1971 Hague Convention on the law applicable to traffic accidents on legal certainty.

*28. Any other practical problems with respect to the application or interpretation of the Rome II Regulation, including but not limited to the suitability of the mosaic approach*

The available sources do not indicate such practical problems in Bulgaria.

### 3. Comments on areas of interest

*These areas are of particular interest for the Commission. Please be as precise as possible regarding any issue that emerged in your Member State regarding:*

*29. The exclusion of violations of privacy and rights relating to personality, including defamation, from the scope of the Rome II Regulation and any difficulties arising out from differences among Member States' rules in cross-border situations*

As mentioned above, the obligations arising out of a violation of rights relating to the personality and rights related to protection of personal data by the mass communication media are governed by Art. 108 (1) of Bulgarian Private International Law Code, which is influenced by the initial Proposal of the Regulation from 2003 that contained similar provision.

The available sources do not contain information about invoking in practice the provision of Art. 108 (1) of Bulgarian Private International Law Code therefore it is difficult to assess its suitability to tackle cross-border situations of violations of personal rights.

*30. Any comment regarding the Interplay of the Rome II Regulation with the treatment of defamation and data protection, and, in these areas, the relevance of Strategic Lawsuits Against Public Participation (SLAPPs)*

The available sources do not contain information about the application, in Bulgarian practice, of the provisions of the Rome II Regulation to cases of defamation and data protection, therefore it is difficult to comment this topic.

Regarding SLAPPs, on 20 April 2021 an article entitled "*Dogan, Peevski, Borisov, Bulgartabak, smuggled tobacco and money for terrorism*"<sup>437</sup> was published on the website for investigative journalism Bivol ([www.bivol.bg](http://www.bivol.bg)) ("the Article"). The Article was making a reference to a secret report,<sup>438</sup> which according to the publication, could be dated around the end of 2016 or the beginning of 2017 and appeared to be a work of a powerful institutional or private intelligence body with access to impressive intelligence resources and unlimited amounts of sensitive trade information ("the Report"). In the Article it was stated that, even though the Bivol acquired the Report some time ago from reliable sources abroad, it was published only now as time was required for verification of certain attributes and data in the report so its status as a legitimate document could be confirmed and it would be established as fit for publication.

In summary, the article described that under guidance from certain Bulgarian political leaders (Ahmed Dogan and Delyan Peevski), a Bulgarian tobacco holding company Bulgartabac Holding Group ("Bulgartabac") developed a complex financial, legal and logistical system for the manufacturing and distribution of cigarettes and, even though the merchandise was officially shipped to legitimate destinations, it was in fact distributed as contraband goods in the Middle East: in Iraq, Syria, Iran and Turkey. Allegedly Bulgartabac's smuggling network covered mainly Bulgaria, Dubai and a dozen ports in the Black Sea and Mediterranean, also making use of traditional smuggling channels in the Middle East. Their illegal trafficking and murky exports contributed to the financing of organisations listed as terror ones in Turkey, NATO and the European Union.

Further in the Article it was stated that according to the Report a Bulgarian bank - the First Investment Bank ("FIB") was involved in these operations and to certain extent due to this, it had a growing public image of a "mafia bank".

On 23 April 2021 Bivol website published parts of an official letter, sent by an UK law firm on behalf of FIB to them, with which letter Bivol was asked to remove the Article from its website or anywhere it may have been published and

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<sup>437</sup> "Доган, Пеевски, Борисов, Булгартабак, контрабанда и финансиране на тероризма" available at <https://bivol.bg/en/dogan-peeovski-borisov-bulgartabak-smuggled-tobacco-and-money-for-terrorism.html>.

<sup>438</sup> Available at <https://bivol.bg/wp-content/uploads/2021/04/bt-report-bw-reduced.pdf>.



to confirm no later than 17:00 (CET) on 23 April 2021 that the Article had been removed from the website and would not be published by Bivol or anyone acting on its behalf to any third party by any means. Additionally in the letter it was stated that should Bivol failed to removed/take down the Article and provide that confirmation, FIB would take legal action seeking court orders compelling Bivol to do so as well as damages.

*31. The extent to which Rome II Regulation has been applied to corporate abuses against human rights and lays down an effective set of rules to regulate non-contractual liability;*

The available sources do not contain information about applying in practice the provisions of the Rome II Regulation to corporate abuses against human rights, therefore it is difficult to comment this topic.

*32. The impact of the development of artificial intelligence on the Rome II Regulation, and in particular on the suitability of the rules that it contains to regulate non-contractual liability.*

The development of artificial intelligence (AI) and its impact on human life and society, including liability for damages, has already being discussed in Bulgaria, yet the discussion is mainly theoretical (i.e. drafting of strategies, academic conferences, etc.)<sup>439</sup>.

The available sources do not contain information about invoking in practice the provisions of the Rome II Regulation in connection with the AI, including liability for damages.

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<sup>439</sup> For instance – Proposal for National Strategy on AI drafted by a team of the Bulgarian Academy of Sciences - <http://www.strategy.bg/FileHandler.ashx?fileId=21904> [last retrieved September 30, 2020]; Conference „ARTIFICIAL INTELLIGENCE: INTELLIGENCE VS. ETHICS“ [https://www.uni-sofia.bg/index.php/bul/novini/novini\\_i\\_s\\_bitiya/konferenciya\\_artificial\\_intelligence\\_intelligence\\_vs\\_ethics](https://www.uni-sofia.bg/index.php/bul/novini/novini_i_s_bitiya/konferenciya_artificial_intelligence_intelligence_vs_ethics) [last retrieved September 30, 2020]

#### 4. List of national case law

<u>Court or tribunal</u>	<u>Case name and reference number</u>  <u>Reference to decision of the Court of Justice if applicable</u>	<u>Date</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings (only for key cases)</u>
Sofia City Court	8048	30.11.2017	Art.3 Art.4 (1)	Road accident	Rome II Regulation led to application of law of a non-Member State (Serbia)
Regional Court - Russe	675	05.06.2017	Art. 4 (2) Art. 17 Art.18 Art. 23	Work accident/Claim against Insurer	Between parties with permanent residence in Bulgaria for accident abroad (Romania)
Sofia City Court	4923	20.07.2018	Art.18	Road accident/Claim against Insurer	Bulgarian law would apply to a claim for damage of worsen health, when injury was caused by a car accident in Belgium, but deterioration of health status occurred at later in Bulgaria
Sofia City Court	619	02.04.2019	Art.18 Art.19	Road accident/Claim against Insurer	Subrogation of the insurer that paid expense for medical treatment of person suffered damages in a car accident

Sofia City Court	1342	15.08.2014	Art.18	Road accident/Claim against Insurer	Temporal application of Bulgarian Private International Law Code and Rome II Regulation
Sofia City Court	16198	11.08.2014	Art.18	Road accident/Claim against Insurer	Taking into consideration prices and fees on the market where the damage occurred when defining the compensation i.e. car accident occurred in Bulgaria, car reparation was done in Germany. The compensation for damage was based on average market prices of materials and labour fees in Bulgaria (where the damage occurred)
Sofia City Court	12837	26.08.2016	Art.18	Road accident/Claim against Insurer	Opposite to Judgement 16198 – not taking into consideration prices and fees on the market where the damage occurred when defining the compensation i.e. car accident occurred in Bulgaria, car reparation was done in the Netherlands. The compensation for damage was based on actual prices of materials and labour fees paid for the reparation in the Netherland not as per average prices in Bulgaria (where the damage occurred)
District Court - Dobrich	500	28.08.2020	Art. 11		Claim against owners of apartments in a building for due expenses for maintenance of jointly used parts of the building falls outside the scope of the Rome II Regulation
Sofia City Court	8091	21.12.2018	Art. 19 Rome II Art.7 (3) Rome I	Road accident/Claim against Insurer	Application of Rome I and Rome II

Sofia City Court	963	23.05.2019	Art.10	Unjust Enrichment	Unjustified bank transfer
Sofia City Court	179	13.01.2020	Art.10	Unjust Enrichment	Unjustified bank transfer
Supreme Court of Cassation	48	23.07.202	Art. 14 (1)	Ship accident, Freedom of choice	Accident with tour boat on lake Ohrid (the North Macedonia), but that parties chosen Bulgarian law as applicable
Court of Appeal - Sofia	1555	13.07.2015	Art. 2 (3)	Damage that is likely to occur	As a defence against <i>rei vindication</i> , the defendant invoked Rome II Regulation and claim for future damage.
The Commission for Protection of Competition	391	29.03.2011	Art.6		Opinion in public consultation initiated by the Commission on collective action for injunction and damages
Sofia City Court	1478	28.02.2019	Art.26		A cap of non-pecuniary damage incompatible with the Bulgarian public policy

# Croatia

## Executive Summary

- There is a different level of awareness of legal practitioners, businesses and citizens in Croatia of the Rome II Regulation. While legal practitioners (particularly judges) have knowledge about its application, citizens are unaware of the existence of such an EU instrument.
- Due to Croatia's late accession to the EU in 2013, the operation of the Rome II Regulation in Croatian courts is limited to a few categories of disputes while in others, court practice is still in very early stages of development. The Rome II Regulation is often applied in traffic accidents while in categories such as environmental damage, product liability, unfair competition etc. there is either no cases, or a single case or few cases recorded.
- Another major problem with acquiring an insight into court practice in which the Rome II Regulation was applied is caused by the fact that there is no systematic approach to collection of relevant data or statistics regarding application of EU instruments, including the Rome II Regulation in Croatia, which is accessible. The collected case law for this Report can be used as a representative sample, since it concerns cases which were collected by the largest Croatian courts (Municipal Civil court and Commercial court in Zagreb).
- The doctrinal discussion in Croatia recently engaged in a discussion on the application of the Regulation to specific areas and highlighted certain trends and issues (mainly concerning the application in the field of traffic accidents, unfair competition and violations of privacy). One issue which has not been sufficiently discussed in the legal literature, but it is obvious from the case law that there are difficulties in its understanding is the interaction between the application of the Rome II Regulation and the **1971 Hague Convention** on the law applicable to traffic accidents to disputes involving citizens of MS and third country citizens.
- At a political level, there is no relevant debate on the application of the Rome II Regulation in Croatia. At a doctrinal level, there has been some discussion on the application of the Rome II Regulation to areas excluded from the scope of its application (such as violations of privacy) under Croatian Private International Law Act (PIL Act).
- Judges do not report any difficulties with respect to applying the category of "civil and commercial matters." (see 1) However, the legal literature questions and debates the appropriateness of the exclusion from the scope of the Rome II Regulation of the same categories, which were excluded from the Rome Convention. In addition, legal theorists raise an issue about the effect of the decision of the Croatian legislator to widen the scope of application of the provisions of the Rome II Regulation to categories of disputes excluded from its scope (Art. 1(1)-(2)). Since for now, there is no court practice, it is impossible to predict the range of possible benefits or problems related to it.
- When the Rome II Regulation was first introduced, there was criticism from the legal theory that *ratione temporis* application was regulated by two opposite concepts of "application in time" and "date of application" (see 2). As to current state and the practical application, there are still issues judges face in the determination of the temporal scope of the Rome II Regulation. This is obvious from the cases presented in the Report (see 2), that are representative of situations in which the courts are uncertain of the temporal scope of the Rome II Regulation or the representative of the parties (lawyers) appeal without ground, claiming erroneous application of the substantive (applicable) law due to the misinterpretation of the provision on the temporal scope of the Rome II Regulation.
- There are difficulties arising out of the interpretation of the concept of non-contractual obligations, where there are both elements of contractual and non-contractual obligation. The Regulation does not bring any guidelines how to differentiate between them. Since Croatian judges are left to interpret the concept of non-contractual obligation by relying on *lex fori* (national law), difficulties may arise in its understanding. Namely, in comparison to the new Croatian PIL Act, the previous Croatian PIL Act (ZRS) provided for a narrower concept of a "tort statute" (Art 28 ZRS). (see 3).

- The interpretation of the Rome II Regulation and its relationship with other EU instruments is challenging for Croatian legal practitioners. In example, judges will not always be aware that determination of the substantive scope and the differentiation between obligationes quae ex contractu nascitur and obligationes quae ex delicto nascitur also requires the judge to consider the interpretation of the term tort (delict) in case law of the CJEU on Brussels I and Brussels I Recast. The quality of the translation of EU instruments, including the Rome II Regulation is additionally burdensome for legal practitioners. (see 5)
- Although in the initial stages of the application of the Rome II Regulation in Croatia, there were doubts whether legis loci damni will result in inflexible or insufficiently flexible legal solutions in the future practice, there seems to be no problem with the application of the general rule provided in Art 4. (see 6)
- The Croatian legal theory warns of the problems caused by the application of a specific rule on unfair competition (Art 6) in regard to compensation of damage sought in a follow-up procedure. National court would be bound by a decision of the EC or a national public entity of a MS on the liability for the act of unfair competition. However, if the EC or a national public entity of a MS does not render a decision establishing liability, but instead decides that conditions for initiating the procedure were not met, there is still a possibility for the claimant to initiate a separate national procedure for protection of his subjective rights caused by the act of unfair competition. As prescribed under Art 58/1/13 Croatian Act on the protection of market competition, it is possible for the national court to decide that there was no distortion of competition in such a case. Although the Act on the protection of market competition allows the national entities to decide that there was no violation of national law on unfair competition as well as violation of EU legislation on unfair competition, this would be contrary to the EU competition law and the case law of CJEU. The case AZTN v Hrvatski Telekom is illustrative of this problem. (see 8)
- There is insufficient insight into the case law on application of Rome II Regulation to environmental damage cases and no relevant legal literature revealing the practical issues. Hence, the conclusion on the smooth operation of Art 7 can be given at the level of a presumption. (see 9)
- Given the strict nature of the provision of Art 8 Rome II Regulation, there is no possibility to choose the law under Art 14 Rome II Regulation and apply it to a non-contractual obligation arising from an infringement of an intellectual property right, or to apply the provision, which allows the application of lex firmae habitationis communis or the escape clause. Hence, according to Croatian legal theory the EU legislator should deliberate allowing the choice of law in cases of infringement of an intellectual property rights (except concerning establishing unlawfulness), especially in situations where the infringement involves parties from multiple MS. (see 10)
- Similar to the non-contractual obligation arising from an infringement of an intellectual property right, the judges report no issues with the operation of the specific rule on unjust enrichment (Art. 10). and there is no relevant legal literature highlighting the practical issues. The available case described in detail, provides for the same conclusion. (see 12)

## 1. Introduction

- *How aware of the Rome II Regulation are practitioners, businesses and citizens in your Member State?*

Legal practitioners, particularly judges are well aware of the Rome II Regulation, businesses are aware to some extent, but Croatian citizens overall have little knowledge of the EU instruments applicable in cross-border cases. Although judges are well aware of the Rome II Regulation, it is applicable to a small number of cases and only concerning few categories of disputes.

- *Is the Rome II Regulation generally known and applied by courts in your Member State?*

The Rome II Regulation is generally known and applied by courts. But, it is obvious from the available case law that its application is limited to certain areas while in others, court practice is still in very early stages of development. This is connected to Croatia's late accession to the EU in 2013. Namely, judges estimate that the full application of the Rome II Regulation at Croatian courts did not begin before 2016 and many complex cases are probably still pending. The reason behind this is the fact that often proceedings are initiated short before the limitation period expires.

The Rome II Regulation is often applied in traffic accidents. In comparison, there is no available case law on unfair competition or violations of privacy (to which under Croatian law the provisions of the Rome II Regulation also apply).<sup>440</sup> Namely, the private law implementation of competition law, which assumes a request for damages, is still not common in Croatia. However, the legal theory warns that the occurrence of such cases in near future should not be dismissed easily.<sup>441</sup>

- *Are there any relevant statistics regarding the application of the Rome II Regulation in your Member State?*

In Croatia, there is no systematic approach to collection of relevant data or statistics regarding application of EU instruments, including the Rome II Regulation. The collected case law for this Report can be used as a representative sample, since it concerns cases, which were collected by the largest Croatian courts (Municipal Civil court and Commercial court in Zagreb). It is obvious that there is not a large number of cases in which the Rome II Regulation was applied before Croatian courts. Still, official statistics confirming such a conclusion is unavailable.

- *How important is the doctrinal discussion on the Rome II Regulation in your Member State?*

The Croatian legal theorists followed closely the introduction of the Rome II Regulation and there are mainly papers on its general characteristics. Few recent papers engage in a discussion on the application of the Regulation to specific areas and highlight certain trends and issues (mainly concerning the application in the field of traffic accidents, unfair competition and violations of privacy). One issue which has not been sufficiently discussed in the legal literature, but it is obvious from the case law that causes problems is the interaction between the application of the Rome II Regulation and the **1971 Hague Convention** on the law applicable to traffic accidents to disputes involving citizens of MS and third country citizens.

- *Are there specific issues concerning the Rome II Regulation that have caused debate at a doctrinal or political level?*

There is no debate at a political level. At a doctrinal level, there have been recent discussions on the application of the Rome II Regulation to violations of privacy under Croatian Private International Law Act<sup>442</sup> (hereinafter: PIL Act).

## 2. Analysis of the Rome II Regulation

### 2.1 Chapter I – Scope and Interpretation

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to :*

1. *The determination of the material scope of application of the Rome II Regulation, including any difficulties in applying the category of “civil and commercial matters” or in defining the exact scope of any excluded matters (Art. 1(1)-(2))*

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<sup>440</sup> Kunda, Ivana, Pravo mjerodavno za povrede prava tržišnog natjecanja Zbornik Pravnog fakulteta Sveučilišta u Rijeci, vol. 39, no. 1, 183-214 (2018), p 206. Vrbljanac, Danijela, Pravo mjerodavno za povrede prava osobnosti u novom ZMPP-u: Je li prihvaćeno rješenje najbolje?, Godišnjak Akademije pravnih znanosti Hrvatske, vol. X, 1/2019, p 420.

<sup>441</sup> Kunda, Ivana, Pravo mjerodavno za povrede prava tržišnog natjecanja Zbornik Pravnog fakulteta Sveučilišta u Rijeci, vol. 39, no. 1, 183-214 (2018), p 206.

<sup>442</sup> Private International Law Act (Zakon o međunarodnom privatnom pravu (Official Gazette 101/17). The new Croatian PIL Act is a comprehensive codification of private international law and it establishes conflict-of-laws rules as well as rules on jurisdiction and recognition and enforcement of foreign decisions on status, family law matters, property law relationships, and other substantive legal relationships involving a foreign element. The 2017 PILA aligns the rules with the current trends in private international law, but, more importantly, it provides rules consistent with the principles and ideas of European private international law and the unification process of European private international law. Hoško, Tena; Zgrabljic Rotar, Dora, Application of the 1971 Hague convention on traffic accidents, Pravni vjesnik, 35(2019)3-4, p 184.

Judges do not report any difficulties with respect to applying the category of “civil and commercial matters”. However, legal theorists warn that although the exclusion of certain categories of matters which arise from contractual obligations was inspired by the Rome convention, this was not equally appropriate in regard to the Rome II Regulation. In some categories, such as non-contractual obligations arising out of the law of companies, maintenance obligations or succession the escape clause enables court to apply the same law to the non-contractual obligation and the basic legal relationship.<sup>443</sup> In example, in some MS the intentional avoidance of the obligation of maintenance may cause non-contractual obligation. If there was no exception, the judge would apply the general rule of the Rome II Regulation and apply the same national law to maintenance and request for damages, on the basis of the escape clause.<sup>444</sup>

From January 2019 and the beginning of the application of the new PIL Act, Croatian legislator decided to widen the scope of application of the provisions of the Rome II Regulation to categories of disputes excluded from its scope (Art. 1(1)-(2)).<sup>445</sup>

The new Croatian PIL Act establishes conflict-of-laws rules. Its aim is to simplify the *ratione materiae* application of the diverse legal sources of private international law that are in effect in Croatia. Croatian PIL Act has an explicit provision, which directs the courts to apply the Rome II Regulation to determine the applicable law in disputes over non-contractual obligations that fall within the scope of application of the Regulation. Moreover, according to the PIL Act, the law applicable to non-contractual obligations that fall outside the scope of the application of the Rome II Regulation, and are not governed by another provision of national or international law in force in Croatia, is also determined according to the provisions of the Rome II Regulation.<sup>446</sup> The explanation, which followed the introduction of the PIL Act, did not contain any reasoning of the decision of the Croatian legislator, the consequence of the application of the general rule (especially to violations of privacy). The reason behind it, according to legal theory, can be found in the lack of court practice, which could raise a doubt on the appropriateness of the chosen connecting factor.<sup>447</sup>

## 2. *The determination of the temporal scope of application of the Rome II Regulation (Arts 31-32)*

When the Rome II Regulation was first introduced, there was criticism from the legal theory as to the manner in which the temporal scope of the Regulation was envisaged. It was argued that *ratione temporis* application was regulated by two opposite concepts of “application in time” and “date of application”. According to Art. 31 “Regulation shall apply to events giving rise to damage which occur after its entry into force” which means twenty days after the publication in the Official Journal on 31 July 2007 and according to Art. 32 “Regulation shall apply from 11 January 2009, except for Article 29, which shall apply from 11 July 2008”. The latter date was considered more appropriate given the *vacatio legis* period. Also, it is relevant that the date of the “events giving rise to damage” was considered relevant instead of the date when the actual “damage occurred”. Hence it was possible to change the status of some civil torts which could occur before and after 11 July 2009 (for example, permanent ecological damage).<sup>448</sup>

Croatia became a MS on 1 July 2013, and since then the Rome II Regulation has had precedence over national conflict-of-laws rules that coincide with its scope of application. For the purpose of the transitory provisions of the Regulation, the date of Croatia’s accession is treated as the day when the Regulation entered into force in Croatia and

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<sup>443</sup> Kunda, Uredba Rim II ujednačena pravila, str. Uredba Rim II: ujednačena pravila o pravu mjerodavnom za izvanugovorne obveze u Europskoj uniji, Zbornik Pravnog fakulteta Sveučilišta u Rijeci (1991) v. 28, br. 2, 1269-1324 (2007), p1278.

<sup>444</sup> Kunda, Uredba Rim II ujednačena pravila, str. Uredba Rim II: ujednačena pravila o pravu mjerodavnom za izvanugovorne obveze u Europskoj uniji, Zbornik Pravnog fakulteta Sveučilišta u Rijeci (1991) v. 28, br. 2, 1269-1324 (2007), p1278.

<sup>445</sup> Vrbljanac, Danijela, Pravo mjerodavno za povrede prava osobnosti u novom ZMPP-u: Je li prihvaćeno rješenje najbolje?, Godišnjak Akademije pravnih znanosti Hrvatske, vol. X, 1/2019, p 420.

<sup>446</sup> Hoško, Tena; Zgrabljić Rotar, Dora, Application of the 1971 Hague convention on traffic accidents, Pravni vjesnik, 35(2019)3-4, p 184.

<sup>447</sup> Vrbljanac, Danijela, Pravo mjerodavno za povrede prava osobnosti u novom ZMPP-u: Je li prihvaćeno rješenje najbolje?, Godišnjak Akademije pravnih znanosti Hrvatske, vol. X, 1/2019, p 420.

<sup>448</sup> Bouček, Vilim, Uredba Rim II - Komunitarizacija Europskog međunarodnog delikatnog prava Zbornik radova Pravnog fakulteta u Splitu, god. 45, 2/2008., p 287.-304, at p 299-300.



it applies to events occurring after 1 July 2013 (Article 31 Rome II Regulation). The law applicable to events that occurred prior to that date is determined according to the rules of the earlier Croatian PIL Act (ZRSZ) and other rules of internal Croatian private international law.<sup>449</sup>

As to the practical issues in the determination of the temporal scope of the Rome II Regulation, there were difficulties before Croatian courts in interpreting whether the Rome II Regulation or the 1971 Hague Convention should apply. The cases presented below are representative of situations in which the courts are uncertain of the temporal scope and/or the representative of the parties (lawyers) appeal without ground, claiming erroneous application of the substantive (applicable) law.

*Issue 1 Determining whether the Rome II Regulation applies at the time before Croatia became a MS*

In Gžx-452/2014-3 County court in Split was correct to conclude that, although both Croatia and Republic of Slovenia are MS where the Rome II Regulation applies, it cannot be applied to the case at hand. Namely, the events giving rise to the damage occurred in 1982, long before the entry into force of the Rome II Regulation and its application would be contrary to Art 31 Rome II Regulation.

In case 2 Gž-1340/13 County court in Dubrovnik (as second instance court) confirmed the position of the municipal court, that the law applicable to a traffic accident which occurred in Bosnia and Herzegovina between Croatian citizens is determined according to Art 3 1971 Hague Convention. Namely, as the County court explained, the Rome II Regulation cannot be applied since at the time when the accident occurred, Croatia was not a MS. Also, ZRSZ is not applicable, since both Bosnia and Herzegovina and Croatia are Members to the 1971 Hague Convention, which takes precedence over the application of the national private international law rules.

*Issue 2 Determining that the Rome II Regulation applies at the time after Croatia became a MS*

In case Gž-1552/2019-2 the County court in Rijeka confirmed (inaccurately) the position of the municipal court that the Rome II Regulation applies to a traffic accident which occurred in Republic of Serbia and in which both the claimant and the defendant have their habitual residence/seat in Croatia. The court explained that the Rome II Regulation is applicable in Croatia, since it became a MS on 1 July 2013 and it has precedence over the application of 1971 Hague Convention. The court even held the defendant's referral to the differencing position of the Supreme Court and County courts in regard to the application of the 1971 Hague Convention as irrelevant, since it dated to the time prior to the introduction of the Rome II Regulation.

*3. The characterization of the **concept of "non-contractual obligations"**, its relationship to the concept of "contractual obligations" and any difficulties in relation to characterisation (Arts. 1(1), 2)*

Although for the purposes of the Rome II Regulation, the concept of non-contractual obligations should be understood as an autonomous concept, in some cases legal practitioners have difficulties to understanding and defining it. Difficulties arise where there are both elements of contractual and non-contractual obligation and the Regulation does not bring any guidelines how to differentiate between them. Hence, the application of the Regulation will be left to the judge's understanding and the interpretation of the concept of non-contractual obligation which arises from lex fori (national law). Some argue that this enhances legal uncertainty and may discourage parties from addressing the court and initiating proceedings.

The difficulties in the interpretation of the concept of non-contractual obligations in Croatia may arise from the fact that the previous Croatian PIL Act (Zakon o rješavanju sukoba zakona s propisima drugih zemalja u određenim odnosima, hereinafter: ZRS) provided for a narrower concept of a "tort statute" (Art 28 ZRS). Namely, in comparison to the concept of non-contractual obligations, the concept of tort statute under Croatian PIL law did not include quasi-delict (Art 27 ZRS).<sup>450</sup>

*4. The universal application of the Regulation (Art. 3)*

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<sup>449</sup> Hoško, Tena; Zgrabljic Rotar, Dora, Application of the 1971 Hague convention on traffic accidents, *Pravni vjesnik*, 35(2019)3-4, p 183.

<sup>450</sup> Bouček, Vilim, Uredba Rim II - Komunitarizacija Europskog međunarodnog delikatnog prava Zbornik radova Pravnog fakulteta u Splitu, 45(2008) 2, p 287.-304, at p 289.

There are no problems with the application of the provision. The judges in Croatia understand the meaning of the concept of universal application and apply it properly.

5. *The approach to interpretation of the Rome II Regulation, and in particular its relationship to other EU private international law instruments (including the recast Brussels I Regulation and the Rome I Regulation) (Recital (7))*

It is important to point out that for judges from Civil law countries such as Croatia, who are not used to defining and interpreting certain legal terms through the lens of interpretations given by the CJEU in its ruling, it might be challenging to understand the relationship of the Rome II Regulation and other EU private international law instruments. Namely, judges will not always be aware that determination of the substantive scope and the differentiation between *obligationes quae ex contractu nascitur* and *obligationes quae ex delicto nascitur* also requires the judge to consider the interpretation of the term tort (delict) in case law of the CJEU on Brussels I and Brussels I Recast.<sup>451</sup>

Another issue, which additionally complicates the interpretation in the context of Croatian legal practice, is the quality of the official translation of the Regulations to Croatian language. The basic provision of Art 6 (3) Rome II Regulation which determines the law applicable to a non-contractual obligation arising out of a restriction of competition instead of "the law of the country where the market is, or is likely to be, affected" is translated as "the law of the country where the act of unfair competition affected the market or is likely to affect it". It is clear from several official language versions (*law of the country where the market is, or is likely to be, affected*, njem. *Das Recht des Staates anzuwenden, dessen Markt beeinträchtigt ist oder wahrscheinlich beeinträchtigt wird*, franc. *la loi du pays dans lequel le marché est affecté ou susceptible de l'être*, tal. *la legge del paese sul cui mercato la restrizione ha o potrebbe avere effetto*, španj. *la ley del país en el que el mercado resulte o pueda resultar afectado*, slov. *pravo države, na katere trgu ima, ali bi lahko imela, taka omejitveni učinek*) that the translation in Croatian does not capture the intended meaning of the provision. A similar mistake was made with the Croatian translation of the criteria for jurisdiction on tort (delict) in Brussels I recast. It is obvious that the translation detects *locus actus* instead of *locus damni* as a basic solution. This enhances difficulties for Croatian judges to interpret the Rome II regulation and to understand its relationship to other EU private international law instruments properly, where relevant<sup>452</sup>.

## 2.2 Chapter II - Tort/Delict

6. *The general conflict-of-laws rule for tort/delict, and difficulties that have arisen in your Member State with respect to its application (Art. 4), and in particular:*

a. *the approach to identifying the place of direct damage in Art 4(1).*

As mentioned, the available case law on the application of Rome II Regulation is reduced to several categories of cases. Since there was a small number of cases in which Art 4 (1) was applied, it seems that for now there were no difficulties with respect to its application. In this sense, the question introduced with the beginning of application of the Rome II Regulation in Croatian legal theory, whether *legis loci damni* will result in inflexible or insufficiently flexible legal solutions in the future practice could for now be answered in the negative.<sup>453</sup>

b. *the approach to the first rule of displacement in Art 4(2) in cases involving multiple parties or claims*

c. *the approach to the escape clause in Art 4(3), and*

d. *the suitability of this set of rules to govern cases of prospectus liability or other financial market torts*

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<sup>451</sup> Kunda, Uredba Rim II ujednačena pravila, str. *Uredba Rim II: ujednačena pravila o pravu mjerodavnom za izvanugovorne obveze u Europskoj uniji, Zbornik Pravnog fakulteta Sveučilišta u Rijeci (1991) v. 28, br. 2, 1269-1324 (2007), p 1275.*

<sup>452</sup> Kunda, Ivana, *Pravo mjerodavno za povrede prava tržišnog natjecanja Zbornik Pravnog fakulteta Sveučilišta u Rijeci, vol. 39, no. 1, 183-214 (2018), p 196-197.*

<sup>453</sup> Bouček, Vilim, Uredba Rim II - Komunitarizacija Europskog međunarodnog delikatnog prava Zbornik radova Pravnog fakulteta u Splitu, 45(2008) 2, p 287.-304, at p 302.

Rules not relevant for Croatian court practice.

7. *The rule on **product liability** (Art. 5) and, where relevant, the interaction with the application of 1973 Hague Convention on the Law Applicable to Products Liability;*

Rules not relevant for Croatian court practice.

8. *The specific rule on **unfair competition** (Art. 6)*

The application of a specific rule on unfair competition (Art 6) raises doubts concerning its application to establishing tort liability, its prohibition and the claimed compensation for damage. In cases where (only) compensation of damage was sought, the national court is to establish tort liability as a preliminary matter in order to decide on the claim. If compensation damage was sought in a follow-up procedure, national court would be bound by a decision of the EC or a national public entity of a MS on the liability for the act of unfair competition. Such a decision of national entity of a MS is prima facie evidence, if the law of the MS does not prescribe otherwise. Under Croatian law such a decision is considered *presumptio iuris tantum*. If the EC or a national public entity of a MS does not render a decision establishing liability, but instead decides that conditions for initiating the procedure were not met, there is still a possibility for the claimant to initiate a separate national procedure for protection of his subjective rights caused by the act of unfair competition. Also, it is possible for the national court to decide that there was no distortion of competition, as prescribed under Art 58/1/13 Act on the protection of market competition. Although the Act on the protection of market competition allows the national entities to decide that there was no violation of national law on unfair competition as well as violation of EU legislation on unfair competition, this would be contrary to the EU competition law and the case law of CJEU.

Such a case was AZTN v Hrvatski Telekom (High Administrative Court, judgment USII-8/15-10 from 29 September 2015 in which AZTN initiated the procedure under both Art 13 Act on the protection of market competition and Art 102 TFEU. In the case at hand an issue was discussed of the effect of a decision according to which no conditions for conducting the procedure were met, because there was no evidence of distortion of competition. After the amendments to the official translation of the Regulation, the High Administrative court changed its practice.

This also raises question of the effect of such a decision before national court in cases in which compensation of damage is sought. Under the Croatian Act on the procedures for compensation of damage caused by acts of unfair competition only effects of a positive judgment, establishing the liability for the act of unfair competition are prescribed. Argumentum a contrario, courts are not bound by a negative judgment in a same manner as they are bound by a positive judgment. In the context of legal certainty and consistency of application of national law on unfair competition, it is questionable should the courts be bound in the same manner by a negative judgement as they are bound by a positive one.<sup>454</sup>

9. *The specific rule on **environmental damage** (Art. 7)*

Again, there are not many cases of environmental damage before Croatian courts. In an environmental damage case brought before Commercial court in Split in 2015, case no. 10 P-927/15 the claimant was a Croatian company from Split against a Dutch insurance company and another Croatian company from Split for payment of cost of removal of damage caused by the defendant(s). As one of the defendants was a Dutch insurance company, the court properly detected a cross-border element, established its jurisdiction based on Brussels I recast and applied Croatian law, based on Art 7 Rome II Regulation to determine Croatian law as the law applicable to the liability of the defendant for environmental damage.

10. *The specific rule on **infringements of intellectual property rights** (Arts. 8, 13)*

The strict nature of the provision of Art 8 Rome II Regulation adheres to the aim of guarantee of legal certainty and the efficiency of cross-border protection of intellectual property. Hence, there is no possibility to choose the law under Art 14 Rome II Regulation and apply it to a non-contractual obligation arising from an infringement of an intellectual property right, or to apply the provision, which allows the application of *lex firmae habitationis communis* or the escape clause. Art 8 also applies to non-contract obligations arising out of infringements of an intellectual property rights (Art

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<sup>454</sup> Kunda, Ivana, *Pravo mjerodavno za povrede prava tržišnog natjecanja Zbornik Pravnog fakulteta Sveučilišta u Rijeci, vol. 39, no. 1, 183-214 (2018), p 192.*

13). In this sense, Croatian legal theory raises the question of allowing the choice of law (except concerning establishing unlawfulness), especially in situations where the infringement involves parties from multiple MS.<sup>455</sup>

*11. The specific rule on industrial action (Art. 9)*

Rules not relevant for Croatian court practice.

## 2.3 Chapter III - Unjust Enrichment, *Negotiorum Gestio* And *Culpa In Contrahendo*

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to the implementation of:*

*12. The specific rule on **unjust enrichment** (Art. 10), including its relationship with the general rule for tort/delict in Art. 4.*

Although only one case (P-442/11-27 Municipal court in Pula) was reported in which the Rome II Regulation was applied to unjust enrichment, it seems that there are no difficulties in its application. Namely, in the case at hand, the claimant requested the return of the monetary funds which she inherited after the death of her brother, which were unjustly taken by the defendant (the daughter of the deceased), who claimed that she was the only heir to the succession. The court established that there was unjust enrichment on the part of the defendant, who was habitually resident in the Netherlands. Namely, after the decision on the succession O-505/10, (11 May 2010) it was clear that the amounts withdrawn from the bank account by the defendant represent unjust enrichment. This event giving rise to the damage occurred after the Rome II Regulation came to force. Since there was a cross-border element in the case, and at the time the proceedings were conducted Croatia was a MS, the Rome II Regulation was applicable. The court relied on Art 10 para 1 Rome II Regulation and decided that the law applicable to the unjust enrichment is Croatian law, because the payment of amounts wrongly received, as requested by the claimant, concerns a relationship existing between the parties on the basis of the succession, which was decided under Croatian law.

*13. The specific rule on **negotiorum gestio** (Art. 11)*

*14. The specific rule on **culpa in contrahendo** (Art. 12)*

Provisions not relevant in Croatian legal system.

## 2.4 Chapter IV - Freedom of Choice

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

*15. The implementation in legal/business practice and by courts of the rule on **freedom of choice**, any difficulties therein and **any discussion that has been carried out in your Member State regarding possible reasons which would justify the need to rethink it** (Art. 14)*

Croatian legal theory questions the appropriateness of the solution according to which the provision on freedom of choice is placed after the general and specific rules on the law applicable to a non-contractual obligation arising out of a tort/delict or a specific act (unfair competition, environmental damage etc.) According to legal practitioners, from the order of the said provisions, it is not clear that the freedom of choice has precedence over the former rules.

Legal theory also discussed the lack of a provision on freedom of choice from the **1971 Hague Convention** on the law applicable to traffic accidents in comparison to the Rome II Regulation. Since there is no explicit exclusion of freedom of choice from the **1971 Hague Convention** on the law applicable to traffic accidents, they argue that due to the enhanced importance of the party autonomy and freedom of choice in contemporary Private International Law, a

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<sup>455</sup> Kunda, Uredba Rim II ujednačena pravila, str. *Uredba Rim II: ujednačena pravila o pravu mjerodavnom za izvanugovorne obveze u Europskoj uniji*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci (1991) v. 28, br. 2, 1269-1324 (2007), p 1297.

judge could consider to fulfil the lacunae in the **1971 Hague Convention** on the law applicable to traffic accidents with the application of Art 14 Rome II Regulation.<sup>456</sup>

From the Croatian perspective, it is to be noted that in none of the cases analysed has the court considered a choice of law under the **1971 Hague Convention** on the law applicable to traffic accidents. It is rather unlikely that the Croatian courts would allow such a choice given that this is not expressly regulated in the Convention. On the other hand, the parties' freedom to choose the applicable law is allowed in the Rome II Regulation, but is limited to the time after the event giving rise to the damage incurred. Even though party autonomy is not expressly envisaged by the Convention, allowing it would contribute to the uniform resolution of non-contractual disputes within the EU.

Another problem legal theorists point to, are difficulties judges face in the interpretation of different stages (temporal deadlines) in which the choice should be expressed or demonstrated under a general choice of law and special choice of law provisions. Namely, the moment of choice determinates the form and the validity of the choice of law and in this sense, there should be more uniformity in the manner in which judges should interpret it.<sup>457</sup>

## 2.5 Chapter V - Common Rules

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

- 16. The scope of the exclusion of 'evidence and procedure' in Art 1(3) and any difficulties in relation to that exclusion or to questions of formal validity or the burden of proof (Arts. 21-22)*
- 17. The approach in your Member State to questions of pleading, proof and application to individual cases of the substantive rules of the law applicable under the Rome II Regulation governing non-contractual obligations.*
- 18. The delimitation of the scope of the applicable law (Art. 15(a)-(h)), including any difficulties as its relationship to the issues addressed at points 16 17 above)*
- 19. The application of the rule on **overriding mandatory provisions** (Art. 16)*
- 20. The application of the specific rule on **direct action against the insurer** of the person liable (Art. 18)*
- 21. The application the specific rule on **subrogation** (Art. 19)*
- 22. The application of the specific rule on **multiple liability** (Art.20)*

Provisions not relevant in Croatian court practice.

## 2.6 Chapter VI - Other Provisions

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

- 23. The implementation of the concept of habitual residence in the Rome II Regulation, with reference both to persons covered by Art 23 and natural persons acting otherwise than in the course of business*
- 24. The application of and any difficulties with the specific rules on exclusion of renvoi (Art.24) and States with more than one legal system (Art.25)*
- 25. The application of and any difficulties with the specific rule on public policy of the forums (Art. 26)*

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<sup>456</sup> Torlak, Dino, Mjerodavno pravo za rješavanje zahtjeva za naknadu štete iz Mjerodavno pravo za rješavanje zahtjeva za naknadu štete iz saobraćajnih nezgoda sa posebnim osvrtom na subrogaciju, available at: <https://www.prf.unze.ba/Docs/Anali/Analibr20god10/8.pdf>, p175.

<sup>457</sup> Meškić, Zlatan, Ograničenje stranačke autonomije u Evropskom kolizionom pravu (Restrictions of autonomy of will in European Private International Law), Revija za Evropsko pravo, Kragujevac, 2012, p 5-33, at p 6.

26. *Practical interaction between the Rome II Regulation and other EU and international legal instruments, in specific areas such as environmental damages, intellectual property rights or data protection (Arts. 27, 28, 29)*

Provisions not relevant in Croatian court practice.

## 2.7 Comments on other Practical Problems

*These areas are of particular interest for the Commission. Please be as precise as possible regarding any issue that has been reported on:*

27. *The impact of the application of the 1971 Hague Convention on the law applicable to traffic accidents on legal certainty (where relevant for your Member State)*

The issues regarding the application of both 1971 Hague Convention and Rome II Regulation on the law applicable to traffic accidents are of importance for Croatian legal practice. Due to the possibility for the applicant to rely on Art 4 Brussels I bis (courts of the MS of the domicile) or Article 7 para 2 Brussels I bis (courts for the place where the harmful event occurred or may occur), the plaintiff may choose the court, depending whether the 1971 Hague Convention or Rome II Regulation would apply (forum shopping).<sup>458</sup>

For Croatian legal practitioners it is particularly burdensome to abandon the previous system of resolving disputes arising from traffic accidents with cross-border element and adapt to simultaneous application of both instruments, since Croatia is a MS of the EU and of the Convention. Some authors argue that it would be possible to resolve issues arising out of the application of the 1971 Hague Convention by harmonizing or at least unifying the rules of the Rome II Regulation and the Convention. To that end, special conflict-of-law rules should be introduced, similar to those existing for other types of damages in Rome II Regulation. Other possible solution would be to conclude an agreement with Member States to the 1971 Hague Convention, which are not MS of the EU that the Convention does not apply to intra-European relations.<sup>459</sup>

Another issue, also highlighted in the legal literature, is a situation where only one vehicle is involved in the accident and it is registered in a State other than that where the accident occurred. The internal law of the State of registration is applicable to determine liability towards a victim who is a passenger and whose habitual residence is in a State other than that where the accident occurred (Art 4a 1971 Hague Convention). Croatian court practice questioned if the same exception should also apply to liability towards indirect victims (family members of the person who was killed in a traffic accident). The systematic, teleological and historical interpretation of the Convention favour the application of the exception to such cases. This leads to the conclusion that the law of the state of registration applies instead of the law of the state where the traffic accident occurred.<sup>460</sup>

Other issues raised in the court practice are best illustrated by the following cases.

In case Gž-1857/2019-2 County court in Split misinterpreted the provision of Art 28 para 2 Rome II Regulation and held that the municipal court was wrong to apply Art 2 1971 Hague Convention instead of the Regulation. It relied on the fact that the habitual residence of the claimant and the seat of the defendant was in Croatia at the time of the accident, which occurred in the Republic of Serbia. Since Croatia is a MS and there is a close connection of both parties to it, the court assumed that the Rome II Regulation has precedence in MS over the 1971 Hague Convention.

In comparison, in case Gž-6/2016-2 County court in Bjelovar confirmed that the municipal court was wrong to apply the provisions of the ZRSZ to determine the applicable law instead of the 1971 Hague Convention. The County court

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<sup>458</sup> Babić, Davor, Rim II-Uredba Europskog parlamenta i Vijeća o mjerodavnom pravu za izvanugovorne obveze, u: Zbornik 17. Savjetovanja o obradi i likvidaciji automobilskih šteta, Opatija, 2009, p 18-19.

<sup>459</sup> Babić, Davor, Rim II-Uredba Europskog parlamenta i Vijeća o mjerodavnom pravu za izvanugovorne obveze, u: Zbornik 17. Savjetovanja o obradi i likvidaciji automobilskih šteta, Opatija, 2009, p 24.

<sup>460</sup> Babić, Davor, Rim II-Uredba Europskog parlamenta i Vijeća o mjerodavnom pravu za izvanugovorne obveze, u: Zbornik 17. Savjetovanja o obradi i likvidaciji automobilskih šteta, Opatija, 2009, p 17.

also explained that although the Rome II Regulation does apply to traffic accidents in MS, it has no precedence in those countries in which the 1971 Hague Convention applies.

In case 42-Pn-1527/13-58 Municipal court in Zagreb decided that the law applicable to a traffic accident which occurred in Bosnia and Herzegovina between a car registered in Croatia and a car registered in Bosnia and Herzegovina is determined under Art 3 1971 Hague Convention (*lex loci commissi*). The court excluded the possibility to invoke Art 4 1971 Hague Convention, since all cars were not registered in the same country. The court also explained that contrary to the claimant's position, ZRSZ could not be applied since the Convention has precedence over the national law according to the Croatian Constitution. The claimant also relied on the provisions of Rome II Regulation. However, as the court explained, the Regulation at the time was not applicable in Croatia as non-MS (in 2010). Even if Croatia were a MS at the time, still the 1971 Hague Convention would apply because both Croatia and Bosnia and Herzegovina are members of the Convention.

In case GŽ-2957/2017 County court in Rijeka questioned whether in the case at hand the municipal court accurately decided between the application of the Rome II Regulation and 1971 Hague Convention. It confirmed the interpretation of the municipal court that in the case of a traffic accident which occurred in the Republic of Serbia between Croatian nationals, the Rome II Regulation applies. The court (incorrectly) argued that because Croatia is a MS, the Rome II Regulation has precedence over 1971 Hague Convention according to Art 28 Rome II Regulation.

*28. Any other practical problems with respect to the application or interpretation of the Rome II Regulation, including but not limited to the suitability of the mosaic approach*

### 3. Comments on areas of interest

*These areas are of particular interest for the Commission. Please be as precise as possible regarding any issue that emerged in your Member State regarding:*

*29. The exclusion of violations of privacy and rights relating to personality, including defamation, from the scope of the Rome II Regulation and any difficulties arising out from differences among Member States' rules in cross-border situations*

In the explanation following the Proposal of the new Croatian PIL Act, the legislator did not offer any reasoning behind the widening of the scope of the Rome II Regulation to matters excluded from its application (exclusion of violations of privacy and rights relating to personality, including defamation) or the consequences of the solution under which the general rule applies to violations of privacy. However, there is no recorded case law from which it would be obvious whether the chosen approach was appropriate.<sup>461</sup> Since **violations of privacy and rights relating to personality** are excluded from the scope of Rome II Regulation, in other MS provisions of the national Private International Law apply.

Prior to the introduction of the new Croatian PIL Act, provisions of the "previous PIL Act" or the ZRSZ applied which contained Art 28 on the law applicable to violations of privacy. The problem occurred with the interpretation of the term damage, which included both direct and indirect damage, although in the context of cross-border disputes, only direct damage is taken into account. The Supreme Court of the Republic of Croatia confirmed that the provisions of the ZRSZ include both categories of damage. Also, the position of the defendant under the SRSZ was more favourable than under the provisions of the new Croatian PIL Act.

The SRSZ contained a rule under which the court would make a choice of the law favourable for the defendant between *lex loci delicti commissi*, *lex loci damni* (direct damage) or *lex loci damni* (indirect damage) *ex officio*. However, the rules of the ZRSZ also enabled the victim to request damage, which occurred in states in which the defendant's act was not illegal. This caused legal uncertainty for the defendant.

The new PIL Act introduced more legal certainty and a better position for the defendant in terms of the predictability of the applicable law. It does not contain a specific conflict-of-law rule, but instead provision of Art 26 para 2 applies, according to which rules of the Rome II Regulation also apply to the matters outside its scope. In this sense, the law

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<sup>461</sup> Vrblijanac, Danijela, Pravo mjerodavno za povrede prava osobnosti u novom ZMPP-u: Je li prihvaćeno rješenje najbolje?, *Godišnjak Akademije pravnih znanosti Hrvatske*, vol. X, 1/2019, p 420.



applicable to the violations of privacy is the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur (lex loci damni), unless there was a choice of law. In cases of violations of privacy lex loci damni is the law of the country where there was a public display of the content harmful for the victim, which changed his public image. The media in Croatia criticised the choice of the connection, which is more favourable for the victim, as unpredictable. They failed to take into account that unlike the media who choose when and where an information will be made public and are aware where the consequence for the victim might occur, the victim is usually unaware that the information will be published. Also, the victim does not know where the seat or residence of the publisher is. Still, according to Croatian legal theory there should have been a more detailed approach, which would enable the court to localize where the damage occurred. Although the current wording provides for more flexibility, there is a risk that different courts will detect the place of damage to rights to privacy differently. Also, the approach opens the possibility that laws of several countries might be applicable. Hence, the law of the country of habitual residence of the victim is suggested as a more appropriate choice.<sup>462</sup>

*30. Any comment regarding the Interplay of the Rome II Regulation with the treatment of **defamation and data protection**, and, in these areas, the relevance of **Strategic Lawsuits Against Public Participation (SLAPPs)***

In the previous period, there was approximately 1000 lawsuits against journalists in Croatia. In this sense, SLAPP has become a problem, which negatively affects media freedom in Croatia. The specific aspect of the SLAPPs in Croatia is that the procedures were started by the public service media company, and by a state authority (the police). The high number of lawsuits initiated by HRT against its employed journalists raises the suspicion that a political interest group had captured the public service media.<sup>463</sup>

There is a diversity in the national approaches towards defamation, which could be harmonised by way of an EU Directive. Due to the fact that defamation is excluded from the scope of the Rome II Regulation, the journalist can only rely on the lowest standard of press freedom available in the laws which might be applied to a potential dispute. If a rule would be introduced to Rome II Regulation, according to which the law of the country in which a publication is made available would apply, this would bring more legal certainty to the journalists, but also activists and citizens.

*31. The extent to which Rome II Regulation has been applied to **corporate abuses against human rights** and lays down an effective set of rules to regulate non-contractual liability;*

*32. The impact of the development of **artificial intelligence** on the Rome II Regulation, and in particular on the suitability of the rules that it contains to regulate non-contractual liability.*

The provisions are not relevant for Croatian court practice.

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<sup>462</sup> Vrblijanac, Danijela, Pravo mjerodavno za povrede prava osobnosti u novom ZMPP-u: Je li prihvaćeno rješenje najbolje?, Godišnjak Akademije pravnih znanosti Hrvatske, vol. X, 1/2019, p 418-419.

<sup>463</sup> Bárd, Petra; Bayer, Judit; Chun Luk, Ngo; Vosyliute, Lina, EU-citizen: Academic Network on European Citizenship Rights, Ad-Hoc Request SLAPP in the Eu context, 2020, available at: [https://ec.europa.eu/info/sites/info/files/ad-hoc-literature-review-analysis-key-elements-slapp\\_en.pdf](https://ec.europa.eu/info/sites/info/files/ad-hoc-literature-review-analysis-key-elements-slapp_en.pdf), p 42



#### 4. List of national case law

<u>Court or tribunal</u>	<u>Case name and reference number</u>  <u>Reference to decision of the Court of Justice if applicable</u>	<u>Date</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings (only for key cases)</u>
County court in Split	Gžx-452/2014-3	11.09.2014.	Article 31	Application in time	County court in Split was correct to conclude that, although both Croatia and Republic of Slovenia are MS where the Rome II Regulation applies, it cannot be applied to the case at hand. Namely, the events giving rise to the damage occurred in 1982, long before the entry into force of the Rome II Regulation and its application would be contrary to Art 31 Rome II Regulation.
County court in Dubrovnik	2 Gž-1340/13	23.06.2016.	Articles 31, 32	Application in time; date of application	County court in Dubrovnik (as second instance court) confirmed the position of the municipal court, that the law applicable to a traffic accident which occurred in Bosnia and Herzegovina between Croatian citizens is determined according to Art 3 1971 Hague Convention. Namely, as the County court explained, the Rome II Regulation cannot be applied since at the time when the accident occurred, Croatia was not a MS. Also, ZRSZ is not applicable,

					since both Bosnia and Herzegovina and Croatia are Members to the 1971 Hague Convention, which takes precedence over the application of the national private international law rules.
County court in Rijeka	Gž-1552/2019-2	13.09.2019.	Article 31	Application in time	County court in Rijeka confirmed the position of the municipal court that the Rome II Regulation applies to a traffic accident which occurred in Republic of Serbia and in which both the claimant and the defendant have their habitual residence/seat in Croatia. The court explained that the Rome II Regulation is applicable in Croatia, since it became a MS on 1 July 2013 and it has precedence over the application of 1971 Hague Convention. The court even held the defendant's referral to the differing position of the Supreme Court and County courts in regard to the application of the 1971 Hague Convention as irrelevant, since it dated to the time prior to the introduction of the Rome II Regulation.
Municipal court in Pula	P-442/11-27	22.07.2013.	Article 10/1	Unjust enrichment	The claimant requested the return of the monetary funds which she inherited after the death of her brother, which were unjustly taken by the defendant (the daughter of the deceased), who claimed that she was the only heir to the succession. The court established that there was unjust enrichment on the part of the defendant, who was habitually resident in the Netherlands. Namely, after the decision on the succession O-505/10, (11 May 2010) it was clear that the amounts withdrawn from the bank

					account by the defendant represent unjust enrichment. This event giving rise to the damage occurred after the Rome II Regulation came to force. Since there was a cross-border element in the case, and at the time the proceedings were conducted Croatia was a MS, the Rome II Regulation was applicable. The court relied on Art 10 para 1 Rome II Regulation and decided that the law applicable to the unjust enrichment is Croatian law, because the payment of amounts wrongly received, as requested by the claimant, concerns a relationship existing between the parties on the basis of the succession, which was decided under Croatian law.
County court in Split	Gž-1857/2019-2	4.03.2020.	Article 28/2	Relationship with other international conventions	County court in Split misinterpreted the provision of Art 28 para 2 Rome II Regulation and held that the municipal court was wrong to apply Art 2 1971 Hague Convention instead of the Regulation. It relied on the fact that the habitual residence of the claimant and the seat of the defendant was in Croatia at the time of the accident, which occurred in the Republic of Serbia. Since Croatia is a MS and there is a close connection of both parties to it, the court assumed that the Rome II Regulation has precedence in MS over the 1971 Hague Convention.
County court in Bjelovar	Gž-6/2016-2	13.12.2016.	Article 28	Relationship with other international conventions	County court in Bjelovar confirmed that the municipal court was wrong to apply the provisions of the ZRSZ to determine the

					applicable law instead of the 1971 Hague Convention. The County court also explained that although the Rome II Regulation does apply to traffic accidents in MS, it has no precedence in those countries in which the 1971 Hague Convention applies.
Municipal court in Zagreb	42-Pn-1527/13-58	7.03.2016.	Article 28, 31	Relationship with other international conventions; application in time	Municipal court in Zagreb decided that the law applicable to a traffic accident which occurred in Bosnia and Herzegovina between a car registered in Croatia and a car registered in Bosnia and Herzegovina is determined under Art 3 1971 Hague Convention (lex loci commissi). The court excluded the possibility to invoke Art 4 1971 Hague Convention, since all cars were not registered in the same country. The court also explained that contrary to the claimant's position, ZRSZ could not be applied since the Convention has precedence over the national law according to the Croatian Constitution. The claimant also relied on the provisions of Rome II Regulation. However, as the court explained, the Regulation at the time was not applicable in Croatia as non-MS (in 2010). Even if Croatia were a MS at the time, still the 1971 Hague Convention would apply because both Croatia and Bosnia and Herzegovina are members of the Convention.
County court in Rijeka	Gž-2957/2017	25.10.2018.	Article 28	Relationship with other international conventions	County court in Rijeka questioned whether in the case at hand the municipal court accurately decided between the application of the Rome II Regulation and 1971 Hague Convention. It

					confirmed the interpretation of the municipal court that in the case of a traffic accident which occurred in Republic of Serbia between Croatian nationals the Rome II Regulation applies. The court (incorrectly) argued that because Croatia is a MS, the Rome II Regulation has precedence over 1971 Hague Convention according to Art 28 Rome II Regulation.
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# Cyprus

## Executive Summary

- Cyprus is a legal order where cases affected with internationality elements are not very frequent. Thus, the interest in relation to the Rome II Regulation is minor.
- There have not been any final decisions where the Rome II Regulation has effectively been applied in Cyprus. The Regulation has been invoked (eg. articles 4 and 10 of the Regulation) only in the context of interim judgments in 8 different cases. In none of these cases was the application of the Regulation crucial for the resolution of the main problems that arose. The main focus of the courts was on international jurisdiction.
- So far, the way Rome II is invoked before Cypriot courts reveals two main issues. The first concerns the localization of the place where the direct damage occurred in cases where this damage is of financial nature. The second concerns the use of the escape clause. There has not been so far an explicit application of the escape clause. However, there have been some indications from one at least case that Cypriot judges might be tempted to give a broader and less rigid interpretation of the way the escape clause works than it is perceived in the text of the Regulation, in the preamble and according to the most prevailing opinions. The fact that Cyprus is a mixed legal system, influenced greatly by common law, could be the reason for this observation.

## 1. Introduction

- *How aware of the Rome II Regulation are practitioners, businesses and citizens in your Member State?*

As a general observation we can note that Cypriot judges and practitioners are aware of the Rome II Regulation and of its provisions. It also results from the cases examined that where the Regulation was invoked, no major problems arose as regards the understanding of the instrument. There have been however a few cases where the way that attorneys pleaded the application of the rules of Rome II revealed a lack of understanding of the system created by this instrument and its provisions.

- *Is the Rome II Regulation generally known and applied by courts in your Member State?*

The Rome II Regulation was invoked only in a handful of cases. However, and as observed above the Regulation seems to be generally known.

- *Are there any relevant statistics regarding the application of the Rome II Regulation in your Member State?*

There are no relevant statistics as to the application of the Rome II Regulation kept centrally or in the courts.

- *How important is the doctrinal discussion on the Rome II Regulation in your Member State?*

There is practically no doctrinal discussion as to the Rome II Regulation in Cyprus. This should not be interpreted however as an indication of lack of interest as regards to the Regulation. It can partly be explained by the fact that law studies at University level in Cyprus have been developed during the last 20 years. Besides that, the gap in doctrinal discussion in Cyprus is partially covered by the fact that there is a developed doctrine in Greece (both countries are Greek speaking). Thus, some of Cypriot law professors contribute in the doctrinal discussion by writing in legal journals and books published in Greece (e.g. Professor Emilianides, dean of the Law school of the University of Nicosia, is a contributor to the Greek commentary on Rome II Regulation). Apart from the above parameters, it has to be added that there are only a few cases where issues of private international law arise.

- *Are there specific issues concerning the Rome II Regulation that have caused debate at a doctrinal or political level?*

There have not been any specific issues that have caused debate at a doctrinal or political level so far in Cyprus.

## 2. Analysis of the Rome II Regulation

### 2.1 Chapter I – Scope and Interpretation

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to :*

1. *The determination of the material scope of application of the Rome II Regulation, including any difficulties in applying the category of “civil and commercial matters” or in defining the exact scope of any excluded matters (Art. 1(1)-(2))*

No difficulties have emerged in that respect.

2. *The determination of the temporal scope of application of the Rome II Regulation, Arts 31-32)*

No difficulties have emerged in that respect. In all the cases where the Regulation has been invoked, judges arrived to the right conclusion as regards the temporal scope of application of the Regulation, although without an explicit reference to the appropriate provisions.

3. *The characterization of the **concept of “non-contractual obligations”**, its relationship to the concept of “contractual obligations” and any difficulties in relation to characterisation (Arts. 1(1), 2)*

No difficulties have emerged in that respect. See however also our observations under 2.1.5.

4. *The universal application of the Regulation (Art. 3)*

There has been no problem as regards the universal application of the Regulation. Moreover, an explicit reference to the universal application of the Regulation suggests that judges are aware of its exact meaning. (District court of Limassol, application number 2989/2016, Reverta AS and 1. Bolmeno Commercial LTD et al., 11.05.2017. All Cypriot case law can be retrieved by the open data base <http://www.cylaw.org/> in greek).

5. *The approach to interpretation of the Rome II Regulation, and in particular **its relationship to other EU private international law instruments (including the recast Brussels I Regulation and the Rome I Regulation)** (Recital (7))*

There have not been any specific issues or difficulties in relation to the interpretation of the Rome II Regulation. In one case, both the Rome I Regulation and Rome II Regulation have been invoked but without further analysis. In one case, judges mistakenly considered the contractual and non-contractual liability as mutually exclusive. In this case, the issue arose in the context of an interim judgment (District court of Larnaka, application number, 2650/2015, Geniki Taxydromiki and Nan Global, 22.12.2015). And although the claimant sought provisional measures both on the basis of the Rome I and Rome II Regulations, judges have considered the issue only under the basis of contractual liability. If Rome II Regulation were deemed to be applied, it would lead to the application of Cypriot law, as the direct damage had occurred in Cyprus.

### 2.2 Chapter II - Tort/Delict

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to the implementation of:*

6. *The general conflict-of-laws rule for tort/delict, and difficulties that have arisen in your Member State with respect to its application (Art. 4), and in particular:*

- a. *the **approach to identifying the place of direct damage** in Art 4(1)*

The number of cases brought before Cypriot Courts do not permit to identify a general trend in relation to the implementation of the Rome II Regulation. There are however some general observations we could make. More precisely, there are some cases which raise doubts as to the way judges identify the place where the direct damage occurred (District court of Nicosia, application no 6078/15, Alterra International Holdings Limited and 1.Bank of Communications Co. Ltd, 2. China Xinyongan Futures Company Ltd, 17.11.2017; District court of Nicosia, application no 6077/2015, Romstron Holdings Limited and 1. United Overseas Bank Limited 2. EKA Maju Mining Pte Limited, 27.09.2017; *contra* District court of Nicosia, application no 6075/15, Vaimicus Estates Limited, and 1.

Bank of China (Hong Kong) Limited 2. Khoo Kim Guang, 17.04.2018) . The cases concern damages of financial nature. In these judgments the resolution of the applicable law was incidental as we are in all of them in the context of interim judgments (the term interlocutory judgment has also been used mostly in the past in order to describe this procedural phase before Cypriot courts) . Characteristic of a doubtful or insufficiently explained approach as to the determination of the place of direct damage is the Alterra International Holdings case (District court of Nicosia, application no 6078/15, Alterra International Holdings Limited and 1. Bank of Communications Co. Limited, Hong Kong Branch 2. China Xinyongan Futures Company Limited, 17.11.2017). The judges' approach could be understood given that they declined their jurisdiction based on the *forum non conveniens* theory. Concluding that Cypriot law was not applicable had been one of the arguments supporting the defense of *forum non conveniens* according to which Cypriot courts were not appropriate to hear the case. The difficulty as to the determination of the place of the damage is due to the fact that this damage was financial. The damage was the result of the transfer of funds from one bank account held in Cyprus to another bank account held in Hong Kong, China. Judges have identified as the place of the direct damage Hong Kong in China. They have tried to reinforce their argumentation as to the applicability of the law of Hong Kong on the basis of article 4 (3) of the Regulation as this provision is interpreted by English courts (*Pickard Marshall and others* (2017) EWCA Civ 17; in this judgment judges express their view in favor of a flexible interpretation of article 4(3)). The demonstration of a manifestly closer connection of the tort with Hong Kong is not sufficiently substantiated. The elements showing a closer connection with this legal order were the seat of one of the defendants (the seat of the other defendant was in Shanghai) and the fact that the violation of the duties of the defendants had to be appreciated according to Hong Kong's legislation. According to the latter argument, the laws applicable to the duties of the defendants, who were banks, were the ones of Hong Kong where their seat was located. However, there were also elements showing a connection with Cyprus such as the fact that the claimant was located in Cyprus and his money was in a bank account held in Cyprus. Judges did not consider these elements as crucial and found that the law of Hong Kong was applicable. They reached the same conclusion as to the determination of the applicable law also on the basis of unjust enrichment although they did not specify the exact provision of article 10 that served as basis for the designation of applicable law. They identified however clearly, Hong Kong as the place of the unjustified enrichment. Their conclusion could better be explained on the basis of article 10 (3) of the Regulation. The above findings as to the applicable law are linked in this specific case with the resolution of the problem of the international jurisdiction of Cypriot courts.

Difficulties as to the determination of the place of the direct damage emerged as well in another case (District court of Nicosia, application no 4662/16, Nibulon S.A., and 1. BSC GmbH, 24 April 2017). In this one the defendants in the principal action challenge the jurisdiction of Cypriot courts in the context of an interim procedure. The interim judgment rejected the request of the applicants for dismissal of the action for lack of jurisdiction of Cypriot courts. The defendants claimed that Cypriot law was not applicable in order to demonstrate that Cypriot courts were not appropriate to hear the case. The damage was in this case of financial nature. The claimants accused the defendants for fraudulently depriving one of the companies implicated in a financial transaction of its assets by increasing artificially its debts towards other entities of the same group of companies. As a result of this fraudulent behavior the claimants could not enforce two decisions rendered in the context of a GAFTA arbitration. A lack of understanding as to the function of the Regulation is obvious in the way the litigants plead the application of the Rome II Regulation and try to identify the place of direct damage. Their argument as to the place of the damage is connected with the place in which the events giving rise to the damage occurred. The center of interests of the claimant is not envisaged as the place of direct damage. On the contrary, an argument formulated on behalf of the claimant could better be understood on the basis of the escape clause of art. 4 (3). The issue of the applicable law has not been resolved by the court because it was not deemed necessary in this procedural stage. However, this case is also indicative of the difficulties of determination of the place of direct damage of financial nature and of the respective difficulty of attorneys to understand the specific conditions of application of the rules of the Regulation.

In another similar case (District court of Nicosia, application no 6077/2015, Romstron Holdings Limited and 1. United Overseas Bank Limited 2. EKA Maju Mining Pte Limited, 27.09.2017) the tort was also based on an illegal transfer of funds from a bank account held in Cyprus to a bank account held in Singapore. The Cypriot judge stated that Cypriot law is not applicable because the issues to be examined presented a closer connection with Singapore and therefore the law of Singapore had to be applied. In this case as well the examination of applicable law is invoked as an argument reinforcing the position according to which the Cypriot court was not the appropriate forum to judge this case (*forum non conveniens*). There is no detailed analysis neither as to the place where the damage occurred nor as to the provision of Rome II Regulation that would determine the applicable law. The court just considers as crucial



information in that respect the fact that the funds were transferred to Singapore. In the same sense, the court argues that the appreciation as to an eventual violation of duties of the bank had to be governed by the law of Singapore which governs the obligations of this banking institution as the law of its seat.

In contrast to the aforementioned cases, judges reached a different conclusion as to the place where the damage had occurred in a case where also the tort allegedly committed implicated a transfer of funds from a bank account held in Cyprus to a bank account held in China (District court of Nicosia, application no 6075/15, Vaimicus Estates Limited, and 1. Bank of China (Hong Kong) Limited 2. Khoo Kim Guang, 17.04.2018). In that case, contrary to the previous ones, judges held that the place of the damage was in Cyprus where the bank account was held. As in the aforementioned cases the central issue here was that of the determination of the international jurisdiction of Cypriot courts. Again, the examination of the applicable law is an argument among others that are taken into consideration to determine whether Cypriot courts are appropriate to rule on the case. The judges don't have in the end to determine the applicable law but they explicitly recognize that the place where the damage occurred was Cyprus. A substantial difference in this case in relation to the aforementioned ones (Alterra, *op.cit.* and Romstron, *op.cit.*) is that the applicant claiming that the jurisdiction should be dismissed openly admits that the place where the damage occurred was Cyprus.

Finally, difficulties as to the determination of the place of direct damage emerged indirectly from another case which dealt with a fraudulent Bankruptcy (District court of Limassol, application number 2989/2016, Reverta AS and 1. Bolmeno Commercial LTD et al., 11.05.2017. All Cypriot case law can be retrieved by the open data base <http://www.cylaw.org/>). Nonetheless, no lesson can be drawn from this case because the determination of the applicable law did not play a crucial role in the judgment. Besides that, the court does not provide in its examination of the applicable law any explanation neither as regards the provision it applied to reach to its conclusion nor as regards the arguments that led it to decide which law would have been applicable. The examination of applicable law was only incidental in the context of an application for the grant of provisional measures (the applicant sought, among others things, a freezing order and a Norwich Pharmacal order) and its determination was not the main reason for which the aforementioned application was rejected. The Court proceeded in this case only to a *prima facie* examination of the probability of success of the main action and it considers it as insufficiently founded. For the needs of this interim decision judges did not get into detail in the determination of applicable law.

*b. the approach to the first rule of displacement in Art 4(2) in cases involving multiple parties or claims*

There has not been any decision applying this rule.

*c. the approach to the escape clause in Art 4(3), and*

There has been one decision where this rule is explicitly invoked (District court of Nicosia, application no 6078/15, Alterra International Holdings Limited and 1. Bank of Communications Co. Limited, Hong Kong Branch 2. China Xinyongan Futures Company Limited, 17.11.2017, see *supra*). The argument of the application of the escape clause has been invoked as well in some other cases. Parties do not seem to be fully aware of the conditions of recourse to the exception. It appears as if the argument based on article 4 par. 3 stem from a result-oriented approach of the advocates. In another case, it seems that the escape clause could have been envisaged by the parties, but this did not happen. The above could indicate a lack of understanding as to the proper function of the escape clause (District court of Nicosia, application no 6077/2015, Romstron Holdings Limited and 1. United Overseas Bank Limited 2. EKA Maju Mining Pte Limited, 27.09.2017). However, the judges dismissed this case on the basis of lack of jurisdiction. It seems that practitioners don't always understand the proper function of conflict of laws rules of the Rome II Regulation (in that sense see also Alterra, *op.cit.*).

The escape clause has also been invoked in another case (District court of Nicosia, application no 4662/16, Nibulon S.A., and 1. BSC GmbH, 24 April 2017). However, the judge issues in this case an interim judgment and thus did not have to decide at that stage about the applicable law.

*d. the suitability of this set of rules to govern cases of **prospectus liability or other financial market torts***

There has not been any decision applying this rule.

*7. The rule on **product liability** (Art. 5) and, where relevant, the interaction with the application of **1973 Hague Convention on the Law Applicable to Products Liability**;*

There has not been any decision applying this rule.

*8. The specific rule on **unfair competition** (Art. 6)*

There has not been any decision applying this rule.

9. *The specific rule on **environmental damage** (Art. 7)*

There has not been any decision applying this rule.

10. *The specific rule on **infringements of intellectual property rights** (Arts. 8, 13)*

There has not been any decision applying this rule.

11. *The specific rule on **industrial action** (Art. 9)*

There has not been any decision applying this rule.

## 2.3 Chapter III - Unjust Enrichment, Negotiorum Gestio And Culpa In Contrahendo

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to the implementation of:*

12. *The specific rule on **unjust enrichment** (Art. 10), including its relationship with the general rule for tort/delict in Art. 4.*

There has been one decision envisaging the application of this rule (District court of Nicosia, application no 6078/15, Alterra International Holdings Limited and 1. Bank of Communications Co. Limited, Hong Kong Branch 2. China Xinyongan Futures Company Limited, 17.11.2017), but such application was not determinant for the resolution of the case. In two other interim judgments article 10 has also been invoked in connection with article 4 of Rome II Regulation but without any further reference (District court of Nicosia, application no 6075/15, Vaimicus Estates Limited, and 1. Bank of China (Hong Kong) Limited 2. Khoo Kim Guang, 17.04.2018; District court of Nicosia, application no 6077/2015, Romstron Holdings Limited and 1. United Overseas Bank Limited 2. EKA Maju Mining Pte Limited, 27.09.2017). In these two cases neither the parties nor the court develop specific arguments in relation to the application of article 10.

13. *The specific rule on **negotiorum gestio** (Art. 11)*

There has not been any decision applying this rule.

14. *The specific rule on **culpa in contrahendo** (Art. 12)*

There has not been any decision applying this rule.

## 2.4 Chapter IV - Freedom of Choice

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

15. *The implementation in legal/business practice and by courts of the rule on **freedom of choice**, any difficulties therein and **any discussion that has been carried out in your Member State regarding possible reasons which would justify the need to rethink it** (Art. 14)*

There has not been any decision applying or case envisaging the application of the choice of law rule as regards an extracontractual obligation.

## 2.5 Chapter V - Common Rules

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

16. *The scope of the exclusion of 'evidence and procedure' in Art 1(3) and any difficulties in relation to that exclusion or to questions of formal validity or the burden of proof (Arts. 21-22)*

The issue was not raised before the courts.

17. *The approach in your Member State to questions of pleading, proof and application to individual cases of the substantive rules of the law applicable under the Rome II Regulation governing non-contractual obligations.*

Cyprus as all common law countries consider the determination of the content of the foreign applicable law as a fact that has to be proven by the litigants and their advocates. There has not been any difference in that respect in decisions

where Rome II Regulation has been invoked (District court of Larnaka, application no. 2650/2015, Geniki Taxydromiki Ltd and Nan Global Ltd, 22.12.2015).

*18. The delimitation of the scope of the applicable law (Art. 15(a)-(h)), including any difficulties as its relationship to the issues addressed at points 16 17 above*

The judges in one case ignored the fact that provisional measures based on non-contractual liability are governed by the Regulation and by the law determined according to its rules. (Art. 15 (d), District court of Larnaka, application no. 2650/2015, Geniki Taxydromiki Ltd and Nan Global Ltd, 22.12.2015).

*19. The application of the rule on **overriding mandatory provisions** (Art. 16)*

There has not been any decision applying an overriding mandatory provision in decisions relative to extra-contractual obligations. However, in two cases involving in one of them the liability of a bank situated in Hong Kong, China, and in the other one of a bank located in Singapore, judges considered that the rules applied to the diligence banks have to comply with in their business had to be the ones of their seat, i.e. Hong Kong in the first case and Singapore in the second one (District court of Nicosia, application no 6078/15, Alterra International Holdings Limited and 1. Bank of Communications Co. Limited, Hong Kong Branch 2. China Xinyongan Futures Company Limited, 17.11.2017; District court of Nicosia, application no 6077/2015, *Romstron Holdings Limited and 1. United Overseas Bank Limited 2. EKA Maju Mining Pte Limited*, 27.09.2017). In these two cases the Court found as well that the aforementioned countries were the place where the direct damage had occurred. Therefore, the law of these countries would apply generally to the tort and to the rules the banks had to comply with. However, in another case (*Vaimicus, op.cit.*) judges reached a different conclusion as regards the place of direct damage that would lead to the application of Cypriot law to the tort. We believe that even in this case where judges would apply the law of the forum to the tort, it would be reasonable to apply the law of the country where the bank had its seat (in China in *Vaimicus*) as regards its obligations of diligence on the basis of articles 16 and 17 of the Regulation. Such reasoning could rely on the consideration of those rules as foreign overriding mandatory provisions. In any case, we have to clarify that in the aforementioned interim judgements the court did not have to apply any foreign rules. It took into consideration the applicability of these rules to the activities of the banks as an argument showing that the Cypriot courts were not appropriate to hear the cases.

*20. The application of the specific rule on **direct action against the insurer of the person liable** (Art. 18)*

There has not been any decision applying this rule.

*21. The application of the specific rule on **subrogation** (Art. 19)*

There has not been any decision applying this rule.

*22. The application of the specific rule on **multiple liability** (Art.20)*

There has not been any decision applying this rule.

## 2.6 Chapter VI - Other Provisions

Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:

*23. The implementation of the concept of habitual residence in the Rome II Regulation, with reference both to persons covered by Art 23 and natural persons acting otherwise than in the course of business*

There has not been any difficulty in respect to the habitual residence for the needs of the application of the Rome II Regulation.

*24. The application of and any difficulties with the specific rules on exclusion of renvoi (Art.24) and States with more than one legal system (Art.25)*

There has not been any difficulty in respect to the renvoi for the needs of the application of the Rome II Regulation.

*25. The application of and any difficulties with the specific rule on public policy of the forums (Art. 26)*

There has not been any difficulty in respect to the public policy exception for the needs of the application of the Rome II Regulation.

*26. Practical **interaction between the Rome II Regulation and other EU and international legal instruments**, in specific areas such as **environmental damages, intellectual property rights or data protection** (Arts. 27, 28, 29)*

There has not been any case involving such interaction.

## 2.7 Comments on other Practical Problems

*These areas are **of particular interest** for the Commission. Please be as precise as possible regarding any issue that has been reported on:*

*27. The impact of the application of the **1971 Hague Convention** on the law applicable to traffic accidents on legal certainty (where relevant for your Member State)*

Cyprus is not a signatory party to the 1971 Hague Convention on the law applicable to traffic accidents.

*28. **Any other practical problems with respect to the application or interpretation of the Rome II Regulation, including but not limited to the suitability of the mosaic approach***

No other practical problems have emerged from the examination of the case law.

## 3. Comments on areas of interest

*These areas **are of particular interest for the Commission**. Please be as precise as possible regarding any issue that emerged in your Member State regarding:*

*29. The **exclusion of violations of privacy and rights relating to personality, including defamation**, from the scope of the Rome II Regulation and any difficulties arising out from differences among Member States' rules in **cross-border situations***

There has not been any such issue in that respect.

*30. Any comment regarding the Interplay of the Rome II Regulation with the treatment of **defamation and data protection**, and, in these areas, the relevance of **Strategic Lawsuits Against Public Participation (SLAPPs)***

No comment.

*31. The extent to which Rome II Regulation has been applied to **corporate abuses against human rights** and lays down an effective set of rules to regulate non-contractual liability;*

There have not been any cases involving corporate abuses against human rights.

*32. The impact of the development of **artificial intelligence** on the Rome II Regulation, and in particular on the suitability of the rules that it contains to regulate non-contractual liability.*

There has not been an issue that emerged in Cyprus in relation to artificial intelligence and its impact on the Rome II Regulation.

#### 4. List of national case law

<u>Court or tribunal</u>	<u>Case name and reference number</u>  <u>Reference to decision of the Court of Justice if applicable</u>	<u>Date</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings (only for key cases)</u>
Nicosia District Court	Orino Limited and 1.Velour Stars Limited et al.	24.04.2018	No specific article of the regulation has been invoked.  Parties have generally invoked Rome II Regulation	The main issue in this case was the international jurisdiction of Cypriot courts. Judges did not apply any article of the Rome II Regulation.	The applicants tried in this context to contest the international jurisdiction of Cypriot courts in a case dealing both with contractual and extra-contractual liability. Rome II Regulation is only indirectly invoked in this case. One of the main points raised by the applicants is that all the relevant acts that could be the basis of the liability have taken place outside of Cyprus (Russia) while only some of the defendants in the initial action had their seat in Cyprus and the first defendant was a company with its seat to British Virgin Islands. The court considered the case as premature and abstained from resolving the issue of jurisdiction.
Nicosia District Court	Vaimicus Estates Limited, and 1. Bank of China (Hong Kong) Limited 2. Khoo Kim Guang,	17.04.2018	1,2,3 4 (1), 10	The main issue in this case was the international jurisdiction of Cypriot courts. The applicable law to the tort is examined as an argument connected with the issue of the international jurisdiction.	An action is filed against two Chinese banks on the basis of a wilful misconduct implicating the transfer of funds from a bank account held in Cyprus to China. The defendants lodged an application to request the dismissal of this action on the basis of the <i>forum non conveniens</i> theory. They argued in support of their application firstly, that the seat of the defendants is in China and secondly, that the defendants are bound by the rules of the country

					where they are registered. The Court rejected the <i>forum non conveniens</i> defence. It considered that the Cypriot courts do have a sufficient connection with this case for a number of reasons. Some of the witnesses are in Cyprus. The main elements of the tort of the willful misconduct have taken place in Cyprus. And finally the Court identified Cyprus as the country where the damage occurred. Such localization is based on the fact that the bank account, from which the money was transferred to China, was held in Cyprus.
Nicosia District Court	Alterra International Holdings Limited and 1. Bank of Communications Co. Ltd, 2. China Xinyongan Futures Company Ltd	17.11.2017	1, 2, 3, 4, 4(3), 10	The main issue in this case was the international jurisdiction of Cypriot courts. In this context the court dealt also with the determination of the place of direct damage (damage of financial nature).	An action is filed against two Chinese banks before Cypriot courts on the basis of wilful misconduct and/or fraud and/or unjust enrichment. The defendants attempted in this case to have the action dismissed on the basis of the <i>forum non conveniens</i> theory. They invoked in support of their position the fact that the law applicable to such action should have been the law of Hong Kong. This assertion was based on the assumption that the legal order where the tort had taken place is Hong Kong. Judges invoked both articles 4 (1) and 4 (2) of the Regulation to reach the conclusion that the law of Hong Kong would have been applicable. The application is successful and the Cypriot courts suspend the examination of the action initially filed.
Nicosia District Court	Romstron Holdings Limited and 1. United Overseas Bank Limited 2. EKA Maju Mining Pte Limited,	27.09.2017	1,2,3, 10	The main issue in this case was the international jurisdiction of Cypriot courts. The Regulation served as one of the bases of the application. Applicable law is only an argument in	The court is seized in the context of a request for the annulment of notifications, required for the establishment of the international jurisdiction of Cypriot courts. The request is based on the <i>forum non conveniens</i> theory. The action against which this application has been lodged, sought damages due to the transfer of funds from a bank account

				support of the <i>forum non conveniens</i> defence.	held in Cyprus to a bank account held in Singapore. The applicant argued that the law of Singapore is applicable because Singapore has a closer connection with this case. A main argument supporting the position of the applicants is that the defendants are banking institutions which have their seat in Singapore and thus have to abide by the rules of this country. In addition to that it is argued that the defendants had no activity whatsoever in Cyprus. The Courts have accepted that Cypriot courts did not have jurisdiction without entering into the consideration of applicable law.
Nicosia District Court	Waipred Financial Co. and Fbme Bank Ltd	16.06.2017	No reference to any articles of Rome II Regulation	The main issue in this case was the international jurisdiction of Cypriot courts. Judges did not apply any article of the Rome II Regulation. The Regulation served as one of the bases of the application.	The applicant contested an <i>ex parte</i> decision issued against it for a tort that allegedly has taken place (misappropriation of funds). The applicant sought the annulment of the decision arguing among other things the lack of international jurisdiction of Cypriot courts due to the existence of a jurisdiction clause in favour of the Courts of Tanzania. The <i>ex-parte</i> decision is annulled because of an improper notification to the defendant.
Limassol District Court	Reverta AS and I. Bolmeno Commercial LTD et al./	11.05.2017	3	Examination of the applicable law as an argument against the granting of a freezing order. Judges did not examine explicitly any articles other than article 3 of Rome II Regulation.	The case arose in the context of an application for a freezing order and other provisional measures. The respondents invoked against the freezing order that the law applicable to the initial action lodged against them was Russian law and that according to that law the claimants had no valid claim. The applicants in this case were of the opinion that the law applicable was Cypriot law. The Court rejected altogether the application for the different provisional measures because it concluded that the claimants did not manage to sufficiently

					substantiate their claim and thus demonstrate that they had valid case.
Nicosia District Court	<p>Nibulon S.A.</p> <p>and</p> <p>1. BSC GmbH,</p> <p>2. Carpentaria Trading Limited et al.</p>	24.04.2017	4 (1), 4(3)	The main issue in this case was the international jurisdiction of Cypriot courts. The court dealt as well with the determination of the place of direct damage (damage of financial nature).	In this case the defendants in the principal action challenged the jurisdiction of Cypriot courts in the context of an interim procedure. Parties invoked at this stage an argument in relation to the applicable law so as to support their respective view as regards jurisdiction. For the applicant it is the law of Ukraine which is applicable because Ukraine is the place where the tort took place whereas for the respondent it is the Cypriot law which is applicable on the basis of the exception clause. The interim judgment rendered by court rejected the request of the applicants for dismissal of the action for lack of jurisdiction.
Larnaka District Court	Geniki Taxydromiki and Nan Global	22.12.2015	1,3, [4 (1) and 15 (d) :not explicitly]	Article 4 (1) is indirectly invoked by the parties	An application for provisional measures is filed. The court rejected the application for provisional measures considering that the difference is in its substance contractual and the parties have submitted their differences from the contract to arbitration and have chosen as applicable to those differences Greek law. Judges did not explain sufficiently the reasons for which they excluded the application of Rome II Regulation. A difficulty as to the interaction of Rome I and Rome II Regulations can be discerned.



# Czech Republic

## Executive Summary

- Czech courts are familiar with the Rome II Regulation and do not have significant difficulties applying its rules. In the majority of the analysed case law the courts have determined Czech law as applicable establishing thus the concurrence of forum and ius.
- But it is evident from the analysed case-law that in particular the courts of first instance repeatedly neglect cross-border aspects of cases, applying Czech law without any prior assessment based on relevant conflict of laws rules. In most of such cases it is indeed the Czech law that applies, and higher courts confirm the tacit determination of Czech applicable law of low courts by citing the relevant conflict rules in the reasoning of their decision. In most cases the cross-border aspect is linked to the neighbouring Slovak Republic, therefore the cross-border aspects are not necessarily perceived by courts because of the joint history of the two countries.
- The most often used conflict provision is the general conflict rule in Art. 4 (1) Rome II Regulation, followed by special rule for law applicable to unjust enrichment in Art. 10. Although in some cases the general rule was also applied to alleged unjust enrichment.
- There seem to be some difficulties with respect to the application of the 1971 Hague Convention which is binding for the Czech Republic. There are both cases when the courts apply correctly the convention that shall take precedence over Rome II Regulation in the Member States that are bound by it and cases when courts apply Rome II Regulation to determine the law applicable to lawsuits filed compensation of damages as a result of a car accident that occurred in the territory of the Czech Republic. The double regime for determination of law applicable to traffic accidents in the EU due to the absence of specific conflict rule for traffic accidents in the Rome II has been criticized in the Czech doctrine.
- No case law is available to the Reporters that concerns the area of defamation and data protection (including the relevance of SLAPPs), the issue of corporate abuses against human rights, nor artificial intelligence.

## 1. Introduction

From the information available to the Reporters, there is a general awareness of the Rome II Regulation among practitioners partly thanks to the fact that the course of Private International Law constitutes an obligatory subject in the curricula of all the Law Faculties at the Universities in the Czech Republic. It is difficult to judge if there is any awareness at all of the Rome II Regulation among citizens and businesses (with the exception of in-house lawyers). The Czech Commentary on Rome II was published in 2018 by Prof. Luboš Tichý, but it mostly draws upon German doctrine and case-law. There is a brief analysis of the Regulation to be found also in both Czech commentaries on Czech Private International Law Act (Act. No. 91/2012 Coll.) in connection with the conflict rule that applies for non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation in its Sec. 101. The most recent publication is the Czech national report on the application of Rome II Regulation by courts that was published last year in the book by Intersentia "Rome I and Rome II in Practice".<sup>464</sup>

As apparent from the analysed case-law, Rome II Regulation is generally known and applied by the courts in the Czech Republic. But it is clear from the case-law that a number of courts of first instance neglect the cross-border aspect of the case and apply Czech law without further considerations and reasoning. In those cases, the appeal court mostly states in its reasoning that the tacit determination of the Czech law was correct and in accordance with the Rome II Regulation.

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<sup>464</sup> BŘÍŽA, Petr and HOKR, Tomáš. The Application of the Rome I and Rome II Regulations in the Czech Republic, in: GUINCHARD, Emmanuel, Rome I and Rome II in Practice, Intersentia, London, November 2020, pp. 171 – 190.

To the knowledge of the Reporters, there are no relevant statistics regarding the application of the Rome II Regulation publicly accessible in the Czech Republic.

The doctrinal discussion on the Rome II Regulation in the Czech Republic is marginal.

The Reporters are not aware of any specific issues concerning the Rome II Regulation that have caused debate at a doctrinal or political level.

## 2. Analysis of the Rome II Regulation

### 2.1 Chapter I – Scope and Interpretation

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

1. *The determination of the material scope of application of the Rome II Regulation, including any difficulties in applying the category of “civil and commercial matters” or in defining the exact scope of any excluded matters (Art. 1(1)-(2))*

In the analysed case-law, the courts excluded the application of Rome II in cases where the subject-matter of the proceedings was an action for compensation for non-material loss suffered due to unlawful custody (56 Co 113/2018, 39 Co 408/2017), unlawful prosecution (39 Co 408/2017) or unlawful enforcement proceedings (39 Co 381/2017) against the Czech Republic/Ministry of Justice. In all these cases the claimants were Slovak nationals claiming compensation for the non-material loss suffered due to unlawful custody, unlawful prosecution or unlawful enforcement proceedings on the territory of the Czech Republic. The lower courts did not deal in its reasoning at all with applicable law, the appeal courts stated that as claims arising out of *acta iure imperii* were excluded from the scope of Rome II, and no applicable conflict rule was included in the bilateral Czech-Slovak treaty on legal assistance, national conflict rule anchored Sec. 15 of the then effective Act on Private International Law<sup>465</sup> applied and determined Czech law as applicable.

2. *The determination of the temporal scope of application of the Rome II Regulation (Arts 31-32)*

In the analysed case-law, the courts excluded the application of the Rome II Regulation in cases where the traffic accident or unjust enrichment (events giving rise to damage) occurred before January 11, 2009 (23 Cdo 4210/2013 - Rome II just briefly mentioned, it did not apply as the traffic accident in question occurred in August 2006, 33 Cdo 3752/2009 – The court just briefly mentioned that Rome II did not apply as the claimed unjust enrichment in question had taken place in 1993-4.).

3. *The characterization of the **concept of “non-contractual obligations”**, its relationship to the concept of “contractual obligations” and any difficulties in relation to characterisation (Arts. 1(1), 2)*

No difficulties indicated in the analysed case-law.

4. *The universal application of the Regulation (Art. 3)*

The majority of the analysed cases are of an intra-EU cross-border nature. Only in one case the Czech courts applied the law of Texas according to Art. 10(4) (30 Co 178/2019 – The claimant was a company with a seat in the USA and the alleged unjust enrichment occurred in connection with a transport of a horse from Europe to Texas, housing, food and care.).

5. *The approach to interpretation of the Rome II Regulation, and in particular **its relationship to other EU private international law instruments (including the recast Brussels I Regulation and the Rome I Regulation)** (Recital (7))*

The consistency with the Brussels I bis Regulation does not represent any problems in the analysed case-law.

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<sup>465</sup> Act No. 97/1963 Coll., on Private International Law and Procedural Law.

With respect to the Rome I Regulation, in one case the court based the application of Czech law on alternatively Rome I and Rome II Regulations stating that the subject of the action was a claim arising out of a contract to make up work, possibly a claim arising out of unjust enrichment (30 Co 259/2017 - The Court of Appeal set aside the decision of the Court of the First Instance, inter alia because the court did not consider the cross-border aspect of the case. The case was subject to Czech laws based on Art. 4 (1), Art. 19 Rome I or Art. 10 (1), (3) and Art. 23 (1) Rome II.). Similarly, in the case of a claim by a Slovak national domiciled in Slovakia for compensation of damage caused to a rented car (breach of contractual obligations) the court stated that Slovak law was applicable pursuant to Art 4(1) lit. b) Rome I Regulation adding that the same conclusion could be reached also by applying Art. 4(1) and 4(3) Rome II Regulation (14 C 168/2017).

## 2.2 Chapter II - Tort/Delict

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to the implementation of:*

6. *The general conflict-of-laws rule for tort/delict, and difficulties that have arisen in your Member State with respect to its application (Art. 4), and in particular:*
  - a. *the **approach to identifying the place of direct damage** in Art 4(1)*  
*No difficulties indicated in the analysed case-law.*
  - b. *the approach to the first rule of displacement in Art 4(2) in cases involving multiple parties or claims*  
*In the analysed case-law there was no case where the court applied Art. 4(2).*
  - c. *the approach to the escape clause in Art 4(3), and*

In one case the Czech court determined Czech law as applicable referring to both Art. 4(1) and 4(3) without further reasoning. The claimant (Slovak national domiciled in Slovakia) sued for compensation of costs incurred in connection with towing of a damaged rented car that was not returned and parked in Slovakia after the lease contract expired (14 C 168/2017). In another case the courts applied Czech law based on Art. 4 (3) in a lawsuit filed by a German national to obtain compensation of damages caused by a Czech attorney by agreeing to a court settlement in Czech court proceedings regarding liquidation of matrimonial property regime without consent of the client (25 Cdo 3453/2018).

- d. *the suitability of this set of rules to govern cases of **prospectus liability or other financial market torts***

Among the analysed case-law there was no case of prospectus liability or any other financial market torts.

7. *The rule on **product liability** (Art. 5) and, where relevant, the interaction with the application of **1973 Hague Convention on the Law Applicable to Products Liability**;*

Czech Republic is not a contracting party to the 1973 Hague Convention. None of the analysed cases involved product liability.

8. *The specific rule on **unfair competition** (Art. 6)*

Only one of the analysed cases involved unfair competition, no difficulty indicated (32 C 47/2018 - The claimants were companies with seat in Germany and Slovakia. The defendants were allegedly distributing TV channels of the claimant without authorization of the holder of the rights to the programme for its distribution. The Municipal Court qualified the dispute as dispute regarding protection of copyright and protection against unfair competition and decided based on Czech law. In its reasoning the court merely states that as regards the applicable law the claimant refers to Art. 4, Ar. 6 and Art. 8 of the Rome II Regulation).

9. *The specific rule on **environmental damage** (Art. 7)*

None of the analysed cases involved environmental damage.

10. *The specific rule on **infringements of intellectual property rights** (Arts. 8, 13)*

Only one of the analysed cases involved infringement of copyright, no further difficulty indicated (32 C 47/2018 - The claimants were companies with seat in Germany and Slovakia. The defendants were allegedly distributing TV channels of the claimant without authorization of the holder of the rights to the programme for its distribution. The Municipal Court qualified the dispute as dispute regarding protection of copyright and protection against unfair

competition and decided based on Czech law. In its reasoning the court merely states that as regards the applicable law the claimant refers to Art. 4, Ar. 6 and Art. 8 of the Rome II Regulation).

*11. The specific rule on industrial action (Art. 9)*

No case-law available to the Reporters.

## 2.3 Chapter III - Unjust Enrichment, Negotiorum Gestio and Culpa In Contrahendo

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to the implementation of:*

*12. The specific rule on **unjust enrichment** (Art. 10), including its relationship with the general rule for tort/delict in Art. 4.*

Alleged unjust enrichment as subject-matter appears in a number of analysed cases. The courts applied Art. 10(2) when both parties had their habitual residence in the same country at the relevant time period (39 Co 114/2017 – the defendant was a Slovak national and the subject-matter was an alleged loan agreement, 30 Co 146/2018 – the claimant sued her ex-partner for repayment of what she had invested into a reconstruction of house owned by his parents, the Court of Appeal confirmed the tacit determination of Czech law as the law applicable to the case by the Court of the First Instance and stated that as both claimant and defendant had their habitual residence in the Czech Republic at the time relevant for the claim, the applicable is determined pursuant to Art. 10 (2) Rome II Regulation, 19 Co 157/2018 - the Regional Court stated that in the case of alleged unjust enrichment the law applicable is the law of the Czech Republic in accordance with Art. 10 (2) Rome II as both claimant and defendant are habitually resident in the Czech Republic (defendant – Slovak national). In one case, where the claimant was from Barbados, the court applied Art. 10(3) to determine the law applicable to alleged unjust enrichment stating in its reasoning that the Regulation is, as part of Czech legal order, applicable to cases where only one party has its seat in the territory of the Czech Republic and that the necessity to apply Rome II can be derived from the fact that the Czech Act on PIL deals only with non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation (22 Co 535/2016). In one case, where the applicant was domiciled in Germany and the defendant in the Czech Republic, the court determined the application of Czech law based on Art. 10(3) in connection with Art. 4(1) as the alleged unjust enrichment or damage occurred in the territory of the Czech Republic (18 Co 304/2019). In one case, where the claimant was domiciled in Iceland, the court applied Czech law based on Art. 10(4) as the unjust enrichment occurred in connection with a foundation of a Czech legal person (30 Co 104/2018). In some cases, despite unjust enrichment, the courts applied Czech law pursuant to Art. 4 (30 Co 360/2017 – the Court of Appeal stated in its reasoning that the Court of First Instance applied correctly Czech law as applicable as it corresponded with Art. 4 of the Rome II Regulation but it was clear from the wording, that the Court of the First Instance had not considered the cross-border aspect of the case not establishing its international jurisdiction, neither determining applicable law, 46 Co 203/2014 - the District Court applied Art. 4 (1) of the Rome II, ignoring the special rule in Art. 10 for unjust enrichment in a case where the claimant that was domiciled in Italy transferred money to the defendant for the purpose of founding a Czech limited company but the defendant failed to finalize the necessary steps and the company was not founded).

*13. The specific rule on **negotiorum gestio** (Art. 11)*

No case-law available to the Reporters.

*14. The specific rule on **culpa in contrahendo** (Art. 12)*

No case-law available to the Reporters.

## 2.4 Chapter IV - Freedom of Choice

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

*15. The implementation in legal/business practice and by courts of the rule on **freedom of choice**, any difficulties therein and **any discussion that has been carried out in your Member State regarding possible reasons which would justify the need to rethink it** (Art. 14)*

No case-law available. The Reporters are not aware of any discussion carried out in connection with Art. 14.

## 2.5 Chapter V - Common Rules

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

*16. The scope of the exclusion of 'evidence and procedure' in Art 1(3) and any difficulties in relation to that exclusion or to questions of formal validity or the burden of proof (Arts. 21-22)*

In none of the analysed cases the courts made any reference to the above-mentioned articles.

*17. The approach in your Member State to questions of pleading, proof and application to individual cases of the substantive rules of the law applicable under the Rome II Regulation governing non-contractual obligations.*

The vast majority of analysed cases is subject to Czech law. When foreign law applies, it is mostly Slovak law that is very similar to Czech law and easily accessible to Czech courts.

*18. The delimitation of the scope of the applicable law (Art. 15(a)-(h)), including any difficulties as its relationship to the issues addressed at points 16 17 above)*

No relevant case-law available to the Reporters.

*19. The application of the rule on **overriding mandatory provisions** (Art. 16)*

No case-law available to the Reporters.

*20. The application of the specific rule on **direct action against the insurer** of the person liable (Art. 18)*

Among the analysed case-law there were two direct actions against the insurer. In one case the court applied Czech law as applicable based on Art. 4(1), (2) and (3) stating that the harmful event occurred in the Czech Republic and both the claimant and the defendant had their habitual residence in the Czech Republic (19 Co 66/2019). In the other case the court applied the Rome II Regulation because the damage occurred in the Czech Republic without mentioning of any of its provisions (39 Co 92/2019). In both cases the damage occurred as result of a traffic accident and the courts kept silent on the application of the 1971 Hague Convention.

*21. The application the specific rule on **subrogation** (Art. 19)*

No case-law available to the Reporters.

*22. The application of the specific rule on **multiple liability** (Art.20)*

No case-law available to the Reporters.

## 2.6 Chapter VI - Other Provisions

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

*23. The implementation of the concept of habitual residence in the Rome II Regulation, with reference both to persons covered by Art 23 and natural persons acting otherwise than in the course of business*

In the reasoning of the analysed case-law the courts did not elaborate in detail on how the habitual residence was ascertained. In one case where legal persons were involved, the court referred to Art. 23 (1), but without further reasoning (30 Co 178/2019 – The claimant was a company with seat in the USA).

*24. The application of and any difficulties with the specific rules on exclusion of renvoi (Art.24) and States with more than one legal system (Art.25)*

No reference in the analysed case-law with respect to the exclusion of renvoi. In one of the cases the court applied directly the law of Texas without any further reasoning or reference to Art. 25 (30 Co 178/2019).

*25. The application of and any difficulties with the specific rule on public policy of the forums (Art. 26)*

In one of the cases the Czech Supreme Court was deciding on the recognition of a judgment delivered by the Supreme Court of Arizona in Maricopa County granting punitive damages. The Supreme Court concluded that the public policy reservation can only be applied if the amount of punitive damage granted is manifestly disproportionate to the injury that is to be compensated. Czech law does not know the concept of punitive damages. This interpretation of the Supreme Court in connection with recognition will most probably be also respected by courts when assessing whether the provisions of foreign applicable law regarding punitive damages could be contrary to Czech public policy (30 Co 3157/2013).

*26. Practical interaction between the Rome II Regulation and other EU and international legal instruments, in specific areas such as environmental damages, intellectual property rights or data protection (Arts. 27, 28, 29)*

No reference to Art. 27, 28, 29 in the given areas. Art. 29 is mentioned in connection with the 1971 Hague Convention (18 Co 319/2017).

## 2.7 Comments on other Practical Problems

*These areas are of particular interest for the Commission. Please be as precise as possible regarding any issue that has been reported on:*

*27. The impact of the application of the 1971 Hague Convention on the law applicable to traffic accidents on legal certainty (where relevant for your Member State)*

The Czech Republic is bound by the 1971 Hague Convention. In two of the analysed cases the courts correctly applied the Convention that takes precedence pursuant to Art. 28 and Art. 29(1). In both cases the cross-border aspect was linked to Ukraine and in both cases the traffic accident (the event giving rise to the damage) and the damage occurred in the Czech Republic. The courts applied Czech law based on Art. 3 of the Convention (18 Co 176/2017 – in this case a Ukrainian national sued the Czech Office of Insurers and the Municipal Court stated in the reasoning that due to the fact that Czech Republic notified the Convention on the Law Applicable to Traffic Accidents, that was binding to both the Czech Republic and Ukraine, in accordance with Art. 29 (1) Rome II, the law applicable should be determined pursuant Art. 3 of the Convention and applied Czech law, 18 Co 319/2017 – the Municipal Court as court of appeal stated that Czech law applied pursuant Art. 3 of the Convention, declaring the reference of the court of first instance to Art. 2 point 5 of the Convention that excludes its application as incorrect, as the action had been brought against the person allegedly liable for the damage). In other cases, the courts ignored the existence of the 1971 Hague Convention and in actions for compensation of damages in connection with traffic accidents applied Art. 4 of the Rome II Regulation (19 Co 66/2019 – in a direct action against the insurer of the person liable for the damage of a car registered in Estonia court of both instances applied Czech law based on Art. 4 (1), (2), (3) and Art. 18 of the Rome II as the harmful event occurred in the Czech Republic, the claimant had its habitual residence and the defendant its seat in the Czech Republic, without any mention of the 1971 Hague Convention, 21 Co 157/2019 – in this case where a UK national with habitual residence in the Czech Republic brought an action for compensation of non-material loss due the death of relatives the court stated Czech law applied pursuant to Art. 4 (1) Rome II Regulation as the traffic accident occurred in the Czech Republic, 25 Co 234/2015 – in this case a Belgian national sought compensation for damage to health and courts of both instances determined Czech law as applicable in accordance with Rome II Regulation as the damage had occurred in the Czech Republic). The absence of specific conflict rule for traffic accidents in the Rome II and the fact that the 1971 Hague Convention takes precedence over Rome II in the MS that are bound by the Convention and the resulting double regime for determination of law applicable to traffic accidents in the EU is viewed rather critically in the Czech doctrine as it leads to forum shopping that is not excluded thanks to the formulation of the Brussels Ibis jurisdiction provisions.<sup>466</sup>

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<sup>466</sup> Valdhan, Jiří. Právní úprava mimosmluvních závazků s mezinárodním prvkem. Praha : C.H.Beck. 2012. S. 176-177.

28. *Any other practical problems with respect to the application or interpretation of the Rome II Regulation, including but not limited to the suitability of the mosaic approach*

### 3. Comments on areas of interest

*These areas are of particular interest for the Commission. Please be as precise as possible regarding any issue that emerged in your Member State regarding:*

29. *The exclusion of violations of privacy and rights relating to personality, including defamation, from the scope of the Rome II Regulation and any difficulties arising out from differences among Member States' rules in cross-border situations*

No case-law available to the Reporters.

30. *Any comment regarding the Interplay of the Rome II Regulation with the treatment of defamation and data protection, and, in these areas, the relevance of Strategic Lawsuits Against Public Participation (SLAPPs)*

No case-law available to the Reporters.

31. *The extent to which Rome II Regulation has been applied to corporate abuses against human rights and lays down an effective set of rules to regulate non-contractual liability;*

No case-law available to the Reporters.

32. *The impact of the development of artificial intelligence on the Rome II Regulation, and in particular on the suitability of the rules that it contains to regulate non-contractual liability.*

No case-law available to the Reporters.

#### 4. List of national case law

<u>Court or tribunal</u>	<u>Case name and reference number</u>  <u>Reference to decision of the Court of Justice if applicable</u>	<u>Date</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings (only for key cases)</u>
Regional Court in Ostrava	11 Co 153/2019	September 24, 2019	Art. 10 (1)	unjust enrichment (defendant domiciled in Austria)	Gas supply after the death of the contracting party. The Regional Court did not consider the fact that the defendant is domiciled in Austria and applied Czech law without prior conflict of laws analysis. The Regional Court confirmed the application of Czech substantive law pursuant to Art. 10 (1) Rome II.
Municipal Court in Prague	12 Co 112/2018	June 19, 2018	Art. 4 (1)	the Court of Appeal decision on the decision of the District Court Prague 10 Ref. No. 46 C 203/2014	The Appeal Court confirmed the decision of the Court of First Instance including the application of Art. 4 (1) of the Rome II to determine the law applicable to unjust enrichment.
Municipal Court in Prague	12 Co 217/2017	October 3, 2017	Art. 4	the Court of Appeal's decision on the decision of the District Court for Prague 4 Ref. No 21 C 71/2015	The Court of Appeal confirmed the decision of the Court of the First Instance. In the reasoning of the court there is no mention of the cross-border aspect, nor of the determination of applicable law.



District Court in Přerov	14 C 168/2017	July 31, 2018	Art. 4 (1), (3)	compensation of damages due to breach of contractual obligations  (claimant – Slovak national domiciled in Slovakia)	The District Court dismissed the claim for compensation of damage caused to a rented car due to prescription. The court stated that the law applicable is Slovak law pursuant to Art 4 (1) lit. b) Rome I Regulation adding that the same conclusion can be reached also by applying Art. 4 (1) and (3) of the Rome II Regulation, concluding there is no reason to apply other law that Slovak substantive law.
Municipal Court in Prague	17 Co 115/2018	December 13, 2018		compensation for damages allegedly suffered by the claimant following the depreciation of share price and non-repayment of a loan by the defendant with seat in Germany	The Municipal Court annulled the decision and referred the case back to the District Court concluding that the court of first instance has to establish its jurisdiction first, and then deal with the determination of applicable law.
Municipal Court in Prague	18 Co 131/2017	May 17, 2017	Art. 14 (1) lit. g	defendant with seat in Germany, choice of law	Additional costs incurred as a result of breach of contractual duty (the defective delivery of vehicles by the defendant).  No further reasoning regarding the choice of law.
Municipal Court in Prague	18 Co 176/2017	May 31, 2017	Art. 3 of the HU Convention	traffic accident in the territory of the Czech Republic (claimant – Ukrainian national, defendant – Czech Office of Insurers)	The Municipal Court stated in the reasoning that due to the fact that Czech Republic notified the Convention on the Law Applicable to Traffic Accidents, that is binding to both the Czech Republic and Ukraine, in accordance with Art. 29 (1) Rome II, the law applicable shall be determined pursuant Art. 3 of the Convention and Czech law applies.

Municipal Court in Prague	18 Co 181/2019	August 28, 2019	Art. 4 (1)	traffic accident that occurred in the Czech Republic  (claimant with seat in Germany, the right of recourse, German social insurer seeking recovery of sums - invalidity pension - paid in accordance with German law)	The Municipal Court stated that Art. 4 (1) Rome II applies to determine the applicable law. With respect to Art. 4 (3) the Court concluded that the closest connection due to the fact that the traffic accident occurred in the Czech Republic, both the insurer and the person claimed to be liable is to the Czech law. The payment of invalidity pension as a manifestation of indirect consequence of the accident has no impact on applicable law and it is not possible to judge the partial consequences of the harmful event based on where they occurred.
Municipal Court in Prague	18 Co 2/2017	February 1, 2017	Art. 10 (1)	unjust enrichment (defendant domiciled in Germany)	Payments based on invalid promissory contract.
Municipal Court in Prague	18 Co 304/2019	November 13, 2019	Art. 10 (3) Art. 4 (1)	unjust enrichment,  (applicant domiciled in Germany, defendant domiciled in the Czech Republic)	The Municipal Court confirmed the application of Czech law pursuant to Art. 10 (3) in connection with Art. 4 (1) of Rome II as the alleged unjust enrichment or damage occurred in the territory of the Czech Republic.
Municipal Court in Prague	18 Co 319/2017	October 25, 2017	Art. 3 of the Hague Convention	traffic accident in the territory of the Czech Republic, compensation for damages to health  (defendant is a Ukrainian national)	The Municipal Court stated in the reasoning that due to the fact that Czech Republic notified The Convention on the Law Applicable to Traffic Accidents in accordance (Art. 29 (1) Rome II), that is binding to both the Czech Republic and Ukraine, the law applicable shall be determined pursuant Art. 3 of the Convention and apply Czech law. The reference of the court of first instance to Art. 2 point 5 of the Convention that excludes its application is incorrect, as the action

					was brought against the person allegedly liable for the damage.
Municipal Court in Prague	18 Co 34/2017	March 29, 2017	Art. 4 (1)	compensation for damages in respect of breach of general duty to prevent damage (claimants - legal persons with seats in the USA, Switzerland and various EU Member States)	The defendant was the tenant, operator and administrator of the marketplace in Prague, subletting sales premises to individual traders who infringe intellectual property rights of the claimants by selling counterfeit goods. The Municipal Court stated that Art. 4 (1) Rome II applies and the dispute is subject to Czech law as the damage occurred in the Czech Republic.
Regional Court in Prague	19 Co 157/2018	September 3, 2018	Art.10 (2)	unjust enrichment, both claimant and defendant habitually resident in the Czech Republic (defendant – Slovak national)	The Regional Court stated that in the case of alleged unjust enrichment the law applicable is the law of the Czech Republic in accordance with Art. 10 (2) Rome II.
Municipal Court of Prague	19 Co 66/2019	April 3, 2019	Art. 4 (1), (2), (3), Art. 18	traffic accident in the Czech Republic, direct action against the insurer of the person liable  (damaged car registered in Estonia)	The Appeal Court confirmed the decision of the Court of the First Instance, that states in its reasoning the application of Czech law based on Art. 4 (1), (2), (3) and Art. 18 of the Rome II as the harmful event occurred in the Czech Republic, the claimant has its habitual residence and the defendant has its seat in the Czech Republic. No mention of the 1971 Hague Convention.
District Court for Prague 4	21 C 71/2015	April 19, 2017	Art. 4	ski accident in the Czech Republic, non-material damages for pain, loss of amenity, loss of income, reimbursement of	The court stated that the law applicable to the ski accident is Czech law, as the damage occurred in the Czech Republic, based on Art. 4 of the Rome II Regulation.

				costs incurred in connection with the accident (defendant domiciled in Germany)	
Regional Court in Prague	21 Co 157/2019	May 13, 2020	Art. 4 (1)	traffic accident, compensation of non-material loss due to the death of grandparents/mother and father/mother and father in law (the claimants shared a household with them)  (claimant – UK national with habitual residence in the Czech Republic)	The court stated that the case is subject to Czech law pursuant to Art. 4 (1) Rome II Regulation as the traffic accident occurred in the Czech Republic.
Regional Court in Prague	22 Co 535/2016	November 30, 2016	Art. 10 (3)	unjust enrichment in the Czech Republic  (claimant is a company with seat in Barbados)	The Court of Appeal stated that the Court of First Instance determined the law applicable to the alleged unjust enrichment pursuant to Art. 10 (3) of Rome II Regulation and elaborated that the Regulation is, as part of Czech legal order, applicable to cases where only one party has its seat in the territory of the Czech Republic. And added that the necessity to apply Rome II can be derived from the fact that the Czech Act of PIL deals only with non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.
Supreme Court of the Czech Republic	23 Cdo 4210/2013	December 15, 2015	Art. 4 and Art. 32	traffic accident, damages, insurance	Rome II just briefly mentioned, it does not apply as the accident occurred in August 2006

				(CZ x D)	
District Court for Prague 5	24 C 95/2017	July 19, 2018	Art. 4 (1), Art. 4 (3)	compensation of damages due to the insolvency administrator's breach of legal obligations, liability of the defendant for the material loss in connection with performing his duties as insolvency administrator (defendant domiciled in Slovakia)	The District Court stated that the law applicable is Slovak law the Slovak law, as it is clear from the facts of the case that the alleged breach of the defendant's legal obligations is significantly linked to his obligations as an insolvency administrator of the debtor's bankruptcy estate pursuant to Slovak law.
Supreme Court of the Czech Republic	25 Cdo 1510/2019	May 28, 2020	Art. 4 (1) in connection with Art. 15 lit. h)	traffic accident in the territory of the Czech Republic (the owner of the damaged car was a German national)	The Bayerischer Versicherungsverband Versicherungsaktiengesellschaft as the Insurance Provider of the injured party filed a lawsuit against The Czech Bureau of Insurers for obtaining compensation from the Guarantee Fund for damage caused by an uninsured car. The disputed issue was the alleged limitation of the claim. The courts determined Czech law as applicable pursuant to Art. 4 (1) in connection with Art. 15 lit. h) Rome II Regulation.
Supreme Court of the Czech Republic	25 Cdo 3453/2018	May 13, 2020	Art. 1 (1), Art. 2 (1), Art. 4 (3), Art. 24	compensation of damages caused by a Czech attorney by agreeing to a court settlement in Czech court proceedings regarding liquidation of matrimonial property regime without consent of the client	The Supreme Court stated that the law applicable was Czech law pursuant to Art. 1 (1), Art. 2 (1), Art. 4 (3) and Art. 24 of the Rome II Regulation. The reference to Art. 24 on exclusion of renvoi was not reasoned.

				(the client was a German national)	
Regional Court in Prague	25 Co 124/2013	October 30, 2013	Art- 4	damages, compensation for loss revenue and material damage to rented premises  (claimant is UK national domiciled in UK)	The Regional Court stated that the case is subject to Czech law in accordance with Art. 4 Rome II Regulation.
Regional Court in Prague	25 Co 131/2013	July 9, 2013	no reference	traffic accident in the Czech Republic, claim of the Insurance Company of the party that suffered the damage  (claimant – Czech Insurance Company, defendant – Slovak national with habitual residence in the Czech Republic)	Czech law applicable in accordance with Rome II Regulation – the Appeal Court does not state any Rome II provision, but refers to the “correct and detailed” reasoning of the Court of First Instance.
Regional Court in Prague	25 Co 234/2015	December 8, 2015		traffic accident in the Czech Republic, compensation for damage to health (pain, loss of amenity, costs for medical care, loss of income)  (claimant – Belgian national)	The Court Appeal confirms the application of Czech law in accordance with Rome II Regulation, as the damage occurred in the Czech Republic and refers to the reasoning of the Court of First Instance.
Supreme Court of the Czech Republic	28 Cdo 3204/2014	November 25, 2014	Art. 2 (1), Art. 10 (2), Art. 31 and 32	unjust enrichment  (defendant of Georgian nationality with habitual	The Supreme Court concluded that the Appeal Court applied national conflict rules to determine the law applicable where Rome II should have been applied. According to the Supreme Court, given the fact that both the claimant and the

				residence in the Czech Republic)	defendant have their habitual residence in the Czech Republic, Czech law applies pursuant to Art. 10 (2) Rome II.
Supreme Court of the Czech Republic	30 Cdo 3157/2013	August 22, 2014	Art. 26, recital 32	punitive damages, public policy of the forum	It is possible to raise a conflict reservation with the Czech public policy in relation to the recognition of a decision imposing <i>punitive damages</i> only if the amount of the penalty for damages is manifestly disproportionate to the damage it is intended to compensate.
Regional Court in Prague	30 Co 104/2018	May 30, 2018	Art. 10 (4)	unjust enrichment (claimant domiciled in Iceland)	The Court of Appeal stated that unjust enrichment is considered a non-contractual obligation according to Art. 2 (1) and therefore the alleged enrichment that occurred in connection with a foundation of Czech legal person shall be subject to Czech law pursuant to Art. 10 (4) Rome II. The Court of First Appeal applied correctly Czech law, but without any reasoning.
Regional Court in Prague	30 Co 146/2018	September 5, 2018	Art. 10 (2)	unjust enrichment (claimant domiciled in Slovakia)	The Court of Appeal confirms the tacit determination of Czech law as the law applicable to the case by the Court of the First Instance and states that as both claimant and defendant had their habitual residence in the Czech Republic at the time relevant for the claim, the applicable is determined pursuant to Art. 10 (2) Rome II Regulation. The claimant sued her ex-partner for repayment of what she had invested into a reconstruction of house owned by his parents.

Regional Court in Prague	30 Co 178/2019	November 27, 2019	Art. 10 (2), (3)	unjust enrichment (claimant – company with seat abroad - USA)	The Court of Appeal confirms the determination of the law of Texas as applicable, but pursuant to Art. 10 (2) and (3) of the Rome II Regulation. The alleged unjust enrichment occurred in connection with a transport of a horse from Europe to Texas, housing, food and care.
Regional Court in Prague	30 Co 259/2017	November 1, 2017	Art. 10 (1), (3), Art. 23 (1)	unjust enrichment (claimant – legal person with seat in UK)	The Court of Appeal set aside the decision of the Court of the First Instance, inter alia because the court did not consider the cross-border aspect of the case. In its reasoning the Court of Appeal stated that the subject of the action is a claim arising out of a contract to make up work, possibly claim arising out of unjust enrichment. The case is subject to Czech laws based on Art. 4 (1), Art. 19 Rome I or Art. 10 (1), (3) and Art. 23 (1) Rome II.
Regional Court in Prague	30 Co 360/2017	October 11, 2017	Art. 4	unjust enrichment (claimant – Slovak national)	The Court of Appeal confirmed the decision of the Court of First Instance in case of alleged unjust enrichment. In its reasoning stated that the Court of First Instance applied correctly Czech law as applicable as it corresponds with Art. 4 of the Rome II Regulation. It is clear from the wording, that the Court of the First Instance did not consider the cross-border aspect of the case and did not establish its international jurisdiction, neither determined applicable law.
Municipal Court Prague	32 C 47/2018	March 27, 2019	Art. 4, Ar. 6 and Art. 8	infringement of copyright, claim for reasonable reparation	The defendants were allegedly distributing TV channels of the claimant without authorization of the holder of the rights to the programme for its distribution. The Municipal Court qualified the



				(claimants are companies with seat in Germany and Slovakia)	dispute as dispute regarding protection of copyright and protection against unfair competition and decided based on Czech law. In its reasoning the court merely states that as regards the applicable law the claimant refers to Art. 4, Ar. 6 and Art. 8 of the Rome II Regulation.
Supreme Court of the Czech Republic	33 Cdo 3752/2009	August 31, 2011		unjust enrichment	Rome II just mentioned, the Regulation does not apply as the claimed unjust enrichment took place in 1993-4.
Municipal Court in Prague	39 Co 114/2017	31. 5. 2017	Art. 10 (2)	unjust enrichment (defendant is Slovak national)	Alleged loan agreement.
Municipal Court in Prague	39 Co 159/2018	October 17, 2018	Art. 4 (1)	compensation for material loss due to unlawful interim relief (claimants domiciled in Slovakia, defendant domiciled in the Czech Republic)	The Municipal Court confirmed the application of Czech law pursuant to Art. 4 (1) Rome II as the alleged damage occurred in the territory of the Czech Republic (ruling of Czech District Court on interim relief).
Municipal Court in Prague	39 Co 16/2018	February 28, 2018	Art. 4 (1)	traffic accident in the Czech Republic, compensation of damages to health (claimant is a Slovak national, defendant is Insurance Company Generali)	According to the reasoning of the Municipal Court the law applicable is determined pursuant with Rome II. As the damage occurred in the Czech Republic, the liability relations are in accordance with Art. 4 (1) subject to Czech law.
Municipal Court in Prague	39 Co 92/2019	June 7, 2019	no provision cited	traffic accident in the Czech Republic, direct claim against the insurer,	The Municipal Court as court of appeal confirmed that Czech law applies based on Rome II Regulation because the damage

				compensation of damages to health (pain, loss of amenity, loss of income)  (claimants domiciled in Slovakia)	occurred in the Czech Republic (no mention of any provision of the Rome II Regulation, no mention of the 1971 Hague Convention).
Municipal Court in Prague	39 Co 303/2018	February 6, 2019	Art. 4 (1), Art. 4 (3)	the Court of Appeal's decision on the decision of the District Court for Prague 5 Ref. No 24 C 95/2017	The Court of Appeal confirmed the decision of the Court of the First Instance and with respect to the applicability of Slovak law consented in the reasoning that the case was subject to Slovak substantive law.
Municipal Court in Prague	39 Co 357/2017	January 10, 2018	Recital 9, Art. 1 (1)	compensation for the non-material loss suffered due to unlawful criminal prosecution in the Czech Republic  (claimant is a Slovak national, defendant the Czech Ministry of Justice)	The Municipal Court stated that as claims arising out of acta iure imperii are excluded from the scope of Rome II, and as no applicable conflict rule is included in the bilateral Czech-Slovak treaty on legal assistance, national conflict rule in Sec. 15 the then effective Act on Private International Law applies, determining Czech law as applicable.
Municipal Court in Prague	39 Co 381/2017	February 28, 2018	Recital 9, Art. 1 (1)	compensation for damages suffered as a result of unlawful enforcement proceedings (one of the claimants – Slovak national, defendant – Ministry of Justice of the Czech Republic)	The Municipal Court stated that the lower court did not deal in its reasoning at all with applicable law. The Municipal Court stated further that as claims arising out of acta iure imperii are excluded from the scope of Rome II, and no applicable conflict rule is included in the bilateral Czech-Slovak treaty on legal assistance, national conflict rule applies.
Municipal Court in Prague	39 Co 389/2016	January 11, 2017	Art. 4 (1)	traffic accident that occurred in the Czech Republic	No account has been taken by the District Court of the fact that one the defendants is Slovak

				(one of the defendants is a Slovak national)	national. The Municipal Court stated that the dispute is subject to the law of the Czech Republic as the damage occurred in its territory.
Municipal Court in Prague	39 Co 408/2017	February 21, 2018	Art. (1) Recital 9	compensation for the non-material loss suffered due to custody and unlawful prosecution on the territory of the Czech Republic  (claimant – Slovak national, defendant Czech Ministry of Justice)	The Municipal Court stated that the District Court in its reasoning did not deal with applicable law despite the fact that the claimant was not a Czech national. The Regional Court stated further that as claims arising out of <i>acta iure imperii</i> are excluded from the scope of Rome II, and as no applicable conflict rule is included in the bilateral Czech-Slovak treaty on legal assistance, national conflict rule applies.
District Court Prague 10	46 C 203/2014	November 30, 2017	Art. 1 (1), Art. 2 (1), Art. 4 (1)	unjust enrichment  (claimant domiciled in Italy)	The claimant transferred money to the defendant for the purpose of founding a Czech limited company, the defendant failed to finalize the necessary steps and the company was not founded. The District Court applied Art. 4 (1) of the Rome II, ignoring the special rule in Art. 10 for unjust enrichment.
Regional Court in Ostrava	56 Co 113/2018	September 11, 2018	Art. 1 (1), recital 9	compensation for the non-material loss suffered due to unlawful custody on the territory of the Czech Republic  (claimant – Slovak national, defendant – Czech Republic)	The Regional Court stated that the District Court did not draw any conclusions with respect to applicable law from the fact that the claimant was a Slovak national. The Regional Court stated further that as claims arising out of <i>acta iure imperii</i> are excluded from the scope of Rome II, and no applicable conflict rule is included in the bilateral Czech-Slovak treaty on legal assistance, national conflict rule applies.

Regional Court of Ostrava	56 Co 67/2019	September 23, 2019	Art. 4 (1), (3)	the Court of Appeal's decision on the decision of the District Court in Přerov Ref. No 14 C 168/2017	The Appeal Court confirmed the decision of the Court of the First Instance, stating that with respect to applicable law the court refers to the correct conclusions of the lower court. The application of Slovak substantive law is, according to the Appeal Court, based on Art. 4 (1) and (3) Rome II Regulation.
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# Estonia

## Executive Summary

- The awareness of the Rome II Regulation in Estonia is higher amongst the judiciary and lower amongst other practitioners (practicing attorneys, in-house lawyers). There are a couple of scientific articles and master theses (in Estonian) which have addressed the provisions of the regulation, but these have not amounted to any scientific discussion on the regulation in Estonian legal literature.
- The scope of application of the Rome II Regulation has not been addressed in Estonian case law and is the subject of passing reference in Estonian legal literature.
- There are no cases in Estonian case law which would have given rise to the interpretation of the provisions on torts/delicts, unjust enrichment, *negotiorum gestio* or *culpa in contrahendo*.
- The freedom to choose the applicable law (Art 14) has been dealt with in criminal cases where the Estonian courts had to solve civil claims of the victims filed against the perpetrators of crimes. In these cases, Art 14 of the regulation was probably wrongly applied by the courts.
- There are no Estonian cases where Arts 13, 15, 16, 17, 18, 19, 20, 21, 22 have been applied by Estonian courts. The content of the foreign law applied under the regulation must be presented to the courts by the parties, but courts have a general obligation to determine the content of foreign law and can, thus, also check what the parties have presented.
- There have been no cases in Estonian case law on the implementation of Arts 23, 24, 25, 26, 27, 28, 29.
- There are no issues that have arisen in Estonia in the areas of specific interest to the Commission.

## 1. Introduction

The awareness of the Rome II Regulation is good among the Estonian judges since there have been several trainings on the EU private international law regulation organised by the Estonian Supreme Court.

Estonian notaries have also been trained on the EU rules on the applicable law, so it is to be expected that they are familiar with the regulation, though the notaries probably do not need to apply the regulation in their practice that much (if at all).

The awareness amongst the other practitioners, businesses and citizens is probably not that high, considering the very small number of cases in which the regulation has been applied in Estonia and considering that the awareness on the EU regulations amongst the practitioners is generally not that high.

There are no statistics regarding the application of the Rome II Regulation in Estonia. All the cases where the regulation has been applied to or referred to are, however, easily found in the Official Gazette of Estonia, which includes the Estonian case law database ([www.riigiteataja.ee](http://www.riigiteataja.ee)). Between the entry into force of the regulation and 30.08.2020, there have been only 17 cases where the regulation has been applied or referred to.

There is no doctrinal discussion on the Rome II Regulation in Estonia. There are a handful of scientific articles and master theses (in Estonian) where the Rome II regulation has been referred to, but these do not amount to discussion on the regulation in Estonian legal literature.

There are no issues concerning the Rome II Regulation that have caused debate at a doctrinal or political level.

## 2. Analysis of the Rome II Regulation

### 2.1 Chapter I – Scope and Interpretation

There is only one case in Estonian case law where the material scope of application of the Rome II Regulation was (very briefly) touched upon. In this case the court refused to apply the Rome II Regulation, because the matter at hand (defamation) fell out of scope of the regulation. In another case, the regulation was used in an unjust enrichment case. However, in neither of these cases did the courts go into an in-depth analysis of the regulation's scope.

There are no cases on the Rome II Regulation where the courts had difficulties in applying the category of "civil and commercial" cases. There are also no cases involving torts, delicts and quasi-delicts where the courts had problems with defining the term "civil and commercial" matters within the meaning of the Brussels I Recast Regulation.

There are no cases on the determination of the temporal scope of the Rome II Regulation (Arts 31-32). However, this issue has found a very brief explanation in Estonian legal literature.<sup>467</sup>

There are no cases on the characterisation of the concept of "non-contractual obligations" and its relationship to the concept of "contractual" obligations in the context of the Rome II Regulation or the Brussels I Recast Regulation. The issue of distinguishing between contractual and non-contractual obligations within the context of Estonian private international law instruments has, however, been dealt with briefly in the Estonian legal literature.<sup>468</sup>

There are no cases on the universal application of the Regulation (Art. 3).

There are no cases on the approach to interpretation of the Rome II Regulation, and in particular its relationship to other EU private international law instruments (including the recast Brussels I Regulation and the Rome I Regulation) (Recital (7)). However, since these regulations are generally used as a package during the judge trainings in Estonia, it is to be assumed that should such an opportunity arise, Estonian courts would interpret the two regulations in a similar manner.

## 2.2 Chapter II - Tort/Delict

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to the implementation of:*

There are no cases in Estonian case law where any difficulties have arisen on the application of Art 4 of the regulation. Art 4 has been relied upon by the courts several times, but these cases have dealt with traffic accidents and therefore have not caused much discussion on whether Art 4 should be applied or not.

There are no cases in Estonia where Arts 5, 6, 7, 8, 9 or 13 of the regulation was interpreted by the courts.

## 2.3 Chapter III - Unjust Enrichment, *Negotiorum Gestio* And *Culpa In Contrahendo*

In one Estonian case, Art 10 of the Rome II Regulation was applied, but not interpreted (the case involved a simple unjust enrichment - a claimant wanted to get back money wrongly paid to a foreign defendant).

There are no cases in Estonian case law where Arts 11 or 12 of the regulation would have been interpreted by the courts.

## 2.4 Chapter IV - Freedom of Choice

The freedom to choose the applicable law within the context of the Rome II regulation has created some confusion in Estonia in criminal cases involving civil claims. Namely, in two Estonian cases the courts used Art 14 of the regulation to apply Estonian law to civil claims. The courts concluded that the choice of the victims of the crime to litigate their civil claim before Estonian courts and the acceptance by the defendant of the civil claim should indicate an agreement

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<sup>467</sup> M. Torga. Kohalduva õiguse ja selle sisu kindlakstegemine rahvusvahelistes eraõiguslikes vaidlustes. – Juridica V/2014, p 411.

<sup>468</sup> See, for example: M. Torga. The conflict of conflict rules – the relationship between European regulations on private International law and Estonian legal assistance treaties concluded with third states. University of Tartu 2019. Available: <https://dspace.ut.ee/handle/10062/63311>, pp 143-146.

within the meaning of Art 14 of the regulation. Since it is clear that the agreement on jurisdiction should not automatically include an agreement on the applicable law and since the relevant cases are already from 2011 and are made by the judges who usually deal with criminal cases and hence are not that aware of the EU private international law rules, these cases should not be taken as a guideline for any future case-law.

There is no discussion in Estonia on the possible rethinking of Art 14.

## 2.5 Chapter V - Common Rules

There are no Estonian cases where Arts 13, 15, 16, 17, 18, 19, 20, 21, 22 would have been applied by Estonian courts.

It is generally agreed in Estonia that the foreign law is to be applied ex officio by Estonian courts, but that in cases where the parties can choose applicable law, it is up to the parties to plead foreign law (otherwise it is presumed that they have chosen Estonian law as the applicable law). The parties have a general obligation to prove the content of foreign law to the courts. However, Estonian courts have the opportunity to collect information on the content of foreign law on their own. This is done by researching foreign law by the judge himself or herself (for example, reading legal literature, searching in internet), but judges can also request help from the Estonian Ministries of Justice and Foreign Affairs, appoint experts and oblige parties to present them with the contents of foreign law. The judges are not, however, bound by what the parties present and have a right to check whether the foreign law indeed is the way that parties are describing it to be.

## 2.6 Chapter VI - Other Provisions

There have been no cases in Estonian case law on the implementation of Arts 23, 24, 25, 26, 27, 28, 29.

The practical interaction between the regulation and other EU and international legal instruments in intellectual property rights has, however, found brief attention in Estonian legal literature.<sup>469</sup>

## 2.7 Comments on other Practical Problems

Estonia has not joined the 1971 Hague Convention on the law applicable to traffic accidents.

The mosaic approach has not found any attention in Estonian case law. There are no other problems that have arisen on the interpretation of the regulation in Estonian case law.

# 3. Comments on areas of interest

There are no issues that have arisen in Estonia on the **exclusion of violations of privacy and rights relating to personality, including defamation**, from the scope of the Rome II Regulation and any difficulties arising from differences among Member States' rules in **cross-border situations**.

There are no issues that have arisen in Estonia on the interplay of the Rome II Regulation with the treatment of **defamation** and **data protection**, and, in these areas, the relevance of **Strategic Lawsuits Against Public Participation (SLAPPs)**.

There are no issues that have arisen in Estonia on the extent to which Rome II Regulation has been applied to **corporate abuses against human rights** and lays down an effective set of rules to regulate non-contractual liability.

There are no issues that have arisen in Estonia on the impact of the development of **artificial intelligence** on the Rome II Regulation, and in particular on the suitability of the rules that it contains to regulate non-contractual liability.

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<sup>469</sup> G. Lepik. Interneti-teenuse vahendaja teisele vastutuse kvalifitseerimine rahvusvahelises eraõiguses. Juridica 2013, pp 385-392.





#### 4. List of national case law

<u>Court or tribunal</u>	<u>Case name and reference number</u>  <u>Reference to decision of the Court of Justice if applicable</u>	<u>Date</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings (only for key cases)</u>
Tartu County Court	Criminal case no 1-11-8927	14.10.2011	Art 14(1)a	General tort Freedom of choice	If a defendant in a criminal proceedings agrees with a civil claim submitted in criminal proceedings by the victims of the crime and if the victims of the crime agree to litigate their civil claim in Estonian court, the parties should be considered as having chosen Estonian law to be applied to the tort.
Tartu County Court	Civil case no 2-11-25631	23.11.2011	Art 4(1)	General tort	Art 4(1) applied but not interpreted in a traffic accident case in which the defendant admitted the claim.
Tartu County Court	Criminal case no 1-11-13823	19.12.2011	Art 14(1)	General tort Freedom of choice	Same as criminal case no 1-11-8927.
Harju County Court	Civil case no 2-11-27979	26.09.2012	Art 10(1)	Unjust enrichment	Art 10(1) applied to a claim where the Estonian claimant wanted to get back a certain sum of money wrongly paid to a German defendant.
Tartu County Court	Civil case no 2-13-26316	18.04.2016	Art 4(1)	General tort	Art 4(1) applied but not interpreted in a traffic accident case concerning a claim against the insurer.

Estonian Supreme Court	Civil case no 3-2-1-45-16	16.06.2016	Art 4(1)	General tort	Art 4(1) applied but not interpreted in a traffic accident case concerning the insurer's redress claim against the policyholder.
Tartu Circuit Court	Civil case no 2-16-2695	02.09.2016	Art 11	Negotiorum gestio	Art 11 referred to, but not interpreted.
Harju County Court	Civil case no 2-15-105851	20.02.2017	Art 4(1)	General tort	Art 4(1) applied but not interpreted in a traffic accident case concerning the insurer's redress claim against the policyholder.
Tallinn Circuit Court	Civil case no 2-15-14492	29.03.2018	Art 1(2)	Scope of the Rome II	Art 1(2)g relied upon to refer to national PIL rules in a defamation case.
Tallinn Circuit Court	Civil case no 2-17-15908	17.10.2018	Art 4(1)	General tort	Art 4(1) applied but not interpreted in a traffic accident case concerning the redress claim between insurers. The court also applied Arts 15(a,b), 18 and 19.
Harju County Court	Civil case no 2-17-13456	12.02.2019	Art 4(1)	General tort	Art 4(1) applied but not interpreted in a traffic accident case concerning the redress claim between insurers. The court also applied Arts 15(a,b) and 19.
Harju County Court	Civil case no 2-17-130791	04.04.2019	Art 4(1)	General tort	Art 4(1) applied but not interpreted in a traffic accident case concerning the redress claim of the insurer against the policyholder.
Harju County Court	Civil case no 2-17-4218	29.04.2019	Art 4(1)	General tort	Art 4(1) applied but not interpreted in a case concerning unfair competition and protection of business secrets.
Harju County Court	Civil case no 2-18-14272	22.05.2019	Art 4(1)	General tort	Art 4(1) applied but not interpreted in a traffic accident case concerning the policyholder's claim

					against the insurer to establish the absence of claim.
Tallinn Circuit Court	Civil case no 2-17-4218	25.10.2019	Art 4(1)	General tort	Art 4(1) applied but not interpreted in a case concerning unfair competition and protection of business secrets.
Tallinn Circuit Court	Civil case no 2-16-3321	03.04.2020	Art 4(1) Art 4(2)	General tort	Art 4(1) and Art 4(2) applied but not interpreted in a case concerning compensation for damage based on CMR.
Tallinn Circuit Court	Civil case no 2-18-113192	27.05.2020	Art 4(1)	General tort	Art 4(1) and Art 4(2) applied but not interpreted in a traffic accident case concerning the redress claim of the insurer against the policyholder.

The cases are collected from the official public database [www.riigiteataja.ee](http://www.riigiteataja.ee) for the time period 11.01.2009-30.08.2020.

# Finland

## Executive Summary

- No case law related to the Rome II Regulation is available in Finland.
- Neither political discussion nor significant doctrinal discussion about the Rome II Regulation is taking place in Finland.

## 1. Introduction

- *How aware of the Rome II Regulation are practitioners, businesses and citizens in your Member State?*

In Finland, the lack of case law and legal literature regarding the Rome II Regulation affects awareness of the instrument among practitioners, businesses and citizens. Nevertheless, law students will most likely acquaint themselves with the Rome II Regulation during their studies at least at surface level. At the University of Helsinki (Finland's capital city), the Rome II Regulation is dealt with briefly during the lectures on private international law. Currently at the University of Helsinki, the general course of private international law contains 12 hours of lectures and 8 hours of group work, so the time resources do not allow the study of the Regulation in detail. The two books used as study material during the course at the University of Helsinki mainly cover the Rome I Regulation<sup>470</sup> (U Liukkunen, *Sopimussuhteita koskeva lainvalinta* (Talentum 2012)) and international family law (M Helin, *Suomen kansainvälinen perhe- ja perintöoikeus* 2nd edition (Alma Talent, verkkokirjajhyly, 2020)). This selection of books has not been made because of the perceived importance of these subject matters but because there are no other up-to-date books on private international law suitable for a basic course literature in Finnish language. Both books nevertheless mention the Rome II Regulation, and the doctrinal opinions presented in the books that are relevant to the Rome II Regulation are discussed in the corresponding paragraphs of this report.

Over the last decades, there has been a tendency to underrate the importance of private international law in Finland. For instance in the 1990s, the teaching of private international law was basically wound down.<sup>471</sup> These occurrences might have had an impact on the awareness of EU private international law in general and the Rome II Regulation in particular by the previous generations of lawyers. Koulu notes that in Finland the extremely low amount of case law related to private international law has naturally reduced interest to do private international law research in the first place, due to the legal science's natural tendency to focus on burning legal issues.<sup>472</sup>

- *Is the Rome II Regulation generally known and applied by courts in your Member State?*

As of July 2020, a search in the case database of the Helsinki District Court showed no results for the Rome II Regulation, signifying that the court has not applied the Regulation. Not a single case was detected, even though the Helsinki District Court resolves approximately 2,000 larger civil cases yearly and around 50,000 civil cases initiated

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<sup>470</sup> 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), OJ L 177, 4.7.2008, 6–16.

<sup>471</sup> M Helin, *Suomen kansainvälinen perhe- ja perintöoikeus* 2nd edition (Alma Talent, verkkokirjajhyly, 2020) 2.

<sup>472</sup> R Koulu, 'Lainvalinnan arkipäivää – yhtenäistyykö korvausstatuutti lähivuosina?' in T Lohi (ed) *Kaavoitus, rakentaminen, varallisuus : juhlaulkaisu Vesa Majamaa 1945–28/12–2005* (Edita 2005) 178. Koulu's article discusses the Commission's proposal for the Rome II Regulation (COM/2003/427 final) and the European Parliament's Report on the proposal (Report on the proposal for a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ("Rome II"). 27.6.2005. Final A6-0211/2005) and speculates what will happen with the Rome II project in the future.

as summary civil cases, and despite the fact that many of the biggest civil cases in Finland are resolved at the Helsinki District Court.<sup>473</sup>

Only one Supreme Court case touches upon the Rome II Regulation and its Article 4.<sup>474</sup> However, in this case, the Supreme Court of Finland does not actually apply the provisions of the Regulation *per se*, since the event at issue took place prior to the date of application of the Regulation. It merely reflects on the contents of the Regulation's provisions in order to find out what choice of law principles they contain.<sup>475</sup>

During brief discussions in July 2020 with a small group of district judges who deal with non-contractual obligations at the Helsinki District Court, it became apparent that they are aware of the Rome II Regulation, similarly as they are aware of the other EU private international law instruments such as the Rome I, the Brussels I<sup>476</sup>, and the Brussels II a Regulations<sup>477</sup>. Furthermore, the judges show readiness to use the Rome II Regulation when needed, but for some reason the Rome II Regulation is not applied in practice. Some cases that involve the Rome I Regulation and the Brussels I Regulation were found in the Court's database, but not many. The Brussels II a Regulation appears to be the most frequently used EU regulation, perhaps due to the comparable high number of international family law cases in Helsinki. Nevertheless, the total number of cases that deal with the Brussels II a Regulation is not particularly high.

No clear hostility or resistance to applying EU private international law was detected; the conclusion was merely that there have been no cases in the Helsinki District Court of issues of choice of law relating to non-contractual disputes. Perhaps the disputing parties have not wished to invoke choice of law questions for certain reasons in courts in Finland, or perhaps the number of cases in which the private international law questions generally might become relevant is small due to Finland's small size, geographically isolated location, and comparatively limited cross-border contacts.<sup>478</sup> The fact that there were no general statutory choice of law rules related to non-contractual obligations in Finland prior to the Rome II Regulation's entry into force,<sup>479</sup> might explain this state of affairs a little further. Liukkunen notes that the unwritten rules for choice of law related to non-contractual obligations in Finland were unclear.<sup>480</sup> She points out that

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<sup>473</sup> Annual report of Helsinki District Court 2019,

[https://oikeus.fi/karajaoikeudet/helsinginkarajaoikeus/material/attachments/oikeus\\_karajaoikeudet\\_helsinginkarajaoikeus/liitteet2019/9MYIEBX03/Helsingin\\_karajaoikeuden\\_vuosikertomus\\_2019.pdf](https://oikeus.fi/karajaoikeudet/helsinginkarajaoikeus/material/attachments/oikeus_karajaoikeudet_helsinginkarajaoikeus/liitteet2019/9MYIEBX03/Helsingin_karajaoikeuden_vuosikertomus_2019.pdf) (assessed 22.1.2021), 20–21.

<sup>474</sup> Supreme Court case KKO 2010:51. Diary number S2009/496, issued on 5 July 2010, ECLI:FI:KKO:2010:51.

<sup>475</sup> See more closely, Chapter II, Paragraph 6 c.

<sup>476</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, 1–32.

<sup>477</sup> Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338, 23.12.2003, 1–29.

<sup>478</sup> See *supra* n. 3. Kalliokoski notes that cross border antitrust damage cases often tend to be solved in certain specific countries such as England, Germany, and the Netherlands. He notes that competition law processes take a long time – it generally takes quite a while before a court starts to deal with the antitrust damages – and the Rome I Regulation is still rather young instrument. Counsel T Kalliokoski 'RE: Tutkimusprojektiin liittyvä tiedustelu' Message to lina Tornberg. 22 January 2021. E-mail.

<sup>479</sup> U Liukkunen, 'Recent Private International Law Codifications' in Erkki J Hollo (ed) *Studies on the Finnish Legal System – Finnish Reports to the 18th Congress of the International Academy of Comparative Law (IACL)* (EDILEX Edita Publishing Oy 2011) 4. See also Koulou, *supra* n. 3, at 179.

<sup>480</sup> Liukkunen, *ibid*, at 132. Finnish legal literature that covered non-contractual obligations back then included T Esko, *Rikkomusperusteiseen korvausvastuuseen sovellettavasta laista. Erityisesti tuotevastuuta silmällä pitäen* (Helsingin yliopiston vertailevan oikeustieteen laitos, 1978) and K Kilpeläinen, *Liikennevahingon johdosta syntyvään*

the Regulation has thus clarified the legal situation in Finland by providing means to predict the effects of possible future liability and to determine the applicable law to already incurred damages.<sup>481</sup> Liukkunen states that the Regulation “has meant a fundamental change to the basis of choice of law” in Finland.<sup>482</sup>

- *Are there any relevant statistics regarding the application of the Rome II Regulation in your Member State?*

No relevant statistics regarding the application of the Rome II Regulation in Finland are available.

- *How important is the doctrinal discussion on the Rome II Regulation in your Member State?*

The doctrinal discussion on the Rome II Regulation is almost non-existent in Finland.<sup>483</sup>

- *Are there specific issues concerning the Rome II Regulation that have caused debate at a doctrinal or political level?*

Article 4 of the Rome II Regulation has caused a little discussion at a doctrinal level. The relationship between the paragraphs of the article has been perceived as complex. It is considered unclear when the escape clause of Article 4 (3) applies, especially in relation to Article 4(2).<sup>484</sup> It has been even questioned whether the latter is needed since the application of the closest connection principle most probably points at the law of the country where both the parties (the person claimed to be liable and the person sustaining damage) have their habitual residence.<sup>485</sup> The mosaic approach adopted by Article 4(1) has raised some questions, since Article 4(2) directly provides an exception to this general rule of the Regulation.<sup>486</sup>

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sopimussuhteen ulkopuoliseen vahingonkorvausvastuuseen sovellettavasta laista : erityisesti Suomen kansainvälisen yksityisoikeuden kannalta, (Helsingin yliopisto, 1987).

<sup>481</sup> Liukkunen, supra n. 10, at 145.

<sup>482</sup> Ibid., at 132.

<sup>483</sup> Finnish contributions that acknowledge the Rome II Regulation include among others: L Sisula-Tulokas, En skada – vad är det? Oikeus 2008 (37); 4: 433, fn. 61; L. Sisula-Tulokas, ‘Europeisering av vår skadeståndsrätt ... que será, será’ in H Lindfors et al (eds) Kuvia aikoja: riitoja ja maksukyvyttömyyttä – Juhlakirja Risto Koulu 60 vuotta (Comi 2009) 584, fn. 75; L Sisula-Tulokas, Vem ansvarar för skador förorsakade av förarlösa fordon? JFT 5–6/2019, 329, fn. 60. M Norrgård refers to the Commission’s proposal for the Rome II Regulation in his article that regards intellectual property rights. M. Norrgård, Immaterialrättens territorialitet, JFT 4 –5/2005, 572–584. In his article that addresses the Draft Common Frame of Reference, Beale on the other hand refers to the Rome II Regulation once and notes that “[a]lthough under the Rome II Regulation parties can now choose what law of tort should apply to their relationship, I am not sure that there will be much scope for this kind of agreement in the kind of transactions that the Optional Instruments I have suggested would seek to cover.” H Beale, From Draft Common Frame of Reference to Optional Instrument, JFT 3–4/2009, 209. Mäenpää also includes one reference to the Rome II Regulation in his article. He notes that “[a]ccording to the Rome II Regulation, culpa in contrahendo is neither tort nor delict but its own type of non-contractual liability. The law applicable is the law that would have been applicable to the contract had it been entered into.” K Mäenpää, Contract Negotiations and the Importance of Being Earnest, JFT 4/2010, 341. Wetterstein discusses the Rome II Regulation in his article regarding maritime choice of law questions. P Wetterstein, Rom II-förordningen och sjöfarten, JFT 1–2/2010 s. 111–138.

<sup>484</sup> Liukkunen notes that Article 5 of the Rome II Regulation contains a similar escape clause related to product liability. Liukkunen, supra n. 10, at 136.

<sup>485</sup> Koulu, supra n. 3, at 184 –185.

<sup>486</sup> Ibid., 184.

## 2. Analysis of the Rome II Regulation

### 2.1 Chapter I – Scope and Interpretation

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

1. *The determination of the material scope of application of the Rome II Regulation, including any difficulties in applying the category of “civil and commercial matters” or in defining the exact scope of any excluded matters (Art. 1(1)-(2))*

Helin refers to Articles 1 (2)(a) and 1 (2)(b) of the Rome II Regulation and notes that obligations arising out of a family relationship, or a relationship having comparable effects to a family relationship, are excluded from the scope of the Rome II Regulation.<sup>487</sup> He presents Article 1 (2)(e) of the Rome II Regulation as an exclusion similar to Article 1 (2)(j) of the EU Succession Regulation.<sup>488</sup>

Liukkunen on the other hand notes that both the Rome I Regulation and the Rome II Regulation exclude revenue, customs and administrative matters from the scope of their application.<sup>489</sup> Furthermore, she notes that the Rome I Regulation does not cover non-contractual obligation and for those, the Rome II Regulation applies.<sup>490</sup> Liukkunen notes that Article 1 (2)(j) of the Rome I Regulation that states that obligations arising out of dealings prior to the conclusion of a contract is compatible with Article 12 of the Rome II Regulation – the latter instrument applies to dealings prior to the conclusion of a contract.<sup>491</sup>

2. *The determination of the temporal scope of application of the Rome II Regulation, Arts 31-32*

No information available

3. *The characterization of the **concept of “non-contractual obligations”**, its relationship to the concept of “contractual obligations” and any difficulties in relation to characterisation (Arts. 1(1), 2)*

Helin refers to Recital 11 of the Rome II Regulation, which states that the concept of non-contractual obligation should be understood as an autonomous concept. He takes this Recital as an example of an express statement of the general rule that the concepts of EU law should be characterized autonomously. He notes that this principle of an autonomous qualification can be difficult to follow in practice since there is no pan-European legal order on which the qualification could be based.<sup>492</sup>

4. *The universal application of the Regulation (Art. 3)*

No information available

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<sup>487</sup> Helin, supra n. 2, at 395.

<sup>488</sup> Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201, 27.7.2012, 107–134. Ibid 790, fn 1042.

<sup>489</sup> U Liukkunen, Sopimussuhteita koskeva lainvalinta (Talentum 2012) 66.

<sup>490</sup> Ibid., at 67.

<sup>491</sup> Ibid., at 74.

<sup>492</sup> Ibid., at 52, fn 60.

5. *The approach to interpretation of the Rome II Regulation, and in particular its relationship to other EU private international law instruments (including the recast Brussels I Regulation and the Rome I Regulation) (Recital (7))*

Liukkunen introduces the Rome II Regulation as a part of the ensemble of EU private international law rules set out in the Rome I Regulation and the Brussels I Regulation<sup>493</sup> in addition to the Rome II Regulation. She notes that the Rome II Regulation did not have a predecessor like the Rome I Regulation and the Brussels I Regulation did. Therefore, prior to the Rome II Regulation's entry into force, the choice of law rules related to the non-contractual obligation were very divergent between each EU Member State.<sup>494</sup> In addition, Liukkunen notes that the EU choice of law rules relating to contractual obligations, on the one hand, and to non-contractual obligations on the other, complete each other. Furthermore, she notes that the rules of the Brussels I Regulation need to be paid heed to when applying both the Rome I and the Rome II Regulation since the latter two instruments are based on the approach adopted in the Brussels I Regulation.<sup>495</sup>

## 2.2 Chapter II - Tort/Delict

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to the implementation of:*

6. *The general conflict-of-laws rule for tort/delict, and difficulties that have arisen in your Member State with respect to its application (Art. 4), and in particular:*
- a. *the approach to identifying the place of direct damage in Art 4(1)*

See below Paragraph c.

- b. *the approach to the first rule of displacement in Art 4(2) in cases involving multiple parties or claims*

no information available

- c. *the approach to the escape clause in Art 4(3), and*

The Finnish Supreme Court case KKO 2010:51 concerned the applicable law for a claim for damages following a killing (i.e., a manslaughter committed under mitigating circumstances). The offence concerned was committed in Estonia. Both the victim and the offender were Finnish nationals who had their habitual residence in Estonia. The victim's Finnish parents and siblings living in Finland claimed damages for the anguish arising from the victim's death under Chapter 5 Section 4a of the Finnish Tort Liability Act. Estonian law did not include a similar provision. Under Estonian law, in such circumstances persons who were close to a victim were only able to claim immaterial and/or moral damages provided that certain conditions were fulfilled. Thus, the Court needed to determine whether the Finnish law, more favourable from the viewpoint of the claimants, should apply to the case.<sup>496</sup>

In its decision, the Court notes that at the time of the offence there was no written choice of law rule in Finnish law that would have answered the question of what law should be applied to non-contractual obligations arising out of a tort in a cross-border case. In addition, the Court points out that there has hardly been any case law related to this issue. Nevertheless, the Court notes that in legal literature it has been quite consistently held that the applicable law should be the law of the place where the damage occurred. According to the Court, this rule has been applied frequently in neighbouring countries such as in Sweden.<sup>497</sup>

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<sup>493</sup> *Ibid.*, at 50. In her book, Liukkunen refers to the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, 1–23 but notices the ongoing reform of the Brussels I Regulation.

<sup>494</sup> Liukkunen, *supra* n. 20, at 50. See also Koulu, *supra* n. 3, at 179.

<sup>495</sup> Liukkunen, *ibid.*

<sup>496</sup> KKO 2010:51, *supra* n. 5, at paras. 1–6.

<sup>497</sup> *Ibid.*, at para. 8.



The Court notes that *lex loci delicti* rule can first refer to the law of the country in which the harmful act was committed or in which the damage-causing event took place, and second, to the law of the country in the territory of which the person sustaining damage has been faced with damage. The Court points out that, in Finland, the first option has been preferred over the second one.<sup>498</sup>

Paragraphs 10 to 13 of the Court's decision relate to the Rome II Regulation. In paragraph 10, the Court explains that the European Parliament and the Council of the European Union have adopted a regulation that concerns the law applicable to non-contractual obligation and that this regulation called as the Rome II Regulation applies as of 11 January 2009. The Court continues explaining the contents of the rules in Article 4 and adds that the Regulation cannot be applied to the case at hand because the event giving rise to damage occurred before the Regulation's entry into force.

In Paragraph 11, the Court notes that in Finland prior to the Regulation it was generally proposed that the law applicable to a non-contractual obligation arising out of a tort should be the law of the place where the tort occurred. Related to the case at issue, the Court considers that the application of this general rule would lead to the application of Estonian law since Estonia was the place in which the offence giving rise to the damage took place. The Court notes that even though this choice of law rule, assigning significance to the place where the tort occurred, might also refer to the place where the damage occurred, the Court finds that the place where the anguish arising from the death of the victim, which is not an indirect consequence of the tort, takes place cannot be deemed as a decisive factor in the choice of law. The Court notes that this presumption appears understandable also since the place where the persons entitled to compensation are located might depend only on incidental factors.<sup>499</sup>

In Paragraph 12, the Court states that the closest connection rule in Article 4(3) of the Rome II Regulation has been considered a generally applicable principle of private international law in Finland as well. Therefore, the Court deemed it necessary to examine the application of that principle to the case at issue.<sup>500</sup>

The Court points out that both the offender, the victim and the victim's near relatives claiming damages were of Finnish nationality. Furthermore, the Court notes that at the time the damage occurred the domiciles of the relatives were in Finland. On the other hand, the place in which the offence was committed and in which the direct consequence of that offence occurred were in Estonia. Additionally, both the offender and the victim had their places of residence and domiciles in Estonia. The Court weighted up these factors and considered that the case was most closely connected to Estonia. Namely, both the general rule of *lex loci delicti* and the places of residence and domiciles of the offender and the direct victim as connecting factors pointed at Estonia. The nationalities of the persons concerned, and the domiciles of the claimants do not reveal the closest connection in this case. The Supreme Court considered that Estonian law should apply to the claim.<sup>501</sup>

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<sup>498</sup> Ibid., at para. 9.

<sup>499</sup> Ibid., at para. 11.

<sup>500</sup> Ibid., at para. 12.

<sup>501</sup> This case has been dealt in Finnish legal literature among other in U Liukkunen, 'KKO 2010:51 Lainvalinta ja sopimuksen ulkopuolinen vahingonkorvausvastuu' in P Timonen (ed) KKO:n ratkaisut kommentein II 2010 (Talentum 2011) 20–25. Liukkunen notes that this decision is in line with Finnish legal literature and for its part enhances the predictability in choice of law. She notes that prior to this case, it was unclear whether the closest connection principle applies also to choice of law in relation to non-contractual obligations in Finland. She notes nevertheless that the importance of this case is diminished by the Rome II Regulation. This Supreme Court case is namely relevant only to damages that have occurred after the Regulation's entry into force. Liukkunen, 22. The case KKO 2010:51 is also referred in a footnote as an additional reading material regarding the question of applicable law in cases where the damage has occurred in a foreign state in P Ståhlberg and J Karhu, Suomen vahingonkorvaus oikeus, 6th ed. 8 (Talentum Media 2013) 505 and its Swedish translation, P Ståhlberg, J Karhu and A Wollstén, Finsk skadeståndsrätt (Talentum 2015)493.

d. *the suitability of this set of rules to govern cases of **prospectus liability** or other financial market torts*

no information available

7. *The rule on **product liability** (Art. 5) and, where relevant, the interaction with the application of **1973 Hague Convention on the Law Applicable to Products Liability**;*

no information available

8. *The specific rule on **unfair competition** (Art. 6)*

no information available

9. *The specific rule on **environmental damage** (Art. 7)*

no information available

10. *The specific rule on **infringements of intellectual property rights** (Arts. 8, 13)*

no information available

11. *The specific rule on **industrial action** (Art. 9)*

no information available

## 2.3 Chapter III - Unjust Enrichment, Negotiorum Gestio And Culpa In Contrahendo

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to the implementation of:*

12. *The specific rule on **unjust enrichment** (Art. 10), including its relationship with the general rule for tort/delict in Art. 4.*

no information available

13. *The specific rule on **negotiorum gestio** (Art. 11)*

no information available

14. *The specific rule on **culpa in contrahendo** (Art. 12)*

no information available

## 2.4 Chapter IV - Freedom of Choice

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

15. *The implementation in legal/business practice and by courts of the rule on **freedom of choice**, any difficulties therein and **any discussion that has been carried out in your Member State regarding possible reasons which would justify the need to rethink it** (Art. 14)*

no information available

## 2.5 Chapter V - Common Rules

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

16. *The scope of the exclusion of 'evidence and procedure' in Art 1(3) and any difficulties in relation to that exclusion or to questions of formal validity or the burden of proof (Arts. 21-22)*

no information available

17. *The approach in your Member State to questions of pleading, proof and application to individual cases of the substantive rules of the law applicable under the Rome II Regulation governing non-contractual obligations.*

no information available

18. *The delimitation of the scope of the applicable law (Art. 15(a)-(h)), including any difficulties as its relationship to the issues addressed at points 16 17 above)*

no information available

19. *The application of the rule on **overriding mandatory provisions** (Art. 16)*

Helin points out that in cases where the choice of law rule is based on an international obligation, whether the overriding mandatory rules of the forum country can be applied depends on the provisions of the international treaty or instrument at issue. Followingly, he notes that the Rome II Regulation accepts the application of the overriding mandatory provisions of the forum country in choice of law.<sup>502</sup>

Liukkunen points out that the Rome II Regulation extended the overriding mandatory rules doctrine to the choice of law relating to damages.<sup>503</sup> She notes the difference between Article 16 of the Rome II Regulation and Article 9 of the Rome I Regulation: in addition to the overriding mandatory rules of the forum country, the Rome I Regulation also covers the overriding mandatory rules of "third" countries that are countries that are neither forum countries nor those of the governing law, if the conditions set by the Regulation are fulfilled. The Rome II Regulation on the other hand addresses only the overriding mandatory provisions of the law of the forum.<sup>504</sup>

20. *The application of the specific rule on **direct action against the insurer of the person liable** (Art. 18)*

no information available

21. *The application the specific rule on **subrogation** (Art. 19)*

no information available

22. *The application of the specific rule on **multiple liability** (Art.20)*

no information available

## 2.6 Chapter VI - Other Provisions

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

23. *The implementation of the concept of habitual residence in the Rome II Regulation, with reference both to persons covered by Art 23 and natural persons acting otherwise than in the course of business*

no information available

24. *The application of and any difficulties with the specific rules on exclusion of renvoi (Art.24) and States with more than one legal system (Art.25)*

Helin uses Article 25 of the Rome II Regulation as an example of a choice of law rule in cases where the State at issue comprises several territorial units that have their own rules of law. He notes that this article handles such territorial units similarly to countries for the purposes of identifying the law applicable under the Rome II Regulation.<sup>505</sup>

25. *The application of and any difficulties with the specific rule on public policy of the forums (Art. 26)*

no information available

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<sup>502</sup> Helin, supra n. 2, at 92.

<sup>503</sup> Liukkunen, supra n. 20, at 241.

<sup>504</sup> Ibid. See also Liukkunen, supra n. 10, at 141.

<sup>505</sup> Helin, supra n. 2, at 94, fn 117.

26. *Practical interaction between the Rome II Regulation and other EU and international legal instruments, in specific areas such as environmental damages, intellectual property rights or data protection (Arts. 27, 28, 29)*

Liukkunen lists the reduction of fragmentation and the strengthening of legal certainty as central objectives of the coordinated unification of private international law through the Rome I and the Rome II Regulation.<sup>506</sup> She notes that the fragmentation of private international law and hence the fragmentation of choice of law rules persists nevertheless, and continues to complicate the choice of law. Liukkunen observes that sectoral instruments of secondary EU legislation often include specific choice of law rules, regrettably drafted in an uncoordinated and differentiated manner.<sup>507</sup> In this context, it is not helpful that the conflict of law rules have even been used as tools to unify politically difficult subject matters within the EU.<sup>508</sup> Liukkunen notes that these scattered conflict of law rules are difficult to interpret and apply since they do not necessarily follow the basic systematics of private international law but are instead created to enhance specific EU policies. Liukkunen thinks that incoherence has truly become a serious issue of European private international law due to this increasing fragmentation.<sup>509</sup>

As for Article 28 (1) of the Rome II Regulation, it is worth noting that Finland is a Contracting Party to the Hague Convention of 2 October 1973 on the Law Applicable to Products Liability. The rules of the Regulation cannot thus prejudice the application of the Convention.<sup>510</sup> In addition, Liukkunen notes that certain Scandinavian environmental conventions contain choice of law provisions.<sup>511</sup> For instance, the Convention on the Protection of the Environment of 19 February 1974 between Denmark, Finland, Norway, and Sweden is relevant with respect to Article 28 (1) of the Rome II Regulation.<sup>512</sup>

## 2.7 Comments on other Practical Problems

*These areas are of particular interest for the Commission. Please be as precise as possible regarding any issue that has been reported on:*

27. *The impact of the application of the 1971 Hague Convention on the law applicable to traffic accidents on legal certainty (where relevant for your Member State)*

no information available

28. *Any other practical problems with respect to the application or interpretation of the Rome II Regulation, including but not limited to the suitability of the mosaic approach*

Koulu notes that the *lex loci damni* (the law of the place where the damage occurs) has been selected as the general rule of the Rome II Regulation. He considers that compared to the traditional *lex loci delicti* approach, the weakness

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<sup>506</sup> Ibid.

<sup>507</sup> Liukkunen notes that these choice of law rules that are scattered in these sectoral instruments can be called even as “hidden” choice of law rules. These private international law rules namely constitute a part of EU instruments that aim to harmonize internal (substantive) market law. Ibid., at 132–133.

<sup>508</sup> She provides international company law and participation rights of workers as an example here. Ibid.

<sup>509</sup> Liukkunen *ibid.*, at 133. See also S Hafren, Några reflexioner inför Rom I-förordningens ikraftträdande JFT 1/2008, 88.

<sup>510</sup> Liukkunen, *ibid.*, at 145. See also Wetterstein, *supra* n. 14, at 134.

<sup>511</sup> Liukkunen, *ibid.*

<sup>512</sup> For instance, Article 3(2) of the Convention provides a mandatory rule that has similarity to Article 6(2) and 8(1) of the Rome I Regulation. It states that the question of compensation shall not be judged by rules which are less favourable to the injured party than the rules of compensation of the State in which the activities are being carried out. Unofficial translation of the instrument is available on <https://sedac.ciesin.columbia.edu/entri/texts/acrc/Nordic.txt.html> (accessed 22 January 2021).

of this rule is evident in cases where damages occur in several countries at the same time.<sup>513</sup> Taking the Kronhofer case as an example, Reich points out that the *lex loci damni* rule might easily lead to a situation where “jurisdiction and applicable law may fall apart”. He notes that this disintegration appears as “a somewhat strange consequence, especially in the case of multiple violations”.<sup>514</sup>

### 3. Comments on areas of interest

*These areas are of particular interest for the Commission. Please be as precise as possible regarding any issue that emerged in your Member State regarding:*

*29. The exclusion of violations of privacy and rights relating to personality, including defamation, from the scope of the Rome II Regulation and any difficulties arising out from differences among Member States’ rules in cross-border situations*

no information available

*30. Any comment regarding the Interplay of the Rome II Regulation with the treatment of defamation and data protection, and, in these areas, the relevance of Strategic Lawsuits Against Public Participation (SLAPPs)*

no information available

*31. The extent to which Rome II Regulation has been applied to corporate abuses against human rights and lays down an effective set of rules to regulate non-contractual liability;*

no information available

*32. The impact of the development of artificial intelligence on the Rome II Regulation, and in particular on the suitability of the rules that it contains to regulate non-contractual liability.*

no information available

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<sup>513</sup> Koulu, *supra* n. 3, at 184.

<sup>514</sup> N. Reich, Rights without duties? JFT (Tidskrift utgiven av juridiska föreningen i Finland JFT) 3–4/2009, 516.

#### 4. List of national case law

<u>Court or tribunal</u>	<u>Case name and reference number</u>  <u>Reference to decision of the Court of Justice if applicable</u>	<u>Date</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings (only for key cases)</u>
Supreme Court of Finland, Korkein oikeus in Finnish	Diary number S2009/496 ECLI:FI:KKO:2010:51 <a href="https://finlex.fi/fi/oikeus/kko/kko/2010/20100051">https://finlex.fi/fi/oikeus/kko/kko/2010/20100051</a>	Issued on 5 July 2010	Article 4(1) and 4(3)	The case concerned the applicable law for a claim for damages following a killing. The Court applied the closest connection principle in choice of law.	The Supreme Court does not actually apply the provisions of the Regulation per se, since the event at issue took place prior to the date of application of the Regulation. It merely reflects on the contents of the Regulation's provisions in order to find out what choice of law principles they contain.

# France

## Executive Summary

- In France, the Rome II Regulation has in general been very well received by practitioners who consider that it reduces the pre-existing legal uncertainty (resulting in a reduction of the possibility of forum shopping) and ensures greater predictability of the applicable law.
- The French doctrinal discussion on the Rome II Regulation is a lively one. It is particularly significant on the localisation of financial damages due to their high complexity linked to the digitalisation of the economy, which raises many complex issues.
- Whilst the scope of civil and commercial matters has been well-received, there has been criticism of the exclusions.

## 1. Introduction

- *How aware of the Rome II Regulation are practitioners, businesses and citizens in your Member State?*

In France, the Rome II Regulation has in general been very well received by practitioners who consider that it reduces the pre-existing legal uncertainty (resulting in a reduction of the possibility of forum shopping) and ensures greater predictability of the applicable law. This text is however unknown to the ordinary French citizen, and it remains an instrument for specialists. The general media has not covered this specific legal issue.

- *Is the Rome II Regulation generally known and applied by courts in your Member State?*

Rome II Regulation is a European norm well known in France ; insomuch as it had been adopted under the influence of France which had always recognized the general principle of the article 4 : the rule of the *lex loci delicti* since 1948 in the Lautour case. This solution has been confirmed by a consistent line of case law (Civ. 25 mai 1948, D. 1948. 357, note P. L.-P. ; JCP 1948. II. 4542, note Vasseur ; Civ. 1<sup>re</sup>, 1<sup>er</sup> juin 1976, D. 1977. 257, note F. Monéger ; JDI 1977. 91, note B. Audit. – Civ. 1<sup>re</sup>, 8 févr. 1983, Bull. civ. I, n° 51 ; JDI 1984. 123, note G. Légier).

- *Are there any relevant statistics regarding the application of the Rome II Regulation in your Member State?*

To our knowledge, there are no statistics on its application by French courts.

- *How important is the doctrinal discussion on the Rome II Regulation in your Member State?*

The French doctrinal debate is a lively one. It is particularly significant on the localisation of financial damages due to their high complexity linked to the digitalisation of the economy, which raises many complex issues.

- *Are there specific issues concerning the Rome II Regulation that have caused debate at a doctrinal or political level?*

In the past, a strong inter-governmental debate which had been concluded by the exclusion of violations of privacy and personality rights including defamation due to political disagreement. This political disagreement has been reflected in academic exchanges by scholars.

## 2. Analysis of the Rome II Regulation

### 2.1 Chapter I – Scope and Interpretation

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to :*

1. *The determination of the material scope of application of the Rome II Regulation, including any difficulties in applying the category of “civil and commercial matters” or in defining the exact scope of any excluded matters (Art. 1(1)-(2))*

The notion of « civil and commercial matters » employed by art. 1 of the Rome II Regulation is far from new. It was developed by CJEU in the *Eurocontrol* case in 1976 and confirmed by the *Rüfer* case four years later. Previously, this autonomous concept had been used, as a « pivotal notion », in Rome I and Brussels I. Hence, this notion is a common denominator for at least three major European texts.

Whilst the scope of civil and commercial matters has been well-received, there has been criticism of the exclusions. At first glance, the reader will find that inclusions only fill three lines before making a way to a succession of exclusions. That's why, the first impression of a positive determination is quickly overturned. The criticism of the French doctrine focusses, on the one hand, on the numerous exclusions starting with that relating to « violations of privacy and rights relating to personality including defamation ». This latter exclusion is seen as a political failure of Europe given that the number of cyberoffences by media has increased.<sup>515</sup> It could be explained by conflicting interests (press freedom versus protection of the respect to the right to a privacy life etc), leaving each state members to fix its own conflict-of-law rules<sup>516</sup>.

The exclusion of nuclear damages from Rome II has also been criticised. The main argument advanced in favour of the exclusion is that there are already international conventions (Paris Convention, 29 juillet 1960 under the supervision of OECD ; Brussels Convention on civil responsibility relative to maritime transport of nuclear material, 17 dec 1971 ; Vienna Convention on civil responsibility relative to nuclear damages). However, it should be noted that all these conventions are more than fifty years old and were concluded in the cold war context ; it might have been pertinent merely to remind the conflict of law rule fixed by these conventions in a European text with less parties<sup>517</sup>.

To conclude, beyond textual exclusions, CJEU in the case *Granorlo* decided to exclude from the scope of Rome II the right of action for the abrupt bringing to an end of long-established business relationships, considering this situation as a contractual matter,<sup>518</sup> the recital 7 exposes the preoccupation of coherence about material scopes between Rome I, Rome II and Brussels I.

## 2. *The determination of the temporal scope of application of the Rome II Regulation (Arts 31-32)*

After many debates at a European level about the temporal scope of application of the Rome II Regulation, the Court of Justice of European Union, in the case C-412/10, *Homawoo*, settled the problem ruling that Rome II will apply to determine the governing law of non-contractual obligations only where the events giving rise to damage occurred after 11 January 2009. Thus, the court marks a distinction between the date of entry into force (according to art. 297 of the TFUE : 20 days after its publication; that is to say the 20 august 2007) and the date for application – the 11 January 2009 - fixed by art. 32.

Now, the question of its reception by French courts has to be distinguished by two different trends. The first – but minority - had been initiated by the Paris Court of appeal (CA, Paris, 26 mars 2013, n° 12-02707) which undertook a hazardous and questionable interpretation of Rome II from a temporal perspective. Indeed, it applies Rome II to operative events dated as of October and November 2018, that is to say largely before the date of application determined by the

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<sup>515</sup> PERREAU-SAUSSINE (L.), « Les mal-aimés du règlement Rome II : les délits commis par voie de média », *Recueil Dalloz*, 2009, p.1647.

<sup>516</sup> BRIERE (C.), *Fasc. 3206 : règlement (CE) n° 864/2007 du 11 juillet 2007 sur la loi applicable aux obligations non contractuelles (« Rome II »)*, 27°. As instance, in case of defamation, in Germany, the conflict-of-law rule is ubi ius ubi iura rule whereas in France, certain decisions have retained the law of the place of diffusion. Nonetheless, in France, there are still doctrinal divergence which are vectors of juridical instability. For the author, this exclusion of Rome II is temporary insofar the European Commission ordered a study on this point and European Parliament suggested to add a specific conflict of law rule in Rome II. On this subject, discussions stay intense : a part of the French doctrine is favourable to the law of the place of the disclosure (in this way MESTRE (J.), « Les conflits de lois relatifs à la vie privée », *Etudes offertes à P.Kayser*, Presses universitaires d'Aix-Marseille, 1979, p.243, n°24), the other part pledge for the law of the victim's residence (in this trend Bourel (P.), « Du rattachement de quelques délits spéciaux en droit international privé », *RCADI 1989, t. 2, p. 261 s., spéc. p. 293 s.*

<sup>517</sup> Four states members (Malta, Austria, Luxemburg, Cyprus) of EU have not ratified these international conventions; Rome II was an occasion to renegotiate the question in a context radically different than cold war, in a small circle in which border states are more partners than enemies.

<sup>518</sup> It invokes the notion of a tacit contractual relationship.



*Homawoo* case. The second – which has the final authority in the French legal order – is represented by the French Cour de cassation. In brief, its position is an orthodox approach; its reminder to French inferior courts repeats the distinction between the date of entry into force and the date for application. Its case law on this point is consistent (cf. Cass, 1er civ, 5 sept 2018, n° 16-24.109; Cass, 1er civ, 10 oct 2018, n° 17-14.401 and n° 15-26.093) : Rome II is strictly applicable to operative events as of 11 January 2009. Before this date, this text is not “operational”.

3. *The characterization of the concept of "non-contractual obligations", its relationship to the concept of "contractual obligations" and any difficulties in relation to characterisation (Arts. 1(1), 2)*

In European law, the concept of « non-contractual obligations » is an autonomous European concept<sup>519</sup>. Its perimeter is more extensive than its French equivalent. Article 2 defines it as « damage shall cover any consequence arising out of tort/delict, unjust enrichment, *negotiorum gestio* or *culpa in contrahendo*. ». It incorporates at the same time tortious liability, the case of no-fault liability but also quasi contract or *culpa in contrahendo*. More specifically, the CJEU has defined residually the notion as all request activating the respondent's responsibility and which is not based on a commitment towards the other party<sup>520</sup>.

Concerning the reception of this by the French courts, the trend is complex. There has been a good deal of discussion in the French commentary on the right of action for the abrupt bringing to an end of long-established business relationships. Before the *Granarolo* case, in 2016, the French supreme courts had regularly held that this right of action was a delictual matter<sup>521</sup>. After the decision of the CJEU, there has been a phenomenon of resistance by French courts to the decision of the CJEU. This takes two forms :

- **Explicit rejections** at the level of the Court of Appeal with disagreements between chambers :
  - o For domestic affairs (without an international element) → it stays a delictual matter which, therefore, is included in the material scope of Rome II<sup>522</sup>
  - o For international affairs → same answer, refusal from the Court of appeal<sup>523</sup>

In a nutshell, the Chambers 10 and 11 of the division 5 of the Paris Court of appeal are on the same line (delictual matter) whereas the Chamber 4 has an opposite jurisprudence<sup>524</sup> and affirms it is a contractual matter. In other terms, it is highly complicated to summarise here.

- **Implicit rejections** at the level of the French supreme court - « Cour de cassation » - with several such instances :
  - o Cass. com., 11 janv. 2017, n° 15-13.780 → underlining that the former article L. 442-6, I, 5° of the commerce code initiates a tortious liability
  - o Cass. com., 7 mai 2019, n° 17-15.340 → in this case, the jurisdiction decided to squeeze out the question of the nature (contractual or non-contractual) of the brutal break of relationship hiding behind the following solution « regardless the legal basis, contractual or delictual, .... ».

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<sup>519</sup> On the autonomous notion, see *CJUE, 21 janv. 2016, aff. jtes C-359/14 et C-475/14, Ergo Insurance SE*

<sup>520</sup> On this point, *CJCE, 27 sept. 1988, aff. 189/87, Kalfelis : Rev. crit. DIP 1989, p. 117 ; JDI 1989, p. 457, obs. A. Huet. – CJCE, 17 juin 1992, aff. C-26/91, Jakob Handte : Rev. crit. DIP 1992, p. 726, note H. Gaudemet-Tallon ; JDI 1993, p. 461, note J.-M. Bischoff. – CJCE, 27 oct. 1998, aff. C-51/91, La Réunion européenne SA : Rev. crit. DIP 1999, p. 322, note H. Gaudemet-Tallon ; JDI 1999, p. 625, note F. Leclerc*

<sup>521</sup> In this way : Cass. com., 21 oct. 2008, n° 07-12.336 ; Cass. com., 15 sept. 2009, n° 07-10.493 ; Cass. com., 18 janv. 2011, n° 10-11.885, bull. civ. IV, n° 9 ; Cass. com., 25 mars 2014, n° 12-29.534, bull. civ. IV, n° 58, sur cet arrêt, v. not. notre article in RLDA 2014/96, n° 5255 ; Cass. com., 20 mai 2014, n° 12-26.705, bull. civ. IV, n° 90.

<sup>522</sup> Cass. com., 11 janv. 2017, n° 15-13.780 ; CA Paris, 9 nov. 2018, n° 17/13048 ; CA Paris, 19 janv. 2018, n° 15/21628 ; CA Paris, 28 juin 2018, n° 18/28490 ; CA Paris, 13 sept. 2018, n° 16/14413

<sup>523</sup> CA Paris, 5 déc. 2016, n° 15/16766.

<sup>524</sup> CA Paris, 19 sept. 2018, n° 16/05579

#### 4. *The universal application of the Regulation (Art. 3)*

There has not been any criticism in France : this characteristic has been welcomed by the French courts and doctrine as a simple established fact already present in other European norms such as Rome I (in its Article 2) and in a constant practice well before Rome II. As to the possibility of applying a foreign law, a great example of this is the issue of *post* Brexit international litigation.

#### 5. *The approach to interpretation of the Rome II Regulation, and in particular its relationship to other EU private international law instruments (including the recast Brussels I Regulation and the Rome I Regulation)(Recital (7))*

The Recital 7 of Rome II highlights the issue of the consistency between European instruments of private international law. The question of the unity (or divergence) is a « hot potato » for French jurists.

From a perspective of coherence, Rome II Regulation has been articulated with other EU international private law, in particular with Rome I and Brussels I bis. There is a commonality of notions such as the European distinction between contractual and non-contractual matters, their scope (positively and negatively defined). In concrete terms, the CJEU has fixed the legislative competence on the jurisdictional competence : in many cases the court determines the non-contractual qualification following the international competence<sup>525</sup>. Nonetheless, it adds that the abusive nature of the provision in the contract has to be scrutinized in view of the law designed by Rome I. The Court's goal is to realize a consistent interpretation of Rome I, II and Brussels I bis.

However, the acceptance of this by the French doctrinal writers is relatively heterogeneous. Many of these notions developed by the Brussels system (Brux 1, 1 bis) also involved in Rome I and Rome II (distinction between civil and commercial matter, contractual and non-contractual matter). The tryptic Rome I, II and Brussels I bis had been built as a whole with common notions to gain in synergy and heighten comprehension. But, it is seductive to replicate these autonomous definitions for a certain type of conflict, to another, all the more so, the recital 7 pleads in this way<sup>526</sup>. The French doctrine is divided between two trends :

- **Supporters of a unified position** → H. GAUDEMET-TALLON, *op. cit.*, n° 178, p. 209. – T. AZZI, *Bruxelles I, Rome I, Rome II : regard sur la qualification en droit international privé communautaire*, D. 2009. ; J. LÜTTRINGHAUS, *Rome I Regulation*, F. FERRARI [dir.], 2014, Sellier, n° 5, p. 26),
- **Supporters of a pluralist position** → J.-S. QUÉGUINER, obs. sous l'arrêt Kainz, ADUE 2014. 465 s. – B. HAFTEL, *Entre «Rome I » et « Bruxelles I » : l'interprétation communautaire uniforme du règlement «Rome I», JDI 2010. 761 s., spéc. p. 766 s. – Adde pour une synthèse des différentes thèses en présence, J.-Cl. Dr. Int., V° Qualification en droit international privé, fasc. 531, spéc. nos 145 s. – S. LEMAIRE, article préc., spéc. p. 43*

But we have to temper this irregularity at the French level by the simple fact that the CJEU jurisprudence is volatile insofar as the unified approach is not at all systematic and, thus, does not give to national jurisdictions stable notional point of references.<sup>527</sup>

From a practical point of view, let's take the example of the articulation between the Hague Convention relative to the law for traffic accidents and Rome II. There are two systems which promote indirectly the forum shopping and the law

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<sup>525</sup> As instance, CJUE, 1er oct. 2002, aff. C-167/00, Henkel : *JDI 2004, p. 903*, note F. Leclerc ; *Europe 2002, comm. 433*, obs. L. Idot ; *Rev. crit. DIP 2003, p. 682*, note P. Rémy-Corlay.

<sup>526</sup> V. not., V. PARISOT, *Vers une cohérence des textes européens en droit du travail ? Réflexion autour des arrêts Heiko Koelzsch et Jan Voogsgeerd de la Cour de justice, JDI 2012-2, doct.* – M. FALLON, *Rapport introductif, in M. FALLON, P. LAGARDE et S. POILLOT-PERUZZETTO [dir.]*, *Quelle architecture pour un code européen de droit international privé ?*, p. 17 s

<sup>527</sup> CJUE 10 déc. 2015, Florin Lazar aff. C-350/14 for a non-unitary approach of the notion of "country of the damage"; the court does not appreciate it following its jurisprudence ; CJUE 21 janv. 2016, aff. jointes C-359/14 et C-475/14, ERGO Insurance et Gjensidige Baltic for a unitary and autonomous approach, the court uses the european notion of contractual and non-contractual matter finded in the conflict of jurisdictions areas to transpose it for conflict of law. In this last case, it justifies its decisions refering to recital 7 and the attention to coherency.

shopping. Indeed, with Brussels I bis, the victim may request either the judge of the state of the respondent's residence, or the judge of the place of the operative event. Let's take another example : in case of a traffic accident on the Portuguese territory with a Spanish driver while the injured passenger is French. The French judge will choose the Portuguese law as the *lex loci delicti*. The Spanish judge would have chosen the Hague convention which derogates to the *lex loci delicti*, in favor of the law of the matriculation of the car (that is to say the Spanish law). As a conclusion, in this case, the implementation of Rome II and the Hague convention would result in the application of the same law – the law of the place of the traffic accident – if only the victim has her permanent residence in Portugal. Thus, many difficulties emerge from the conservation of the Hague Convention with the Rome II Regulation.

## 2.2 Chapter II - Tort/Delict

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to the implementation of:*

6. *The general conflict-of-laws rule for tort/delict, and difficulties that have arisen in your Member State with respect to its application (Art. 4), and in particular:*

a. *the approach to identifying the place of direct damage in Art 4(1)*

The European jurisprudence lays down the principle that the direct damage is only appropriate to determine the applicable law ; the applicable law to indirect damages will follow the law of the principal damage. This interpretation had been confirmed by CJEU in 2015.<sup>528</sup>

The French supreme court accepts without difficulties this point ; in a 2003 decision, it decided that « about the indirect victim's moral prejudice, which is linked to the operative event, the applicable law to this injury is the law of the place of the principal damage, not the law of the place of the moral prejudice »<sup>529</sup>

b. *the approach to the first rule of displacement in Art 4(2) in cases involving multiple parties or claims*

In the continuation with the previous question, the same French supreme court decision is categorical: the law of the principal damage is the « juridical centre of gravity » so that secondary damage will be analysed through the prism of this applicable law to avoid a dispersion of the litigation. It was even the solution raised implicitly by the French jurisprudence in the *Lautour* case in 1948.

c. *the approach to the escape clause in Art 4(3),*

About the application of the escape clause, there is only one interesting case of the Paris Court of appeal which overturns the French lower courts. It argues in its decision to choose the French law to the case applying the article 4(3) to the facts. Again, it was always a French judicial reflex before the adoption of Rome II. This article does not appear to pose any problem.

d. *the suitability of this set of rules to govern cases of prospectus liability or other financial market torts*

The compensation of financial offences is included in the application of the instrument but there is not any special conflict of law rule while it is a very complex contentious matter. Thus, articles 4 et 14 are the sole articles to cover this field. There is no decision from the French supreme court on this theme which is why there is much doctrinal debate<sup>530</sup>.

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<sup>528</sup> CJUE, 10 déc. 2015, aff. C-350/14, *Lazar* : *Europe* 2016, comm. 82, obs. L. Idot ; *Rev. crit. DIP* 2016, p. 678, note D. Bureau ; *LPA* 2016, n° 194, *chronique de DIP du CUREJ*, p. 7, note V. Parisot

<sup>529</sup> Cass. 1<sup>re</sup> civ., 28 oct. 2003 : *Rev. crit. DIP* 2004, p. 85, note D. Bureau ; *D.* 2004, p. 233, note Ph. Delebecque ; *LPA* 23 déc. 2003, p. 11, note P. Ancel ; *LPA* 8 juin 2004, p. 15, note H. Chanteloup ; *JCP G* 2004, II, 10006, note G. Lardeux ; *JDI* 2004, p. 499, note G. Légier

<sup>530</sup> [https://www.lexis360.fr/Document/rome\\_ii\\_la\\_place\\_du\\_reglement\\_rome\\_ii\\_dans\\_la\\_regulation\\_globale\\_de\\_s\\_marches/5dS6CtLBaOdtVT6uuOIZzY9PW4cxOGDxALEhn4C3tX41?data=c0luZGV4PTEmckNvdW50PTcm&rndNum=1426560972&tsid=search17\\_&](https://www.lexis360.fr/Document/rome_ii_la_place_du_reglement_rome_ii_dans_la_regulation_globale_de_s_marches/5dS6CtLBaOdtVT6uuOIZzY9PW4cxOGDxALEhn4C3tX41?data=c0luZGV4PTEmckNvdW50PTcm&rndNum=1426560972&tsid=search17_&) ; [https://www.jura.uni-bonn.de/fileadmin/Fachbereich\\_Rechtswissenschaft/Einrichtungen/Institute/IPR/LS\\_Lehmann/Publikationen/Leh](https://www.jura.uni-bonn.de/fileadmin/Fachbereich_Rechtswissenschaft/Einrichtungen/Institute/IPR/LS_Lehmann/Publikationen/Leh)

The CJEU jurisprudence gives us some clues as to how to systematize legal reasoning about the localisation of the place for a financial damage. In the case *Kronhofer*: the victim had transferred money on a foreign bank account which had been used to realize financial operations ; the place of the damage would be identified in the country in which the bank account is located. A short while ago, the Paris Court of appeal answered a powerful decision in this area, arguing that « *the place of the damage according to article 4.1 of Rome II has to be interpreted following the jurisprudence relative to the choice of competence in non-contractual matter in Brussels I bis Regulation* »<sup>531</sup>. This is a clue, but not a fixed answer. The question is even more sensitive about falsified information which causes financial damage. Where is the appropriate localisation of the damage ?

- the place of the diffusion of the information ?
- the place of the bank account from which money had been invested ?
- the place of the commercialisation of these financial products ?
- the place of the victim's residence ?

In the *LVMH c/ Morgan Stanley* case, the Paris Court of appeal chose the French law as the law of the place of the diffusion of the wrong information<sup>532</sup> but the question is still uncertain with several gaps between national jurisprudence of EU members<sup>533</sup>

7. *The rule on product liability (Art. 5) and, where relevant, the interaction with the application of 1973 Hague Convention on the Law Applicable to Products Liability*

Before Rome II entered into force, the French supreme court considered that the Hague Convention on the law applicable to Products Liability must be raised automatically<sup>534</sup> ; this obligation was not justified by its international law origin.

Since the entry into force of Rome II, article 18 places the primacy of pre-existing international conventions. The French doctrine underlines also the absence of a definition of a product while there are many types (e.g. the definition given by Hague convention includes movable and immovable properties). Nonetheless, Rome II will be necessary in two particular cases. The first, in a transactional perspective, what is the applicable law for a non-signatory state to this Hague Convention<sup>535</sup>. The second is the question of the reparation of the damage caused to the product itself.

As to the articulation of Rome II, art 5 and the 1973 Hague Convention, there is no recent French jurisprudence but a French article is highly interesting to understand the French outlook about the articulation between these two instruments<sup>536</sup>. The 1973 Hague Convention is not relevant to frame the applicable law when the claimant and the defendant conclude an agreement (before or after the operative event) : the applicable law to this agreement will be designated by article 14 to determine conditions of its conclusion. According to the preparatory work of this convention, it is not appropriate to identify the applicable law to the direct action of the victim against the insurer's respondent.

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mann-Matthias - Proposition d'une règle spéciale dans le Règlement Rome II pour les délits financiers - in - Rev. crit. DIP juillet-septembre 2012-1.pdf

<sup>531</sup> CA Paris 12 novembre 2019 n° RG 19/03149, Société LLOYDS BANK PLC c/ SARL [X] et Société Générale

<sup>532</sup> CA Paris, 30 juin 2006 : RTD com. 2006, p. 875, obs. N. Rontchevsky ; *Banque et Droit* n° 108, juill.-août 2006, p. 34, note H. de Vauplane.

<sup>533</sup> For more details, see Corneloup (S.), « La place du Règlement Rome II dans la régulation globale des marchés financiers », *Cahiers de droit de l'entreprise* n° 6, Nov 2012, dossier 30.

<sup>534</sup> Cass. 1re civ., 6 févr. 2008, no 07-12.672

<sup>535</sup> BOSKOVIC (O.), Répertoire de droit international, « Règlement Rome II : obligations non contractuelles », Sept 2010 (updated in November 2018), n° 43 to

<sup>536</sup> <https://www.hoganlovells.com/~media/hogan->

[lovells/pdf/publication/journaldessocisdossierresponsabilitdufaitdesproduitscdimeglio010213\\_pdf.pdf](https://www.hoganlovells.com/~media/hogan-lovells/pdf/publication/journaldessocisdossierresponsabilitdufaitdesproduitscdimeglio010213_pdf.pdf)

Lastly, it does not frame the applicable law to the recourse action or in case of subrogation. However, if the claimant did not acquire directly the product from the respondent, the Hague convention will be applicable (except if the claimant bases his action on a subrogation).

Finally, taking into account the primacy of pre-existing international conventions on Rome II, the material scope of Rome II in this field is negatively defined – art 5 seems “only” applicable to situations declined by the 1973 Hague Convention. This conclusion emerges from the doctrine; the national jurisprudence should be updated.

#### *8. The specific rule on unfair competition (Art. 6)*

The French doctrine has fully accepted notions of “unfair competition and acts restricting free competition” as autonomous concept for the interpretation of Rome II<sup>537</sup>. There is however a small reservation about the characterisation of this notion: indeed, many acts are located so close to the contract that the doubt is legitimate; it is the case of abusive prices fixed by a party toward his co-contracting party based upon a framework contract.

The first question is: Does Article 2-1 of the Paris Union Convention on the industrial property, ratified by certain states, constitute a hidden conflict of law rule which prevails over Rome II, article 6?<sup>538</sup> In the past, the French supreme court has never applied this convention<sup>539</sup>.

The second question is : to what extent is Article 6 applied by French courts? Very little used by French lower courts; in the Expedia case, the Paris Court of appeal “forgot” to enforce this article<sup>540</sup>. But, recently, the French supreme court<sup>541</sup> has overturned a Paris Court of appeal decision<sup>542</sup> on the basis of article 6-1 and 6-2 of Rome II. In 2017, the French supreme court has even overturned another Paris court of appeal decision founded on one of its rejection on the article 6 of Rome II.

As a conclusion, we may affirm that article 6 has been taken into account at the highest level of judicial authority in France, which sounds like a positive indication of the inclusion of art 6 of Rome II in the French legal order.

#### *9. The specific rule on environmental damage<sup>543</sup> (Art. 7)*

Article 7 of Rome II offers to the victim an option between the law of the place of the damage or the law of the place of the operative event (ubiquity rule). This rule had been unanimously welcomed by French experts and has been seen as constituting a powerful means to encourage industry to respect environment (but one disappointment: the exclusion of nuclear damages from the scope – see above). In addition, Rome II includes a large definition of environmental damage (recital 24).

The French commentary however underlines three difficulties with this.<sup>544</sup>

- The first is the moment of the choice of the law of the place of the operative event. No specific provisions of the Rome II give us an explicit answer but Recital 25 lays down that the law should be chosen by the *lex fori*. Two other issues have been raised: the definition of damage and the operative event for environmental damage. In another field, the French supreme court affirmed, about press offenses, that the act of broadcasting is the operative

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<sup>537</sup> RLC 2010/22, n° 1523, M. Behar-Touchais ; Suppl. RLDA 2013/83 n° 4660, S. Clavel ; RLC 2018/72, n° 3393, J-P. Arroyo

<sup>538</sup> T. Azzi et E. Treppoz, « Contrefaçon et conflits de lois : quelques remarques sur la liste des conventions internationales censées primer le règlement Rome II, D. 2011, p. 1293

<sup>539</sup> In this way Cass. com., 8 nov. 2017, n° 16-10850, D. 2018. 966, obs. S. Clavel, ibid. 1939, obs. L. d'Avout, RCDIP 2019 p.547 note V. Pironon.

<sup>540</sup> CA Paris, 21 juin 2017 n° 15/18784

<sup>541</sup> Cass, com, 15 janvier 2020, n°17-22.295

<sup>542</sup> CA Paris, 10 mai 2017

<sup>543</sup> On this question, see Grisel (F.), « Analyse critique de l'article 7 du règlement du 11 juillet 2007 sur la loi applicable aux obligations non contractuelles », *Revue de droit international et de droit comparé*, 2011, n° 1

<sup>544</sup> BOSKOVIC (O.), JCI Droit international Fasc. 146-40 : Droit international privé et environnement. – Conflit de juridictions – conflit de lois, 19 novembre 2013, n°48-53.

event.<sup>545</sup> The identification of the operative event is a difficult stage when the place of the damage differs with the place of the decision making which caused the environmental damage.

- Second, about the option: does Article 7 allow one to choose between the law of the place of the environmental damage or the law of personal damages? In other terms: do personal damages, suffered in the continuation of environmental damage have to be taken into account to identify the applicable law or not (autonomous damage unrelated to the environmental damage) ? The question raised is the risk of a multiplication of applicable laws. In the negative answer, the place of personal damage will be ignored in the identification of the applicable law process. Some writers have advocated in favour of the positive answer for “political reasons” (in order to offer to the victim an option between the law of the environmental damage or the law of her personal damages)
- Third, about the introduction of the autonomy of parties (article 14) while the conflict of law rule generally promotes the general interest. It is a little difficult to understand why the autonomy of parties has been excluded in respect of private law matters (such as intellectual property) but has been maintained for environmental damages.

#### 10. *The specific rule on infringements of intellectual property rights (Arts. 8, 13)*

There is no French supreme court decision on this topic but the commentary has raised the issue of infringement of intellectual property rights by a cyber means (again, raising the question of the localisation of the damage). The concept of *lex protectionis* is seen as an ambiguous notion; the wording of article 8 is comparable to article 4 because it requires to choose the law of the damage; article 8 is a transposition of article 4 to the intellectual property field.

The first concern raised by doctrinal writers is the difference in approach between the conflict of law and the conflict of jurisdiction ; many experts support the idea of a convergence between the *lex protectionis* and the *lex damni*. All the more so, the position of the French supreme court<sup>546</sup> before the adoption of Rome II was not in favour of this. In the *Lamore* case, the Court decided that the *lex protectionis* was not the country in which the damage occurred but the law of the place of the operative event.

A part of the French doctrine considers that article 8 could be marginalized by other international rules,<sup>547</sup> what is more the lack of French decisions prevents to determine a clear legal position. To conclude, the position of the French jurisprudence on this point of law is still highly uncertain, unstable.

#### 11. *The specific rule on industrial action (Art. 9)*

There are no supreme court decisions on this topic even though, in France, actions involving industrial action are frequent in the maritime domain. By the way, the juridical press does not broach the question. We consider however that the risk of complications in case law is somewhat limited because strikes are generally geographically specific.

## 2.3 Chapter III - Unjust Enrichment, Negotiorum Gestio And Culpa In Contrahendo

This chapter is seen by French scholars as a concentration of heterogeneous notions but their common point is the identification of the applicable law. The common reasoning consists in researching the nearest point of contact (the most relevant) before choosing the second nearest point of contact and so on. Overall, the common reasoning is, firstly, to search a potential pre-existing contractual relationship. In case of failure, the applicable law will be the law of the country of residence of the parties. If this point of contact does not exist, then one must refer to the place of the operative event (that is to say the general rule of the article 4).

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<sup>545</sup> Cass. 1<sup>re</sup> civ., 14 janv. 1997, n° 94-16.861, *Gordon* : JurisData n° 1997-000078 ; *Rev. crit. DIP* 1997, p. 504, note J.-M. Bischoff

<sup>546</sup> Cass. 1<sup>re</sup> civ., 30 janv. 2007, *Lamore*, Bull. civ. I, n° 44 : « la législation du pays où la protection est réclamée n'est pas celle du pays où le dommage est subi mais celle de l'État sur le territoire duquel se sont produits les agissements délictueux »

<sup>547</sup> For more details, see BERGE (J.-S.), « Territorialité du droit de propriété intellectuelle et conflit de lois : prospective », *Revue Lamy droit de l'immatériel*, n° 53, 1<sup>er</sup> oct 2009

12. *The specific rule on unjust enrichment (Art. 10), including its relationship with the general rule for tort/delict in Art. 4.*

The sole significant French case on this theme is a Paris Court of Appeal decision which upheld a French lower court decision on the choice of applicable law. It applies literally article 10(1) of Rome II attesting that there was a pre-existing business relationship between the parties. Hence, the applicable law to the case of unjust enrichment has to be the law which frames the business relationship. Notwithstanding the lack of case law, article 10 of Rome II seems to be well received in the French legal order. The absence of debate on this point could be interpreted as a positive sign.

13. *The specific rule on negotiorum gestio (Art. 11)*

Again, there is a silence from French courts on this article of Rome II even though the notion of *negotiorum gestio* is well known in the French civil code. The doctrine points to a weakness of the Rome II Regulation: the case of a dissociation of constitutive elements (linked to the dematerialization and the "globalization" of social relationships) of the *negotiorum gestio*. The CJEU has to clarify this aspect.

14. *The specific rule on culpa in contrahendo (Art. 12)*

The expression refers to all negotiations before the conclusion of contract and the break of contractual negotiations. The recital 30 affirms that *culpa in contrahendo* is an autonomous concept which should not be interpreted according to national law: this is a contractual matter in German law but a non-contractual matter in French law.<sup>548</sup> According to the Rome II Regulation, it is a non-contractual matter. The content of article 12 has never caused controversy in the French commentary.

By the way, the first two points of contact – *lex of contractus* and law of the residence of the parties – testify to the achievement of the principle of proximity in the identification of the applicable law. This preoccupation had been globally appreciated in France.

## 2.4 Chapter IV - Freedom of Choice

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

15. *The implementation in legal/business practice and by courts of the rule on freedom of choice, any difficulties therein and any discussion that has been carried out in your Member State regarding possible reasons which would justify the need to rethink it (Art. 14)*

Commentators have noted that the choice of the parties being indicated expressly «or expressed or demonstrated with reasonable certainty by the circumstances of the case» may give rise to some uncertainty and might result in inconsistent case law. (See Carine Brière, « Fasc. 3206 : RÈGLEMENT (CE) N° 864/2007 DU 11 JUILLET 2007 SUR LA LOI APPLICABLE AUX OBLIGATIONS NON CONTRACTUELLES » *JurisClasseur Europe Traité*, para 84).

In the commentary, there has been criticism about the criteria of "pursuing a commercial activity" in respect of the validity of a contractual agreement prior to the event giving rise to the damage occurred. In one text, it was stated that "La limitation de l'élection ex ante aux seuls commerçants est critiquable. Sans doute aurait-il été préférable d'étendre cette liberté de choix « aux rapports entre professionnels même non commerçants » ... dans la mesure où la notion « d'activité commerciale » reçoit des acceptions différentes selon les pays. » (See Carine Brière, « Fasc. 3206 : RÈGLEMENT (CE) N° 864/2007 DU 11 JUILLET 2007 SUR LA LOI APPLICABLE AUX OBLIGATIONS NON CONTRACTUELLES » *JurisClasseur Europe Traité*, para 85).

## 2.5 Chapter V - Common Rules

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

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<sup>548</sup> Cass. 3e civ., 28 juin 2006 : *JurisData* n° 2006-034261 ; JCP G 2006, II, 10130, note O. Deshayes

16. *The scope of the exclusion of 'evidence and procedure' in Art 1(3) and any difficulties in relation to that exclusion or to questions of formal validity or the burden of proof (Arts. 21-22)*

There does not appear to be any case law / or particular problems relating to this issue.

17. *The approach in your Member State to questions of pleading, proof and application to individual cases of the substantive rules of the law applicable under the Rome II Regulation governing non-contractual obligations.*

See previous answer.

18. *The delimitation of the scope of the applicable law (Art. 15(a)-(h)), including any difficulties as its relationship to the issues addressed at points 16 17 above)*

There has been a degree of discussion concerning Article 15(c), which entails that the law applicable to non-contractual obligations shall govern "the existence, the nature and the assessment of damage or the remedy claimed." The focus has been on the impact on road accident / PI cases. Some authors have suggested a different approach (see e.g. *O. Boskovic, La réparation du préjudice en droit international privé, préface P. Lagarde* (Paris, LGDJ, Bibliothèque de droit privé, t. 407) ; *O. Boskovic, « Les dommages-intérêts en droit international privé. » JCP G 2006.I.163*).

It has also been pointed out that this approach might result in the availability of punitive damages, which is traditionally frowned upon under French law, being governed by the law applicable to non-contractual obligations (*O. Boskovic, « Règlement Rome II : obligations non contractuelles » in Répertoire de droit international* para 134)

19. *The application of the rule on **overriding mandatory provisions** (Art. 16)*

There does not appear to be any case law relating to this issue. This issue has been raised in respect of Business & Human rights cases (see below). Some commentators have indicated that the impact of this rule is not likely to be great in French law : "D'une manière générale, on voit peu de dispositions relatives à la responsabilité extracontractuelle qui mériteraient la qualification de loi de police." ( *O. Boskovic, « Règlement Rome II : obligations non contractuelles » in Répertoire de droit international* para 120).

20. *The application of the specific rule on **direct action against the insurer of the person liable** (Art. 18)*

This rule has been approved of by doctrinal writers (see *O. Boskovic, « Règlement Rome II : obligations non contractuelles » in Répertoire de droit international* para 124).

It has been underlined in the French case law that this specific rule applies solely to non-contractual obligations and not in relation to contractual obligations. *Cass. 1re civ., 24 janv. 2018, n° 17-10.959 : JurisData n° 2018-000857*)

21. *The application the specific rule on **subrogation** (Art. 19)*

There does not appear to be any case law / or particular problems relating to this issue – see below on relationship with 1971 Hague Convention.

22. *The application of the specific rule on **multiple liability** (Art.20)*

There does not appear to be any case law / or particular problems relating to this issue.

## 2.6 Chapter VI - Other Provisions

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

23. *The implementation of the concept of habitual residence in the Rome II Regulation, with reference both to persons covered by Art 23 and natural persons acting otherwise than in the course of business*

One issue has been raised in the literature which how 23(2) will apply in case of loss caused to secondary victims (the so-called "préjudice par ricochet".) One commentator has thus noted : « En effet, lorsque le règlement donne compétence à la loi de la résidence habituelle commune de la personne lésée et de la personne dont la responsabilité est invoquée, comment interpréter les termes « personne lésée » ? Faut-il entendre par là, la victime par ricochet ou bien faut-il s'en tenir à la victime directe ? Dans la mesure où ces deux personnes peuvent avoir des résidences habituelles dans des pays différents, la solution du conflit de lois va s'en trouver affectée. Or, aucune disposition du



texte ne permet de répondre à cette question et l'hésitation est donc permise. » (see O. Boskovic, « Règlement Rome II : obligations non contractuelles » in *Répertoire de droit international* para 37).

24. *The application of and any difficulties with the specific rules on exclusion of renvoi (Art.24) and States with more than one legal system (Art.25)*

No particular problems reported.

25. *The application of and any difficulties with the specific rule on public policy of the forums (Art. 26)*

French commentary considers that the public policy rule will be applied only in exceptional circumstances, as the French courts have often been cautious in applying this doctrine in cases of delict (para 122).

One specific issue raised is that of punitive damages. It is noted that Recital 32 deals specifically with this issue, which indicates that it should be dealt with on a case by case basis, and will only be contrary to public policy (ordre public) where the award of punitive damages is "of an excessive nature."

*"Il est présent dans toutes les conventions internationales de conflits de lois. Il est vraisemblable que la CJUE en imposera une application exceptionnelle. La Cour de cassation française, quant à elle, a toujours fait preuve d'une grande modération dans l'usage de l'exception d'ordre public en matière délictuelle, en estimant que les dispositions étrangères ne sont pas contraires à l'ordre public international français « par cela seul qu'elles diffèrent des dispositions impératives du droit français, mais uniquement en ce qu'elles heurtent des principes de justice universelle considérés dans l'opinion française comme doués de valeur internationale absolue" (Cass. 25 mai 1948, GADIP, no 19).*

26. *Practical interaction between the Rome II Regulation and other EU and international legal instruments, in specific areas such as environmental damages, intellectual property rights or data protection (Arts. 27, 28, 29)*

As mentioned above, a part of the French doctrine considers that Article 8 of the Reg concerning IP could be marginalized by other international rules (such as the Paris Convention for the Protection of Industrial Property and the Berne Convention) but the lack of French decisions on this means that the position is still unclear (For further discussion, see BERGE (J.-S), « Territorialité du droit de propriété intellectuelle et conflit de lois : prospective », *Revue Lamy droit de l'immatériel*, n°53, 1er oct 2009).

## 2.7 Comments on other Practical Problems

*These areas are of particular interest for the Commission. Please be as precise as possible regarding any issue that has been reported on:*

27. *The impact of the application of the 1971 Hague Convention on the law applicable to traffic accidents on legal certainty (where relevant for your Member State)*

Pursuant to Article 28 of Rome II, the 1971 Hague Convention (to which France is a party) remains applicable. The rules contained therein sometimes differ from those in Rome II. This is the case as regards the direct action against the insurer of the person liable (covered in Art. 18 of Rome II, as we have seen above), which enables a tort victim to bring a claim directly against the tortfeasor's insurer if either the law applicable to the tort / or the law applicable to the insurance contract so provides. The rule in the 1971 Hague Convention is different (see article 9 of the Convention), and is more favourable to victim as it allows a traffic victim a direct action against a liability insurer if such a claim is recognised either by the law applicable to the victim's claim against the insured, or by the internal law of the country of accident; or by the law which governs the insurance contract (on this see P.Stone, *EU Private International Law* (3rd ed, Edward Elgar, 2014) page 128).

Moreover, given that the 1971 Hague Convention does not deal with the issue of subrogation, then the rule laid down in Art. 19 of Rome II above is applicable (see on the relationship b/w Rome I and Rome II on this point, C-359/14 & C-475/14 CJCE 21 Jan 2016, *Ergo Insurance SE*).

28. *Any other practical problems with respect to the application or interpretation of the Rome II Regulation, including but not limited to the suitability of the mosaic approach*

No particular problems reported.

### 3. Comments on areas of interest

*These areas are of particular interest for the Commission. Please be as precise as possible regarding any issue that emerged in your Member State regarding:*

29. *The exclusion of violations of privacy and rights relating to personality, including defamation, from the scope of the Rome II Regulation and any difficulties arising out from differences among Member States' rules in cross-border situations*

The exclusion of violations of privacy and rights relating to personality, including defamation, from the scope of the Rome II Regulation has been criticised by French academic : L. Perreau-Saussine L., Les mal aimés du règlement Rome II : les délits commis par voie de média , D. 2009, p. 1467.

30. *Any comment regarding the Interplay of the Rome II Regulation with the treatment of **defamation** and **data protection**, and, in these areas, the relevance of **Strategic Lawsuits Against Public Participation (SLAPPs)***

We are not aware of any French commentary on SLAPPs.

31. *The extent to which Rome II Regulation has been applied to **corporate abuses against human rights** and lays down an effective set of rules to regulate non-contractual liability;*

We are not aware of case law as yet. There is some doctrinal commentary about the impact of the French law 2017-399 du 27 mars 2017 relating to a "devoir de vigilance" imposed on parent companies, and in particular as to whether the law in question may override the principle set out in 4(1) by virtue of the application of Article 16 (mandatory provisions) or Article 17 (Rules of safety and conduct). See discussion in O. Boskovic, Brèves remarques sur le devoir de vigilance et le droit international privé, D. 2016. 385 ; A. Danis-Fatome & G. Viney, « La responsabilité civile dans la loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre » D 2017.1610.

32. *The impact of the development of **artificial intelligence** on the Rome II Regulation, and in particular on the suitability of the rules that it contains to regulate non-contractual liability.*

We are not aware of any French commentary on this issue.

#### 4. List of national case law

<u>Court or tribunal</u>	<u>Case name and reference number</u>  <u>Reference to decision of the Court of Justice if applicable</u>	<u>Date</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings (only for key cases)</u>
Court of cassation	N° 16-24.109	10 october 2018	Art 31, 32	Temporal scope	Rome II is strictly applicable to operative event unfolded from 11 January 2009
Court of cassation	N° 07-12.336	21 october 2008	Art 1(1), (2)	Material scope	Previous French conception of abrupt break of business relationships long-established before the adoption of Rome II. It is a non-contractual matter.
Court of cassation	n° 17-15.340	7 mai 2019	Art 1(1), (2)	Material scope	French conception of abrupt break of business relationships long-established after the adoption of Rome II and the Granarolo case which affirms that this field is a contractual matter. Implicit resistance of the French supreme court to accept the solution of the CJEU.
Court of cassation	N° 00-18794 00-20065	28 october 2003	Art 4(1)	The place of the direct damage	The indirect victim's moral harm is not take into account to identify the applicable law. The law applicable for the indemnisation of this indirect damage follows the law of the principal damage.
Court of cassation	N° 17-22.295	15 january 2020	Art 6	Unfair competition	It bases its decision on the basis of article 6 of Rome II.

Paris Court of appeal		30 juin 2006		Prospectus liability	Before Rome II, this French court has considered that the applicable law is the place of the diffusion of wrong information.
Paris Court of appeal	Société LLOYDS BANK PLC c/ SARL [X] et Société Générale n° RG 19/03149	12 november 2019	Art 4	Financial market torts	An attempt of a French inferior court to localize the place of a financial damage. The place of the financial damage, according to art 4.1 of Rome II, must be located following the jurisprudence relative to Bruxelles I Bis.

# Germany

## Executive Summary

- The Rome II Regulation is well-known in German legal research and broadly applied in German court practice. Although individual questions regarding its application remain controversial, it has proved to be a reliable and appropriate instrument for determining the law applicable to non-contractual situations, which fits well into German private international law.
- However, the exceptions provided for in Art. 1(2) Rome II Regulation seem to be too broad. In particular, the extensive discussion in the German literature on law applicable to privacy and personality rights illustrates the need for a conflict-of-laws rule for violations of rights of personality and privacy (see Q 1).
- In some cases, the rules of the Rome II Regulation have been found to be inappropriate. In particular, more specific conflict-of-laws rules are needed with regard to financial market torts (see Q 6 d.).
- The German literature has identified a gap in Art. 5 Rome II Regulation: those cases which are not covered by neither Art. 5(1) lit. (a), (b) nor (c) of the Regulation (see Q 7).
- A clarification of the effects of foreign authorisations on the liability of a tortfeasor seems advisable, in particular with regard to environmental liability (Art. 7 Rome II Regulation) (see Q 9).
- Any reform of the Regulation should also include clarifying amendments to the conflict-of-laws rule for negotiorum gestio (Art. 11 Rome II Regulation), especially with regard to the scope of application and the precise connecting factor (see Q 13).
- From a German perspective, few issues are as controversial as that of the application of overriding mandatory rules under the Rome II Regulation. There is a strong need for clarification as to whether and which third country's overriding mandatory rules can be applied or given effect, and if so, under what conditions (see Q 19).
- It is frequently discussed in the German literature whether conflicts rules of the Regulation are appropriate in case of human rights violations in supply chains (see Q 31).

## 1. Introduction

The Rome II Regulation is quite well-known among practitioners who are dealing with cross-border issues. Most general practitioners know of its existence, though they are often not familiar with its precise content. The business community and citizens are generally ignorant about the text. This is not a specific feature of the Rome II Regulation, but applies to a wide range of legislation that is not relevant to the everyday life of individuals.

In German courts, the Rome II Regulation is known and scrupulously followed. Every year, a collection of all German judgments in the area of private international law is published, which also includes cases dealing with the Rome II Regulation.<sup>549</sup> The number of cases is at a constantly moderate level. Given the numerous cases in the area of non-contractual obligations and the great importance of cross-border interaction, it must be assumed that the applicability of the Rome II Regulation is frequently overlooked. This assumption is confirmed by the comparatively few preliminary rulings by the CJEU that have been initiated by German courts.<sup>550</sup> Moreover, some decisions testify to a lack of sufficient knowledge with regard to the application of the Rome II Regulation. This is not a dilemma specific to the Rome II Regulation but rather concerns the area of private international law in general.

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<sup>549</sup> Kulms, *Die deutsche Rechtsprechung auf dem Gebiete des Internationalen Privatrechts im Jahre* (Mohr Siebeck 1995-2017).

<sup>550</sup> See CJEU 27.9.2017, *Nintendo*, Joined Cases C-24/16 and C-25/16, ECLI:EU:C:2017:724, as one of the few preliminary rulings initiated by German courts.

Unfortunately, there are no statistics with regard to the application of the Rome II Regulation. A database search revealed that the Regulation was mentioned in 212 court decisions.<sup>551</sup> Based on the extensive debate in the academia as well as the existing case law, it can be inferred, however, that the importance of the Rome II Regulation is not unduly underestimated in Germany.

The doctrinal discussions within German academia relating to the Rome II Regulation are numerous and also of importance. Most of the commentaries on general civil law include a chapter on the Rome II Regulation. This applies also to the commentaries used predominantly by practitioners. In addition, there are a large number of papers and contributions on the Rome II Regulation. Often the focus is on the chapter on tort law.

A lot of doctrinal debates arose in the literature with regard to minor issues of specific articles which will be addressed later on. A general problem of private international law which has been especially discussed in the context of the Rome II Regulation is whether and to which extent parallelism between jurisdiction and the applicable law is desirable. A very much discussed problem more specific to the Rome II Regulation is the question of how to determine the place in which the damage occurs in situations where financial loss is the only damage sustained. This problem is particularly relevant in the context of new technologies, where damage is hard to locate. Some of the Regulation's aspects have caused considerable discussions within the legal community, e.g. the law applicable to human rights violations in production chains involving developing countries. Beyond the specialised circles, there is however no debate about the Regulation.

Some reform proposals have also been made at the political level. Noteworthy is the proposal made by the Special Committee on Financial Market Law of the German Council for Private International Law in 2012, which recommended that a new conflict-of-laws rule relating to financial market torts be incorporated within the Rome II Regulation.<sup>552</sup> According to the proposal, this rule should determine the applicable law according to the place of the market on which the affected financial instrument is traded.

In addition, a central legal policy aim is interpretation and modification of the Rome II Regulation in such a way that it can – better and more sustainably – be used as an instrument of transnational prosecution of human rights violations and human rights litigation.<sup>553</sup> Such proposals have been discussed in the German parliament, but have not been successful yet.<sup>554</sup>

Another reform proposal aims at avoiding the parallel existence of Rome II Regulation and the 1971 Hague Convention on the Law Applicable to Traffic Accidents. As some Member States are signatories to the Hague Convention and others have not ratified it – including Germany – the private international law is not really harmonised in this area, as, according to Art 28 Rome II, the Hague Convention takes precedence over the Rome II Regulation as between those Member States who have ratified it.<sup>555</sup>

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<sup>551</sup> The research has been carried out on the database juris.de on 14 September 2020.

<sup>552</sup> Resolution of the German Council for Private International Law, Special Committee on Financial Market Law, (2012) 32 IPRax 471-472. See Lehmann, 'Vorschlag für eine Reform der Rom II-Verordnung im Bereich der Finanzmarktdelikte' (2012) 32 IPRax 399.

<sup>553</sup> Knöfel, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen* (Vol 6, 3rd edn, Nomos 2019) Vorb. Art. 1 Rom II-VO paras 8-9 with further references. See Weller/Kaller/Schulz, 'Haftung deutscher Unternehmen für Menschenrechtsverletzungen im Ausland' (2016) 216 AcP 387; Wagner, 'Haftung für Menschenrechtsverletzungen' (2016) 80 RabelsZ 717.

<sup>554</sup> See Knöfel, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen* (Vol 6, 3rd edn, Nomos 2019) Vorb. Art. 1 Rom II-VO para 10.

<sup>555</sup> Thiede/Kellner, "'Forum shopping' zwischen dem Haager Übereinkommen über das auf Verkehrsunfälle anzuwendende Recht und der Rom-II-Verordnung: Eine Fallstudie' (2007) 34 VersR 1624; Nordmeier, 'Divergenz von Delikts- und Unterhaltsstatut bei tödlich verlaufenden Straßenverkehrsunfällen' (2011) 31 IPRax 292, 295; Czaplinski, *Das internationale Straßenverkehrsunfallrecht nach Inkrafttreten der Rom II-VO* (Jenaer Wissenschaftliche Verlagsgesellschaft 2015) 373ff.

Finally, there have been some discussions concerning the question of cross-border protection of privacy rights.<sup>556</sup>

## 2. Analysis of the Rome II Regulation

### 2.1 Chapter I – Scope and Interpretation

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

1. *The determination of the material scope of application of the Rome II Regulation, including any difficulties in applying the category of “civil and commercial matters” or in defining the exact scope of any excluded matters (Art. 1(1)-(2))*

In Germany, the existence of a civil or commercial matter is assessed in accordance with the caselaw of the CJEU on the basis of whether public powers are exercised.<sup>557</sup> However, there is a lack of consensus as to the extent to which claims for refunds based on an act of specific public power are to be classified as civil and commercial matters. This is particularly problematic in cases where the state takes responsibility for remedying environmental damage but imposes the cost of doing so on a private party. It is sometimes assumed that such claims are covered by the Rome II Regulation<sup>558</sup>, while others disagree<sup>559</sup>.

With regard to the exceptions listed in Art. 1(2) Rome II, German scholars recognise that these must be interpreted narrowly in order to maximise the effectiveness of the Union's conflict of laws regime.<sup>560</sup> There is also a broad agreement on how to interpret the individual exceptions listed in Art. 1(2) Rome II. However, the interpretation of Art. 1(2) lit. (d) remains subject to debate: It is disputed whether liability for incorrect prospectuses is covered by Art. 1(2) lit. (d) and thus not covered by the Rome II Regulation.<sup>561</sup>

Furthermore, the scope of “the personal liability of officers and members as such” listed in Art. 1(2) lit. (d) is controversial. While there is agreement in the German literature that this provision includes the question of the limitation of “the personal liability of officers and members as such for the obligations of the company” on account of the chosen form of the company, it is unclear whether Art. 1(2) lit. (d) also excludes any liability of officers and shareholders in other situations, e.g. in case of an abuse of the corporate form leading to a piercing of the corporate veil.<sup>562</sup> This question is seen in part in close connection with the problem whether such liability is to be characterised as being part of tort or corporate law. If one assumes a characterisation as tortious, the consequence is that this kind of liability does not fall under the exclusion criterion of Art. 1(2) lit. (d).<sup>563</sup>

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<sup>556</sup> Knöfel, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen* (Vol 6, 3rd edn, Nomos 2019) Art. 30 Rom II-VO paras 8ff.

<sup>557</sup> Schmidt, in Gsell/Krüger/Lorenz/Reymann (eds), *beck-online.GROSSKOMMENTAR zum Zivilrecht* (C.H. Beck 2019) Art. 1 Rom II-VO para 16.

<sup>558</sup> Graziano, ‘Das auf außervertragliche Schuldverhältnisse anzuwendende Recht nach Inkrafttreten der Rom II-Verordnung’ (2009) 73 *RabelsZ* 53ff.

<sup>559</sup> Unberath/Cziupka, in Rauscher (ed), *Europäisches Zivilprozess- und Kollisionsrecht EuZPR / EuIPR* (Vol 3, 4th edn, Otto Schmidt 2016) Art. 1 Rom II-VO para 14.

<sup>560</sup> Knöfel, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen* (Vol 6, 3rd edn, Nomos 2019) Art. 1 Rom II-VO para 34.

<sup>561</sup> Einsele, ‘Internationales Prospekthaftungsrecht – Kollisionsrechtlicher Anlegerschutz nach der Rom II-Verordnung’ (2012) 20 *ZEuP* 23, 27; Schmidt, in Gsell/Krüger/Lorenz/Reymann (eds), *beck-online.GROSSKOMMENTAR zum Zivilrecht* (C.H. Beck 2019) Art. 1 Rom II-VO para 56.

<sup>562</sup> Knöfel, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen* (Vol 6, 3rd edn, Nomos 2019) Art. 1 Rom II-VO para 47; Junker, in Säcker/Rixecker/Limberg (eds), *Münchener Kommentar zum BGB* (Vol 12, 7th edn, C.H. Beck 2018) Art. 1 Rom II-VO paras 38f.

<sup>563</sup> Unberath/Cziupka, in Rauscher (ed), *Europäisches Zivilprozess- und Kollisionsrecht EuZPR / EuIPR* (Vol 3, 4th edn, Otto Schmidt 2016) Art. 1 Rom II-VO paras 54f.

With regard to the exception in Art. 1(2) lit. (g) Rome II, it is debated whether the exemption also covers injuries to the body or health stemming from the violation of personal rights, such as an incorrect medical consultation leading to an operation without consent.<sup>564</sup>

## 2. *The determination of the temporal scope of application of the Rome II Regulation (Arts 31-32)*

With regard to the different points in time mentioned in Arts. 31, 32 of the Regulation, there were doubts in the German literature as to the exact time from which the provisions of Rome II Regulation shall apply. However, since the decision by the CJEU in the *Homawoo* case, it has been universally accepted that the provisions of the Rome II Regulation only apply to cases which occurred after 11 January 2009. It remains nevertheless disputed how this result is to be justified doctrinally.<sup>565</sup>

Concerning the interpretation of Art. 31 Rome II, it is still unclear amongst German scholars what exactly is meant by the event giving rise to damages. In this respect, it is disputed in particular whether the decisive factor should be the infringement of legal rights or the action leading to it.<sup>566</sup> The answer to this question also affects the precise determination of the event giving rise to damages in cases of actions of a certain duration, such as in cases of omission and in cases of strict liability.

For acts of a certain duration, this means that it is disputed whether the temporal scope of application of the Rome II Regulation is uniformly assessed<sup>567</sup> and whether the beginning of the act or the occurrence of the damage is relevant for determining the temporal scope of application of the Rome II Regulation.<sup>568</sup>

As regards injunctive relief claims, the question arises whether the mere possibility that damage might occur, an increase of the probability, or the time at which the court takes its decision, is relevant.<sup>569</sup>

## 3. *The characterization of the concept of "non-contractual obligations", its relationship to the concept of "contractual obligations" and any difficulties in relation to characterisation (Arts. 1(1), 2)*

In German jurisprudence, based on the criteria defined by the CJEU, the existence of a non-contractual obligation is in principle established by determining whether the legal relationship underlying the claim is based on a voluntary obligation.<sup>570</sup>

However, there is disagreement about the relationship between Rome I and Rome II. While some assume that the Rome I and II Regulations, taken together, determine the applicable law of each obligation<sup>571</sup>, others argue that not every obligation can be attributed to one of the two Regulations. According to the latter view, there are thus obligations

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<sup>564</sup> Knöfel, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen* (Vol 6, 3rd edn, Nomos 2019) Art. 1 Rom II-VO para 55.

<sup>565</sup> Knöfel, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen* (Vol 6, 3rd edn, Nomos 2019) Art. 31, 32 Rom II-VO paras 4f.

<sup>566</sup> Schulze/Fervers, in Gsell/Krüger/Lorenz/Reymann (eds), *beck-online.GROSSKOMMENTAR zum Zivilrecht* (C.H. Beck 2019) Art. 31 Rom II-VO paras 7f.

<sup>567</sup> Junker, in Säcker/Rixecker/Limberg (eds), *Münchener Kommentar zum BGB* (Vol 12, 7th edn, C.H. Beck 2018) Art. 32 Rom II-VO para 10.

<sup>568</sup> Knöfel, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen* (Vol 6, 3rd edn, Nomos 2019) Art. 31, 32 Rom II-VO para 10.

<sup>569</sup> Picht in Rauscher (ed), *Europäisches Zivilprozess- und Kollisionsrecht EuZPR / EuIPR* (Vol 6, 4th edn, Otto Schmidt 2016) Art. 31, 32 Rom II-VO para 4a.

<sup>570</sup> See e.g. Staudinger/Magnus, in *Staudinger BGB: Einleitung zur Rom I-VO* (De Gruyter/Sellier 2016) Art. 1 Rom I-VO para 29; Knöfel, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen* (Vol 6, 3rd edn, Nomos 2019) Art. 1 Rom II-VO para 3; Unberath/Cziupka, in Rauscher (ed), *Europäisches Zivilprozess- und Kollisionsrecht EuZPR / EuIPR* (Vol 6, 4th edn, Otto Schmidt 2016) Art. 1 Rom II-VO para 25.

<sup>571</sup> Staudinger/Magnus, in *Staudinger BGB: Einleitung zur Rom I-VO* (De Gruyter/Sellier 2016) Art. 1 Rom I-VO para 31; Lehmann, 'Eine Lücke im europäischen Kollisionsrecht der Schuldverhältnisse? Die Haftung wegen Vermögensübernahme und wegen Fortführung eines Handelsgeschäfts' (2015) 35 IPRax 495, 496f.



which cannot be classified under neither Rome I nor Rome II and which must therefore be determined by national conflict-of-law rules.<sup>572</sup> An example of a legal relationship which is covered neither by Rome I nor Rome II, some scholars refer to the creditor's challenge in the case of insolvency, or to liability in cases of a takeover of a company.

In addition, for some legal relationships, it is controversial whether they can be classified as contractual or non-contractual obligations. Particularly difficult is the classification of the legal concept of a contract with protective effect in favour of third parties, which is a staple of German law. This legal institution gives a third party a contractual claim against the debtor of a contract, although the third party is not a party to the contract.

The classification of liability as a *falsus procurator* is equally controversial.<sup>573</sup> Opinion is also divided as to the classification of an obligation resulting from the offering or announcement of a promotional prize, as is often done in the retail sector.<sup>574</sup> Furthermore, it is unclear whether the liability of an expert for his expert opinion to persons who have not themselves concluded a contract with the expert is to be classified as a contractual or non-contractual obligation.<sup>575</sup> Finally, there is debate in German jurisprudence as to whether claims under property law establish a 'non-contractual relationship' within the meaning of Art. 1(1) Rome II Regulation.<sup>576</sup>

#### 4. *The universal application of the Regulation (Art. 3)*

There are no relevant unanswered questions in German practice or academia with regard to Art. 3 of the Regulation.

#### 5. *The approach to interpretation of the Rome II Regulation, and in particular its relationship to other EU private international law instruments (including the recast Brussels I Regulation and the Rome I Regulation) (Recital (7))*

The German literature analyses the Rome II Regulation based on the general principles of interpretation established in German jurisprudence. Here, it is generally accepted that terms must be interpreted autonomously so that they have a uniform meaning throughout the EU.<sup>577</sup> In this context, the literature emphasises the final competence of the CJEU to interpret these terms.<sup>578</sup>

When interpreting the Rome II Regulation, the need for a harmonious interpretation with other legal acts of European private international law is highlighted with reference to Recital 7 of the Rome II Regulation.<sup>579</sup> At the same time, any interpretation is supposed to take into account the differences which exist with regard to the determination of the competent court and the determination of the applicable law. For example, the mosaic approach for the determination of the law applicable to pure financial loss in the form of dispersed damage has been accepted, particularly with reference to Recital 7 of Rome II and the handling of this type of damage, when determining the competent court.<sup>580</sup>

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<sup>572</sup> Knöfel, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen* (Vol 6, 3rd edn, Nomos 2019) Art. 1 Rom II-VO para 5.

<sup>573</sup> See for a comprehensive overview Schmidt, in Gsell/Krüger/Lorenz/Reymann (eds), *beck-online.GROSSKOMMENTAR zum Zivilrecht* (C.H. Beck 2019) Art. 1 Rom II-VO para 22.

<sup>574</sup> Junker, in Säcker/Rixecker/Limberg (eds), *Münchener Kommentar zum BGB* (Vol 12, 7th edn, C.H. Beck 2018) Art. 1 Rom II-VO paras 21f.

<sup>575</sup> Unberath/Cziupka, in Rauscher (ed), *Europäisches Zivilprozess- und Kollisionsrecht EuZPR / EuIPR* (Vol 6, 4th edn, Otto Schmidt 2016) Art. 1 Rom II-VO para 34.

<sup>576</sup> Knöfel, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen* (Vol 6, 3rd edn, Nomos 2019) Art. 1 Rom II-VO paras 6f.

<sup>577</sup> Schmidt, in Gsell/Krüger/Lorenz/Reymann (eds), *beck-online.GROSSKOMMENTAR zum Zivilrecht* (C.H. Beck 2019) Art. 1 Rom II-VO para 8.

<sup>578</sup> Junker, in Säcker/Rixecker/Limberg (eds), *Münchener Kommentar zum BGB* (Vol 12, 7th edn, C.H. Beck 2018) Vor Art. 1 Rom II-VO para 29.

<sup>579</sup> Unberath/Cziupka, in Rauscher (ed), *Europäisches Zivilprozess- und Kollisionsrecht EuZPR / EuIPR* (Vol 3, 4th edn, Otto Schmidt 2016) Art. 1 Rom II-VO para 5.

<sup>580</sup> Rühl, in Gsell/Krüger/Lorenz/Reymann (eds), *beck-online.GROSSKOMMENTAR zum Zivilrecht* (C.H. Beck 2019) Art. 4 Rom II-VO paras 71f.

## 2.2 Chapter II – Tort/Delict

Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to the implementation of:

6. *The general conflict-of-laws rule for tort/delict, and difficulties that have arisen in your Member State with respect to its application (Art. 4), and in particular:*

a. *the approach to identifying the place of direct damage in Art. 4(1)*

Only very few cases have so far dealt with the general rule of Art. 4 of the Regulation. It seems that this provision has not caused many problems in practice so far.

Some initial cases concerned the law applicable to claims for injunctions against unfair terms.<sup>581</sup> This issue has now been clarified by the CJEU by reference to Art. 6(1) Rome II.<sup>582</sup> Other cases have dealt with Art. 4(2) and (3) of the Regulation (see below under b. and c.).

The scarcity of case law stands in contrast to the abundant discussions Art. 4 Rome II has caused in the literature. Of special relevance is the application of this provision to financial market torts (see in more detail below under d.). Another topic of concern is the law applicable to tort claims against German retailers for human rights violations abroad (see in more detail below Q 31).

b. *the approach to the first rule of displacement in Art. 4(2) in cases involving multiple parties or claims*

The application of Art. 4(2) Rome II does not seem to have created major problems in practice. There is however a discussion in the literature whether this provision could be extended to tort cases occurring outside of the EU involving two or more EU citizens residing in different Member States.<sup>583</sup> A hypothetical example would be a car accident between a French and a German resident in Florida, USA. An application of Art. 4(2) Rome II to this set of facts would reflect that two EU citizens have a closer connection to the EU than to Florida. However, it is unclear which law should govern their relationship, given that there is currently no European law of torts. A possible solution could be to apply legal principles that are common to both French and German law, or to the private laws of the EU. Furthermore, an extension or an application by analogy does not seem to be possible due the restrictive wording of the provision. Such a change could only be introduced by reform of the Regulation.

c. *the approach to the escape clause in Art. 4(3), and*

A number of cases deal with the so-called escape clause of Art. 4(3) Rome II, which they interpret strictly.<sup>584</sup> In general, the application of this clause was rejected and did not play any further role in the judgments.

A remarkable exception is the case of the Germanwings plane crashed down by a suicidal pilot in 2015. The court of first instance of Essen ruled that German law would govern the claims of the victims' heirs against the US subsidiary of the German airline, which had provided training for the pilot.<sup>585</sup> Though the crash happened in France, the court found that this was purely circumstantial and that there were no other connections to the French legal system. At the same time, it pointed to several connections to Germany which it deemed "essential": the airline and the plaintiffs were German, the pilot was a German national, and the plane was heading for Germany. Based on these circumstances, the court found that the tort was manifestly more closely connected to Germany in the sense of Art. 4(3) Rome II.

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<sup>581</sup> Federal Court of Justice (BGH) 9.7.2009, Xa ZR 19/08; Federal Court of Justice (BGH) 29.4.2010, Xa ZR 5/09.

<sup>582</sup> CJEU 28.7.2016, *Verein für Konsumentensachen*, C-191/15, ECLI:EU:C:2016:612.

<sup>583</sup> See von Hein, in Calliess (ed), *Rome Regulations* (2nd edn, Kluwer Law International 2014) Art. 4 Rome I para 41; von Hein, 'Internationales Europäisches Deliktsrecht nach der Rom II-Verordnung' (2009) 17 ZEuP 6; Lehmann, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen* (Vol 6, 3rd edn, Nomos 2019) Art. 4 Rom II-VO para 134.

<sup>584</sup> Court of Appeal Hamburg (Hanseatisches OLG) 2.5.2019, 3 U 182/17; Court of Appeal Nuremberg (OLG Nürnberg) 13.5.2015, 4 U 1839/14.

<sup>585</sup> Regional Court Essen (LG Essen) 1.7.2020, 16 O 11/18.

In the literature, Art. 4(3) Rome II is often suggested as a device to avoid results under the Regulation that seem inadequate. This is particularly true in the case of financial market torts (see below d.) and human rights violations (see below Q 31).

d. *the suitability of this set of rules to govern cases of **prospectus liability or other financial market torts***

The German literature discusses how financial market torts shall be dealt with under the Regulation.<sup>586</sup> There is broad agreement that it would be wholly inappropriate to apply the law of the state in which the damage occurred under Art. 4(1) Rome II for several reasons: first, the localisation of financial loss of investors is notoriously difficult. Second, any localisation involving investor-specific criteria, such as the place of the investor's habitual residence or the place of establishment of the bank managing his account,<sup>587</sup> would lead to a fragmentation of the applicable law to the liability for a single financial market tort, e.g. misrepresentation in a prospectus. This would confer an unjustified advantage on investors from a state with a high protective standard, who would be allowed to raid the coffers of the issuer at the expense of other investors. Moreover, the applicable law would become unforeseeable for the issuer given that the habitual residence of the investor or the establishment of his bank is mostly unknown to the issuer. At the same time, the fragmentation of the applicable law would also render collective actions of investors more difficult.

There is thus agreement that the application of the law provided for in Art. 4(1) Rome II must be avoided. The question is how. Very few voices have favoured applying the law of the issuer.<sup>588</sup> In contrast, the vast majority of German authors considers that the proper law for financial market torts is the law of the market where the financial instrument in question is traded.<sup>589</sup> The German Council for Private International Law, a group of academics advising the German government adopted a resolution in 2012 to this effect.<sup>590</sup> It suggests introducing a new article into the Rome II Regulation containing a special conflict rule for financial torts. The general rule selects the law of the country where the affected financial instrument is traded. There is also an escape clause and a clause for instruments traded on more than one trading venue, in addition to a proposed change to the recitals. The reform has yet to be implemented.

7. *The rule on **product liability** (Art. 5) and, where relevant, the interaction with the application of **1973 Hague Convention on the Law Applicable to Products Liability***

Germany is not a party to the Hague Convention on the Law Applicable to Products Liability 1973, so no interaction problems with Rome II exist in this regard.

There are no reported cases on the application of Art. 5 Rome II. A problem identified by the literature concerns Art. 5(1) sentence 1 Rome II. This provision contains a hierarchy of combined connecting factors. The question discussed in the literature is which law applies if neither the combined conditions of Art. 5(1) sentence 1 lit. (a), (b) or

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<sup>586</sup> Einsele, 'Internationales Prospekthaftungsrecht – Kollisionsrechtlicher Anlegerschutz nach der Rom II-Verordnung' (2012) 20 ZEuP 23; von Hein, 'Die Internationale Prospekthaftung im Lichte der Rom-II Verordnung' in Baum/Hellgardt/Fleckner/Roth (eds), *Perspektiven des Wirtschaftsrechts, Beiträge für Klaus J. Hopt aus Anlass seiner Emeritierung* (De Gruyter 2008) 371, 392-394; Hellgardt/Ringe, 'Internationale Kapitalmarkthaftung als Corporate Governance' (2009) 173 ZHR 802; Lehmann, 'Vorschlag für eine Reform der Rom II-Verordnung im Bereich der Finanzmarktdelikte' (2012) 32 IPRax 399-405; Uhink, *Internationale Prospekthaftung nach der Rom II-VO* (Verlag Dr. Kovač 2016).

<sup>587</sup> See for Art. 7(2) Brussels I Regulation (recast): CJEU 28.1.2015, *Kolassa*, C-375/13, ECLI:EU:C:2015:37; CJEU 12.9.2018, *Löber*, C-304/17, ECLI:EU:C:2018:701.

<sup>588</sup> Hellgardt/Ringe, 'Internationale Kapitalmarkthaftung als Corporate Governance' (2009) 173 ZHR 802.

<sup>589</sup> Einsele, 'Internationales Prospekthaftungsrecht – Kollisionsrechtlicher Anlegerschutz nach der Rom II-Verordnung' (2012) 20 ZEuP 23; von Hein, 'Die Internationale Prospekthaftung im Lichte der Rom-II Verordnung' in Baum/Hellgardt/Fleckner/Roth (eds), *Perspektiven des Wirtschaftsrechts, Beiträge für Klaus J. Hopt aus Anlass seiner Emeritierung* (De Gruyter 2008) 371, 392-394; Hellgardt/Ringe, 'Internationale Kapitalmarkthaftung als Corporate Governance' (2009) 173 ZHR 802; Lehmann, 'Vorschlag für eine Reform der Rom II-Verordnung im Bereich der Finanzmarktdelikte' (2012) 32 IPRax 399-405.

<sup>590</sup> Resolution of the German Council for Private International Law, Special Committee on Financial Market Law, (2012) 32 IPRax 471-472; a French translation can be found in *Revue critique de droit international privé* 2012, 679f.

(c) Rome II are met. The Regulation does not provide an answer, so a gap exists. Proposals for filling this gap include: (1) the law that of the state that is closest to the one mentioned in Art. 5(1) sentence 1 lit. (a), (b) or (c) Rome II, provided that the product is also marketed there;<sup>591</sup> (2) the application of the general rule of Art. 4<sup>592</sup>; and (3) the analogous application of Art. 5(1) sentence 2.<sup>593</sup> A clear solution of this issue can only be achieved through reforms to the Regulation.

#### 8. The specific rule on *unfair competition* (Art. 6)

Art. 6 Rome II comprises two sets of rules, one on unfair competition (Art. 6(1) and (2) Rome II), the other on antitrust law (Art. 6(3) and (4) Rome II).

The general rule for determining the law governing unfair competition claims does not pose any major problems in practice so far.

Doubts have emerged, however, regarding the role of Art. 6(2). In particular, it is unclear whether the reference to Art. 4 only concerns Art. 4(1) or also Art. 4(2) and (3). Some voices simply assume that the reference is made to the whole of Art. 4, as indicated by the text of Art. 6(2).<sup>594</sup> Other authors contend, in contrast, that the application of Art. 4(2) and (3) in the context of unfair competition would risk further distorting competition, and should therefore be excluded.<sup>595</sup> Their concern can be illustrated by a hypothetical example in which a company established in the same state as a consumer would be allowed to follow different rules than a competitor from another state. One may however object that even if Art. 4(2) were applied to this case, the rules of marketing should be the same for all competitors following Art. 17 Rome II. A clarification of the already abundantly clear text of Art. 4 Rome II does not seem in order.

Moreover, German courts tend to interpret Art. 6(2) Rome II in a restrictive manner. A good illustration is a decision by the German Federal Court.<sup>596</sup> In the underlying case, so-called "buddy-bots" had automatically performed player functions in the computer game "World of Warcraft", allowing some players to gain points without doing anything. The Federal Court held that the claim by the developer of "World of Warcraft" against the company that had programmed the buddy-bots did not exclusively affect the interests of a specific competitor but also those of the other users of the game. It thus ruled out the application of Art. 6(2) Rome II and applied Art. 6(1) Rome II instead. A similarly restrictive interpretation has been adopted in the case of a press release by the airline Ryanair denouncing a ticket platform as being overpriced and illegal.<sup>597</sup>

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<sup>591</sup> Kadner Graziano, 'Das auf außervertragliche Schuldverhältnisse anzuwendende Recht nach Inkrafttreten der Rom II-Verordnung' (2009) 73 *RabelsZ* 44.

<sup>592</sup> Müller, in Gsell/Krüger/Lorenz/Reymann (eds), *beck-online.GROSSKOMMENTAR zum Zivilrecht* (C.H. Beck 2019) Art. 5 Rom II-VO para 10; Spickhoff, 'Die Produkthaftung im Europäischen Kollisions- und Zivilverfahrensrecht', in Baetke/von Hein/von Hinden (eds), *Die richtige Ordnung - Festschrift für Jan Kropholler zum 70. Geburtstag* (Mohr Siebeck 2008) 671, 686f.

<sup>593</sup> von Hein, 'Europäisches Internationales Deliktsrecht nach der Rom II-Verordnung' (2009) 17 *ZEuP* 6, 28; Leible/Lehmann, 'Die neue EG-Verordnung über das auf außervertragliche Schuldverhältnisse anzuwendende Recht ("Rom II")' (2007) *RIW* 721, 728; Lehmann, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen (Vol 6, 3rd edn, Nomos 2019) Art. 5 Rom II-VO paras 95f*; Thorn, in Palandt, *Bürgerliches Gesetzbuch* (79 edn, C.H. Beck 2020) Art. 5 Rom II-VO para 11; Unberath/Cziupka/Pabst, in Rauscher (ed), *Europäisches Zivilprozess- und Kollisionsrecht EuZPR / EuIPR (Vol 3, 4th edn, Otto Schmidt 2016) Art. 5 Rom II-VO para 93; Wagner, 'Die neue Rom-II-Verordnung' (2008) 28 *IPRax* 1, 7.*

<sup>594</sup> Unberath/Cziupka/Pabst, in: Rauscher (ed), *Europäisches Zivilprozess- und Kollisionsrecht EuZPR / EuIPR (Vol 3, 4th edn, Otto Schmidt 2016) Art. 6 Rom II-VO para* 46.

<sup>595</sup> Drexler, 'Internationales Lauterkeitsrecht' in Säcker/Rixecker/Limberg (eds), *Münchener Kommentar zum BGB* (Vol 12, 7th edn, C.H. Beck 2018) para 17; Weller, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen (Vol 6, 3rd edn, Nomos 2019) Art. 6 Rom II-VO para* 147.

<sup>596</sup> Federal Court of Justice (BGH) 12.1.2017, I ZR 253/14.

<sup>597</sup> Federal Court of Justice (BGH) 12.12.2013, I ZR 131/12.

No particular problems have been caused by Art. 6(3) Rome II. The Grand Chamber of the Federal Courts has applied the provision to a Dutch online pharmacy selling its products to German customers over the internet.<sup>598</sup> The Grand Chamber ruled that German law applies in this case without having any major difficulties.

#### 9. *The specific rule on environmental damage (Art. 7)*

No cases have been reported concerning Art. 7 Rome II.

The most relevant question discussed in the literature concerns the interaction of Art. 7 with Art. 17 of the Regulation: the effect of foreign authorisations on the liability of the polluter. Two contradicting theories have been submitted: on the one hand, it is suggested that such authorisations should be considered as “rules of safety and conduct” in the sense of Art. 17 where they have been issued by the competent authorities of another Member State and minimum procedural requirements have been respected.<sup>599</sup> On the other hand, some authors are of the view that the recognition of foreign authorisations would undermine the goal of Art. 7 to incentivise the highest standards of behaviour for the protection of the environment.<sup>600</sup> Some words in the recitals would be helpful to clarify this issue.

Another problem discussed in the literature concerns the right of the victim to choose the applicable law.<sup>601</sup> Recital 25 submits this right to the provisions of national law; and the German legislator has adopted specific provisions in Art. 46a of the Introductory Law to the Civil Code (EGBGB). Nevertheless, a question that should be regulated by EU law is whether a choice in a particular proceeding is limited or whether it also has effects for subsequent proceedings between the same parties. Ideally, this question should be treated identically within the Union in order to exclude conflicts between different jurisdictions and possibilities of forum shopping.

#### 10. *The specific rule on infringements of intellectual property rights (Arts. 8, 13)*

Art. 8 Rome II has led to some decisions by German courts. The German Federal Court had to judge whether the use of a picture of a German cruise liner for advertising purposes on the internet would violate the shipping company’s copyright.<sup>602</sup> Although the picture had been taken in an Egyptian port, the Court ruled that German law applies in accordance with Art. 8(1) Rome II because the photo was used on a website directed at German customers inviting them to shore leaves. The Court furthermore ruled as *obiter dicta* that in case of EU intellectual property rights such as a brand, the country where the infringement was committed in the sense of Art. 8(2) Rome II is the one where a particular advertisement is uploaded on the internet.<sup>603</sup>

In the literature, there is some debate about the country whose law provides copyright protection in the sense of Art. 8(1) Rome II.<sup>604</sup> One camp of authors tends towards the principle of universality, according to which the law of the first publication or nationality of the author governs the protection of the work world-wide. The majority opinion favours the principle of territoriality, under which copyright protection depends on the country in which protection is sought. The debate seems quite fundamental and concerns core issues of intellectual property law. It seems unlikely that it could be solved by a reform of Rome II.

A more practical issue concerns violations of intellectual property rights on the internet. These cases by definition have connections to multiple states, leading to a plurality of applicable laws under Art. 8(1) Rome II. The question that arises

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<sup>598</sup> Federal Court of Justice (BGH) 22.8.2012, GmS-OGB 1/10.

<sup>599</sup> Lehmann, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen* (Vol 6, 3rd edn, Nomos 2019) Art. 17 Rom II-VO para 59; Maultzsch, in Gsell/Krüger/Lorenz/Reymann (eds), *beck-online.GROSSKOMMENTAR zum Zivilrecht* (C.H. Beck 2019) Art. 17 Rom II-VO para 18.

<sup>600</sup> Unberath/Cziupka/Pabst, in Rauscher (ed), *Europäisches Zivilprozess- und Kollisionsrecht EuZPR / EuIPR* (Vol 3, 4th edn, Otto Schmidt 2016) Art. 7 Rom II-VO paras 47f.

<sup>601</sup> See e.g. Plehwe, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen* (Vol 6, 3rd edn, Nomos 2019) Art. 7 Rom II-VO para 10.

<sup>602</sup> Federal Court of Justice (BGH) 27.4.2017, I ZR 247/15.

<sup>603</sup> Federal Court of Justice (BGH) 9.11.2017, I ZR 164/16.

<sup>604</sup> Grünberger, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen* (Vol 6, 3rd edn, Nomos 2019) Art. 8 Rom II-VO para 3.

is how their number can be limited in order to avoid the application of virtually all laws of the world. Methods suggested in the literature have been the introduction of an “effects” principle or a de minimis threshold.<sup>605</sup> A clarification of this problem in the Regulation would be very welcome.

A further issue is how the ownership of intellectual property rights is to be determined. Some authors think that this is a preliminary question, which has to be decided according to international conventions or national conflict-of-laws rules.<sup>606</sup> Another strand in the literature wants to submit this problem to the Rome II Regulation.<sup>607</sup> The debate could be easily solved through an additional rule in Art. 15 Rome II or a clarifying remark in a recital.

#### *11. The specific rule on industrial action (Art. 9)*

No case has been reported on this provision. In the literature, it has been questioned whether Art. 9 also covers the law governing the liability of officials of trade unions, former employees and atypical union members, such as students.<sup>608</sup> Furthermore, it has been asked whether the provision also covers the law applicable to the liability of third persons that are not directly connected to the strike, e.g. the participants of a “flash mob”.<sup>609</sup> These questions could be easily clarified through an additional recital.

### 2.3 Chapter III – Unjust Enrichment, *Negotiorum Gestio* And *Culpa In Contrahendo*

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to the implementation of:*

#### *12. The specific rule on unjust enrichment (Art. 10), including its relationship with the general rule for tort/delict in Art. 4.*

There have been very few cases arising under Art. 10 Rome II in Germany so far. Nevertheless, there are some controversial points in the literature which would need clarification.

With regard to Art. 10(1) of the Regulation it is unclear whether the provision also applies if the relationship between the parties, such as under a contract or a tort, arises in the same moment the unjust enrichment occurs.<sup>610</sup> To give an example, if a theft constitutes both a tort and an unjust enrichment, the question arises whether Art. 10(1) Rome II is applicable. If Art. 10(1) is applied, the law applicable to the unjust enrichment is the law which governs the tort/delict. Yet Art. 10(1) can only be applied if one interprets the phrase “existing” in a wide sense. Contrary to that, one could argue that the relationship (the tort/delict) did not exist before the unjust enrichment. In that scenario the law applicable must be determined according to Art. 10(2) and (3) Rome II.

A further problem concerns the relationship between Art. 10 and the general rule for tort/delict in Art. 4 Rome II. English law differentiates between “unjust enrichment by subtraction” and “unjust enrichment by wrongdoing”, with the latter being identified by many British scholars as a case of Art. 4 Rome II.<sup>611</sup> There is however a broad consensus in

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<sup>605</sup> Grünberger, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen* (Vol 6, 3rd edn, Nomos 2019) Art. 8 Rom II-VO para 46.

<sup>606</sup> Drexler, ‘Internationales Immaterialgüterrecht’ in Säcker/Rixecker/Limberg (eds), *Münchener Kommentar zum BGB* (Vol 12, 7th edn, C.H.Beck 2018) paras 178f.

<sup>607</sup> Grünberger, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen* (Vol 6, 3rd edn, Nomos 2019) Art. 8 Rom II-VO para 52.

<sup>608</sup> Temming, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen* (Vol 6, 3rd edn, Nomos 2019) Art. 9 Rom II-VO paras 43f.

<sup>609</sup> Temming, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen* (Vol 6, 3rd edn, Nomos 2019) Art. 9 Rom II-VO para 47.

<sup>610</sup> Limbach, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen* (Vol 6, 3rd edn, Nomos 2019) Art. 10 Rom II-VO para 21; Fehrenbacher, in Prütting/Wegen/Weinreich (eds), *BGB* (12th edn, Luchterhand 2017) Art. 10 Rom II-VO para 5.

<sup>611</sup> Rushworth/Scott, ‘Rome II Regulation: Choice of Law for Non-contractual Obligations’ (2008) *L.M.C.L.Q.* 274, 286; Dickinson, *The Rome II Regulation* (Oxford 2010) para 4.13.

the German literature that such cases are to be classified under Art. 10 Rome II.<sup>612</sup> What is discussed amongst German scholars, rather, is the relationship between unjust enrichment and rights in rem.<sup>613</sup> It would be helpful for the Regulation's uniform application to clarify both questions.

### 13. The specific rule on *negotiorum gestio* (Art. 11)

There is also very little case law with regard to the *negotiorum gestio* in Germany. It is not totally clear what is meant by this notion in the first place. The concept of *negotiorum gestio* must be interpreted autonomously. However, neither the regulation nor the recitals entail any hints about the meaning of it.<sup>614</sup> Thus, legal uncertainty with regard to the applicability of the rule exists. To give an example, it is debated whether the situations addressed in sec. 687(1) and (2) of the German Civil Code are to be regarded as cases of *negotiorum gestio* in the sense of Art. 11 Rome II.<sup>615</sup> It would be useful to at least define the content of *negotiorum gestio* in order to ensure greater legal certainty.

Furthermore, it is unclear whether "the country in which the act is performed" in the sense of Art. 11(3) of the Regulation is the country where the action leading to the obligation was undertaken<sup>616</sup> or where a loss occurred that was caused by an action<sup>617</sup>. Also, if the *negotiorum gestio* consists of multiple actions taking place in different countries, it is difficult to identify the place which is decisive for Art. 11(3).<sup>618</sup> Some refer to the place where the first action was taken,<sup>619</sup> while others consider the place where the centre of the actions is located to be relevant.<sup>620</sup>

### 14. The specific rule on *culpa in contrahendo* (Art. 12)

There are quite a number of controversies surrounding the applicability of Art. 12 of the Regulation. It is rather unclear how Art. 4 Rome II and Art. 12 Rome II are to be delineated. Different approaches have been suggested in the literature.<sup>621</sup> Some apply Art. 12 where a duty specific to a transaction was breached and Art. 4 where the general

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<sup>612</sup> Schinkels, in Gsell/Krüger/Lorenz/Reymann (eds), *beck-online.GROSSKOMMENTAR zum Zivilrecht* (C.H. Beck 2019) Art. 10 Rom II-VO paras 11-14.

<sup>613</sup> Wendehorst, in Säcker/Rixecker/Limberg (eds), *Münchener Kommentar zum BGB* (Vol 12, 7th edn, C.H. Beck 2018) Art. 43 EGBGB paras 96-99; Prütting, in Gsell/Krüger/Lorenz/Reymann (eds), *beck-online.GROSSKOMMENTAR zum Zivilrecht* (C.H. Beck 2019) Art. 43 EGBGB paras 78-80.

<sup>614</sup> Limbach, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen* (Vol 6, 3rd edn, Nomos 2019) Art. 11 Rom II-VO para 5.

<sup>615</sup> Dismissive: Huber/Bach, in Huber (ed), *Rome II Regulation* (Sellier 2011) Art. 11 Rome II para 2; Wendelstein, 'Das Statut der Geschäftsführung ohne Auftrag in Nothilfefällen - "Wechselwirkungen" zwischen Kollisionsrecht und Sachrech' (2014) 11 GPR 46, 47. Dissenting: Fischer, 'Ungerechtfertigte Bereicherung und Geschäftsführung ohne Auftrag im europäischen Internationalen Privatrecht', in Jörn/Freitag (eds), *Festschrift für Ulrich Spellenberg* (Sellier 2010) 151, 163.

<sup>616</sup> LG Munich I, (2014) 34 IPRax 438, paras 42f; Wendelstein, 'Das Statut der Geschäftsführung ohne Auftrag in Nothilfefällen - "Wechselwirkungen" zwischen Kollisionsrecht und Sachrech' (2014) 11 GPR 46, 54f; Limbach, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen* (Vol 6, 3rd edn, Nomos 2019) Art. 11 Rom II-VO para 13.

<sup>617</sup> Leible/Lehmann, 'Die neue EG-Verordnung über das auf außervertragliche Schuldverhältnisse anzuwendende Recht ("Rom II")' (2007) RIW 721, 732; Looschelders, 'Die Rechtsstellung des gewerblichen Erbensuchers im deutsch-österreichischen Rechtsverkehr' (2014) 34 IPRax 406, 409f.

<sup>618</sup> Limbach, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen* (Vol 6, 3rd edn, Nomos 2019) Art. 11 Rom II-VO para 13 with further references.

<sup>619</sup> Junker, in Säcker/Rixecker/Limberg (eds), *Münchener Kommentar zum BGB* (Vol 12, 7th edn, C.H. Beck 2018) Art. 11 Rom II-VO para 18; Thorn, in *Palandt, Bürgerliches Gesetzbuch* (79 edn, C.H. Beck 2020) Art. 11 Rom II-VO Rn. 8.

<sup>620</sup> Limbach, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen* (Vol 6, 3rd edn, Nomos 2019) Art. 11 Rom II-VO para 13; Spickhoff, in Hau/Poseck (eds), *BeckOK BGB* (55th edn, C.H. Beck 2020) Art. 11 Rom II-VO para 6.

<sup>621</sup> Spickhoff, in Hau/Poseck (eds), *BeckOK BGB* (55th edn, C.H. Beck 2020) Art. 12 Rom II-VO paras 4f.

duties owed to everybody have been violated, such as the duty to respect another's physical integrity.<sup>622</sup> Others focus on the damage caused and not the duty which has been breached, by applying Art. 12 where the compensation sought relates to a disappointment in performance expectations, and Art. 4 where it relates to the violation of integrity interests.<sup>623</sup>

A special case with regard to the delineation of Arts. 4 and 12 Rome II concerns the question of third-party liability. Some stress that third persons are not party to the contract and thus apply Art. 4.<sup>624</sup> However, one could also look at the specific duty which was breached and then determine whether it is more contractual or more tortious.<sup>625</sup> In cases where the duty is more of a contractual nature, one could argue in favour of the application of Art. 12. If one follows this opinion, it is subsequently debated whether paragraph 1 or 2 of Art. 12 shall apply.<sup>626</sup>

Finally, there are some uncertainties with regard to the delineation of Art. 12 Rome II and the Rome I Regulation. First, it is unclear whether the violation of precontractual disclosure obligations is governed by Rome I or Rome II.<sup>627</sup> A similar problem arises with damage suffered by the conclusion of a contract that does not meet the expectations of one party as it was based on wrong information. Such damage could be subject to Rome I or Art. 12 Rome II.<sup>628</sup> Moreover, it is unclear whether the liability of an agent without authority is governed by Rome II, as advocated by the minority view among German scholars, or by Rome I, as the majority thinks.<sup>629</sup>

Apart from the scope of application, there are also some other uncertainties surrounding Art. 12 Rome II. One problem relates to the relationship of the different alternatives in paragraph 2.<sup>630</sup> Some argue that they are of equal rank as the wording suggests. The prevailing view in German literature is, however, that the alternatives are not equal, and that the legislator wanted to establish a graduated system similar to the ones followed by Arts. 4, 10 and 11 of the Regulation.

There is also a debate about Art. 12(2) lit. (c). Some scholars suggest that the wording is mistaken and that the provision would also apply to Art. 12(1).<sup>631</sup> If that is indeed the case, a clarification in this sense would be in order.

A rather special issue relates to the situation where damages are claimed for the breakdown of contractual negotiations. Some scholars argue a party must be shielded from claims not foreseeable for that party given that the

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<sup>622</sup> Budzikiewicz, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen* (Vol 6, 3rd edn, Nomos 2019) Art. 12 Rom II-VO para 22; Jakob/Picht, in Rauscher (ed), *Europäisches Zivilprozess- und Kollisionsrecht EuZPR / EulPR* (Vol 3, 4th edn, Otto Schmidt 2016) Art. 12 Rom II-VO Rn. 10ff; Kadner Graziano, *RechtsZ* 73 (2009) 1, 64

<sup>623</sup> Spickhoff, in Hau/Poseck (eds), *BeckOK BGB* (55th edn, C.H. Beck 2020) Art. 12 Rom II-VO Rn. 4 f; Junker, in Säcker/Rixecker/Limperc (eds), *Münchener Kommentar zum BGB* (Vol 12, 7th edn, C.H. Beck 2018) Art. 12 Rom II-VO para 18.

<sup>624</sup> Otto, in Herberger/Martinek/Rüßmann/Weth/Würdinger (eds), *juris Praxiskommentar BGB* (Vol 6, 9th edn, juris 2020) Art. 12 Rom II-VO para 22.

<sup>625</sup> Dörner, in Schulze (ed), *Bürgerliches Gesetzbuch Handkommentar* (10th edn, Nomos 2019) Art. 12 Rom II-VO Rn. 2; Backmann, in Herberger/Martinek/Rüßmann/Weth/Würdinger (eds), *juris Praxiskommentar BGB* (Vol 6, 9th edn, juris 2020) Art. 12 Rom II-VO para 7; Thorn, in *Palandt, Bürgerliches Gesetzbuch* (79 edn, C.H. Beck 2020) Art. 12 Rom II-VO para 2.

<sup>626</sup> Budzikiewicz, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen* (Vol 6, 3rd edn, Nomos 2019) Art. 12 Rom II-VO para 39.

<sup>627</sup> Lehmann, 'Der Anwendungsbereich der Rom I - Verordnung – Vertragsbegriff und vorvertragliche Rechtsverhältnisse', in Ferrari/Leible (eds.), *Ein neues Internationales Vertragsrecht für Europa* (Jenaer Wissenschaftliche Verlagsgesellschaft 2007) 17, 37f.

<sup>628</sup> Limbach, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen* (Vol 6, 3rd edn, Nomos 2019) Art. 12 Rom II-VO paras 31-33.

<sup>629</sup> Reuter, *Die Qualifikation der Haftung des falsus procurator im Internationalen Privatrecht* (Mohr Siebeck 2016) 205ff.

<sup>630</sup> Spickhoff, in Hau/Poseck (eds), *BeckOK BGB* (55th edn, C.H. Beck 2020) Art. 12 Rom II-VO para 9.

<sup>631</sup> Limbach, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen* (Vol 6, 3rd edn, Nomos 2019) Art. 12 Rom II-VO paras 61-63.



law of his country of habitual residence does not provide for this type of liability.<sup>632</sup> This is backed up by an analogy to Art. 10(2) Rome I Regulation, according to which a party “may rely upon the law of the country in which he has his habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in paragraph 1.”

## 2.4 Chapter IV – Freedom of Choice

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

**1.5. The implementation in legal/business practice and by courts of the rule on freedom of choice, any difficulties therein and any discussion that has been carried out in your Member State regarding possible reasons which would justify the need to rethink it (Art. 14)**

The rule on freedom of choice has been generally welcomed in Germany, especially, the possibility of an ex-post choice of law.<sup>633</sup> The different wording compared to the Rome I Regulation concerning the provision on implicit choice of law has created some uncertainty though.<sup>634</sup> Art. 3(1) Rome I requires a “clearly demonstrated” (in German: “hinreichender Sicherheit”) choice whereas Art. 14(1) Rome II demands a choice “demonstrated with reasonable certainty” (in German: “eindeutig”). It would thus be better to harmonise the wordings.

The implicit choice-of-law clause has been the subject of some judgments. Very recently, the OLG Frankfurt decided that when ascribing an implicit choice of law to the parties, the latter must at least be aware of the possibility of making such a choice.<sup>635</sup> If they only present their arguments before the court based on the *lex fori*, the court may not infer from this that they also implicitly wish to choose the law of the *lex fori*. Other courts as well demand at a minimum some kind of awareness with regard to the possibility of a choice of law.<sup>636</sup> Thus it has been ruled that where two German lawyers negotiate limitation periods before a German court, it cannot be inferred that they wanted to choose German law if the question of applicable law was not part of the negotiation.<sup>637</sup>

Another problem concerns the meaning of “freely negotiated” in Art. 14(1) lit. (b) Rome II. In particular, it is debated whether standard clauses or general terms and conditions can be classified as freely negotiated, and if so, under what circumstances.<sup>638</sup>

As the Rome II Regulation does not contain any provisions regarding the validity and form of the choice of law, the standards for such assessments are not clear.<sup>639</sup> Some argue in favour of applying Art. 3(5), (10), (11) and (13) Rome I by analogy in the context of Art. 14 Rome II.

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<sup>632</sup> Junker, in Säcker/Rixecker/Limberg (eds), *Münchener Kommentar zum BGB* (7th edn, C.H.Beck 2018) Art. 12 Rom II-VO para 24.

<sup>633</sup> With further references: Gebauer, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen* (Vol 6, 3rd edn, Nomos 2019) Art. 14 Rom II-VO paras 1ff; with regard to the ex-ante choice of law, there are also some critical voices: Symeonides, ‘Choice of Law in the American Courts in 2007’ (2008) 9 Am. J. Comp. L. 149, 170f; Rugullis, ‘Die antizipierte Rechtswahl in außervertraglichen Schuldverhältnissen’ (2008) 28 IPRax 319, 322. Dissenting and in favour of the possibility of an ex-ante choice of law: Rühl, in Gsell/Krüger/Lorenz/Reymann (eds), *beck-online.GROSSKOMMENTAR zum Zivilrecht* (C.H. Beck 2019) Art. 14 Rom II-VO paras 2ff; Leible, RIW 2008, 257ff.

<sup>634</sup> von Hein, in Calliess (ed), *Rome Regulations: Commentary* (2nd edn, Kluwer 2015) Art. 14 Rome II para 24.

<sup>635</sup> Court of Appeal Frankfurt (OLG Frankfurt) 30.1.2020, 6 W 9/20, para 26.

<sup>636</sup> Most scholars also demand awareness for an implicit choice of law. See Gebauer, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen* (Vol 6, 3rd edn, Nomos 2019) Art. 14 Rom II-VO para 22.

<sup>637</sup> Court of Appeal Hamm (OLG Hamm) 21.5.2019, I-9 U 44/19, paras 12ff.

<sup>638</sup> Gebauer, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen* (Vol 6, 3rd edn, Nomos 2019) Art. 14 Rom II-VO paras 35-36.

<sup>639</sup> Gebauer, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen* (Vol 6, 3rd edn, Nomos 2019) Art. 14 Rom II-VO para 28.

## 2.5 Chapter V – Common Rules

Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:

16. The scope of the exclusion of 'evidence and procedure' in Art. 1(3) and any difficulties in relation to that exclusion or to questions of formal validity or the burden of proof (Arts. 21-22)

Art. 1(3) Rome II Regulation is interpreted broadly in Germany. The concept of procedure also includes legally controlled mechanisms which do not take place before courts and which do not aim at settling disputes by way of a decision.<sup>640</sup> The term "evidence" is understood as any activity of the court or of the parties in civil proceedings, the object or aim of which is a fact submitted to the judge and which is intended to serve to achieve its conviction in the sense of confirming an assertion of facts.<sup>641</sup> In general, Art. 1(3) Rome II is considered to be of largely declaratory nature since it only establishes the well-known principle of applying the civil procedural law of the *lex fori*.<sup>642</sup>

The relationship between Art. 1(3) Rome II and Art. 21 Rome II is clear in German literature and not connected to any problems.

The systematic position of Art. 1(3) Rome II is criticised. Due to the close connection with the scope of the reference, a positioning in the context of Art. 15 Rome II is considered more appropriate.<sup>643</sup>

With regard to Art. 22 of the Regulation, two issues in particular are controversial in Germany. First, it is unclear under which law the required standard of proof is determined, i.e. what degree of certainty must be achieved in order to consider a fact to be proven. It is discussed whether this is governed by the *lex causae* or the *lex fori*.<sup>644</sup> Furthermore, it is disputed how the German legal institution of *prima facie* evidence should be classified. *Prima facie* evidence is a concept of German law under which the judge, applying general principles of experience, may draw from established facts on the basis of a typical course of events which constitute sufficient proof of a fact to be established. The classification of *prima facie* evidence is very contested in substantive law, where it is partly classified under substantive law and partly under procedural law. Mirroring this discussion in private international law, it is debated whether the law applicable to *prima facie* evidence is to be determined according to the *lex fori* or the *lex causae*.<sup>645</sup>

It is controversial whether the subjective burden of proof is to be classified as substantive or procedural law, and thus determined according to the *lex fori* or the *lex causae*.<sup>646</sup> To this extent, the German Federal Court recently decided that the issue is procedural and that the determination of the applicable law is governed by the *lex fori*.<sup>647</sup>

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<sup>640</sup> Junker, in Säcker/Rixecker/Limberg (eds), *Münchener Kommentar zum BGB* (Vol 12, 7th edn, C.H. Beck 2018) Art. 1 Rom II-VO para 44.

<sup>641</sup> Knöfel, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen* (Vol 6, 3rd edn, Nomos 2019) Art. 1 Rom II-VO para 56.

<sup>642</sup> Knöfel, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen* (Vol 6, 3rd edn, Nomos 2019) Art. 1 Rom II-VO para 57.

<sup>643</sup> Junker, in Säcker/Rixecker/Limberg (eds), *Münchener Kommentar zum BGB* (7th edn, C.H.Beck 2018) Art. 1 Rom II-VO para 45.

<sup>644</sup> Limbach, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen* (Vol 6, 3rd edn, Nomos 2019) Art. 22 Rom II-VO para 5.

<sup>645</sup> Federal Court of Justice (BGH) 4.10.1984, I ZR 112/82; Court of Appeal Saarland (Saarländisches OLG) 6.2.2020, 4 U 33/18, paras 46f; Varga, in Gsell/Krüger/Lorenz/Reymann (eds), *beck-online.GROSSKOMMENTAR zum Zivilrecht* (C.H. Beck 2019) Art. 22 Rom II-VO para 41.

<sup>646</sup> Varga, in Gsell/Krüger/Lorenz/Reymann (eds), *beck-online.GROSSKOMMENTAR zum Zivilrecht* (C.H. Beck 2019) Art. 22 Rom II-VO paras 27f.

<sup>647</sup> Federal Court of Justice (BGH) 8.9.2016, III ZR 7/15, para 16.

17. *The approach in your Member State to questions of pleading, proof and application to individual cases of the substantive rules of the law applicable under the Rome II Regulation governing non-contractual obligations.*

The substantive rules applicable under the Rome II Regulation are pleaded and proven as any other provisions of foreign law. Under sec. 293 of the Code of Civil Procedure (ZPO):

*“The laws applicable in another state, customary laws, and statutes must be proven only insofar as the court is not aware of them. In making inquiries as regards these rules of law, the court is not restricted to the proof produced by the parties in the form of supporting documents; it has the authority to use other sources of reference as well, and to issue the required orders for such use.”*

No specific problems have been raised by the application of this provision in the context of the law applicable under the Rome II Regulation.

18. *The delimitation of the scope of the applicable law (Art. 15 lit. (a)-(h)), including any difficulties as its relationship to the issues addressed at points 16 17 above)*

Art. 15 Rome II has not created many problems in theory or practice.

Some difficulties persist though regarding claims involving multiple parties. It is discussed whether the governing law has to be determined individually for each relation between two parties or whether it could also comprise relations to third parties. The Court of Appeal of Düsseldorf initiated a preliminary ruling to the Court of Justice regarding the law applicable to preparatory acts by third parties for an infringement of intellectual property rights.<sup>648</sup> The question was however dismissed by the CJEU because of a lack of reasons given by the referring court for the reference on this point.<sup>649</sup> It is therefore an open issue whether a third party participating in a tort committed by another person will be submitted to the same law as the latter or not. This question could be addressed by a change of Art. 15 or by an additional recital.

German literature is inconsistent in its assessment of the extent to which party-agreed exclusions or limitations of liability are covered by Art. 15 lit. (b) Rome II Regulation. According to one view, the law applicable under the Rome II Regulation determines whether and to what extent the non-contractual obligation can be modified by way of a party agreement. Apart from that, the law applicable under the *Rome I Regulation* would govern the exclusion and limitation of liability.<sup>650</sup> Others determine the law applicable to contractual exclusions or limitations of liability uniformly by reference to the Rome II Regulation.<sup>651</sup> Some authors also consider corresponding exclusions and limitations of liability not to be covered by Art. 15 lit. (b) Rome II Regulation at all.<sup>652</sup>

With regard to Art. 15 lit. (c) Rome II, it is disputed whether this provision also includes the right of a court to estimate damages or whether this is to be determined according to the *lex fori* as part of procedural law.<sup>653</sup>

In connection with Art. 15 lit. (f) Rome II, it is disputed whether the law applicable to claims of an indirectly injured party is determined according to the law applicable to the relationship between the tortfeasor and the directly injured party or whether the applicable law to this relationship is to be determined independently.<sup>654</sup> The CJEU judgment in

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<sup>648</sup> Court of Appeal Düsseldorf (OLG Düsseldorf) 7.1.2016, I-20 U 225/13.

<sup>649</sup> CJEU 27.9.2017, *Nintendo*, Joined Cases C-24/16 and C-25/16, ECLI:EU:C:2017:724, para 110.

<sup>650</sup> Nordmeier, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen* (Vol 6, 3rd edn, Nomos 2019) Art. 15 Rom II-VO para 10.

<sup>651</sup> Dörner, in Schulze (ed), *Bürgerliches Gesetzbuch Handkommentar* (10th edn, Nomos 2019) Art. 15 Rom II-VO para 3.

<sup>652</sup> Engel, in Herberger/Martinek/Rüßmann/Weth/Würdinger (eds), *juris Praxiskommentar BGB* (Vol 6, 9th edn, juris 2020) Art. 15 Rom II-VO para 11.

<sup>653</sup> Nordmeier, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen* (Vol 6, 3rd edn, Nomos 2019) Art. 15 Rom II-VO para 12.

<sup>654</sup> Nordmeier, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen* (Vol 6, 3rd edn, Nomos 2019) Art. 15 Rom II-VO para 20.

Lazar<sup>655</sup> has not fully settled this debate. In particular, some authors continue to argue for the independent determination of the applicable law where third parties suffered their *own* damage, such as witnesses to a car accident.<sup>656</sup>

Finally, with regard to Art. 15 lit. (h) Rome II Regulation, some argue that all questions regarding a settlement are covered by this provision. Others follow a different approach and determine the question whether an obligation arising from a non-contractual obligation is amenable to settlement on the basis of the Rome II Regulation, whereas the settlement contract as such is subject to the Rome I Regulation as a contractual obligation.<sup>657</sup>

#### 19. *The application of the rule on overriding mandatory provisions (Art. 16)*

No decision of importance deals with this provision. However, there is a hot debate in the literature whether Art. 16 Rome II disallows the application of overriding mandatory provisions of third countries.<sup>658</sup> This debate has been caused by the absence of a rule on this subject, which stands in stark contrast to Art. 9(3) Rome I. It is strongly advised that a review of Rome II includes a specific rule on this question. It is clear that this rule could not be copied from the Rome I Regulation given that concepts such as the “unlawfulness of the contract” and the “place of performance” do not play any role in the context of non-contractual obligations. In the view of the author of the present report, a more general conception should be chosen, which could be inspired e.g. by Art. 19 of the Swiss Federal Act on Private International Law.

#### 20. *The application of the specific rule on direct action against the insurer of the person liable (Art. 18)*

Two questions are mainly discussed in German literature in connection with Art. 18 Rome II: First, the consequences of choosing a tort law under Art. 14 Rome II that does not recognise a direct claim and the extent to which such a choice of law requires the consent of the insurer are controversial.<sup>659</sup> Second, the delimitation of the governing tort law and the law governing the insurance contract under Art. 18 Rome II is disputed. In this respect, it is being discussed in particular whether the possibility of the victim to choose between two laws also comprises the limitation period for direct claims and the maximum insurance limits.<sup>660</sup>

#### 21. *The application the specific rule on subrogation (Art. 19)*

There is debate as to whether Art. 19 Rome II is directly applicable or only by analogy if the third party's obligation to satisfy the creditor is not imposed directly against the creditor but only in the relationship between the third party and the debtor.<sup>661</sup>

In addition, it is discussed whether Art. 19 is applicable in cases where a third party who has paid the entire debt due to an obligation towards the creditor may seek recourse against other debtors who are also liable. For example, this is the case in insurance where there are several tortfeasors. In these cases, it is agreed that the applicable law to the

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<sup>655</sup> CJEU 10.12.2015, *Lazar*, C-350/14, ECLI:EU:C:2015:802.

<sup>656</sup> Also critical on this question: Mankowski, ‘Anmerkung zu EuGH, Rs. C-350/14’ (2016) 71 JZ 310, 311ff; Thorn, in *Palandt* (79th edn, C.H. Beck 2020) Art. 15 Rom II-VO para 8.

<sup>657</sup> Junker, in Säcker/Rixecker/Limberg (eds), *Münchener Kommentar zum BGB* (7th edn, C.H.Beck 2018) Art. 15 Rom II-VO para 25; Spickhoff, in Hau/Poseck (eds), *BeckOK BGB* (55th edn, C.H. Beck 2020) Art. 15 Rom II-VO para 11.

<sup>658</sup> Knöfel, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen* (Vol 6, 3rd edn, Nomos 2019) Art. 16 Rom II-VO para 6.

<sup>659</sup> Jakob/Picht, in Rauscher (ed), *Europäisches Zivilprozess- und Kollisionsrecht EuZPR / EuIPR* (Vol 3, 4th edn, Otto Schmidt 2016) Art. 18 Rom II-VO para 4; Bisping, in Gsell/Krüger/Lorenz/Reymann (eds), *beck-online.GROSSKOMMENTAR zum Zivilrecht* (C.H. Beck 2019) Art. 18 Rom II-VO para 33.

<sup>660</sup> Nordmeier, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen* (Vol 6, 3rd edn, Nomos 2019) Art. 18 Rom II-VO paras 21f; Jakob/Picht, in Rauscher (ed), *Europäisches Zivilprozess- und Kollisionsrecht EuZPR / EuIPR* (Vol 3, 4th edn, Otto Schmidt 2016) Art. 18 Rom II-VO para 5.

<sup>661</sup> Picht, in Rauscher (ed), *Europäisches Zivilprozess- und Kollisionsrecht EuZPR / EuIPR* (Vol 3, 4th edn, Otto Schmidt 2016) Art. 19 Rom II-VO para 4.

transfer of claims based on the plurality of debtors is determined by Art. 20 Rome II and the applicable law to the transfer of claims based on the obligation towards the creditor is determined by Art. 19 Rome II. The applicable law must hence be assessed separately for each claim.<sup>662</sup>

As regards recourse between insurance companies of the same injuring party, it is disputed whether Art. 19 Rome II or Art. 20 Rome II is applicable.<sup>663</sup>

## 22. *The application of the specific rule on multiple liability (Art. 20)*

In German literature the interpretation of the term "same claim" in Art. 20 Rome II is discussed. Some interpret this term in a very broad sense: it is neither a prerequisite that the claims are subject to the same law nor that the claims are based on the same legal ground. The only decisive factor is that, if one of the debtors pays his debt, all other debtors are released from their obligation to pay the creditor and that the obligations are of equal rank.<sup>664</sup> Others apply Art. 20 Rome II only if the same law applies to all of the claims against the debtors; otherwise, the question if and to what extent the debtor is allowed to take recourse shall be determined by Art. 20 Rome II Regulation while the law applicable to objections by other debtors to the claim, the consequences of performance to the former creditor and other aspects of the debt relationship is determined by the law applicable to the relationship between this debtor and the former creditor.<sup>665</sup>

In the German literature, there is, however a discussion in respect of Art. 20 Rome II as to whether Art. 16 sentence 2 Rome I should be applied by analogy in cases of Art. 20 Rome II.<sup>666</sup>

It is also disputed how the applicable law is determined for liability exemptions of various debtors who have agreed amongst themselves to contribute if the creditor has not yet been satisfied.<sup>667</sup> If one of the debtors had a special settlement with the creditor, this could potentially result in a partial release of the other debtors. The question is under which law governs such release.

## 2.6 Chapter VI – Other Provisions

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

### 23. *The implementation of the concept of habitual residence in the Rome II Regulation, with reference both to persons covered by Art. 23 and natural persons acting otherwise than in the course of business*

The concept of habitual residence has not raised many questions in German case law and literature. One minor point that is still unclear is the precise meaning and scope of the expression "companies and other bodies".<sup>668</sup>

With regard to natural persons acting otherwise than in the course of business, there is far-reaching consensus concerning the meaning of habitual residence, even though the Rome II Regulation does not put the meaning in

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<sup>662</sup> Court of Appeal Celle (OLG Celle) 5.2.2020, 14 U 163/19, para 11f; Limbach, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen* (Vol 6, 3rd edn, Nomos 2019) Art. 19 Rom II-VO para 6a.

<sup>663</sup> Limbach, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen* (Vol 6, 3rd edn, Nomos 2019) Art. 20 Rom II-VO para 4a.

<sup>664</sup> Junker, in Säcker/Rixecker/Limberg (eds), *Münchener Kommentar zum BGB* (7th edn, C.H.Beck 2018) Art. 20 Rom II-VO para 11.

<sup>665</sup> Picht, in Rauscher (ed), *Europäisches Zivilprozess- und Kollisionsrecht EuZPR / EuIPR* (Vol 3, 4th edn, Otto Schmidt 2016) Art. 20 Rom II-VO para 6.

<sup>666</sup> Junker, in Säcker/Rixecker/Limberg (eds), *Münchener Kommentar zum BGB* (7th edn, C.H.Beck 2018) Art. 20 Rom II-VO para 15.

<sup>667</sup> Picht, in Rauscher (ed), *Europäisches Zivilprozess- und Kollisionsrecht EuZPR / EuIPR* (Vol 3, 4th edn, Otto Schmidt 2016) Art. 20 Rom II-VO para 11.

<sup>668</sup> It is for instance debated whether the community of heirs ("Erbengemeinschaft") or the German association without legal personality ("nicht rechtsfähiger Verein") are meant by it.

concrete terms.<sup>669</sup> The habitual residence is understood in German literature as the centre of one's life, relations or being or as the factual residence ("Schwerpunkt der Lebensverhältnisse", "Lebens- oder Daseinsmittelpunkt" or "faktischer Wohnsitz"). This place can be identified by looking at the focus of all social, cultural and economic relations of the person in question.<sup>670</sup> Although, most scholars agree on this, some minor questions are still discussed, such as whether one person can actually have more than one habitual residence.<sup>671</sup>

*24. The application of and any difficulties with the specific rules on exclusion of renvoi (Art. 24) and States with more than one legal system (Art. 25)*

The implementation of the exclusion of the renvoi in Art. 24 and of Art. 25 are clear in Germany and there have been no relevant cases so far. One interesting question, which is debated amongst German scholars, is whether parties can deviate from the exclusion of the renvoi by way of a choice of law that extends to rules of private international law of the chosen state.<sup>672</sup>

*25. The application of and any difficulties with the specific rule on public policy of the forums (Art. 26)*

The concept of public policy of the forum is clear and no major difficulties have been encountered so far. One minor issue, which is debated in German literature, is whether directives are part of public policy in cases where they have not been transposed correctly by the Member State whose law has to be applied, but the relevant provisions also cannot be applied directly according to the case law of the CJEU.<sup>673</sup>

Another discussion concerns the legal consequences of a violation of the public policy of the forum by the *lex causae*.<sup>674</sup> It is debated whether the ensuing gap must in this case be filled using the provisions of the *lex fori* or whether the gap must be filled based on the *lex causae*.

*26. Practical interaction between the Rome II Regulation and other EU and international legal instruments, in specific areas such as environmental damages, intellectual property rights or data protection (Arts. 27, 28, 29)*

The interaction between the Rome II Regulation and other EU and international legal instruments is very much debated in Germany. The legal situation is unclear for multiple reasons.

First, it is discussed whether Art. 27 applies at all in the context of harmonised substantive law of the EU. Some argue that private international law does not apply to cases governed by harmonised substantive law, such as the CISG, while other scholars disagree and want to apply private international law first.<sup>675</sup>

Second, it is unclear whether Art. 27 only applies to other Union law containing conflict-of-law rules or whether it applies to all other substantive Union law. In this context it is also disputed under what circumstances a provision can

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<sup>669</sup> Schulze, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen* (Vol 6, 3rd edn, Nomos 2019) Art. 23 Rom II-VO para 28.

<sup>670</sup> Schulze, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen* (Vol 6, 3rd edn, Nomos 2019) Art. 23 Rom II-VO para 16.

<sup>671</sup> Schulze, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen* (Vol 6, 3rd edn, Nomos 2019) Art. 23 Rom II-VO para 18.

<sup>672</sup> Schulze, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen* (Vol 6, 3rd edn, Nomos 2019) Art. 24 Rom II-VO para 5 with further references.

<sup>673</sup> Schulze, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen* (Vol 6, 3rd edn, Nomos 2019) Art. 26 Rom II-VO para 9.

<sup>674</sup> Schulze, in Hüßtege/Mansel (eds), *BGB: Rom-Verordnungen* (Vol 6, 3rd edn, Nomos 2019) Art. 26 Rom II-VO paras 28f.

<sup>675</sup> See generally with further references: von Hein, in Säcker/Rixecker/Limberg (eds), *Münchener Kommentar zum BGB* (Vol 12, 8th edn, C.H. Beck 2020) Einl. zum IPR para 99.

be identified as a conflict-of-laws rule. Some scholars argue that provisions defining the territorial scope, such as Art. 3 GDPR, are also conflict-of-law rules.<sup>676</sup>

## 2.7 Comments on other Practical Problems

*These areas are of particular interest for the Commission. Please be as precise as possible regarding any issue that has been reported on:*

*27. The impact of the application of the 1971 Hague Convention on the law applicable to traffic accidents on legal certainty (where relevant for your Member State)*

The 1971 Hague Convention has not been ratified by Germany and is therefore not applicable.

*28. Any other practical problems with respect to the application or interpretation of the Rome II Regulation, including but not limited to the suitability of the mosaic approach*

In German literature, the mosaic approach has largely prevailed.<sup>677</sup> The reason for this is, on the one hand, the case law of the CJEU regarding international jurisdiction and, on the other hand, the declaration of the Commission who suggested to use the mosaic approach developed for international jurisdiction as well for the Rome II Regulation.<sup>678</sup> In favour of this approach it is argued that this leads to a parallelism of jurisdiction and applicable law. At the same time, however, the problems of such a mosaic approach for conflict-of-law rules and the Rome II Regulation are also emphasised, in particular, the danger of different assessments of an act due to the application of different legal systems and the additional effort for persons operating in several states who have to base their actions on several legal systems.<sup>679</sup> The coordination and adaptation problems associated with the split-up into different national laws are also emphasised.<sup>680</sup>

## 3. Comments on areas of interest

*These areas are of particular interest for the Commission. Please be as precise as possible regarding any issue that emerged in your Member State regarding:*

*29. The exclusion of violations of privacy and rights relating to personality, including defamation, from the scope of the Rome II Regulation and any difficulties arising out from differences among Member States' rules in cross-border situations*

The exclusion of violations of privacy and personal rights, including defamation, is seen critically in German literature from a legal policy perspective.<sup>681</sup> However, no specific problems arose in connection with this exclusion under the Rome II Regulation. Due to the questionable legal policy underlying this exclusion, it is argued that Art. 1(2) lit. (g)

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<sup>676</sup> Lüttringhaus, 'Das internationale Datenprivatrecht: Baustein des Wirtschaftskollisionsrechts des 21. Jahrhunderts' (2018) 117 ZVglRWiss 50, 72f.

<sup>677</sup> Junker, in Säcker/Rixecker/Limberg (eds), *Münchener Kommentar zum BGB* (Vol 12, 7th edn, C.H.Beck 2018) Art. 4 Rom II-VO para 32.

<sup>678</sup> Rühl, in Gsell/Krüger/Lorenz/Reymann (eds), *beck-online.GROSSKOMMENTAR zum Zivilrecht* (C.H. Beck 2019) Art. 4 Rom II-VO para 71.

<sup>679</sup> Rühl, in Gsell/Krüger/Lorenz/Reymann (eds), *beck-online.GROSSKOMMENTAR zum Zivilrecht* (C.H. Beck 2019) Art. 4 Rom II-VO para 72.

<sup>680</sup> Schaub, 'Streuschäden im deutschen und europäischen Recht' (2011) 66 JZ 13, 19.

<sup>681</sup> Unberath/Cziupka, in Rauscher (ed), *Europäisches Zivilprozess- und Kollisionsrecht EuZPR / EuIPR* (Vol 3, 4th edn, Otto Schmidt 2016) Art. 1 Rom II-VO paras 66, 68; Leible/Lehmann, 'Die neue EG-Verordnung über das auf außervertragliche Schuldverhältnisse anzuwendende Recht ("Rom II")' (2007) RIW 721, 723f.

Rome II Regulation is to be interpreted very narrowly excluding, in particular, certain claims for damages for pain and suffering from its scope.<sup>682</sup>

30. *Any comment regarding the Interplay of the Rome II Regulation with the treatment of **defamation and data protection**, and, in these areas, the relevance of **Strategic Lawsuits Against Public Participation (SLAPPs)***

The relationship of the Rome II Regulation to data protection issues has so far received little attention in German literature. The discussion regularly revolves around three questions: First, it is unclear whether the GDPR itself contains provisions that can be considered as conflict-of-laws rules. Secondly, it is questionable how the GDPR relates to the Rome Regulations, in particular whether its applicability can be determined without the law applicable under private international law. If it is assumed that the application of the GDPR must be preceded by an analysis under private international law, the question then arises as to the relationship between the Rome Regulations and the GDPR. In particular, it is doubtful whether Art. 3 GDPR is a special conflict-of-laws rule in the sense of Art. 23 Rome I Regulation and Art. 27 Rome II Regulation.<sup>683</sup>

31. *The extent to which Rome II Regulation has been applied to **corporate abuses against human rights** and lays down an effective set of rules to regulate non-contractual liability;*

The law applicable to corporate liability for human rights violations has recently received much attention in the German literature.<sup>684</sup> The interest was sparked by German retailers who exploit the lenient standards of labour law in developing countries to deliver cheap goods for the German market through supply chains. In case the victims of these practices bring an action before German courts because of the damage suffered, the lenient standards of their home country apply under Art. 4(1) and 17 Rome II. The problem was strikingly illustrated by a claim brought in German courts against the German retailer Kik by the heirs of the employees of a Pakistani supplier which had died when a plant burnt down in Pakistan.<sup>685</sup> Under Pakistani law, the claims for wrongful death prescribed within a period of one or two years after the incident. The German court found no way to escape the application of this rule and dismiss the claims.

The case has led to a broader discussion about the relationship between European private international law and human rights violations. Several authors have analysed whether German public policy or German overriding mandatory provisions could act as a barrier to the application of the standards of the *lex loci delicti*.<sup>686</sup> However, the results were negative because of the supposed distance of the facts to the German legal system. This has triggered a proposal by one group of academics to apply German law via the escape clause of Art. 4(3) Rome II Regulation, save for the case

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<sup>682</sup> Unberath/Cziupka, in Rauscher (ed), *Europäisches Zivilprozess- und Kollisionsrecht EuZPR / EuIPR* (Vol 3, 4th edn, Otto Schmidt 2016) Art. 1 Rom II-VO para 68.

<sup>683</sup> See on these questions Thon, 'Transnationaler Datenschutz: Das Internationale Datenprivatrecht der DS-GVO' (2020) 84 *RabelsZ* 25, 38ff, 49ff; Lüttringhaus, 'Das internationale Datenprivatrecht: Baustein des Wirtschaftskollisionsrechts des 21. Jahrhunderts' (2018) 117 *ZVglRWiss* 50, 72f; for the legal situation prior to the GDPR see also Heiderhoff, in Rauscher (ed), *Europäisches Zivilprozess- und Kollisionsrecht EuZPR / EuIPR* (Vol 3, 4th edn, Otto Schmidt 2016) Art. 6 Rom II-VO para 15; Steinrötter, 'Dogmatische Kohärenz im Internationalen Wirtschaftsrecht der EU - der EuGH kann es jetzt richten!' (2015) *EWS* Heft 4, 1.

<sup>684</sup> On this topic, see e.g. Peters/Gless/Thomale/Weller, *Business and Human Rights: Making the Legally Binding Instrument Work in Public, Private and Criminal Law*, available on [ssrn.com](https://ssrn.com) (last visited 15.9.2020); Stürner, 'Die Rolle des Kollisionsrechts bei der Durchsetzung von Menschenrechten', in Hilbig-Lugani/Jakob/Mäsch/Reuß/Schmid, *Zwischenbilanz - Festschrift für Dagmar Coester-Waltjen zum 70. Geburtstag* (Giesecking 2015) 843; Wagner, 'Haftung für Menschenrechtsverletzungen' (2016) 80 *RabelsZ* 740; Weller/Kaller/Schulz, 'Haftung deutscher Unternehmen für Menschenrechtsverletzungen im Ausland' (2016) 216 *AcP* 387; Weller/Thomale, 'Menschenrechtsklagen gegen deutsche Unternehmen' (2017) 46 *ZGR* 509.

<sup>685</sup> Regional Court Dortmund (LG Dortmund) 10.1.2019, 7 O 95/15.

<sup>686</sup> See e.g. Stürner, 'Die Rolle des Kollisionsrechts bei der Durchsetzung von Menschenrechten', in Hilbig-Lugani/Jakob/Mäsch/Reuß/Schmid, *Zwischenbilanz - Festschrift für Dagmar Coester-Waltjen zum 70. Geburtstag* (Giesecking 2015) 843; Wagner, 'Haftung für Menschenrechtsverletzungen' (2016) 80 *RabelsZ* 740.



in which the victim prefers the application of the *lex loci delicti* under Art. 4(1) Rome II Regulation.<sup>687</sup> This proposal effectively amounts to the introduction of an option right of the victim similar to that provided in Art. 7 Rome II Regulation. In the opinion of the author of this report, such an option could only be introduced by the European legislator via a reform of the Regulation.

*32. The impact of the development of **artificial intelligence** on the Rome II Regulation, and in particular on the suitability of the rules that it contains to regulate non-contractual liability.*

As artificial intelligence is an area which is still very young and evolving, no case law exists with regard to the Rome II. Also, the interplay of artificial intelligence and Rome II have barely been discussed in the literature so far. Nonetheless, this area will be of greater importance with the rise of artificial intelligence in the upcoming years and decades. Potential problems may include inter alia the identification of the tortfeasor, the applicability of Art. 5 Rome II to artificial intelligence and questions relating to a choice of law involving artificial intelligence.

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<sup>687</sup> Peters/Gless/Thomale/Weller, Business and Human Rights: Making the Legally Binding Instrument Work in Public, Private and Criminal Law, available on [ssrn.com](https://ssrn.com) (last visited 15.9.2020).

#### 4. List of national case law

<u>Court or tribunal</u>	<u>Case name and reference number</u>  <u>Reference to decision of the Court of Justice if applicable</u>	<u>Date</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings (only for key cases)</u>
BGH	Xa ZR 19/08	9.7.2009	Art. 1	Applicable law for injunctions and validity of GTC	
BGH	VI ZR 217/10	19.7.2011	Art. 1	Applicability of state liability	
LG Dortmund	8 O 46/13	14.5.2014	Art. 1	Applicability of Rome II for dispute about handball players' release to play for the national team	
AG Nürnberg	21 C 7497/18	31.1.2019	Art. 1	Classification of compensation claims based on the European Flight Compensation Regulation (contractual or non-contractual?)	
AG Charlottenburg	203 C 47/16	29.11.2016	Art. 2	Applicability of tort statute to culpa in contrahendo	

LG Saarbrücken	13 S 5/15	25.6.2015	Art. 3	Validity of referral to Swiss law following Art. 4 of Rome II	
BGH	Xa ZR 19/08	9.7.2009	Art. 4	Applicable law for injunctions and validity of GTC	
BGH	Xa ZR 5/09	29.4.2010	Art. 4	Determining the place where harm occurred in connection with injunctions against GTC	The decisive factor for determining the place where the damage occurs under Art. 4(1) Rome II Regulation in the case of actions for injunctions against the use of general terms and conditions is the place where the general terms and conditions are likely to be used.
BGH	I ZR 178/08	11.2.2010	Art. 4	Reference of GTC on a webpage is classified as "usage of GTC"	
OLG Köln	13 U 41/11	25.1.2012	Art. 4	Applicability of Art. 4 regarding takeover bids	
KG	5 U 63/12	16.4.2013	Art. 4	Determining the place where harm occurred in connection with a website's top level domain	
OLG Nürnberg	4 U 1839/14	13.5.2015	Art. 4	Determining which country has manifestly closer connections to a car accident	
OLG Nürnberg	7 UF 617/18	31.10.2018	Art. 4	Applicable law for a marriage in connection with	

				the abusive use of power of attorney to access a bank account	
LG Essen	16 O 11/18	1.7.2020	Art. 4	Determining which country has manifestly closer connections to a plane crash in France	
BGH	I ZR 253/14	12.1.2017	Art. 6	Applicability of Art. 6(2) for a computer game where automated bots negatively impact both the consumers and the company operating the game	
OLG Hamm	I-4 U 196/10	1.2.2011	Art. 6	Country of origin principle may apply to online advertisement	
KG	5 U 167/13	12.6.2015	Art. 6	Country of origin principle does not supersede the domestic-market principle	
OLG Köln	6 U 172/13	14.3.2014	Art. 6	A website in German is targeted at German customers	
LG Karlsruhe	14 O 27/11 KfH III	16.12.2011	Art. 6	Applicability of German law for a website (Application of precedents set in CJEU cases C-509/09 and C-161/10)	

GmS-OGB	GmS-OGB 1/10	22.8.2012	Art. 6	Determination of the marketplace for a mail-order drug business selling to consumers	
KG	5 U 63/12	16.4.2013	Art. 6	Applicability of Art. 6(2) for incriminating statements about a German hotel that were published on a website operated in Switzerland	
OLG Hamm	4 U 100/13	17.12.2013	Art. 6	German Telemedia Act is not exempt from competition law	
OLG Hamburg	3 U 86/13	6.11.2014	Art. 6	Confirming the above mentioned ruling	
BGH	I ZR 131/12	12.12.2013	Art. 6	Statements about an airline in a press release affect the public interest for undistorted competition	
OLG Düsseldorf	VI-U (Kart) 13/14	15.7.2015	Art. 6	Applicable law for damages occurring in different countries.	
OLG Köln	6 U 152/16	28.4.2017	Art. 6	The affected market of the violation of a (German) disclosure obligation lies in Germany	
KG	5 W 221/17	11.10.2017	Art. 6	Applicability of German law for an Austrian blog	

				(language of blog is German)	
OLG München	29 U 1091/18	10.1.2019	Art. 6	Applicable law for injunctions against GTC and the reimbursement of warning costs	
LG Hamburg	315 O 540/12	10.1.2013	Art. 8	The law of the country in which protection is claimed also determines what constitutes an act of exploitation	
BGH	I ZR 76/11	5.11.2015	Art. 8	Extent of the tort statute for rights resulting from and related to intellectual property	
LG Hamburg	308 O 480/16	22.3.2017	Art. 8	Application of Art. 8 to disclosure obligations	
BGH	I ZR 247/15	27.4.2017	Art. 8	Application of Art. 8 for recordings of works protected by copyright.	
BGH	I ZR 164/16	9.11.2017	Art. 8	If a Community trademark is violated, the place where the damage occurred is where the damaging material was put online	

OLG Hamm	24 U 110/15	6.4.2017	Art. 10	Applicable law for recovery claim in connection with a car accident	
LG München I	10 O 6084/12	18.4.2013	Art. 11	The law applicable for a contract may not be used as a connecting factor for Art. 11	
LG Hamburg	329 O 343/14	4.12.2015	Art. 12	Choice of law in a contract that was ultimately not signed is still relevant for determining the (hypothetically) applicable law	
OLG München	34 SchH 18/13	7.7.2014	Art. 14	Laws from a state that is not the place of arbitration are irrelevant for determining the arbitrability of a claim, even if said norms are binding	
OLG Frankfurt	6 W 9/20	30.1.2020	Art. 14	Choice of law by implication	
OLG Hamm	I-9 U 44/19	21.5.2019	Art. 14	Choice of law by implication when both parties acted under wrong assumptions about the applicable law	
LG Saarbrücken	13 S 21/15	11.5.2015	Art. 15	Scope of the applicable law in relation to interest	

OLG Düsseldorf	I-20 U 225/13	7.1.2016	Arts. 8 and 15	Scope of applicable law for multiple involved persons	<p>In this case, the OLG initiated a preliminary ruling to the CJEU. The question concerned the interpretation of Art. 8(2) Rome II. More specifically, it asked how the place “in which the act of infringement was committed” is to be determined in cases in which the infringer offers goods that infringe a Community design on a website and that website is also directed at Member States other than the one in which the person damaged by the infringement is domiciled, and/or has goods that infringe a Community design shipped to a Member State other than the one in which it is domiciled?</p> <p>The CJEU found that the country in which the act of infringement was committed is the country where the event giving rise to the damage occurred. Where the same defendant is accused of various acts of infringement committed in various Member States, the correct approach for identifying the event giving rise to the damage is not to refer to each alleged act of infringement, but to make an overall assessment of that defendant’s conduct in order to determine the place where the initial act of infringement at the origin of that conduct was committed or threatened by it.</p>
LG Neuruppin	1 O 120/14	8.3.2017	Art. 16	Classification of damage calculation norms as overriding mandatory principles	



OLG München	10 U 2408/16	4.11.2016	Art. 17	Classification of the highway code as a rule of conduct	
LG Hamburg	327 O 59/16	10.11.2016	Art. 17	Applicability on contractual relations in case of occupational regulations	
AG Köln	268 C 89/1	29.4.2014	Art. 19	Choice of law for the preferential quota of damages	
OLG Celle	14 U 163/19	5.2.2020	Art. 19	Choice of laws in the case of multiple insurers for one vehicle	
BGH	IV ZR 62/19	18.3.2020	Art. 19	Choice of laws for recoveries of the insurer from the injuring party	Recourse claims of an insurer against a co-insured third party are contractually qualified, as they originate from the insurance contract. The law applicable to the legal relationship between the insurer and the third party is hence determined by the Rome I Regulation.
BGH	III ZR 7/15	8.9.2016	Art. 22	Classification of the nature of general rules regarding the burden of proof	
OLG Saarbrücken	4 U 33/18	6.2.2020	Art. 22	Classification of the nature of prima facie proof	
AG Geldern	4 C 356/10	27.10.2010	Art. 26	Public policy conflicts of rules governing the burden of proof	

LG Neuruppin	1 O 120/14	8.3.2017	Art. 26	Public policy conflicts of damage limitation rules	
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# Greece

## Executive Summary

- Prior to the adoption of the Rome II Regulation the conflict of law rule that determined the law applicable to the most cases of extracontractual liability was article 26 of the Greek civil code (hereafter GCC). Article 26 GCC disposed: "*Obligations arising from tort. Obligations arising from tort shall be governed by the law of the State where the tortious act was committed*".
- Rome II regulation is an instrument which has been applied regularly by Greek courts. Judges and practitioners both seem aware of the implications of the instrument. Apart from some cases where judges had a difficulty to determine correctly the scope of application of the Regulation *rationae temporis*, the Regulation has been applied without significant problems. Its entry into force has not exercised a particular influence into the resolution of problems of applicable law to non-contractual obligations. In other words, the Regulation did not revolutionize judicial practice.
- The introduction of the Regulation has not exercised a significant influence on the private international law issues of non-contractual obligations that have been contentious in Greek law. In the big majority of the cases judges applied article 4 par. 1 of the Regulation. To a lesser extent we see that article 10 par. 1 of the Regulation is also applied. The use of article 10 is most of time subsidiary since claims based on unjustified enrichment are considered in Greek civil law as subsidiary to the claims based on a contract or on tort. Therefore, when a claim is considered as well-founded on the basis of a contract the Court does not proceed to the examination the unjustified enrichment argument. Another finding from this study is the frequent recourse to the escape clause of article 4 par. 3. The application of the exception leads in all the cases to the application of the law of the forum. The application of the law of the forum in these circumstances is in most of the cases justified. However, courts don't always provide sufficient arguments in support of their conclusion. Finally, the rest of the conflict of laws rules of the Regulation have hardly been applied.
- No particular comments can be made in the areas of interest and this is because of the nature of cases with internationality elements with which Greek courts mostly deal. These deal only rarely with issues such as the violations of privacy, rights relating to personality, including defamation, corporate abuses against human rights and Strategic Lawsuits Against Public Participation (SLAPPs).

## 1. Introduction

- *How aware of the Rome II Regulation are practitioners, businesses and citizens in your Member State?*

The answer to this question depends to a certain extent on the field of practice. Practitioners who are engaged in international litigation are better versed into the Regulation and its provisions. One such example concerns practitioners and courts who are specialized in maritime law. In the Greek legal order the legislator has created a chamber specialized in maritime disputes (article 51 of Law no. 2172/1993) whose seat is in the Civil courts of Piraeus (Piraeus is the biggest port of Greece). Judges in this chamber are very frequently confronted with cases affected with internationality elements. It can generally be noted that judges of this chamber fair better dealing with issues of applicable law and international jurisdiction. There are however also judges that do not seem to be aware of the inner logic of the Regulation. The same can be said for certain practitioners. Nonetheless, it has to be pointed out that in the majority of cases dealing with torts with an internationality element judges identified correctly that Rome II Regulation had to be examined and eventually applied. Finally, there are not reliable data in relation to citizens so as to determine to which degree they are aware of the Regulation.

- *Is the Rome II Regulation generally known and applied by courts in your Member State?*

The Regulation is generally known and applied by the courts although there have been some problems in the understanding of its conditions of application, and more precisely of the scope of application *rationae temporis*.

- *Are there any relevant statistics regarding the application of the Rome II Regulation in your Member State?*

There are no relevant statistics as to the application of the Rome II Regulation.

- *How important is the doctrinal discussion on the Rome II Regulation in your Member State?*

The doctrinal discussion in Greece on Rome II Regulation is not so developed. Nonetheless, a thorough and comprehensive commentary has been written on the Rome II Regulation. Besides that, several articles have been published on different issues of non-contractual liability in private international law. As a general conclusion, it can be said that the doctrinal discussion in this field has not been intense.

An issue that has attracted the attention of the doctrine concerns preliminary questions in the field of non-contractual liability (see.V. Koumpli, "Article 4-Addendum II, Tortious liability due to road traffic accidents", in A. Bolos/P.-D.Tzakas, *op.cit.*, pp. 183-207) for traffic accidents. A significant number of such cases with an internationality element have been brought before Greek courts mainly for two reasons. The first reason is that Greece has in comparison with other EU countries one of the worst statistics in traffic accidents resulting in the death of the persons involved. The second is that the attribution of Greek citizenship is a hard, bureaucratic, time and money consuming procedure. As a consequence, thousands of foreigner citizens who have lived for several years in Greece and thus have been integrated to a great extent in the country have not acquired the Greek citizenship. The real link of these people with the country of their origin has progressively weakened and even remote. As a consequence, a lot of cases brought before Greek courts appear as private international law cases but in reality, are most closely linked with the Greek legal order. In our opinion the foreign citizenship in these circumstances is not *de lege ferenda* an internationality element sufficient to trigger a reasoning in terms of private international law. In most of the aforementioned cases, Greek law has been designated as applicable since both the accident and the damage occurred in Greece. Therefore, Greek law is designated as applicable both by virtue of article 26 Greek civil code (hereafter GCC) and by virtue of Rome II Regulation. As already said an interesting issue of preliminary question (incidental question) arises in these cases. The fact that the law designated to the main problem is the law of the forum means that in reality judges are not confronted with a genuine incidental question problem as it is perceived traditionally in private international law. This is because there is no necessity to choose between the conflict-of-law rules of the forum and the conflict of law rules of *lex causae*. The major issue in these cases brought before Greek courts has been to determine the persons entitled to seek moral damages, when a death happens as a result of a traffic accident. The answer to that question was thought to fall within the scope of article 26 GCC (The Greek conflict-of-law rule on non-contractual liability). This led systematically to the application of Greek law as the accidents occurred always in Greece. Therefore, Greek substantive law was applied. Among the different provisions of Greek law article 932 GCC provides that: "*In the event of a tort, regardless of the compensation for the property damage, the court may award reasonable monetary satisfaction due to non-pecuniary damage. This applies in particular to anyone who has suffered an injury to his health, honor or purity or has been deprived of his liberty. In the event of a person's death, the monetary compensation can be awarded to the victim's family for pain and suffering*". This application of this provision necessitates the determination of family members. Greek courts held that the determination of the members of the family has to be conducted according to the Greek law and pursuant to the meaning of the provision of article 932 GCC as to what a family comprises (Areios Pagos 1414/2019 ; Court of first instance of Athens 1815/2019 ; Court of first instance of Athens 16782/2017. All Greek case law can be retrieved by the data base in Greek of the Athens Bar Association <http://www.dsanet.gr/1024x768Auth.htm> ). According to this position the conflict of law rules on parentage and kinship of the Civil code have to be taken into consideration only if one of the litigants challenges the existence of the parentage or kinship which entitles a person to seek *pretium doloris* (compensation for pain and suffering). That said, Rome II Regulation exercised no influence as to the answer to these preliminary questions of family law.

- *Are there specific issues concerning the Rome II Regulation that have caused debate at a doctrinal or political level?*

Doctrinal discussion in relation to issues of applicable law to non-contractual obligations has been developed. However, this discussion is not linked directly with the adoption of the Regulation since the problems examined in this context had already arisen at an earlier moment. After the adoption of the Rome II Regulation judges did not actively seek whether and how this new piece of legislation shed light to the questions asked in the past. One of these aforementioned problems was whether the liability of a person acquiring an undertaking for the debts contracted by the latter before its sale and transfer can be qualified as a non-contractual issue covered by the relevant conflict of law rules of the Greek civil code (In that sense see Metallinos, in A. Bolos/P.-D.Tzakas, *op.cit.*, p. 149-150, no 28; *contra*

Korotzis, « The Regulation 864/2007 of the European Union on the law applicable to non-contractual obligations (Rome II) and its influence on Greek maritime law », *Nomiko Vima* 2009, 283 and 291; G. Panopoulos, « The liability of the person who acquires a patrimony or undertaking in private international law », (see *infra* 2.1.1)).

At a political level there has not been any discussion concerning Rome II regulation.

## 2. Analysis of the Rome II Regulation

### 2.1 Chapter I – Scope and Interpretation

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to :*

1. *The determination of the material scope of application of the Rome II Regulation, including any difficulties in applying the category of “civil and commercial matters” or in defining the exact scope of any excluded matters (Art. 1(1)-(2))*

There have not been significant problems so far in relation to the material scope of application of the Regulation. There have nonetheless been some issues concerning the material scope as well one problem in relation to the territorial scope of the Regulation. The problems in relation to the material scope have arisen prior to the adoption of the Regulation and concerned article 26 GCC which designates the applicable law to torts. The question was whether the responsibility of a person acquiring an undertaking for the debts contracted by the latter before its sale and transfer can be qualified as a non-contractual issue and thus submitted to the relevant conflict of laws (In that sense see Metallinos, in A. Bolos/P.-D.Tzakas, *op.cit.*, p. 149-150, no 28; *contra* Korotzis, « The Regulation 864/2007 of the European Union on the law applicable to non-contractual obligations (Rome II) and its influence on Greek maritime law», *Nomiko Vima* 2009, 283 and 291; G. Panopoulos, « The liability of the person who acquires an estate or undertaking in private international law (on the occasion of the decision of the Court of Appeal of Piraeus 94/2009) [in Greek] », 2011, published in <https://www.hiifl.gr/wp-content/uploads/Panopoulos-Final.pdf> (2011 ; H. Meïdanis, « Sale and purchase of vessels before Greek courts – How safe is the choice of foreign law made by the parties ? The controversial discussion on Article 479 of the Greek Civil Code», *RHDI* 61 (2008), p. 455; P. Dimitriadis/K. Rokas, «The applicable law in 479 of the Greek civil code-The effect of Res Judicata on Third Parties, *Synigoros* (66), 2008, p. 38). This question is linked with the doctrinal discussion conducted as regards the problem of the qualification of *Actio pauliana* as a tort. It has been argued that both *actio pauliana* and the liability of the purchaser of an undertaking can be qualified as non-contractual and thus covered by the conflict of laws of the Rome II Regulation (see in that sense Metallinos, in A. Bolos/P.-D.Tzakas, *op.cit.*, p. 149-150). Judges prior to the Regulation applied article 25 al. 2 GCC (Article 25 of the Greek civil code is the conflict of law rule that determines the applicable law to contracts) which determined as applicable to that problem “*the law which is appropriate to the contract having regard to all the special circumstances*” (Application by analogy of article 25 b GCC and of article 4 par. 4 of Rome I regulation Multi-member court of Piraeus 3658/2019; Court of first instance of Piraeus 2601/2019). This doctrinal discussion has been developed mainly because of the existence of a significant number of shipping companies which have a close link with the Greek legal order. Greek courts do not explicitly qualify this issue as non-contractual. They maintain their solution as to the applicable law to this specific issue, i.e. that the law applicable is determined by the exception clause of article 4 par. 3 of Rome I regulation. In addition, they continue to invoke article 25 GCC which determines the applicable law to contracts although Rome I Regulation has replaced article 25 GCC for all the issues that fall within the material scope of the Regulation. Therefore, the reference to article 25 GCC is either mistaken or could mean that judges have a doubt as to whether the aforementioned question falls within the scope of Rome I Regulation. One could argue more precisely that the issue under examination does not fall within the material scope of Rome I Regulation and thus article 25 GCC continues to be applicable to it. Such position is not explained sufficiently. Furthermore, Greek judges do not explain in detail the reasons of the application of article 25 GCC to the aforementioned issue. An alternative reading of judges’ approach could interpret their reference to article 25 GCC just as a reminder of the case law generated prior to the adoption of the Regulation. Moreover, we observe that there is a fluctuation as to the way courts qualify the issue of the extent of the responsibility of the buyer of an undertaking for its debts. In some cases, judges have qualified it as non-contractual and apply Rome II Regulation (Court of first instance of Piraeus 3410/2018). However, even in cases where the qualification remains vague the Courts have recourse to the escape clause for the needs of determination of the applicable law. When they conclude that Rome II

Regulation is applicable to that issue, article 4 par. 3 of Rome II regulation is invoked in support of their solution (Court of first instance of Piraeus 839/2019; Court of first instance of Piraeus 3410/2018).

Another situation which is indicative of difficulties in the determination of the material scope of the conflict of law rules of the Regulation is the following. It concerns situations where the courts have to decide on the applicable law to the liability of the shipowner for the debts (debts that are generated as a result of the exploitation of a ship) created by the charterer (This liability of the shipowner is limited to the value of the ship and is regulated in Greek law by article 109 of the Code of private maritime law [Κώδικας Ιδιωτικού Ναυτικού Δικαίου-ΚΙΝΔ]. Such liability is considered as deriving by the law (*ex lege*) (Supreme Court 1529/2017; see also *supra* the issue of the joint liability of the purchaser of an undertaking and of the seller of this undertaking). Although, courts characterize the ship-owner's liability as non-contractual, they do not seek the answer as regards the applicable law in the Rome II Regulation. Instead they rely on an application by analogy of articles 4 par. 1 a of the Rome Convention and article 25 b of the Greek civil code<sup>688</sup>. Article 25 b GCC leads to the application of the law which is deemed to be the most suitable as it results from the specific circumstances. This solution is confirmed by a number of decisions where judges apply by analogy the conflict of law rule of article 4 par. 3 of the Regulation 593/2008 trying to identify the country to which the situation is more closely connected (Court of first instance of Piraeus 2658/2018 ; Court of first instance of Piraeus 4133/2017). In Greek case law (Court of first instance of Piraeus 3075/2012 not published; cited by A. Metallinos, in A. Bolos/D.-P. Tzakas (eds), *The private international law of non-contractual obligations, Commentary of Regulation 864/2007 [Rome II]*) it has been decided that a non-contractual liability that does not coincide with one of the specific types of non-contractual liability envisaged by the Rome II Regulation does not fall within the material scope of the Regulation. Therefore, article 26 GCC is applicable in order to determine the applicable law.

Greek courts seem also to accept that *actio pauliana* has to be considered as a non-contractual obligation to which the applicable law has to be determined by the provisions of the Rome II Regulation (Court of first instance of Piraeus 3410/2018; Court of Appeals of Piraeus 28/2017; in favor of this opinion see Metallinos, in A. Bolos/P.-D. Tzakas, *op.cit.*, p. 149, n<sup>os</sup> 26-27). In the cases dealing with a fraudulent conveyance judges applied Rome II Regulation having directly recourse to the escape clause of article 4 par. 3 (Court of Appeals of Piraeus 28/2017; Court of first instance of Piraeus 3410/2018).

Finally, as noted above, there has also been a problem relative to the territorial scope or the scope *rationae personae* of the Regulation. This emerged in one case brought before the courts of Thessaloniki. The judges (Court of first instance, Thessaloniki 822/2017 and Supreme Court 1747/2017) excluded the application of the Regulation and applied the national conflict of law rule of article 26 GCC. They did not apply the Regulation because the victim did not have the citizenship of an EU member state (It had the Syrian nationality). It is as if the judges discovered an additional condition *rationae personae* for the application of the Regulation rendering it dependent on the EU citizenship of the persons involved in the non-contractual liability issue. This interpretation has unfortunately been validated by the Supreme Court (in chamber-Areios Pagos is the name of Greek Supreme Court). Our view is that the judges reached to that conclusion from a result-oriented approach that dictated according to them the application of Greek law. The solution is unfortunate, not only because it is simply wrong but also because a correct application of Rome II Regulation would also lead to the application of Greek law. Judges thought that they had to apply Syrian law because it was the country where the moral damage of the relatives of the deceased had been suffered. This interpretation was mistaken since according to the prevailing view in doctrine the law of the country where the initial damage occurred is also applicable in relation to the claims of third parties suffering by the indirect consequences of the tort.

## 2. *The determination of the temporal scope of application of the Rome II Regulation (Arts 31-32)*

There have been several cases revealing problems in the determination of the conditions of temporal scope of the Regulation. Judges have not always been particularly careful on the interpretation and application of the conditions of the temporal scope. In some cases, they did not pay attention to article 31 of the Regulation and have reached to the wrong conclusions as to its application. This problem is linked with the difficulty of the Courts to focus on the moment that the events which gave rise occurred so as to determine whether they fall within the temporal scope of the Regulation

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<sup>688</sup> "Article 25-Contractual obligations. Contractual obligations shall be governed by the law to which the parties have submitted themselves. Failing this shall be applicable the law which is appropriate to the contact having regard to the whole of the special circumstances").

or not (See in that sense Multi-member court of first instance of Athens 5304/2015 and Areios Pagos 249/2018 which corrected the motivation of the judges of first instance; Court of first instance of Thessaloniki, 2760/2013 and Areios Pagos 755/2019; Court of first instance of Thessaloniki. 17933/2012 and ΑΠ 756/2019; Court of first instance Thess. 2760/2013 and Areios Pagos 755/2019; Areios Pagos 468/2019 and C-136/16 and Areios Pagos 1166/2019; Multi-member Court of Thessaloniki 10369/2009). However, in most of the cases the mistaken interpretation as to the temporal scope of the Regulation did not lead to significant problems since in the majority of these cases both the Regulation and art. 26 of the Greek civil code led to the same applicable law (Multi-member Court of Thessaloniki 10369/2009). Finally, in most of the cases brought before Greek courts judges determined correctly the temporal scope of the regulation (Court of Appeal of Piraeus 81/2017; Court of first instance of Larissa 61/2017).

3. *The characterization of the **concept of "non-contractual obligations"**, its relationship to the concept of "contractual obligations" and any difficulties in relation to characterisation (Arts. 1(1), 2)*

See 2.1.1.

4. *The universal application of the Regulation (Art. 3)*

In one decision of the Greek Supreme court, judges made a serious mistake as to the universal application of the Regulation. The Supreme Court in its decision 1747/2007 did not apply the Regulation because the victim did not have the citizenship of an EU member (see above under 2.1.2). Although this issue is linked with the lack of comprehension of the territorial scope of the Regulation, it is connected in our opinion as well with an insufficient understanding of the meaning of the universal application of the Regulation. As said above (under 2.1.2) an understanding of this decision could be found in a result-oriented approach of the court in this case.

5. *The approach to interpretation of the Rome II Regulation, and in particular **its relationship to other EU private international law instruments (including the recast Brussels I Regulation and the Rome I Regulation)** (Recital (7))*

No indication of problems so far in that respect are to be reported.

## 2.2 Chapter II - Tort/Delict

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to the implementation of:*

6. *The general conflict-of-laws rule for tort/delict, and difficulties that have arisen in your Member State with respect to its application (Art. 4), and in particular:*

A general observation as to the application of conflict-of-law rules of the Regulation is that Greek judges in a significant number of cases invoke article 4 of the Regulation in combination with article 26 GCC which regulates the applicable law in torts ("*Article 26-Obligations arising from tort. Obligations arising from tort shall be governed by the law of the state where the tortuous act was committed*"). This is problematic for two reasons. First of all, the Rome II Regulation replaces article 26 GCC for all the differences and problems that fall within the material scope of the Regulation. Secondly, the combined reference could induce judges in mistakes since article 4 par. 1 of the Regulation uses the *lex loci damni* whereas article 26 GCC adopts the *lex loci delicti commissii* criterion. However, problems did not appear in any of the cases where judges formulated their reasoning in that way (Court of Appeal of Piraeus 581/2018; Court of Appeal of Piraeus 749/2018; Multi-member court of first instance of Piraeus 1410/2019; Court of first instance of Piraeus 2658/2018).

a. *the **approach to identifying the place of direct damage** in Art 4(1)*

There have not been any major difficulties in the determination of the place of direct damage (applied in a case of a collision between ships occurred in Nigeria: Court of Appeals of Piraeus 29/2019). As regards the determination of damage of financial nature it appears that at least in one case it has been accepted that the place where the damage has occurred is the place where the bank account from which money have been extracted is held (Court of first instance of Piraeus 2166/2011).

*b. the approach to the first rule of displacement in Art 4(2) in cases involving multiple parties or claims*

There have been only a limited number of cases where the first rule of displacement has been applied (eg. See Court of appeal of Piraeus 44/2017; Court of first instance of Piraeus 2019/2019). No major difficulties are to be reported in that respect.

*c. the approach to the escape clause in Art 4(3), and*

We can observe a recourse to the escape clause of article 4 (3) in numerous cases (Multi-member court of first instance of Athens 3393/2018; Court of first instance of Piraeus 1719/2018). This is often the case in differences of maritime nature (Multi-member court of first instance of Piraeus 3420/2018; Court of first instance of Piraeus 2535/2018; Court of first instance of Piraeus 4996/2017: place of the real seat of the defendants, place of conclusion of the contract linked with the tort). This frequent recourse to the escape clause can partly be explained given that a significant number of maritime business is conducted by the means of offshore companies, constituted in countries like Monrovia, Marshall islands, The Bahamas etc which are linked with the financial interests of Greek citizens. The links with the Greek legal order are apparent from the fact that a significant number of these undertakings have their offices in Greece, their management is conducted by Greece and are linked to the financial interests of Greek shipowners and charterers. Besides that, the application of article 4 par. 1 in those cases does not make real sense. It would necessitate to determine the place of a damage which is frequently of financial nature and which is most often fortuitous or has little connection to the tort. This would have as a consequence to have to deal with all the difficulties linked with the determination of the place where the financial damage occurs. It has to be added that no decision having applied the escape clause under any circumstances has been challenged so far by any of the litigants.

Judges have also applied the escape clause to a number of cases of different nature such as ones engaging the responsibility of financial institutions for investment products (Multi-member court of first instance of Athens 1470/2017 and 1471/2017; Multi-member court of first instance of Athens, 1902/2017). The basic argument in those cases was that the applicable law to the contract governing the relationship between the parties (the bank and the client) was Greek law. The application of Greek law to the contract was based also on the fact that the claimants had invoked Greek law during the litigation and defendants did not challenge that. Eventually, the judges could have reached to the same result by applying article 4 par. 1 of the Regulation since the bank accounts through which the acts giving rise to the tort took place, were open and held in Greece.

*d. the suitability of this set of rules to govern cases of **prospectus liability or other financial market torts***

There has been no significant litigation on prospectus liability or other financial market torts. One case which concerned the acquisition of a company and was linked with charges of market manipulation was brought before Greek courts (Multi-member Court of first instance of Athens 6006/2010). The applicable law to that case was determined according to article 26 GCC because it did not fall within the temporal scope of the Regulation.

*7. The rule on **product liability** (Art. 5) and, where relevant, the interaction with the application of **1973 Hague Convention on the Law Applicable to Products Liability**;*

There has not been a specific case on product liability.

*8. The specific rule on **unfair competition** (Art. 6)*

The provision has been hardly invoked and applied albeit correctly (Multi-member Court of first instance of Athens 3955/2015; Multi-member Court of first instance of Athens 3008/2018). In the cases where unfair competition issues arose, the tortious acts were linked also to violations of intellectual property. No major difficulties have been observed in that respect apart from one case where judges had mistakenly directly recourse to article 4 par. 1 of the Regulation instead of focusing to article 6 par. 1 (Multi-member Ct of 1st Inst. Thess. 4622/2015).

*9. The specific rule on **environmental damage** (Art. 7)*

There have been no cases dealing with environmental damage.

*10. The specific rule on **infringements of intellectual property rights** (Arts. 8, 13)*

In two cases of infringement of intellectual property rights where judges did not apply article 8 par. 1 as they should but based their answer on art. 4 par. 1 (Multi-member Ct of 1st Inst. Thess. 4622/2015: this case dealt as well with unfair practices; Court of first instance of Athens 4568/2012). The result nonetheless would be in any case the same.



Article 8 has also been applied in other cases without serious difficulties (Multi-member Court of first instance of Athens 3008/2018; Multi-member Court of first instance of Athens 3141/2015; Multi-member Court of first instance of Athens 3955/2015). In one case, the action of the claimants had as a legal basis both an infringement of intellectual property rights as well as the unfair practices of the respondent (Multi-member Court of first instance of Athens 3008/2018).

*11. The specific rule on industrial action (Art. 9)*

There have not been any cases with internationality elements dealing with industrial action.

## 2.3 Chapter III - Unjust Enrichment, *Negotiorum Gestio* And *Culpa In Contrahendo*

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to the implementation of:*

*12. The specific rule on **unjust enrichment** (Art. 10), including its relationship with the general rule for tort/delict in Art. 4.*

Article 10 has been invoked and applied in a number of cases dealing with unjust enrichment. In most of them the law applicable to the contract concluded between the parties turns to be the determining factor for the determination of applicable law to the unjust enrichment (Court of first instance of Athens 3993/2017; Multi-member court of first instance of Piraeus 3496/2019; Court of first instance of Piraeus 32/2019; Court of first instance of Piraeus 336/2019; Court of first instance of Piraeus 1278/2019; Court of first instance of Piraeus 1279/2019; Court of first instance of Piraeus 2303/2018; Multi-member court of first instance of Piraeus 236/2017; Multi-member court of first instance of Piraeus 3114/2017; Court of first instance of Piraeus 1416/2017; Court of first instance of Piraeus 5409/2017).

*13. The specific rule on **negotiorum gestio** (Art. 11)*

There have not been any cases with internationality elements dealing with *negotiorum gestio*.

*14. The specific rule on **culpa in contrahendo** (Art. 12)*

There has been one case dealing with *culpa in contrahendo* in which judges applied correctly the conflict of law rule of article 12 par. 1 of the Regulation. No difficulty has emerged in relation to the application of this rule (Court of Appeal of Larissa 348/2015).

## 2.4 Chapter IV - Freedom of Choice

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

*15. The implementation in legal/business practice and by courts of the rule on **freedom of choice**, any difficulties therein and **any discussion that has been carried out in your Member State regarding possible reasons which would justify the need to rethink it** (Art. 14)*

There have not been any cases where the conflict of law rule on freedom of choice has been applied. In a number of cases article 14 of the Regulation has been invoked by the judges in their reasoning but the circumstances of the choice of applicable law to the non-contractual liability do not appear clearly from the text of the decision (Court of first instance of Piraeus 1420/2015; in the same sense Multi-member Court of first instance of Athens 3961/2015 and 3962/2015). The Courts justified occasionally the application of the law of the forum as the result of a tacit choice of law made by the parties during the litigation (Court of first instance of Patras 420/2018; Multi-member court of first instance of Athens 1470/2017 and 1471/2017; Multi-member court of first instance of Athens 1902/2017 and 1906/2017; Court of first instance of Piraeus 4133/2017; Multi-member court of first instance of Patras, 244/2015). This finding is based on the fact that one of the litigants invokes Greek law before the Court and the other does not contest its application.

## 2.5 Chapter V - Common Rules

Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:

16. *The scope of the exclusion of 'evidence and procedure' in Art 1(3) and any difficulties in relation to that exclusion or to questions of formal validity or the burden of proof (Arts. 21-22)*

There have been no difficulties in that respect.

17. *The approach in your Member State to questions of pleading, proof and application to individual cases of the substantive rules of the law applicable under the Rome II Regulation governing non-contractual obligations.*

There have not been any particular difficulties in that respect. The Courts in cases where the application of foreign law is necessary order most frequently the parties to produce a legal opinion from the Hellenic Institute of International and Foreign Law (hereafter Hiifl <https://hiifl.gr/en>; see for instance in Supreme Court 1529/2017 where it is mentioned that the Hellenic institute has provided the required information as to the content of English law; the court ordered the litigants to produce a legal opinion from the Hiifl as to the content of Dutch and Belgian Law in Multi-member Ct of 1st Inst. Ath. 3008/2018) which is based in Athens. The Hiifl provides after a written request a legal opinion on the content of the foreign applicable law. However, in some cases judges acquire knowledge by their own means (personal research) as they are allowed to do (article 337 Greek code of civil procedure). In Greek private international law foreign law is treated as an issue of law and not as an issue of fact required to be proven (as it is the case in common law countries).

18. *The delimitation of the scope of the applicable law (Art. 15(a)-(h)), including any difficulties as its relationship to the issues addressed at points 16 17 above)*

An interesting issue concerns the determination of the persons entitled to compensation. The Regulation provides that the applicable law to the damage also determines the circle of the persons entitled to compensation for damages sustained personally. Greek law considers that the same law determines the persons entitled to compensation for indirect damages (Supr Ct. 1863/2017).

19. *The application of the rule on **overriding mandatory provisions** (Art. 16)*

There have been two cases where overriding mandatory provisions have been invoked (Court of appeal of Piraeus 29/2019; Court of appeal of Piraeus 714/2012). In one of those (Court of appeal of Piraeus 714/2012) judges have qualified as overriding mandatory provisions the rules of the collective agreements on the minimum salaries of seamen. This finding does not constitute a novelty since these rules had already been qualified as overriding mandatory rules prior to the adoption of the Rome II Regulation. In the same decision judges qualified as an overriding mandatory rule the provision of article 1 par. 1 of Law 762/1978, "on civil liability of a representative concluding an employment contract in Greece with a seafarer". This provision stipulates that, "if the seafarer's employer, shipowner or the person who exploits the ship, does not have a permanent residence in Greece or if it is a foreign shipping company, the person who represents him in the conclusion in Greece of a contract of employment on board of its ship, is fully and jointly responsible with him for all the obligations of the shipowner arising from the maritime employment contract or in connection with this contract towards the seafarer (par. 1)."

20. *The application of the specific rule on **direct action against the insurer of the person liable** (Art. 18)*

There has not been any difficulty in relation to this provision.

21. *The application of the specific rule on **subrogation** (Art. 19)*

There has been one case where the judges have applied the specific rule on subrogation although such application was erroneous in that context (Court of first instance of Piraeus 2023/2019).

22. *The application of the specific rule on **multiple liability** (Art.20)*

There have not been any cases where the specific rule on multiple liability has been applied.

## 2.6 Chapter VI - Other Provisions

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

*23. The implementation of the concept of habitual residence in the Rome II Regulation, with reference both to persons covered by Art 23 and natural persons acting otherwise than in the course of business*

There have not been any difficulties observed in that respect.

*24. The application of and any difficulties with the specific rules on exclusion of renvoi (Art.24) and States with more than one legal system (Art.25)*

There are no difficulties in that respect because *Renvoi* is in principle excluded in Greek private international law (article 32 GCC). Besides that, Greece is a one legal system country.

*25. The application of and any difficulties with the specific rule on public policy of the forums (Art. 26)*

No particular difficulties are to be reported because the application of foreign law has been rare. In the cases, where foreign law has been applied there have not been any difficulty in relation to the rule of public policy. The public policy has hardly been invoked in decisions of non-contractual liability.

*26. Practical interaction between the Rome II Regulation and other EU and international legal instruments, in specific areas such as environmental damages, intellectual property rights or data protection (Arts. 27, 28, 29)*

In one case Greek courts had to take into consideration the EU legal framework on intellectual property (Regulation EU 2015/2424 of the European Parliament and of the Council of 16 December 2015 amending Council Regulation (EC) No 207/2009 on the Community trade mark and Commission Regulation (EC) No 2868/95 implementing Council Regulation (EC) No 40/94 on the Community trade mark, and repealing Commission Regulation (EC) No 2869/95 on the fees payable to the Office for Harmonization in the Internal Market (Trade Marks and Designs) and Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark) and the national provisions applicable according to article 8 par. 2 of the Rome II regulation so as to determine the rules applicable to an infringement of an EU trade mark (Multi-member court of first instance 3008/2018). Thus, it specified that issues such as the monetary compensation for moral damages for the infringement do not fall within the scope of article 101 par. 2 or the Regulation 2015/2424 and have to be solved by the national law which will be designated applicable by article 8 par. 2 of the Rome II Regulation. In other words, judges explain the way the issues of infringement are delimited between the relevant EU instrument and national law. The act of infringement of the EU trademark had taken place in Greece and therefore Greek law was applicable. In the same case the claimants argued that the infringement constituted an act of unfair competition as well. Judges qualified the acts of the defendant as constituting unfair competition in accordance with the definitions of the directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') and Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising. Thus, judges had also to appreciate the applicable law according to article 6 par. 1 of the Rome II Regulation. This led them to the conclusion that Belgian and Dutch law had to be applied since the *competitive relations* and the *collective interests of consumers* were affected in these two countries. Having determined the applicable law judges postponed the issuance of the decision in order to obtain information about the content of Belgian and Dutch law. They ordered the litigants to produce a legal opinion from the Hiifl on the content of these two laws. Other than the aforementioned, there have not been any other cases revealing such interaction most probably because of the limited number of cases dealing with environmental damages, intellectual property rights or data protection.

## 2.7 Comments on other Practical Problems

*These areas are of particular interest for the Commission. Please be as precise as possible regarding any issue that has been reported on:*

27. *The impact of the application of the 1971 Hague Convention on the law applicable to traffic accidents on legal certainty (where relevant for your Member State)*

The 1971 Hague Convention on the law applicable to traffic accidents has not been signed by Greece. Thus, the Convention is not relevant for Greece.

28. *Any other practical problems with respect to the application or interpretation of the Rome II Regulation, including but not limited to the suitability of the mosaic approach*

There has not been any case where the mosaic approach had to be applied so far. In one case the application of article 6 par. 1 would lead to the application of the mosaic approach (Multi-member court of first instance 3008/2018) but the court suspended its ruling after having ordered the parties to produce a legal opinion on the content of Dutch and Belgian law by the Hellenic Institute of International and Foreign. It is reasonable to note that at least in some occasions the application of the mosaic approach will lead to delays of the judicial procedure because of the need to produce information as to the content of the laws applicable to the dispute.

## 3. Comments on areas of interest

*These areas are of particular interest for the Commission. Please be as precise as possible regarding any issue that emerged in your Member State regarding:*

29. *The exclusion of violations of privacy and rights relating to personality, including defamation, from the scope of the Rome II Regulation and any difficulties arising out from differences among Member States' rules in cross-border situations*

Judges applied in these cases the conflict of law rule of the Greek civil code (art.26 GCC). There has been one decision in which judges applied the Regulation' provisions despite the fact that one of the claims formulated was based on a violation or personality rights (Multi-member Court of first instance of Athens 6006/2010). It has to be noted that in the latter case the Regulation should in any event not have been applied also because the events giving rise to damage had taken place before the 11<sup>th</sup> January of 2009. However, the application of the conflict of law rule of article 26 GCC would lead to the same applicable law. Other than that, no particular difficulties are to be mentioned.

30. *Any comment regarding the Interplay of the Rome II Regulation with the treatment of defamation and data protection, and, in these areas, the relevance of Strategic Lawsuits Against Public Participation (SLAPPs)*

No comment.

31. *The extent to which Rome II Regulation has been applied to corporate abuses against human rights and lays down an effective set of rules to regulate non-contractual liability;*

There have not been any cases so far dealing with corporate abuses against human rights.

32. *The impact of the development of artificial intelligence on the Rome II Regulation, and in particular on the suitability of the rules that it contains to regulate non-contractual liability.*

There has been no case as regards artificial intelligence. We would like however to express our skepticism in relation to the existing conflict of law rules and their ability to correspond to the needs of non-contractual liability arising out of the use of artificial intelligence. The fact that deep-learning allows to machines and robots to evolve in an unpredicted way deserves some thought. Although, deep-learning and evolution of machines, robots and other applications are considered as one of the strengths of AI it could pose serious difficulties. There are a number of questions that need to be thought more thoroughly. Who will be liable for a damage inflicted to a person due to a skill developed after the sale of a machine and thanks to the inherent ability of machines to evolve via deep-learning? The problem is first of all a problem of substantive law in relation to the rules that will determine the conditions of liability. If there are efforts to adopt uniform substantive rules on the status of this type of liability, Rome II Regulation could be no longer relevant. If on the contrary, countries develop their own set of substantive rules depending on their investment in this type of

technologies, then the potential divergence of national legislations will be a source of legal uncertainty and a hurdle to the development and use of AI technology. Then, the conflict-of-laws rules of Rome II Regulation might enter into the picture. Will in that case article 4 par. 1 designating the law where the damage occurred appropriate? Can the conflict-of-law rule on product liability be appropriate to provide an answer to this problem? Can a product using AI be covered by article 5 of Rome II Regulation? In some cases, a positive answer will be easy to provide. In relation to other questions we could hesitate to accept this conflict of law rule. The country where the product was marketed as a criterion required for the determination of the applicable law does not seem to be appropriate in the circumstances of a global market. This rule if applicable will lead to the applicable law of the country where the damage occurred. The solution does not seem well-suited. This will be especially so if the country which has developed the technology has its seat in a different country. A final question one could ask in that respect is whether the developer of AI technology will have any sort of liability in case he does not notify to the persons having purchased its products or technology information indicating risks from subsequent use of his products.

#### 4. List of national case law

<u>Court or tribunal</u>	<u>Case name and reference number</u>  <u>Reference to decision of the Court of Justice if applicable</u>	<u>Date</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings (only for key cases)</u>
Supreme Court	1529/2017	7.09.2017	<p>The Regulation has not been applied although the Courts have identified that the liability of the shipowner for the acts of the charterer is extracontractual in nature.</p> <p>Art. 4 par 1 of the Rome Convention on the law applicable to contractual obligations</p>	Extra contractual liability of the shipowner for the acts of the charterer of the ship.	<p>The case concerned the determination of the liability of a shipowner for the acts of a charterer. Judges have qualified this type of liability as extra-contractual (<i>ex lege</i>) but have not applied the rules of Rome II Regulation to the determination of the applicable law although the facts fell within its temporal scope. Instead, they applied by analogy article 25 b of the Greek civil code [hereafter GCC] ("<i>Article 25-Contractual obligations. Contractual obligations shall be governed by the law to which the parties have submitted themselves. Failing this shall be applicable the law which is appropriate to the contact having regard to the whole of the special circumstances</i>") in combination with article 4 par 1 a of the Rome Convention ("<i>Article 4 Applicable law in the absence of choice 1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected</i>". A crucial point taken into consideration for the determination of the applicable law to the liability of the shipowner was</p>

					the law applicable to the contract concluded between the shipowner and the charterer. Parties had submitted their contract to English law and judges at first instance and on appeal have concluded that English law governed also the liability of the shipowner. The determination of the applicable law to the extra-contractual liability of the shipowner has not been challenged. The appeal before the Supreme court was successful. The judgment of the Court of Appeal was set aside for having erroneously interpreted and applied article 21 (4) of the Senior Courts Act of English law.
Supreme Court	1747/2017	22.09.2017	1, 3, 4, 32	Tort/Delict – General rule	The case involved a traffic accident in which the victims were of Syrian nationality. The members of their family who claimed moral damages had their habitual residence in Syria. The judges erroneously determined the territorial scope of the Regulation whose application was excluded. They applied instead art. 26 GCC because the victim did not have the citizenship of an EU member state. Greek law was applicable according to art. 26GCC. A correct interpretation of the Regulation would lead as well to the application of Greek law. Art. 4 par. 2 of the Regulation was also invoked although its conditions were not met.
Supreme Court	1863/2017	20.10.2017	4(1), 4(2), 31, 32	Tort/Delict – General rule: Place of direct damage, 1 <sup>st</sup> rule of displacement	The case concerned the attribution of moral damages after a death provoked by a traffic accident. The determination of the applicable law has not been challenged. The Court of appeal's judgment was challenged for the way it determined the compensation. The appeal was rejected.

Supreme Court	249/2018	30.01.2018	1(1), 2, 4, 4(3), 14, 15, 31, 32	Tort/delict – General rule: escape clause, Application in time	An action has been brought for malpractice against attorneys for the way they exercised their duties. The facts did not fall within the temporal scope of the Rome II Regulation which had been applied by the courts of first and second instance and led to the application of Greek Law. The Supreme court judges found that the Court of Appeal's motivation was wrong but the operative part of the judgment was right. The appeal has been rejected. This decision manifests the difficulty of judges to apply correctly the provisions relative to the temporal scope of the regulation.
Supreme Court	270/2018	15.12.2018	4(1), 4(2)	Tort/Delict – General rule: Place of direct damage, 1 <sup>st</sup> rule of displacement	The case dealt with a traffic accident. The decision of the Court of Appeal of Larissa has been challenged among other reasons for not having invoked explicitly the provisions of the Rome II Regulation. The applicants claimed that the provisions of the Regulation should lead to the application of the law of Albania. These allegations have been rejected by the Supreme court which considered that the omission of the rules of the Regulation was insufficient to consider that the action lacked of a legal basis. Judges went on to observe that according to art.s 4.1 and 4.2 of the Regulation Greek law was applicable not only because the place of the direct damage was in Greece but also because both the responsible for the accident and the victim had their habitual residence in Greece.
Supreme Court	755/2019	10.05.2019	4, 31, 32	Tort/Delict – General rule: Place of direct damage, Application in time	This case dealt with a traffic accident and the claims brought by the social security organization - substituted in the victim's place- against the person



					<p>responsible and the insurance companies. The social security organization was substituted in the victim's place after having paid an invalidity pension. As a result of that it tried to claim the rights transferred to it due to this substitution. The Court clarified that there were two distinct issues to which the applicable law had to be determined. The first one was that of the subrogation of a person who has a duty to satisfy a creditor to the rights of the latter. The second was the law applicable to the tort. The claim transferred to the person who has satisfied the creditor remains a claim arising from the tort. The subrogation and the rights of the organization arising therefrom were governed by Greek law. The subrogation derived in that case from the law. Therefore, the law applicable to the subrogation had to be determined according to the rules governing the relation between the social security organization and the creditor. The Court reached this conclusion applying by analogy article 25 GCC. As regards the claim transferred to this organization this was governed by the law applicable to the tort which in this case was determined by art. 26 GCC. The case did not fall within the temporal scope of the Rome II Regulation but the Court of appeal applied it. Thus the Supreme court reached the same conclusion as to the applicable law to the tort as the first and second instance courts did but on the basis of article 26 GCC. Once again, the Supreme court judges found that the motivation of courts adjudicating on the merits was wrong but the operative part of the judgment was right.</p>
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Supreme Court	756/2019	10.05.2019	4, 31, 32	Tort/Delict – General rule: Place of direct damage, Application in time	It is the same case as the previous one (Supreme Court 755/2019). Different decisions have been issued because the Social Security Organization filed separate actions which were challenged separately.
Supreme Court	848/2019	26.06.2019	31, 32	Application in time	This case deals with a defamation action. The courts have correctly excluded the application of the Rome II Regulation and have applied instead article 26 GCC to determine the applicable law to the tort. The application of the Regulation has been excluded based on the conditions of the temporal scope of the Regulation. The acts constituting the tort had taken place on the 20.12.2007. The Supreme Court confirmed the findings of the courts adjudicating on the merits as to the determination of the applicable law. It is noteworthy that the judges have identified as the place where the tortious act was committed the country where the center of the interests of the victim was located (country of the domicile of the victim).
Supreme Court	1166/2019	28.05.2019	4(1), 4(2), 31, 32	Tort/Delict – General rule: Place of direct damage, 1 <sup>st</sup> rule of displacement, Application in time	This case is relative to the chartering of a ship. The charterer has not paid in time the agreed freights. The private international law issue examined by the Supreme court judges was the one of the determination of the applicable law to the tort. The applicants before the Supreme court claimed that at least for the acts that had taken place after the 01.01.2009 the Court should have applied the Regulation and not article 26 GCC. The Supreme court accepted that the Regulation had to be applied but reached to the same conclusion as the Court of appeals, ie that the Greek law was

					applicable on the basis of both art. 4.1 and art. 4.2. The motivation of the Court of second instance was found to be partially mistaken but its conclusion as to the applicable law correct. The Supreme court judges rejected the allegation according to which the escape clause (4.3) was applicable. Their decision in that respect is explained by the absence of “a pre-existing relationship between the parties” such as a contract. The arguments excluding the escape clause are not sufficient although the conclusion is most probably correct.
Supreme Court	1295/2019	11.06.2019	1(1), 2, 4, 14, 15, 31, 32	Application in time	The case concerned the sale of a ship and the issuance of false certificates as to its condition and its seaworthiness. The Courts applied correctly the temporal scope conditions of the Regulation and concluded that the Regulation was not applicable.
Supreme Court	1414/2019	08.11.2019	4(1), 4(2), 31, 32	Tort/Delict – General rule: Place of direct damage, 1 <sup>st</sup> rule of displacement	This case dealt with a traffic accident. Greek law was designated applicable as a result of the application of art. 4 (1). One of the issues that arose was the one of the determination of the person entitled to be paid moral damages for the death that has been provoked as a result of the accident. The Supreme Court’s decision confirmed the position of previous decisions according to which the quality of a family member is to be understood in the sense of Greek substantive law. The Greek conflict of law rules as to the quality of a family member have to be applied only in case one of the litigants challenges the quality of the family member who seeks moral damages.

Multi-member Ct of 1 <sup>st</sup> Inst. Thess.	10369/2009	03.03.2009	4(1), 5(1), 31, 32	Tort/Delict – General rule: Place of direct damage, Product Liability, Application in time	
Multi-member Ct of 1 <sup>st</sup> Inst. Ath.	6006/2010	23.09.2010	4(1), 31, 32	Tort/Delict – General rule: Place of direct damage, Application in time	The decision is one of the few dealing with the tort of market manipulation. The problem of the applicable law is resolved according to art. 26 GCC because the facts did not enter within the temporal scope of the Regulation. The decision is not final because the court ordered an expert opinion as regards different issues that had to be evaluated.
Court of 1 <sup>st</sup> Inst. Pir.	2166/2011	---.2011	4(1), 31, 32	Tort/Delict – General rule: Place of direct damage, Application in time	The case concerned a tort related to the extraction of money from a bank account. This decision is one of those having accepted that the place where the financial damage occurs is in the country where the bank account is held from which money have been extracted.
Court of App. Pir.	12/2011	---.2011	1(1), 3, 4, 31, 32	Application in time	
Court of 1 <sup>st</sup> Inst. Ath.	4568/2012	16.05.2012	4(1)	Intellectual Property Rights	
Multi-member Ct of 1 <sup>st</sup> Inst. Ath.	1738/2012	---.2012	31,32	Application in time	
Multi-member Ct of 1 <sup>st</sup> Inst. Ath.	2528/2012	05.04.2012	31,32	Application in time	
Court of App. Pir.	714/2012	15.11.2012	1(1), 3, 4(3), 14, 16, 32	Tort/delict – General rule: escape clause, Application in	The interesting point in this decision is that judges have qualified as overriding mandatory provisions the rules of the collective agreements on the

				time, Overriding mandatory rules	minimum salaries of seamen. Judges also qualified as an overriding mandatory rule the provision of article 1 par. 1 of Law 762/1978, "on civil liability of a representative concluding an employment contract in Greece with a seafarer". This provision stipulates that, "if the seafarer's employer, shipowner or the person who exploits the ship, does not have a permanent residence in Greece or if it is a foreign shipping company, the person who represents him in the conclusion in Greece of a contract of employment on board of its ship, is fully and jointly responsible with him for all the obligations of the shipowner arising from the maritime employment contract or in connection with this contract towards the seafarer (par. 1)."
Multi-member Ct of 1 <sup>st</sup> Inst. Vol.	199/2013	---.2013	1, 2(1), 4, 12(1)	Tort/Delict – General rule: Place of direct damage	
Court of 1 <sup>st</sup> Inst. Thess.	20455/2014	08.12.2014	1, 2(1), 4(1)	Tort/Delict – General rule: Place of direct damage	
Court of 1 <sup>st</sup> Inst. Pir.	1817/2014	---.2014	4(3)	Tort/delict – General rule: escape clause	
Multi-member Ct of 1 <sup>st</sup> Inst. Thess.	9059/2014	06.05.2014, 14.05.2014	4(1)	Tort/Delict – General rule: Place of direct damage	
Multi-member Ct of 1 <sup>st</sup> Inst. Thess.	11792/2014	---.2014	31, 32	Application in time	
Multi-member Ct of 1 <sup>st</sup> Inst. Pir.	464/2014	15.11.2013, 28.01.2014	31, 32	Application in time	

Multi-member Ct of 1 <sup>st</sup> Inst. Pir.	1743/2014	18.03.2014, 04.04.2014	1(1), 2(1), 3(1), 31, 32	Tort/Delict – General rule: Place of direct damage	
Multi-member Ct of 1 <sup>st</sup> Inst. Pir.	2818/2014	04.06.2014, 10.06.2014	4(1), 10(1)	Tort/Delict – General rule: Place of direct damage, Unjust Enrichment, Application in time	
Multi-member Ct of 1 <sup>st</sup> Inst. Pir.	3839/2014	31.07.2014	31, 32	Application in time	
Court of App. Pir.	238/2014	27.03.2014	1(1), 2(1), 3, 4(1), 10(1), 31, 32	Tort/Delict – General rule, Unjust Enrichment, Application in time	Case relative to the lift of the corporate veil which can have as a result to treat the rights or duties of a corporation as the rights or liabilities of its shareholders.
Court of 1 <sup>st</sup> Inst. Pir.	1420/2015	09.09.2015	14	Freedom of choice	
Multi-member Ct of 1 <sup>st</sup> Inst. Ath.	3141/2015	---.2015	1(1), 8(1), 15	Intellectual Property Rights	The case concerned an infringement of an intellectual property right of an architect which was the result of an unauthorized use of photos of the exterior of a building. The Court applied art. 8 par. 1 of the Regulation which led to Greek law.
Multi-member Ct of 1 <sup>st</sup> Inst. Ath.	3955/2015	18.11.2015	6, 8(1)	Unfair Competition, Intellectual Property Rights	The case concerned an infringement of the European patent of a medication. The infringement constituted at the same time an act of unfair competition. Judges concluded that according to art.s 6 par. 1 and 8 par 1 of the Regulation Greek law had to be applied to both legal bases.
Multi-member Ct of 1 <sup>st</sup> Inst. Ath.	3961/2015	08.10.2015	2, 4, 14(1a), 15	Freedom of choice	

Multi-member Ct of 1 <sup>st</sup> Inst. Ath.	3962/2015	08.10.2015	2, 4, 14(1a), 15	Freedom of choice	
Multi-member Ct of 1 <sup>st</sup> Inst. Thess.	4622/2015	27.03.2015, 30.03.2015	4	Unfair Competition, Intellectual Property Rights	Despite the fact that the case concerned acts that constituted both a violation of a European Union trademark as well as an unfair practice, judges applied art. 4 par. 1 of the Regulation in the determination of applicable law.
Multi-member Ct of 1 <sup>st</sup> Inst. Patr.	244/2015	10.03.2015, 30.04.2015	2, 4, 14(1a), 15	Freedom of choice	
Multi-member Ct of 1 <sup>st</sup> Inst. Pir.	714/2015	17.02.2015, 06.03.2015	4(1), 4(3), 10(1)	Tort/Delict – General rule: Place of direct damage, Escape clause, Unjust Enrichment	
Court of App. West Mac.	44/2015	---.2015	31, 32	Application in time	
Court of App. Lar.	348/2015	---.2015	1, 4(1), 12, 21, 31, 32	Tort/Delict – General rule: Place of direct damage, Culpa In Contrahendo	This is the only case where Courts had to apply the conflict of law rule of article 12 par. 1 in addition to the conflict of law rule of article 4 par. 1.
Court of App. Pir.	149/2015	30.03.2015	4(3)	Tort/Delict – General rule: Escape clause	The case is relative to the lift of the corporate veil of a legal entity. The Court concluded that the applicable law to the lift of the corporate veil is the Greek law on the basis of art. 4 par. 4 of Rome I Regulation. The claims of the applicant are two-fold. The first is based on the theory of piercing the corporate veil while the second is based on a tort. Courts concluded that the applicable law to the tort is Greek law on the basis of art. 4 par. 3 of Rome II Regulation.

Court of 1 <sup>st</sup> Inst. Thess.	126/2016	07.01.2016	1(1), 4, 4(2), 4(3)	Tort/Delict – General rule: Escape clause	
Court of 1 <sup>st</sup> Inst. Pir.	2811/2016	--.12.2016	1(1), 10(1), 32	Unjust Enrichment	
Multi-member Ct of 1 <sup>st</sup> Inst. Ath.	875/2016	02.03.2016	6(1), 8(1), 8(2)	Unfair Competition, Intellectual Property Rights	The case is relative to the infringement of an EU trademark by means of a domain name created well after the registration of the aforementioned trademark. The company having created this domain name had an activity very similar with the one of the claimant. The Court concluded that the acts of the respondent constituted both a violation of an intellectual property right as well as unfair competition. Judges reached the conclusion that Greek law had to be applied both on the basis of art.s 8 par. 1 and 2 and 6 of the Regulation.
Multi-member Ct of 1 <sup>st</sup> Inst. Ath.	1934/2016	21.09.2016	6(1), 8(1), 8(2)	Unfair Competition, Intellectual Property Rights	Similar decision to the decision of the Multi-member court of first instance of Athens 875/2016.
Court of App. Pir.	541/2016	20.12.2016	1(1), 2(1), 10(1), 14(1a), 31, 32	Unjust Enrichment, Freedom of choice	
District Civil Ct Ath.	5286/2017	27.09.2017	4(1)	Tort/Delict – General rule: Place of direct damage, Product Liability	
Court of 1 <sup>st</sup> Inst. Ath.	3993/2017	15.05.2017	10	Unjust Enrichment	
Court of 1 <sup>st</sup> Inst. Thess.	16782/2017	30.10.2017	4(3)	Tort/Delict – General rule: Escape clause	
Court of 1 <sup>st</sup> Inst. Lar.	61/2017	---.2017	31, 32	Application in time	



Court of 1 <sup>st</sup> Inst. Pir.	821/2017	--.02.2017	1(1), 2(1), 4(3), 31, 32	Tort/Delict – General rule: Escape clause	
Court of 1 <sup>st</sup> Inst. Pir.	1416/2017	---.2017	10(1), 14(2)	Unjust Enrichment, Freedom of choice	
Court of 1 <sup>st</sup> Inst. Pir.	4133/2017	--.09.2017	1(1), 14(1a), 31, 32	Freedom of choice	This case concerned the liability of a shipowner resulting from a collision between two ships. Judges concluded that Greek law is applicable on the basis of an agreement as to its application entered after the events giving rise to the damage occurred. The agreement is thought to have taken place tacitly before the Court. Judges also determined the applicable law to the liability of the shipowner. Although they qualified this type of liability as deriving from the law, they identified the applicable law by an application by analogy of article 4 par. 3 of Rome I Regulation.
Court of 1 <sup>st</sup> Inst. Pir.	4996/2017	---.2017	1(1), 2(1), 4(1), 4(3)	Tort/Delict – General rule: Place of direct damage, Escape clause, Applicable law to the lift of the corporate veil	The case concerned a contract of sale of fuel to a shipping company. The legal bases of the application were the contract, the theory of the lift of the corporate veil and the tort. The issue of the lift of the corporate veil is governed by article 10 GCC which leads to the application of the law of the real seat of the company. The judges applied to the tort the escape clause of 4 par. 3 of the Regulation which led to the application of Greek law. The subsidiary company of the claimant was a Greek company and the respondents had their residence and their main establishment in Greece. An additional element in support of the application of the escape clause was the fact that the contract

					concluded between the litigants was also governed by the Greek law.
Court of 1 <sup>st</sup> Inst. Pir.	5409/2017	--.12.2017	1(1), 2(1), 3, 10(1), 32	Unjust Enrichment	
Multi-member Ct of 1 <sup>st</sup> Inst. Ath.	1470/2017	11.01.2017	2, 4, 14(1a), 15	Tort/Delict – General rule, Freedom of choice	
Multi-member Ct of 1 <sup>st</sup> Inst. Ath.	1471/2017	11.01.2017	2, 4, 14(1a), 15	Tort/Delict – General rule, Freedom of choice	
Multi-member Ct of 1 <sup>st</sup> Inst. Ath.	1887/2017	05.04.2017	4(1)	Tort/Delict – General rule: Place of direct damage	
Multi-member Ct of 1 <sup>st</sup> Inst. Ath.	1902/2017	26.04.2017	2, 4, 14(1a), 15	Tort/Delict – General rule, Freedom of choice	
Multi-member Ct of 1 <sup>st</sup> Inst. Ath.	1906/2017	26.04.2017	2, 4, 14(1a), 15	Tort/Delict – General rule, Freedom of choice	
Multi-member Ct of 1 <sup>st</sup> Inst. Pir.	236/2017	04.01.2017	1(1), 2(1), 3, 10(1), 32	Unjust Enrichment	
Multi-member Ct of 1 <sup>st</sup> Inst. Pir.	3114/2017	30.05.2017, -- .06.2017	1(1), 2(1), 3, 10(1), 32	Unjust Enrichment	
Court of App. Pir.	28/2017	08.12.2016, 19.01.2017	4(3)	Tort/Delict – General rule: Escape clause	
Court of App. Pir.	44/2017	12.01.2017, 26.01.2017	4(1), 4(2)	Tort/Delict – General rule: Place of direct damage	

Court of App. Pir.	81/2017	12.01.2017, 15.02.2017	31, 32	Application in time	
Court of 1 <sup>st</sup> Inst. Patr.	420/2018	29.06.2018	2, 10, 14(1), 15	Unjust Enrichment, Freedom of choice	
Court of 1 <sup>st</sup> Inst. Pir.	1719/2018	---.2018	10(1)	Unjust Enrichment	
Court of 1 <sup>st</sup> Inst. Pir.	2303/2018	---.2018	10(1)	Unjust Enrichment	
Court of 1 <sup>st</sup> Inst. Pir.	2431/2018	---.2018	4(1)	Tort/Delict – General rule: Place of direct damage	
Court of 1 <sup>st</sup> Inst. Pir.	2535/2018	--.06.2018	1(1), 2(1), 4(3), 31, 32	Tort/Delict – General rule: Escape clause	The case is related to the exploitation of a ship. The ship was under the flag of Liberia and the damage has occurred in The Bahamas. However, judges concluded on the basis of the clause of exception that Greek law was applicable. The tort committed was relevant to a contract concluded between the litigants which was also governed by Greek law. It is the clause of exception which also led to the application of Greek law to the contract.
Court of 1 <sup>st</sup> Inst. Pir.	2658/2018	---.2018	4(3), 10(1)	Tort/Delict – General rule: Escape clause, Unjust Enrichment	The judgment resolved different issues among which the problem of the applicable law to the liability of a shipowner for the claims that are born as a result of the exploitation of a ship by a charterer. Judges qualified this liability, which derives by the law, as extra-contractual. Nonetheless, they held that the applicable law to this type of liability is determined by an application by analogy of art. 25 b GCC and art. 4 par. 4 of the Rome I Regulation. Judges considered as well the law applicable to the issue of lifting of the

					<p>corporate veil. This problem is governed by article 10 GCC which led to the application of the law of the real seat of the company. Finally, judges resolved the law applicable to the liability of the persons having the management of the ships which were at the origin of this litigation. They proceeded in that respect to a combined application of art.s 26 GCC and 4 par. 3 of the Regulation. The application of the clause of exception led to the designation of Greek law. The solution seems justified given that there was a pre-existing contract between the parties governed by Greek law. In addition the companies and the persons involved in this case had a close connection with the Greek legal order.</p>
Court of 1 <sup>st</sup> Inst. Pir.	3410/2018	--.07.2018	1(1), 1(2), 2(2), 4(3), 15, 23, 24, 31, 32	<p>Tort/Delict – General rule: Escape clause; applicable law to the <i>actio pauliana</i>; applicable law to the liability of a person who acquires an undertaking</p>	<p>The Court had to resolve a maritime dispute that concerned the sale of fuel to a ship. The applicant sought with his action the payment of the cost of the fuel and compensation for moral damages. The fuel was sold to a ship which was later sold to a third company. The judges clarified a number of issues. They qualified the liability of the person acquiring an undertaking as extra-contractual and determined the applicable law to it according to art. 4 par 3 of the Regulation. The second issue is that of the liability of the shipowner for the acts of the charterer. This liability is also qualified extracontractual but the law applicable to it is determined by a combined application of art.s 25 b GCC and 4 par 4 of the Rome I Regulation. Finally, the Court considered that the <i>actio pauliana</i> also falls within the material scope of the Rome II Regulation and reached the conclusion that Greek law was applicable on the basis of the</p>

					escape clause. The conclusion of the Court was that Greek law was applicable in all the aforementioned issues.
Multi-member Ct of 1 <sup>st</sup> Inst. Ath.	3008/2018	---.2018	1, 2, 3, 6(1), 8(2), 15	Intellectual Property Rights, Unfair Competition	The case concerned an infringement of an EU trade mark and the unfair practices of a company who took an unfair advantage of the distinctive signs of the trade mark of another company selling olive oil. Judges invoked directives 2005/29/EC of 11 May 2005 and 2006/114/EC of 12 <sup>th</sup> December 2006 in order to qualify the unfair practices. They also invoked (EU) 2017/1001 Regulation of the European Parliament and of the Council of 14 June 2017 on the EU trade mark in order to determine correctly the questions governed by EU law provisions and the ones governed by the substantive rules of national law. The national law applicable had to be determined according to the rules of Rome II Regulation. They concluded that the issues not covered by the 2017/1001 Regulation and sanctions other than those described by the 2017/1001 Regulation are governed by the law designated in accordance with art. 8 par. 2 of the Rome II Regulation. In this case the illegal use of a trademark took place in Greece. Therefore, Greek law was deemed to be applicable. The action filed was also based on the fact that the respondent took an unfair advantage of the distinctive signs of the product of the claimant. The court applied in that respect art 6 par. 1 concluding that Dutch law and Belgian law had to be applied. They reached this conclusion because the product of the respondent was exported and sold to the markets of The Netherlands and of Belgium. Judges suspended the

					trial and ordered the litigants to produce a legal information as to the content of Dutch and Belgian law by the Hellenic Institute of International and Foreign Law.
Multi-member Ct of 1 <sup>st</sup> Inst. Ath.	3393/2018	06.08.2018	2, 4, 14(1a), 15	Escape clause, Freedom of choice	The case concerned the liability of a bank for the sale of perpetual bonds to its clients. The action is based both on a contractual basis and on a tort committed by the bank. Judges held that Greek law is applicable to the tort because, the tortious behaviour was connected with the contracts concluded between the clients and the bank, which were also governed by Greek law. Judges reinforced their reasoning as to the application of Greek law to the tort by invoking art. 14 par. 1 of the Regulation. Such choice of Greek law to the tort is in connection with the fact that the claimants invoked Greek law and the respondents did not challenge that.
Multi-member Ct of 1 <sup>st</sup> Inst. Pir.	3420/2018	---.---.2018	4, 4(3)	Tort/Delict – General rule: Escape clause	The litigation is linked with the exploitation of a shipping company. The Court had in this case to solve two issues of applicable law. The first was to determine the applicable law to the lift of the corporate veil of a company. This is governed by art. 10 GCC which leads to the application of the law of the real seat of the company. The second issue was that of the determination of the applicable law to the tort. Greek judges had recourse to the escape clause of the Regulation (4 par. 3) which led to the application of Greek law. The closest connection with the Greek legal order could be justified by the fact that the litigants had their main activities in Greece.

Multi-member Ct of 1 <sup>st</sup> Inst. Pir.	5409/2018	11.12.2018	3, 4, 32	Tort/Delict – General rule	
Court of App. Pir.	581/2018	07.06.2018	4(1)	Tort/Delict – General rule: Place of direct damage	The case concerned a contract of sale of fuel to a shipping company. The claim was based both on a violation of a contract as well as on a tort. The Court based its solution both on art.s 4 par. 1 of the Regulation and 26 GCC which shows some confusion in the reasoning followed. This way of reasoning can lead to a confusion between the <i>lex loci delicti commissi</i> (art. 26 GCC) and the <i>lex loci damni</i> (art. 4 par 1 of the Reg.) It is crucial however that both litigants have pleaded their case on the basis of Greek law. That's why the court invoked also in support of its conclusion as to the applicable law a choice of law made after the moment the tort was committed.
Court of App. Pir.	749/2018	13.12.2018	1(1), 2(1), 4(1), 4(3), 31, 32	Tort/Delict – General rule	The tort in this case was connected with the sale of a ship. Judges proceeded to a combined application of art.s 26 GCC and 4 par. 1 & 3 of the Regulation. Greek law was determined applicable on the basis of the escape clause. Although the holding companies involved in this litigation had their seat abroad there was a multitude of elements showing that the tort was more closely connected with the Greek legal order. The claimant was domiciled abroad but all the involved parties were Greek; the company that exercised the management had its real seat in Greece (the statutory seat was abroad).
Court of 1 <sup>st</sup> Inst. Ath.	1130/2019	07.05.2019	4(1), 4(3)	Tort/Delict – General rule	

Court of 1 <sup>st</sup> Inst. Ath.	1815/2019	29.07.2019	4, 15, 32	Tort/Delict – General rule	
Court of 1 <sup>st</sup> Inst. Pir.	32/2019	---.2019	1(1), 2(1), 3, 10(1), 32	Unjust Enrichment	The applicant in this instance sought the payment of the consideration for the sale of fuel to a shipowner. The claim is based both on a contractual basis and subsidiarily on the legal basis of the unjustified enrichment. The Court concluded that the law applicable to the unjustified enrichment was the Greek law (10.1) due to the law applicable to the contract of sale of the fuel which was also Greek law.
Court of 1 <sup>st</sup> Inst. Pir.	336/2019	---.2019	3, 4(3), 10(1)	Tort/Delict – General rule: Escape clause, Unjust Enrichment	
Court of 1 <sup>st</sup> Inst. Pir.	585/2019	---.2019	4(1), 31, 32	Tort/Delict – General rule: Place of direct damage	
Court of 1 <sup>st</sup> Inst. Pir.	839/2019	30.05.2019	2(2), 4(3)	Tort/Delict – General rule: Escape clause	The case is linked with a contract of sale of cardboard boxes. The main finding of this judgment is the determination of the applicable law to the joint liability of a person who acquires an undertaking for the debts contracted prior to the sale of this undertaking. Judges considered this liability as deriving by the law (ex lege) and found that it falls within the material scope of the Regulation. They found that the applicable law had to be determined by the escape clause of art. 4 par. 3 of the Regulation. They concluded that Greek law was applicable.
Court of 1 <sup>st</sup> Inst. Pir.	1278/2019	08.04.2019	1(1), 2(1), 3, 10(1), 32	Unjust Enrichment	



Court of 1 <sup>st</sup> Inst. Pir.	1279/2019	08.04.2019	1(1), 2(1), 3, 10(1), 32	Unjust Enrichment	
Court of 1 <sup>st</sup> Inst. Pir.	2019/2019	---.2019	4(2), 23	Tort/Delict – General rule: 1 <sup>st</sup> rule of displacement	
Court of 1 <sup>st</sup> Inst. Pir.	2023/2019	28.05.2019, 11.06.2019	19	Subrogation	Judges have mistakenly applied the specific rule on subrogation in that context.
Court of 1 <sup>st</sup> Inst. Pir.	2138/2019	---.2019	4, 32	Tort/Delict – General rule: Place of direct damage	
Court of 1 <sup>st</sup> Inst. Pir.	2601/2019	23.07.2019	1(1), 2, 10(1), 31, 32	Liability that derives by the law (art. 479 GCC), Unjust Enrichment	The differences brought before the court concerned a contract of sale of equipment and of supplies to a shipping company whose sole asset was a ship. The company having bought the equipment was later sold to a third company. The main private international law issue solved by the Court was the one of the applicable law to the joint liability of the person who acquires an undertaking for the debts created prior to its sale. Article 479 GCC which governs this issue creates a responsibility that derives from the law (ex lege). The law applicable to this issue was determined by a combined application of art. 25 b GCC and art. 4 par. 4 of the Rome I Regulation. Judges concluded that the law applicable to this issue was the Greek law. The claims were based both on a contractual basis and on the subsidiary legal basis of the unjustified enrichment to which the court applied art. 10 par. 1 of the Regulation.
Multi-member Ct of 1 <sup>st</sup> Inst. Patr.	682/2019	01.10.2019, 15.10.2019	2, 3, 4(1), 15	Tort/Delict – General rule: Place of direct damage	

Multi-member Ct of 1 <sup>st</sup> Inst. Pir.	1410/2019	09.04.2019, 17.04.2019	4	Tort/Delict – General rule	Judges proceeded to a combined application of art.s 26 GCC and 4 of the Regulation. Although the claimants are foreign companies, judges concluded that the place where the damage occurred was Greece because the real seat of these companies was in Greece.
Multi-member Ct of 1 <sup>st</sup> Inst. Pir.	3496/2019	21.10.2019	1(1), 2(1), 10(1)	Unjust Enrichment	
Multi-member Ct of 1 <sup>st</sup> inst. Pir.	3658/2019	07.11.2019	4	Tort/Delict – General rule	The case arose in the context of a collision of two yachts. The main private international law issue solved by the Court was the one of the applicable law to the joint liability of the person who acquires an undertaking for the debts created prior to its sale. Article 479 GCC which governs this issue creates a responsibility that derives from the law ( <i>ex lege</i> ). According to the judges the law applicable to this issue had to be determined by a combined application of art. 25 b GCC and art. 4 par. 4 of the Rome I Regulation. Judges concluded that Greek law was applicable to this issue.
Court of App. Ath.	7120/2019	12.12.2019, 27.12.2019	4(1)	Tort/Delict – General rule: Place of direct damage	
Court of App. Pir.	29/2019	06.12.2018, 16.01.2019	1(1), 2, 3, 4(1), 15, 16, 31, 32	Tort/Delict – General rule: Place of direct damage, Overriding mandatory provisions	The case dealt with a collision of two ships that took place in Nigeria. The Court applied art. 4 par. 1 of the Regulation and reached to the conclusion that Nigerian law was applicable. It dismissed the arguments of the appellant that Greek law should have been applied either on the basis of art. 4 par. 2 or 4 par. 3 of the Regulation. According to the judges the shipowner company had no link with

					Greece. The fact that the manager of the damaged ship had its main establishment in Greece and that the shipowner who provoked the damage also had its main establishment in Piraeus were not considered as significant enough to trigger the application of the escape clause.
Court of 1 <sup>st</sup> Inst. Pir.	90/2020	---.2020	1(2), 4(1), 10(1)	Tort/Delict – General rule: Place of direct damage, Unjust Enrichment	
Court of 1 <sup>st</sup> Inst. Pir.	334/2020	---.2020	1(1), 2(1), 4(1), 31, 32	Tort/Delict – General rule: Place of direct damage	

# Hungary

## Executive Summary

- There is plenty of literature dealing with Rome II in Hungary, but these are often very descriptive and not sufficiently analytical to provide answers for the questions below. This is the reason why some questions stayed unanswered.
- It is important to note that in Hungary most international private law relationships are discussed in the context of Act XXVIII of 2017 on international private law<sup>689</sup> that applies as a set of default rules for issues not regulated, among others, by the Rome II Regulation.
- Rome II is often discussed from a distinctly European perspective with less or no reference to Hungarian-specific context.

## 1. Introduction

- *How aware of the Rome II Regulation are practitioners, businesses and citizens in your Member State?*

There is no publicly available information on how aware businesses and citizens are. When it comes to practitioners the picture is mixed, as explained below.

- *Is the Rome II Regulation generally known and applied by courts in your Member State?*

It is hard to generalize as there is no official statistics on the frequency of cases with foreign elements in front of Hungarian courts. Academic views are inconsistent on how frequently Rome II or any conflict of laws rules would be applied by the courts. According to Bóka, disputes with foreign elements are likely to be rare and hence courts do not have a routine in handling these cases. It happens that the court simply disregards the foreign element and bases its decision solely on Hungarian law.<sup>690</sup> According to Szabados, however, from the date of accession, even in the absence of an explicit provision, the principle of the primacy of EU law applied automatically. Following the adoption of the Rome I and Rome II Regulations, the Hungarian legislature repealed the previous autonomous conflict-of-laws rules and referred explicitly to the primacy of the Rome I Regulation and the Rome II Regulation. The Rome II Regulation also gained application in Hungarian court practice. Courts were correct in not applying the Rome II Regulation to claims related to the violation of personality rights.<sup>691</sup>

- *Are there any relevant statistics regarding the application of the Rome II Regulation in your Member State?*

Unfortunately, not.

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<sup>689</sup> Act XXVIII of 2017 on International Private Law (2017. évi XXVIII. Törvény a nemzetközi magánjogról). This act repeals the previous Decree Act XIII of 1979 on International Private Law

<sup>690</sup> János Bóka „Jogharmonizációs dilemmák a külföldi jog tartalmának megállapításával kapcsolatban” (2014) X(2) Iustum Aequum Salutare 23, 27 <http://ias.jak.ppke.hu/hir/ias/20142sz/04.pdf>

<sup>691</sup> Tamás Szabados, “EU Private International Law in Hungary, An Overview on the Occasion of the 15th Anniversary of Hungary’s Accession to the EU” (2018) 2 Elte Law Journal 41 available at <https://eltelawjournal.hu/eu-private-international-law-in-hungary-an-overview-on-the-occasion-of-the-15th-anniversary-of-hungarys-accession-to-the-eu/>

- *How important is the doctrinal discussion on the Rome II Regulation in your Member State?*

The general impression given by the reviewed literature is that academics feel the need for discussing the important aspects of Rome II by providing theoretical analysis supplemented with case-law analysis to guide practitioners. However, unfortunately there is no evidence to what extent academic discussions are taken into account in practice.

- *Are there specific issues concerning the Rome II Regulation that have caused debate at a doctrinal or political level?*

At the Insurance Law Subsection of the Hungarian Lawyers Association on the 28<sup>th</sup> of October 2008, the problem of forum shopping has been highlighted on a practical level in the context of road traffic accidents. As it appears, Hungary has a large percentage of road traffic accidents with foreign elements, and this gives rise to forum shopping. Practicing lawyers pointed out the risk for forum shopping in international torts because there are enormous differences in awarding non-material damages between countries. For instance, awarding non-material damages to relatives is not possible under German law, whereas in other countries clients can get large amounts of compensation on this basis.<sup>692</sup> It is obviously in the interest of the victim to obtain the highest possible compensation and thus to use the law of the country that would enable the achievement of this aim.

On a doctrinal level it has been highlighted that the applicable law may lead to such a low level of compensation that it would even harm human dignity (under Art. 15 para. b) and c) of Rome II Regulation).<sup>693</sup>

## 2. Analysis of the Rome II Regulation

### 2.1 Chapter I – Scope and Interpretation

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

1. *The determination of the material scope of application of the Rome II Regulation, including any difficulties in applying the category of “civil and commercial matters” or in defining the exact scope of any excluded matters (Art. 1(1)-(2))*

Generally, Hungarian scholars emphasized the need to interpret the key concepts in Rome II according to the rules of this Regulation together with the clarification of the rules by the CJEU. They urge the need to depart from interpreting key concepts of Rome II according to the understanding of the key concepts developed and established over years by national law. This arguably also applies to the category of ‘civil and commercial matters’.<sup>694</sup> For instance, the Budapest Court of Appeal (in a case referred for preliminary reference C- 102/15) interpreting the provisions of the Regulation according to

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<sup>692</sup> Tibor Pataky, Beszámoló a Magyar Jogászegylet szekcióüléséről, (2008) available at

<https://www.biztositas.hu/hirek-informaciok/biztositasi-szemle/2009-januar/biztositasi-jogi-szakosztaly-ulese.html>

<sup>693</sup> Tamás Szabados, „Emberi méltóság és nemzetközi magánjog”, in Katalin Raffai and Sarolta Szabó (eds) *Honeste beneficare pro scientia* Ünnepi kötet Burián László 65. születésnapja alkalmából (Pázmány Press, 2019) available at [https://jak.ppke.hu/uploads/collection/207/file/BurianLaszlo65\\_unnepikotet\\_2019.pdf](https://jak.ppke.hu/uploads/collection/207/file/BurianLaszlo65_unnepikotet_2019.pdf)

<sup>694</sup> For instance, László Burián, „Kodifikálható-e az Európai Unió nemzetközi magánjogának „Általános Része”?” (2014) X(2) *Iustum Aequum Salutare* 7 available at <http://ias.jak.ppke.hu/hir/ias/20142sz/02.pdf>, Ildikó Nagyné Sándor, „Külföldi jog alkalmazása a polgári perben – kártérítési peres kitékintéssel” (2018) 3 *Eljárásjogi szemle* available at <https://eljarasjog.hu/2018-efolyam/kulfoldi-jog-alkalmazasa-a-polgari-perben-karteritesi-peres-kitekintessel/>

Hungarian law wrongly classified an administrative case as civil<sup>695</sup>. Some authors even see the unified concepts/definitions as tools for creating unified international private law.<sup>696</sup>

In terms of defining excluded matters, there is an opinion that Rome II should be applicable for any damages caused during negotiation on shares transfer/acquisition under Art. 1(d) on non-contractual obligations arising out of the law of companies. Czigler argues for the applicability of Rome I on the transfer of shares, and it follows that Rome II via Art. 12 is then applicable for any damages caused during the negotiation (*culpa in contrahendo*) of the transfer/acquisition.<sup>697</sup>

### 2. *The determination of the temporal scope of application of the Rome II Regulation (Arts 31-32)*

The unclear result of the relationship between the entry into force and the various rules on the start of application of Rome II caused debates in Hungary. Art. 31 of Rome II provides its applicability on events following its entry into force, that is, according to Art. 32 after 11 January 2009. The leading academic interpretation that follows Art. 254(1) TFEU is that Rome II Regulation is applicable to events causing non-contractual obligations following 20 August 2007. It follows that the Regulation is applicable from 11 January 2009 for events following 20 August 2007.<sup>698</sup> Courts do not always follow this interpretation. For instance, a judgment P. 24.487/2012/47 in 2017 for a road traffic accident in 2005 wrongly applied Rome II (see The list of national case law below).<sup>699</sup>

### 3. *The characterization of the concept of "non-contractual obligations", its relationship to the concept of "contractual obligations" and any difficulties in relation to characterisation (Arts. 1(1), 2)*

Mádl and Vékás emphasize that the contours of non-contractual obligations are not as clear as those of contractual obligations. Determining the characterization of *culpa in contrahendo* can be confusing for Hungarian courts, because there is a major difference between the approach of Rome II and the Hungarian Civil Code. The Hungarian Civil Code makes the categorization of infringing the obligation to cooperate and inform during negotiations dependent to the conclusion of the contract. If following negotiations, the contract is concluded, it will be treated as a contractual matter and, if the contract is not concluded, as a non-contractual matter. On the contrary, Rome II treats any infringement that occur in the course of contract conclusion as a non-contractual obligation.<sup>700</sup> Mádl and Vékás highlighted that in the above situation the problem must be considered as a matter of EU law - the application of Rome II must get primacy over Hungarian national rules.

### 4. *The universal application of the Regulation (Art. 3)*

The rule on universal application does not create any special problems in Hungary. The general problems with the application of foreign law continue to be relevant: accessibility, interpretation and application of foreign law.

Accessibility: the unclear nature of accessibility of foreign law under Rome II creates practical problems and academic debates in Hungary. How is foreign law going to be accessible? Do courts have *ex officio* powers, or should the onus be

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<sup>695</sup> See below C-102/15 in the List of national case law.

<sup>696</sup> Katalin Gombos, "A határon átnyúló elemeket tartalmazó jogviták bírói gyakorlata" (2014) X(2) *Iustum Aequum Salutare* 15 available at <http://ias.jak.ppke.hu/hir/ias/20142sz/03.pdf>

<sup>697</sup> Dezső Tamás Czigler, *Az európai nemzetközi (kollíziós) magánjog és családi jog főbb kérdései*, Phd thesis (Szécsényi István Egyetem, Győr, 2011) 241 – 244 available at <http://www.sze.hu/~smuk/Doktoriiskola/Fokozatszerzes/CzieglerDT/Disszert%E1ci%F3%20-%20V%E9gleges%20verzi%F3.pdf>

<sup>698</sup> Ferenc Mádl and Lajos Vékás, *Nemzetközi magánjog és nemzetközi gazdasági kapcsolatok joga* (Elte Eötvös Kiadó, 2014) available at [https://regi.tankonyvtar.hu/hu/tartalom/tamop425/2011\\_0001\\_527\\_nemzetkozi\\_maganjog/ch25s02.html](https://regi.tankonyvtar.hu/hu/tartalom/tamop425/2011_0001_527_nemzetkozi_maganjog/ch25s02.html)

<sup>699</sup> A similar approach was taken by the Budapest-Capital Regional Court Pf. 641.647/2013/4. See below in the List of national case law.

<sup>700</sup> Mádl and Vékás, *Supra note 10*; László Burián *Európai kollíziós jog: Korszak-ésparadigmaváltás a nemzetközi magánjogban?* Draft available at [https://jak.ppke.hu/uploads/articles/12417/file/kollizios\\_jogegysegites.pdf](https://jak.ppke.hu/uploads/articles/12417/file/kollizios_jogegysegites.pdf)

on the parties to provide the foreign law to the proceeding court?<sup>701</sup> According to Vékás, although Rome II is mandatory for Member State courts, this does automatically entail an *ex officio* obligation. The mandatory nature of the Regulation only means that at the request of the applicant, the court can only apply the Regulation in question. This also means that courts will need to refuse the parties request to disregard the applicable law to which the rules of Rome II have led and the parties could only ask the court to disregard the applicable foreign law where the parties have forum selection autonomy.<sup>702</sup> Ildikó Nagyné Sándor is of the opinion that Hungarian courts should have *ex officio* obligation to observe the presence of a foreign element in the dispute and to apply EU conflict of law rules. She also recommends that the parties should not have the option to choose *lex fori* instead of the law applicable based on conflict of law rules.<sup>703</sup>

5. *The approach to interpretation of the Rome II Regulation, and its relationship to other EU private international law instruments (including the recast Brussels I Regulation and the Rome I Regulation) (Recital (7)).*

Hungarian commentators note that the Hungarian Commentary to Brussels I<sup>704</sup> edited by the National Office for the Judiciary (Országos Bírósági Hivatal) with Hungarian experts on EU law is useful in explaining many key notions in Rome II.<sup>705</sup> It has been emphasized that Rome I and Rome II as well as Brussels I are complementary to each other and this could be useful in their interpretation. This however leads to another problem, the issue of regulatory overlap between Rome I, Rome II and Rome III, and the content of the rules does not always correspond. This led some authors to argue for the need of Rome O.<sup>706</sup>

## 2.2 Chapter II - Tort/Delict

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to the implementation of:*

6. *The general conflict-of-laws rule for tort/delict, and difficulties that have arisen in your Member State with respect to its application (Art. 4), and in particular:*

a. *the approach to identifying the place of direct damage in Art 4(1):*

Gárdos highlights a discrepancy in Hungarian law and Rome II in identifying the place of direct damage. For instance, which law will apply for awarding non-material damages for relatives of a person that passed away following a road traffic accident? Under Hungarian law this non-material damage is the direct damage (damage to personality rights) of the relatives whereas under Rome II, following the CJEU in C-350/14 this would be classified as indirect damage.<sup>707</sup> Thus the place of death is taken as the connecting factor for determining the applicable law. Gárdos highlighted the need for unified interpretation of the rules of Rome II and recommends following the CJEU's approach textual interpretation in C-350/14 Florin Lazar v Allianz SpA, especially considering Art. 2 and recitals 16 and 17 in interpreting Art. 4(1).<sup>708</sup>

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<sup>701</sup> Nagyné Sándor, *Supra Note 6*.

<sup>702</sup> Mádl and Vékás, *Supra Note 10*.

<sup>703</sup> Nagyné Sándor, *Supra Note 6*.

<sup>704</sup> Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)

<sup>705</sup> *Joghatóság az átdolgozott Brüsszel I Rendeletben, Kommentár* (Országos Bírósági Hivatal, 2016) available at

[http://publicatio.bibl.u-szeged.hu/11525/1/Joghatosag\\_az\\_atdolgozott\\_Brusszel\\_I\\_rendeletben\\_Kommentar\\_u.pdf](http://publicatio.bibl.u-szeged.hu/11525/1/Joghatosag_az_atdolgozott_Brusszel_I_rendeletben_Kommentar_u.pdf)

<sup>706</sup> Burián, *Supra Note 6*.

<sup>707</sup> In Hungarian law, non-material damages are regulated in Section 2:52 of Act V of 2013 on Hungarian Civil Code. The regulation is very narrow. Although the Civil Code does not characterise non-material damages as direct, as these damages are directly linked to the injured person's personality rights, they can arguably be called 'direct'.

<sup>708</sup> Gárdos, Mosonyi, Tomori Law Firm, *A kártérítési követelésekre alkalmazandó jog A Róma II rendelet szabályait értelmezte az Európai Unió Bírósága*, 4 January 2016 available at <https://gmtlegal.hu/hir/a-karteritesi-kovetelesekre-alkalmazando-jog.php>

b. *the approach to the first rule of displacement in Art 4(2) in cases involving multiple parties or claims*

There is no available information on this question.

c. *the approach to the escape clause in Art 4(3)*

There is no available information on this question.

d. *the suitability of this set of rules to govern cases of **prospectus liability or other financial market torts***

There is no available information on this question.

7. *The rule on **product liability** (Art. 5) and, where relevant, the interaction with the application of **1973 Hague Convention on the Law Applicable to Products Liability**:*

Fuglinszky discusses matters of product warranty and Rome II without bringing in the 1973 Hague Convention into a theoretical perspective. He notes that Art. 5 of Rome II should be applicable in competition with other rules when goods are purchased from non-Hungarian manufacturers. Although product warranty rules result in repair or replacement claims directly settled with the manufacturer as opposed to compensation claims for damages caused by faulty products, Fuglinszky finds that in the absence of direct EU regulation, Art. 5 of Rome II is the best placed to fill the regulatory gap. This is because the relationship between consumers and manufacturers is non-contractual and because some of the aims of Art. 5 in the recitals could equally be applicable to product warranty. Naturally, there is always a possibility that Hungarian law would be applicable by virtue of Art. 5(2) to the transaction or that Rome I would also apply as the consumer would try to enforce its rights with the seller (Rome I) and the manufacturer (Rome II) at the same time. Finally, he notes that the content of warranty rights would need to be determined by reference to the applicable substantive law.<sup>709</sup>

8. *The specific rule on **unfair competition** (Art. 6)*

In Hungary there is no tradition of awarding damages for competition infringements. This process is too long and complicated. Court proceedings would usually involve several instances, many years with associated challenges of corporate insolvency and evidentiary problems for proving decade long harms. Perhaps the most significant challenge of court disputes is for the claimant to be able to prove the amount of damages sustained and the causal connection between the competition infringement and the damages.<sup>710</sup> However, Mester notes that this may all change following the recent CJEU case C-451/18 Tibor Trans. In this case the CJEU took the law of the affected market as the applicable law and the case was thus decided under Hungarian law. Gárdos notes that the applicability of Hungarian law may incentivize companies to seek remedies from courts in future in competition disputes.<sup>711</sup>

9. *The specific rule on **environmental damage** (Art. 7)*

There does not seem to be any Hungary specific problems with environmental damages claims. Kecskés et al. point to a more Europe-wide positive effect of the rules. They note that Art. 7 enables the victim of cross-border pollution to benefit from the law that is more favourable to them. From a methodological point of view, the preferential treatment of plaintiffs is not compatible with traditional European choice-of-law rules. The authors note that distinctive values such as legal predictability, fairness and neutrality, which are being promoted by traditional European choice of law rules "should be sacrificed, at least to some degree in the limited area of environmental tort." The advantage should be given to the distinguished principle of substantive justice that would in this case ensure that the polluter pays and that a high level of

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<sup>709</sup> Ádám Fuglinszky „*A termékszavatosság kollíziós jogi minősítése*” (2016) 4 Polgári Jog available at [https://uj.jogtar.hu/login#doc/db/193/id/A1600401.POJ/.%20\(2016\)](https://uj.jogtar.hu/login#doc/db/193/id/A1600401.POJ/.%20(2016))

<sup>710</sup> Éva Mária Verebesné dr. Verzár, „*A versenyjogi jogsértés folytán fennálló kártérítési követelések sorsa a finn aszfaltkartellügy kapcsán hozott ítélet tükrében*” (2019) VX (2) Versenykör 90 available at [https://www.gvh.hu/pfile/file?path=/gvh/kiadvanyok/versenytorok/lapszamok/versenytorok\\_2019\\_02&inline=true](https://www.gvh.hu/pfile/file?path=/gvh/kiadvanyok/versenytorok/lapszamok/versenytorok_2019_02&inline=true)

<sup>711</sup> Ágnes Mester „*A „káresemény bekövetkezésének helye” értelmezése az Európai Unió Bíróságának Tibor-Trans-ügyben hozott ítélete tükrében*” (2019) XV(2) Versenykör 70 available at [https://www.gvh.hu/pfile/file?path=/gvh/kiadvanyok/versenytorok/lapszamok/versenytorok\\_2019\\_02&inline=true](https://www.gvh.hu/pfile/file?path=/gvh/kiadvanyok/versenytorok/lapszamok/versenytorok_2019_02&inline=true)



environmental protection is set and is preserved. All the above confirm that the provisions of the Rome II Regulation truly accomplished the polluter pays principle.<sup>712</sup>

10. *The specific rule on **infringements of intellectual property rights** (Arts. 8, 13):*

Although Rome II identifies the applicable law arising from the infringement of intellectual property rights in Art. 8(1), Nagy highlights that it does not deal with the law applicable to identify the author (who can be considered the original author of the intellectual property). Nagy argues in favour of the application of the state of origin (*lex originis*) instead of the more accepted *lex loci protectionis*.<sup>713</sup>

11. *The specific rule on **industrial action** (Art. 9)*

Again, there do not seem to be any pressing Hungary specific problems. Kovács notes that Art. 9 reflects the principle of territoriality that fits within the broader international practice for international or cross-border international actions more generally, where normally (although she notes the absence of consensus on this issue) the law of the country would apply where the affected company/employer is located. Companies involved in industrial actions are most likely to be multinational companies with branches in more than one country or cross-border strike to express solidarity. Kovács emphasizes the usual international practice that reflects the principle of territoriality; and take the country of where the company affected by the action is located.<sup>714</sup>

## 2.3 Chapter III - Unjust Enrichment, Negotiorum Gestio And Culpa In Contrahendo

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to the implementation of:*

12. *The specific rule on **unjust enrichment** (Art. 10), including its relationship with the general rule for tort/delict in Art. 4.*

There is no available information on this question.

13. *The specific rule on **negotiorum gestio** (Art. 11):*

There is no available information on this question.

14. *The specific rule on **culpa in contrahendo** (Art. 12):*

The above-mentioned problem (under 2.1) of classifying matters as contractual or non-contractual.

## 2.4 Chapter IV - Freedom of Choice

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

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<sup>712</sup> László Kecskés et al. "The polluter pays (?) - Compensation for cross-border environmental damages" in: Drinóczi, T; Župan, M; Mario, Vinkovic (eds) *Law - Regions - Development*, Pécs (Faculty of Law, University of Pécs, Faculty of Law, J. Strossmayer University of Osijek, 2013) available at [https://www.academia.edu/10530949/Book\\_chapter\\_T%C3%ADmea\\_Drin%C3%B3czi\\_Mirela\\_Zupan\\_eds.\\_Law\\_Regions\\_Development\\_p\\_79\\_-\\_100\\_Title\\_Representation\\_and\\_possibilities\\_of\\_regions\\_in\\_the\\_European\\_Union](https://www.academia.edu/10530949/Book_chapter_T%C3%ADmea_Drin%C3%B3czi_Mirela_Zupan_eds._Law_Regions_Development_p_79_-_100_Title_Representation_and_possibilities_of_regions_in_the_European_Union)

<sup>713</sup> Csongor István Nagy „A szerzőség kérdése a kollíziós jogban” in Katalin Raffai and Sarolta Szabó (eds) *Honeste beneficere pro scientia* Ünnepi kötet Burián László 65. születésnapja alkalmából (Pázmány Press, 2019) available at [https://jak.ppke.hu/uploads/collection/207/file/BurianLaszlo65\\_unnepikotet\\_2019.pdf](https://jak.ppke.hu/uploads/collection/207/file/BurianLaszlo65_unnepikotet_2019.pdf)

<sup>714</sup> Erika Kovács „Az európai munkajogi kollíziós szabályok elemzése, különös tekintettel a Róma I. Rendeletre”, 6(2) Miskolci Jogi Szemle 110 available at [https://www.mjsz.uni-miskolc.hu/files/egyeb/mjsz/201103/10\\_kovacserika.pdf](https://www.mjsz.uni-miskolc.hu/files/egyeb/mjsz/201103/10_kovacserika.pdf)

15. *The implementation in legal/business practice and by courts of the rule on **freedom of choice**, any difficulties therein and **any discussion that has been carried out in your Member State regarding possible reasons which would justify the need to rethink it** (Art. 14):*

The freedom of choice rules is considered good in Hungary and even the Hungarian Act on International Private Law was modified to reflect this solution.<sup>715</sup>

## 2.5 Chapter V - Common Rules

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

16. *The scope of the exclusion of ‘evidence and procedure’ in Art 1(3) and any difficulties in relation to that exclusion or to questions of formal validity or the burden of proof (Arts. 21-22):*

There is no available information on this question.

17. *The approach in your Member State to questions of pleading, proof and application to individual cases of the substantive rules of the law applicable under the Rome II Regulation governing non-contractual obligations.*

Ildikó Nagyné Sándor sees a problem of national laws having different rules for allowing appeals based on a wrong application and interpretation of foreign applicable (substantive) law. She notes that one country may consider this as a valid ground for appeal while the other might not, ultimately leading to unfair results and potentially denying parties of their important procedural right to appeal.

Other than this specific issue, Nagyné Sándor talks about several technical and practical issues that should be resolved to aid court processes with foreign elements. There needs to be a much better system of communication between Member State courts and adequate legal framework and technical requirements to aid the understanding and the provision of the content of foreign law. In Hungary, she highlights, the Ministry of Justice should have a separate division dedicated to provide support for courts with their pending cases with foreign law and that would also maintain communication with the Member State whose laws are applicable in particular cases. According to Nagyné Sándor, these two interventions would enable swift acquisition of foreign law and would significantly speed up court proceedings.<sup>716</sup>

18. *The delimitation of the scope of the applicable law (Art. 15(a)-(h)), including any difficulties as its relationship to the issues addressed at points 16 17 above):*

Hungarian scholars raised an interesting question about the amount of compensation awardable under Art. 15 b) and c) of Rome II. It is a theoretically puzzling question whether the public policy clause would result in setting aside the applicable law based on Rome II if the amount of compensation awardable under the given national law would harm the human dignity of the injured person.<sup>717</sup>

19. *The application of the rule on **overriding mandatory provisions** (Art. 16):*

Scholars have noted that although Rome II deals with overriding mandatory provisions in Art. 16, it does not provide their definitions and thus, scholars point to the applicability of Rome I as a gap filler but note that it should be interpreted taking into account the relevant circumstances.<sup>718</sup> It has also been pointed out that Rome II makes compulsory to take into account some rules that are not mandatory, effectively then making them mandatory for Member States. For instance, based on Art. 17, courts need to consider rules of safety and conduct e.g. road traffic rules of a third country, i.e. the place where the tort was committed (*lex loci delicti commissi*). Although these rules do not qualify as mandatory provisions within Art. 16, the

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<sup>715</sup> Lajos Vékás „Európai uniós és tagállami nemzetközi magánjog” 61(10) Magyar Jog 589, 595 available at [https://www.mokk.hu/regioldal/pdf/linkgyujto/Magyar\\_Jog/2017-10\\_Magyar\\_Jog.pdf](https://www.mokk.hu/regioldal/pdf/linkgyujto/Magyar_Jog/2017-10_Magyar_Jog.pdf), see also Nagyné Sándor, *Supra Note 6*.

<sup>716</sup> Nagyné Sándor, *Supra Note 6*.

<sup>717</sup> Szabados, *Supra Note 5*.

<sup>718</sup> Katalin Raffai „Az imperatív normák jelentőségéről az európai uniós nemzetközi magánjogban” Pázmány Law Working Papers 2014/24 available at [http://plwp.eu/docs/wp/2014/2014-24\\_Raffai.pdf](http://plwp.eu/docs/wp/2014/2014-24_Raffai.pdf)

regulation makes it mandatory to take them into account. The reason for mandating the consideration of third country rules is that courts would be unable to make fair and just decisions on liability without taking them into account. Without mandating courts to take into account these rules they would not be taken into account based on the rules of international private law that would provide the applicability of the place where the damage occurred (*lex loci damni*) or the law chosen by the parties. In case of collision however between the rules of a third country and the rules of the applicable law the rules of the applicable law should prevail.<sup>719</sup>

20. *The application of the specific rule on **direct action against the insurer of the person liable** (Art. 18):*

This rule is applied frequently in practice given the number of road traffic accidents involving Hungarian citizens but more often than applying this rule, the parties reach an out of court agreement (settlement) with the insurer.<sup>720</sup>

21. *The application the specific rule on **subrogation** (Art. 19):*

There is no available information on this question.

22. *The application of the specific rule on **multiple liability** (Art.20):*

There is no available information on this question.

## 2.6 Chapter VI - Other Provisions

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

23. *The implementation of the concept of habitual residence in the Rome II Regulation, with reference both to persons covered by Art 23 and natural persons acting otherwise than in the course of business:*

Burián notes the applicability of habitual residence instead of nationality/citizenship in spite of not having a unified definition of habitual residence. According to him, although Art. 23 of Rome II defines the notion of habitual residence for corporations, these definitions are inapplicable for natural persons. He also notes that it would be impossible to give a unified, international private law definition of habitual residence. Instead, the concept needs to be flexible to be able to be interpreted in the specific context in which it occurs.<sup>721</sup>

24. *The application of and any difficulties with the specific rules on exclusion of renvoi (Art.24) and States with more than one legal system (Art.25):*

Vékás notes the less significant practical role of renvoi nowadays. According to him, there is no need for renvoi in the EU. The unified rules of the EU minimized the application of renvoi to third non-EU countries by unified laws of the EU (just as in case of unified rules with international convention).<sup>722</sup> There is no information on Art. 25.

25. *The application of and any difficulties with the specific rule on public policy of the forums (Art. 26):*

Regarding the application of the public policy clause, authors point to CJEU case-law on the interpretation of Art. 34 of Brussels I Regulation, and to the explanations from recital 32 on the provision.<sup>723</sup>

26. *Practical **interaction between the Rome II Regulation and other EU and international legal instruments**, in specific areas such as **environmental damages, intellectual property rights or data protection** (Arts. 27, 28, 29):*

Hungarian scholars did not deal with the specific issue, however, it could be noted here that there are numerous international agreements that regulate the above areas in addition to Hungarian domestic and other EU rules, and thus this raises the

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<sup>719</sup> Vékás, *Supra Note 27*, 596.

<sup>720</sup> Pataky, *Supra Note 4*.

<sup>721</sup> László Burián „*Európai kollíziós jog: Korszak-és paradigmaváltás a nemzetközi magánjogban?*” 9, Draft available at [https://jak.ppke.hu/uploads/articles/12417/file/kollizios\\_jogegysegites.pdf](https://jak.ppke.hu/uploads/articles/12417/file/kollizios_jogegysegites.pdf)

<sup>722</sup> Vékás, *Supra Note 27*.

<sup>723</sup> Burián, *Supra Note 33*.

practical question of what rules to apply on a case at hand: the Hungarian rules, the international agreements that Hungary is a signatory of or EU rules.<sup>724</sup>

## 2.7 Comments on other Practical Problems

*These areas are of particular interest for the Commission. Please be as precise as possible regarding any issue that has been reported on:*

*27. The impact of the application of the 1971 Hague Convention on the law applicable to traffic accidents on legal certainty (where relevant for your Member State):*

Hungary is not a member of the Hague Convention and thus Rome II is the applicable instrument for road traffic accidents.<sup>725</sup> According to Nagy, the fact that some Member States are part of the Convention and some are not is not the most fortunate solution as it gives rise to forum shopping.<sup>726</sup> This author urges the Commission to reconsider this approach and to use the opportunity of a periodic review on the operation of Rome II to revise the current position. He highlights that no empirical data is necessary for establishing that the split of the conflict regimes is an unwelcome plight, even if they usually result in the application of the same law and that Art. 28 should be amended in such a way that the Regulation has precedence over the Convention.<sup>727</sup>

*28. Any other practical problems with respect to the application or interpretation of the Rome II Regulation, including but not limited to the suitability of the mosaic approach:*

There was no experience with applying the mosaic approach in practice in Hungary. However, Czigler theoretically notes that in case of a multi-state tort, these should be solved separately by applying the relevant substantive rules of a country where the damage occurred (so called, issue by issue analysis). If Rome II is read in conjunction with Brussels I, this enables the injured to choose between three avenues for obtaining compensation: 1) sue the person who caused injury at its own place of habitual residence and apply the substantive rules of the countries where the damages occurred; 2) start damages action in the country in which the event giving rise to the damage occurred and apply the substantive rules of the countries where the damage occurred; 3) start the damages action in the country where the damage occurred, however, in this case, the proceeding court can only award compensation in respect of damages that occurred under its own jurisdiction. Czigler concludes that none of the options are ideal. In addition, he notes that even more confusingly Rome II and Brussels I attribute divergent meaning to the notion of the 'event giving rise to the damage'.<sup>728</sup>

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<sup>724</sup> Interview by Emese Szilágyi with Dr Zoltán Nemessányi, Deputy State Secretary for International Judicial Cooperation at the Ministry of Justice, Budapest, 29 March 2017 available at <https://www.jogiforum.hu/interju/157>, see also The list of EU and international legal sources between Hungary and other countries that are applicable for judicial cooperation in civil cases, Pulsished by the Ministry of Justice, last update in 2015 available at <https://igazsagugyiinformaciok.kormany.hu/download/e/1d/e0000/%C3%A1llamok%20%C3%A9s%20egyezm%C3%A9nyek%20t%C3%A1j%C3%A9koztat%C3%B3%202015%20%20%C3%A1prilis.pdf>

<sup>725</sup> *Pataky, Supra Note 4.*

<sup>726</sup> *Ibidem.*

<sup>727</sup> Csongor István Nagy "The Rome II Regulation and Traffic Accidents: Uniform Conflict Rules with Some Room for Forum Shopping – How so?" (2010) 6(1) Journal of Private International Law 93 available at <https://ssrn.com/abstract=1737713>; Lajos Vékás "About the Rome II regulation, the European Unification of the Conflict rules of Torts, in Resolving International Conflicts" in Peter Hay et al. *Liber Amicorum Tibor Várady* (CEU Press, 2009).

<sup>728</sup> Czigler, *Supra Note 9*, 250 – 251.

Vékás highlights a legal gap of Rome II that would need to be addressed. Namely, Rome II left out the matter of contributory negligence.<sup>729</sup>

### 3. Comments on areas of interest

*These areas are of particular interest for the Commission. Please be as precise as possible regarding any issue that emerged in your Member State regarding:*

29. *The exclusion of violations of privacy and rights relating to personality, including defamation, from the scope of the Rome II Regulation and any difficulties arising out from differences among Member States' rules in cross-border situations.*

Vékás and Mádl emphasize that the academia unanimously considers the exclusion of personality rights (private life, honour, reputation) from the scope of Rome II as the 'most unfortunate handicap' of the Rome II, the approach that needs revision.<sup>730</sup> The absence of regulation provides opportunities for forum shopping. The authors note for instance that England is known for 'libel tourism' because, according to the authors, English law presumes the existence of damages when personality rights are infringed.

In the absence of EU rules, in Hungary the rules for violations of privacy rights and rights relating to personality fall under Art. 23 of the new Act on International Private Law,<sup>731</sup> and these had been inserted here in the absence of EU rules in Rome II. The Hungarian solution provides the applicable law as the law of the habitual residence (*szokásos tartózkodási helye*) /registered place of business (*székhely*) of the injured. However, it also gives a choice of law opportunity to the injured and this choice will override the default rule. The injured may choose Hungarian law as the applicable law, the law of the habitual residence of the person causing the injury or the law of the place where the injured party has its major business interests. It can also be important to know that under Art. 23(3) the above choice of law rules also apply for preventive actions to eliminate the danger of infringing personality rights. These solutions are presented here as possible model rules for the EU law maker given that, in drafting these rules, the Hungarian drafting team scrutinized the CJEU case law on violation of personality rights, especially those committed on the internet.<sup>732</sup>

In addition, Vincze notes the new challenges raised by online platforms that operate world-wide and their violations of privacy and personality rights. The operation of these platforms raises an important and interesting question as to the legal effect of a judgment from a Member State. Could a Member State court oblige the platform to remove harmful content posted by users residing in other Member States? This question was recently raised in front of the CJEU in C- 18/18 *Glawischnig-Piesczek v Facebook Ireland Limited*.<sup>733</sup>

30. *Any comment regarding the Interplay of the Rome II Regulation with the treatment of defamation and data protection, and, in these areas, the relevance of Strategic Lawsuits Against Public Participation (SLAPPs):*

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<sup>729</sup> Vékás, *Supra Note 27*, 592.

<sup>730</sup> Mádl and Vékás, *Supra Note 10*, 449. See also Vékás, *Supra Note 27*, 589 – 602. Vékás, *Supra Note 39*.

<sup>731</sup> Interview with Dr. Nemessányi, *Supra Note 36*. See also Csongor István Nagy (2012) "The Word is a Dangerous Weapon: Jurisdiction, Applicable Law And Personality Rights in EU Law – Missed and New Opportunities" (2012) 8(2) *Journal of Private International Law* 251.

<sup>732</sup> *Ibidem*.

<sup>733</sup> Gabriella Anita Vincze, "Joghatósági kihívások a digitális korban. Az interneten elkövetett személyiségi jogi jogsértések legújabb fejleményei az EUB előtt" in Katalin Raffai and Sarolta Szabó (eds) *Honeste beneficare pro scientia Ünnepi kötet Burián László 65. születésnapja alkalmából* (Pázmány Press, 2019) available at [https://jak.ppke.hu/uploads/collection/207/file/BurianLaszlo65\\_unnepikotet\\_2019.pdf](https://jak.ppke.hu/uploads/collection/207/file/BurianLaszlo65_unnepikotet_2019.pdf)

There is no Hungary-specific information available on SLAPPs, but one Hungarian organization, the Clean Air Action Group joined 118 organizations in asking the EU for anti-SLAPP measures. They have published the policy paper: Ending gag lawsuits in Europe to protect democracy and fundamental rights. The policy paper also refers to Rome II noting that by allowing the claimant to select the most favourable substantive law for defamation, Rome II effectively leads to a 'race to a bottom' leaving victims with the lowest standard of freedom of expression.<sup>734</sup>

In regard to SLAPP lawsuits more generally, a recent report prepared for the Academic Network of European Citizenship Rights that talks about SLAPP-like lawsuits against Hungarian academics and vexation of civil activities.<sup>735</sup> Although the report considers the relationship between SLAPP lawsuits and Rome II it does so without specific reference to Hungary.

*31. The extent to which Rome II Regulation has been applied to **corporate abuses against human rights** and lays down an effective set of rules to regulate non-contractual liability:*

There is no available information on this question. No reference was found in business and human rights academic papers to Rome II.

*32. The impact of the development of **artificial intelligence** on the Rome II Regulation, and in particular on the suitability of the rules that it contains to regulate non-contractual liability:*

Hungary has no special civil liability regime, including non-contractual liability for damage caused by artificial intelligence or even a legal definition of artificial intelligence. Hence, if the the conflict of law rules point on Hungarian law as the applicable law, the general rules on non-contractual liability will apply. In a recent report prepared for the European Commission Evans provides the following summary:

For AI the most important provision is Section 6:535-6:539 of the Hungarian Civil Code that provides the a general strict (objective) liability regime (liability for hazardous activities), which covers liability for 'things', such as machinery and equipment (without explicitly covering AI or software). According to BDT 2012.2661, an activity is hazardous where a relatively minor disorder occurring during the performance of an activity could create a situation threatening to cause serious injury (such as a life-threatening injury, injury causing a permanent disability, a permanent deterioration of health or substantial damage to property), or where even a minor negligence of the person carrying out the activity could create a situation that poses a risk to serious injury. However, a person will not be exempt from liability for reason of an irregularity that is due to an unidentifiable reason where such an irregularity occurred within the hazardous activity itself. Such a reason could be the faulty, irregular operation of the software of the AI where it causes extra-contractual damage.<sup>736</sup>

Whilst there is academic interest in exploring the legal implications of AI, Rome II is very seldom at the center of attention. The reason may be, as Udvarý notes, that new issues raised by the emergence of AI should be primarily solved by relevant substantive rules rather than rules on conflict of laws.<sup>737</sup>

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<sup>734</sup> Ending Gag Lawsuits in Europe Protecting Democracy and Fundamental Rights <https://europeanjournalists.org/wp-content/uploads/2020/06/Ending-SLAPPs-NGO-Policy-Paper-119-FINAL.pdf>

<sup>735</sup> Petra Bárd et al. SLAPP in the EU Context, Report for the Academic Network of European Citizenship Rights, May 2020) available at [https://ec.europa.eu/info/sites/info/files/ad-hoc-literature-review-analysis-key-elements-slapp\\_en.pdf](https://ec.europa.eu/info/sites/info/files/ad-hoc-literature-review-analysis-key-elements-slapp_en.pdf)

<sup>736</sup> Tatjana Evans, *Civil liability regime for artificial intelligence* (Report for the European Parliament, September 2020) 20, available at

[https://www.europarl.europa.eu/RegData/etudes/STUD/2020/654178/EPRS\\_STU\(2020\)654178\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/654178/EPRS_STU(2020)654178_EN.pdf). See for a more detailed presentation of non-contractual liability and AI in Hungarian context Andrea Bocskai-Láng „Hungary: non-contractual liability and artificial intelligence” in Annex I of the same Report: Comparative study on national rules concerning non-contractual liability, including with regard to AI.

<sup>737</sup> Sándor Udvarý “A non-humán ágensek (intelligens rendszerek) jogi szabályozása – robotok, dedikált rendszerek (önvezető autók)” in Árpád Olivér Homicskó *A digitalizáció hatása az egyes jogterületeken* (Károli Gáspár University of

Academics seem particularly interested in liability caused by autonomous vehicles. Horváthy<sup>738</sup> warns that the use of autonomous vehicles will change the nature of road traffic accidents and that this should be reflected in legislation. Namely, while today the negligence or intentional act of the persons concerned (e.g. going above the speed limits, etc.) is dominant in judicial decision making, with the arrival of autonomous vehicles using 'robot drivers' objective factors such as technical reasons, technical problems, etc. are expected to play a much more important role than today. As a result, Horváthy warns, product liability claims might supersede non-contractual liability claims. According to the author, compared to the concept of non-contractual damages, the rules of jurisdiction and conflict of laws regarding product liability are already closer to the model that focuses on the injured party, however, the specificities of possible product liability claims related to autonomous vehicles and artificial intelligence should also be investigated. He suggests the review of the relationship of Rome II to other international conventions especially the Hague Convention to reflect this change.

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the Hungarian Reformed Church, Faculty of Law and Political Sciences, 2020) available at [https://ajk.kre.hu/images/doc6/PR/A\\_digitalizacio\\_hatasa\\_az\\_egyes\\_jogteruleteken.pdf](https://ajk.kre.hu/images/doc6/PR/A_digitalizacio_hatasa_az_egyes_jogteruleteken.pdf)

<sup>738</sup> Balázs Horváthy "Autonomous vehicles – Challenges for EU private international law" in Judit Glavanits et al. (eds) *EU Business Law and Digital Revolution: Selected Studies from New Fields of Technology* (Széchenyi István University, Deák Ferenc Faculty of Law and Political Sciences, 2019) available at <http://real.mtak.hu/117964/>

#### 4. List of national case law

<u>Court or tribunal</u>	<u>Case name and reference number</u> <u>Reference to decision of the Court of Justice if applicable</u>	<u>Date</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings (only for key cases)</u>
CJEU	Tibor-Trans Fuvarozó és Kereskedelmi Kft. V DAF Trucks NV Reference for Preliminary Ruling C-451/18  Hungarian transport company purchased several trucks manufactured by DAF Trucks via Hungarian intermediaries (no contractual relationship) – DAF was part of a cartel and sold trucks at inflated price. Collusive agreements took place in Germany.  Győr Regional Court of Appeal, Hungary (Győri Törvényszék)  Gpkf.II.25.561/2019/2.	29/07 / 2019	6(3)(a)	Damages compensation based on previously established infringement of competition law	The first instance court refused jurisdiction based on Art. 7(2) of Brussels I because the colluding agreements took place in Germany.  In interpreting Art. 7(2) of Brussels I and the place where the harmful event occurred, the CJEU also looked at the solution of Art. 6(3)(a) of Rome II for the law applicable to actions for damages based on an act restricting competition, under which the applicable law is the law of the country where the market is, or is likely to be, affected. The CJEU concluded that in an action for compensation for damage caused by collusive arrangements on pricing and gross price increases for trucks, ‘the place where the harmful event occurred’ covers the place where the market which is affected by that infringement is located, that is to say, the place where the market prices were distorted and in which the victim claims to have suffered that damage, even where the action is directed against a participant in the cartel at issue with whom that victim had not established contractual relations. Consequently, Hungarian law was applicable to the case.
Supreme Court (Kúria)	Hungarian plaintiff company’s vehicle suffered damage in Germany. Plaintiff asked compensation in Hungarian forints.	2018 (no full date available)	2 4 (1) 15	Damages compensation, law applicable for calculating interest on the sum owed	Applying Art. 4(1) of Rome II the Hungarian Supreme Court decided that in the present case the applicable law for determining the entitlement and the amount of damages compensation is German law as the place where the damage occurred.



	Pfv.V.20.490/2018/10		18		Based on Art. 18, German law will determine whether direct action against the insurer is available.  Applying Arts. 2 and 15, the Court concluded that the fact that the plaintiff asked for compensation to be awarded in Hungarian forints does not justify the applicability of Hungarian law. The claim should be fully decided based on relevant provisions on Germany law applicable for debts owed in foreign currency (amount and calculation of interest) (no paragraphs available)
Hungarian Supreme Court and Constitutional Court	No name (Hungarian poultry breeding company brought damages action against an Austrian foundation and slaughterhouses for forcing the company to stop feather collection from his breed due to economic duress)  First instance judgment: G.40.057/2012/118  Debrecen Court of Appeal (Debreceni Ítéltábla) Gf.II.30.106/2015/7.  Supreme Court (Kúria) Gfv.VII.30.183/2015/10  Constitutional Court: 3240/2017. (X. 10.) AB	10/03 / 2017	4. cikk (1)	Damages compensation	
Győr Court of Appeal (Győri Ítéltábla)	No name (Slovakian defendant caused road traffic accident with Hungarian plaintiff – collision) Pf. 20.174/2011/10	22/3/ 2012	4(1)	Damages compensation	

Budapest-Capital Regional Court (Fővárosi Törvényszék)	No name (Hungarian tourist suffered road traffic accident in Greece- run over by motorbike while having a walk)  9.UP.24.487/2012/47.	1/2/ 2017	4(1)	Material and non-material damages compensation	The Hungarian court applied Greek law as the place where the damage occurred- where the non-material damage was suffered and where the material damage was realized (no paragraph available).
Budapest-Capital Regional Court (Fővárosi Törvényszék)	No name (plaintiff and defendant Hungarian nationals involved in road traffic accident in Hungary while the plaintiff was driving a car registered in country x- collision)  Pf. 640.701/2013/4	05/03 / 2014	4(1)	Damages compensation, direct against insurer	The Court applied Hungarian law (Act LXII of 2009 on compulsory vehicle insurance), in spite of the fact that the car was registered and insured in country x. Following Art. 4(1) the court reasoned that the applicable law is the law where the damage occurred, regardless of the location of the infringing event and where the indirect consequences of this event occurred (no paragraph available).
CJEU	Gazdasági Versenyhivatal v Siemens Aktiengesellschaft Österreich (Plaintiff fined defendant for breaching competition rules- action for recovery of sum not due on the ground of unjust enrichment)  C-102/15  Budapest-Capital regional Court (Fővárosi Törvényszék)	28/07 / 2016	10 (1)	Recovery of sum not due on the ground of unjust enrichment	This case is interesting because of the mistake that the referring Budapest Court of Appeal made in interpreting the provisions of Rome II according to Hungarian law instead of autonomous interpretation of the Regulation. This resulted in the wrong classification of the administrative case as civil.  The CJEU did not question this classification and proceeded on the merits of the case.  AG Whal, giving his opinion in the case noted in para 4 that 'For reasons which are not obvious, the referring court has not put a question as to whether the action before it comes within the scope of the regulation. One possible explanation for this, as demonstrated at the hearing, might in fact be that,

	Budapest Court of Appeal (Fővárosi Ítéltábla)  (Hungarian judgment unavailable)				under Hungarian law, such types of action are clearly civil matters.'  In fact, commentators note, this was an incorrect assumption (see Report under 2.1).
Budapest- Capital Regional Court  (Fővárosi Törvényszé k)	No name  Road traffic accident-collision of vehicles in Hungary  Pf. 641.647/2013/4	03/12 / 2014	4(1)	Damages compensation, direct action against Hungarian insurer	The court wrongly applied Rome II for a road traffic accident that occurred on 23 March 2005.

# Italy

## Executive Summary

- Overall, Italian courts and practitioners appear to be familiar with the Rome II Regulation. Reported cases, however, deal for the most part with road accidents and torts otherwise falling within the scope of the general rule in Art. 4. In fact, several provisions in the Regulation have never, or very rarely, been specifically discussed, let alone applied, in court proceedings.
- Few scholarly contributions have been published in Italy regarding the law applicable to non-contractual obligations over the last few years, compared with those published in the years immediately following the adoption of the Regulation. This explains, to some extent, why relatively new topics such as the role of conflict-of-laws rules in data protection, the relevance of the Regulation to transnational human rights litigation involving corporations and the impact of the Rome II Regulation on liability arising out of artificial intelligence applications remain insufficiently explored in the country.
- Italian courts have not experienced any special difficulties in applying the general rule on torts in Art. 4. Hard cases, however, such as those relating to double- or multi-locality torts, have not been specifically the object, so far, of any ruling.
- The rules on special torts in Articles 5 to 9 have rarely been discussed by courts in Italy. No reported decisions could be retrieved regarding some of the above rules, such as the rule on liability arising from industrial action.
- Similarly, few rulings are known which relate to unjust enrichment, *negotiorum gestio* and pre-contractual liability. The single reported case concerning *culpa in contrahendo* suggests that courts may find it difficult to yield rational and predictable results when localising damage resulting from the violation of good faith in pre-contractual dealings.
- Italian courts have very rarely been seised of cases involving the application of Art. 14 on freedom of choice. No evidence is available on the frequency with which choice-of-law agreements are actually stipulated with respect to non-contractual obligations.
- Only some of the 'common rules' in Chapter V of the Regulation have specifically been the object of discussion in judgments given by Italian courts. The issues surrounding the assessment of damage, notably in cases involving victims whose habitual residence is in a State other than the forum, have been among the most frequently discussed. As regards damages for non-monetary prejudice, Italian courts consider that, while the *rules* governing the said assessment must be taken from *lex causae*, the standards used by Italian courts to quantify such damages on an equitable basis apply, in the country, to domestic and cross-border cases alike, regardless of the social and economic conditions of the victim, that is regardless of whether the habitual residence of the victim is in a State whose cost of living and social conditions are similar to Italy's, or not.
- Italian courts follow, in general, a genuinely restrictive approach to public policy. That said, situations arise in practice where the normally applicable foreign law must be disregarded out of respect for the fundamental principles of the Italian legal system. According to the Italian Supreme Court, this occurs, in particular, where, under the foreign law in question, the relatives of the victim of an accident, or some of them, are denied compensation *as a matter of principle* for the suffering resulting from the loss of a loved one, i.e. regardless of any assessment of whether the concerned relatives' ties with the victim would be such as to deserve protection through the award of damages.

## 1. Introduction

Italian practitioners are, overall, familiar with the Rome II Regulation. This is true in particular of litigation lawyers and in-house counsels in the insurance sector.

Lacking reliable evidence, the author of this report was unable to assess the extent to which Italian businesses and the public at large are themselves aware of the Regulation.

Italian courts, too, seem to have a fair knowledge of the Rome II Regulation and of the relevant judgments of the Court of Justice. Most of the cases decided by Italian courts, however, relate to road accidents, or torts otherwise falling within the scope of Art. 4. The provisions on 'special torts' (Articles 5 to 9) and those regarding unjust enrichment, *negotiorum gestio* and pre-contractual liability have so far been the object of very few rulings. The same holds true for Art. 14 of the Regulation, on freedom of choice. Similarly, little or no evidence exists regarding the application of most of the 'common rules' in Chapter V, including the rule on multiple liability, direct action against the insurer and burden of proof. It is hard to determine in these circumstances the extent to which practitioners in Italy are familiar with the Regulation as a whole, rather than some of its key provisions.

No statistics could be found relating to the application of the Rome II Regulation in Italy.

The Regulation formed the object of various scholarly works in the years immediately following its adoption. Published contributions have been significantly less numerous in the subsequent years. Recent literature mostly consists of case notes and short essays focusing on particular topics. No reference work providing an in-depth analysis of the Regulation (such as an article-by-article commentary) has been published recently.

The following issues relating to the law applicable to non-contractual obligations have been among the most debated among Italian scholars and in courts:

- whether, in the event of an accident, the prejudice related to the death of the victim sustained by the relatives should be treated as a 'damage' for the purposes of determining the applicable law, or rather as an 'indirect consequence' of the accident: the issue was referred to the Court of Justice by an Italian court, the Tribunal of Trieste, and finally settled in *Florin Lazar*,<sup>739</sup>
- whether the foreign law applicable to the liability resulting from such an accident ought to be disregarded on grounds of public policy where it is established that, according to the law in question, the close relatives of the victim are not entitled, as such, to any compensation: the Italian Supreme Court answered the question in the affirmative in a ruling of 2018, analysed below in this report;<sup>740</sup>
- whether, for the purposes of assessing the quantum of compensation due for the said prejudice, regard ought to be had to the cost of living and other social and economic indicators of the State of habitual residence of those entitled to compensation: the Italian Supreme Court replied in the negative in a ruling of 2016, illustrated below.<sup>741</sup>

## 2. Analysis of the Rome II Regulation

### 2.1 Chapter I – Scope and interpretation

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

1. *The determination of the material scope of application of the Rome II Regulation, including any difficulties in applying the category of "civil and commercial matters" or in defining the exact scope of any excluded matters (Art. 1(1)-(2))*

So far, Italian courts have only rarely been seised of cases involving an assessment of the applicability *ratione materiae* of the Rome II Regulation.

One such case was decided in 2017 by the Tribunal of Trento.<sup>742</sup> An Italian company sought compensation from the sole director of an English company for monies that the latter proved unable to pay. The plaintiff claimed that the company's insolvency was in fact due to the director's malfeasance. The Tribunal ruled that the matter fell outside the

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<sup>739</sup> See § 2.2 below.

<sup>740</sup> See § 2.6 below.

<sup>741</sup> See § 2.5 below.

<sup>742</sup> Tribunal of Trento, 17 February 2017, No 177, *GiustUp*.

scope of the Regulation pursuant to Art. 1(2)(d) and relied, instead, on the conflict-of-laws rules on torts in the Italian Statute on Private International Law.

Another ruling, given by the Italian Supreme Court in 2019, is of some interest in this respect.<sup>743</sup> The Court apparently did not have any doubts as to the applicability of the Rome II Regulation in this case, although, it is contended, the issue would have probably required a more careful analysis. A dispute arose between an Italian company and a company based in the UK regarding the prejudice caused by the latter in its capacity as enforcement officer for the High Court of England and Wales. The claimant was the secured creditor of an Italian company which owed monies to two English businesses. In the framework of enforcement proceedings in the UK against the Italian company, the defendant organised the sale of an aircraft owned by the latter. This, the claimant argued, resulted in the breach of its rights over the aircraft based on a mortgage. The Supreme Court held that the Italian courts lacked jurisdiction. It relied for this on Art. 7 point 2 of the Brussels I *bis* Regulation. It did not deem it necessary to assess whether the liability of a private company for acts performed in the exercise of State authority (*acta iure imperii*) should be deemed to fall within the scope of the Regulation. The Court implicitly assumed it did. Since the Court referred to Art. 4 of the Rome II Regulation for the purposes of interpreting Art. 7 point 2 of the Brussels I *bis* Regulation, one may suppose that, had the jurisdiction of Italian courts been asserted in the case examined, the Court would have resorted to the Rome II Regulation to determine the law applicable to the merits of the dispute. Given that the Regulation only applies 'in civil and commercial matters', the pertinence of its rules in the case at issue cannot, it is submitted, be taken for granted.

## 2. *The determination of the temporal scope of application of the Rome II Regulation (Arts. 31-32)*

Italian courts were asked to assess the applicability *ratione temporis* of the Regulation in a number of instances. This mainly occurred, unsurprisingly, in the first years after the Regulation became applicable. With few exceptions,<sup>744</sup> Italian courts showed to be aware of the interpretation of Articles 31 and 32 of the Regulation provided by the Court of Justice in *Homawoo*.<sup>745</sup>

## 3. *The characterization of the concept of "non-contractual obligations", its relationship to the concept of "contractual obligations" and any difficulties in relation to characterisation (Arts. 1(1), 2)*

Rare are the cases where Italian courts discussed the notion of 'non-contractual obligations' for the purposes of determining the applicability of the Rome II Regulation. In some instances, the matter would have deserved a more accurate consideration. In 2020, for example, the Tribunal of Siracusa ruled on a claim for compensation brought by a person living in Italy who had suffered personal injuries falling down the stairs in a hotel in Paris.<sup>746</sup> The woman sued the hotel company for negligence, claiming that the carpet covering the stairs had not been properly fixed. The Tribunal dismissed the case for lack of jurisdiction according to Art. 5 point 3 of the Brussels I Regulation but noted in an *obiter* that the substance of the case was governed by French law, pursuant to Art. 4(1) of the Rome II Regulation. The Tribunal did not find it appropriate to inquire into whether the alleged liability of the hotel company should rather be characterised (for the purposes of jurisdiction, and – where relevant – the applicable law) as contractual in nature, i.e. as a liability arising from a breach of the contractual duty of care and protection owed by the hotel to its clients.

A ruling of the Italian Supreme Court of 2020 provides an additional illustration of the doubts that practitioners sometimes raise concerning the distinction between contractual and non-contractual obligations.<sup>747</sup> The case concerned the alleged liability of a German doctor and a German medical laboratory for failing to detect a fatal cancer. The patient suffering from the cancer used to live in Italy when she was visited by the German doctor, in Germany. Her cancer became apparent after she returned to Italy, when it was too late to treat it. The woman's heirs

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<sup>743</sup> Corte di Cassazione, Sezioni Unite, 1 February 2019, No 3165, *DeJure*.

<sup>744</sup> Tribunal of Livorno, 6 July 2016, *Pluris*; Tribunal of Modena, 4 December 2015, *Pluris*; Tribunal of Trieste, 11 July 2013, (2013) *RDIPP*, 796 f.

<sup>745</sup> See, e.g. Tribunal of Bologna, 6 November 2019, *Pluris*; Tribunal of Turin, 16 March 2017, No 1407, *GiustUp*; Court of Appeal of Genova, 12 May 2015, No 641, *GiustUp*.

<sup>746</sup> Tribunal of Siracusa, 9 March 2020, No 328, *DeJure*.

<sup>747</sup> Corte di Cassazione, Sezioni Unite, 26 November 2020, No 26986, *DeJure*.

framed their action in tort and contract, alternatively. The Court, for its part, considered the matter to be contractual in nature, noting that the claimants were in fact complaining of the defendants' negligence in performing the medical investigation they had undertaken to carry out in their relationship with the patient.

#### 4. *The universal application of the Regulation (Art. 3)*

Although none of the rulings considered for this report involved the application of the law of a State other than a Member State of the EU, Italian courts appear to be aware of the universal character of the Rome II Regulation, just like they are – as it is attested by numerous judgments – of the universal character of similar legal instruments, such as the Rome I and the Rome III Regulations.

#### 5. *The approach to interpretation of the Rome II Regulation, and in particular its relationship to other EU private international law instruments (including the recast Brussels I Regulation and the Rome I Regulation) (Recital (7))*

It is not frequent for Italian courts to refer to the Brussels I *bis* Regulation, or any of its predecessors, for the purposes of interpreting the Rome II Regulation.

In a ruling of 2018, the Italian Supreme Court relied on the Rome II Regulation as a means to interpret Art. 5 point 3 of the Brussels I Regulation, on jurisdiction over torts or delicts.<sup>748</sup> At issue was whether Italian courts had jurisdiction to entertain a case of unfair competition brought by a radio broadcaster based in Trieste against a broadcaster based in Slovenia, accused of using its radio signals to disrupt the former's communications. The Court referred to the special conflict-of-law rules on unfair competition in Art. 6 of the Rome II Regulation to state that the damage had occurred in Italy, since the acts complained of by the claimant had allegedly affected the competitive relations between the parties in Italy, where the audience of the two broadcasters was located.

No references to the Rome I Regulation were found in the case law of Italian courts relating to the Rome II Regulation.

## 2.2 Chapter II - Tort/Delict

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to the implementation of:*

6. *The general conflict-of-laws rule for tort/delict, and difficulties that have arisen in your Member State with respect to its application (Art. 4), and in particular:*
  - a. *the approach to identifying the place of direct damage in Art. 4(1)*

As mentioned above, the vast majority of the cases decided by Italian courts under the Rome II Regulation concern the general rule on torts in Art. 4. Road accidents cases are, by far, the most numerous. Most of those cases involve a rather straightforward application of Art. 4(1). For example, the Tribunal of Florence had no difficulties in ruling, in 2017, that a claim for damages following a traffic accident in Greece should be decided in accordance with Greek law.<sup>749</sup> The Court of Appeal of Milan likewise held in 2019 that Hungarian law applied to the liability arising out of an accident in Hungary.<sup>750</sup>

The interpretation of the term 'damage' proved problematic in some early cases. The question arose whether the prejudice related to the death of the victim, sustained by relatives living in a country other than the country where the accident occurred, ought to be treated as a 'damage' for the purposes of Art. 4(1), or rather as an indirect consequence of the accident. The judgment of the Court of Justice in *Florin Lazar*, where the Court endorsed the latter

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<sup>748</sup> Corte di Cassazione, Sezioni Unite, 26 October 2018, No 27164, *Pluris*.

<sup>749</sup> Tribunal of Florence, 23 November 2017, No 3773, *GiustUp*.

<sup>750</sup> Court of Appeal of Milan, 3 June 2019, No 2381, *GiustUp*.

option, put an end to the debate. Italian courts were quick to take note of the Court's answer and have since consistently followed that approach,<sup>751</sup> including in tort cases governed by domestic conflict-of-laws rules.<sup>752</sup>

On a different note, doubts have been raised in legal literature as regards the localisation of maritime torts, other than those falling within the scope of Art. 7. One author, referring to the findings of the Court of Justice in *DFDS Torline*,<sup>753</sup> suggested that the ship's flag should assist in the identification of the place of the damage, pursuant to Art. 4(1), in the case of intra-vessel torts, i.e., torts that merely affect life on board the vessel concerned, without prejudice for the application of the rules in Art. 4(2) and (3).<sup>754</sup> As to 'external' maritime torts, difficulties arise where the damage occurred in areas outside the jurisdiction of any States. The same author opined that regard should be had to the implicit rule according to which, where the applicable law cannot be determined otherwise, the law of the country with which the tort is most closely connected applies.<sup>755</sup>

*b. the approach to the first rule of displacement in Art. 4(2) in cases involving multiple parties or claims*

Italian courts relied on Art. 4(2) of the Regulation in various instances. The interpretation of Art. 4(2) raised no difficulties in practice, as illustrated by a ruling of 2019 given by the Tribunal of Reggio Emilia.<sup>756</sup> A car accident occurred near Barcelona, in Spain, caused by the negligence of the driver, with no other vehicles being involved. The passenger suffered serious personal injuries as a result of the accident. As the driver and the passenger had their habitual residence in Italy at the time of the accident, the Tribunal ruled that Italian law was applicable. The Tribunal acknowledged that neither the company which owned the car nor the car's insurer were based in Italy, but considered that the latter circumstances do not affect the operation of Art. 4(2) of the Regulation.

*c. the approach to the escape clause in Art. 4(3), and*

Italian courts have, so far, never applied the escape clause provided for in Art. 4(3). In fact, the latter provision has seldom been invoked in court proceedings in the country. Arguably, litigation lawyers are aware that the provision is meant to apply exceptionally, and that strong arguments must be put forward to displace the rules in Art. 4(1) and (2). In a case decided in 2014, regarding a road accident which occurred in Romania, the Tribunal of Bologna ruled that the fact that the car involved was registered in Italy, and insured by an Italian insurer, was not enough a reason to exclude, on the basis of Art. 4(3), the application of Romanian law.<sup>757</sup>

*d. the suitability of this set of rules to govern cases of prospectus liability or other financial market torts*

The localisation of torts unrelated to car, or similar, accidents has been discussed in cases where jurisdiction, rather than the applicable law, was the main concern, or as the subject of scholarly reflection. Two scenarios attracted particular attention in this respect, namely prospectus liability and the liability of rating agencies towards issuers and investors.

The Italian Supreme Court decided in 2011 a cases involving an assessment of whether Italian courts had jurisdiction to rule on a matter of prospectus liability.<sup>758</sup> The case originated in a claim for compensation brought by an Italian asset management company against a number of defendants based in Ireland and Switzerland. The claimant had purchased the shares of an undertaking for collective investment in transferable securities established in Ireland. It did

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<sup>751</sup> See, e.g., Court of Appeal of Milan, 3 June 2019, No 2381, *GiustUp*; Tribunal of Milan, 31 January 2018, No 1078, *GiustUp*; Tribunal of Milan, 10 January 2017, No 193, *GiustUp*.

<sup>752</sup> Tribunal of Turin, 16 March 2017, No 1407, *GiustUp*.

<sup>753</sup> Case C-18/02, *Danmarks Rederiforening, acting on behalf of DFDS Torline A/S v LO Landsorganisationen i Sverige, acting on behalf of SEKO Sjöfolk Facket för Service och Kommunikation* [2004].

<sup>754</sup> P. Ivaldi, 'Illeciti marittimi e diritto internazionale privato: per una norma *ad hoc* nella legge n. 218/1995?' (2015) 51 *Rivista di diritto internazionale privato e processuale* 879, at 889.

<sup>755</sup> *Ibidem*, 894 ff., arguing that the rule may be inferred, by way of interpretation, from Art. 4(3).

<sup>756</sup> Tribunal of Reggio Emilia, 1 April 2019, No 503, *GiustUp*.

<sup>757</sup> Tribunal of Bologna, 17 March 2014, *Pluris*.

<sup>758</sup> Corte di Cassazione, Sezioni Unite, 8 April 2011, No 8034. Note that the ruling of the Supreme Court was exclusively concerned with the issue of jurisdiction. After the Court's ruling, the case was apparently discontinued, with no ruling on the merits being rendered.



so on reliance of a prospectus that later proved false, when the claimant discovered it was one the victims of the infamous fraud orchestrated by Bernie Madoff. The plaintiff alleged that the defendants had played an active role in drafting and circulating the prospectus and had thus contributed to causing the damage. The Supreme Court asserted the jurisdiction of Italian courts on the basis of Art. 5 point 3 of the Brussels I Regulation. It noted that the event giving rise to the damage occurred in Italy, for the purchase had been offered to the buyer in Italy, and the prospectus itself had been presented to the latter there. The Court added that the damage, too, occurred in Italy, arguing that the purchased shares should be deemed to be localised in Italy in accordance with the Place of the Relevant Intermediary Approach (PRIMA), as expressed in in Art. 9 of Directive 2002/47/EC on financial collateral arrangements.

The ruling prompted mixed reactions among commentators. One author argued that the Supreme Court's interpretation of Article 5 point 3 of the Brussels I Regulation was mainly driven by a concern for the protection of the Italian market and investors based in Italy.<sup>759</sup> The same author welcomed the use of PRIMA, stressing that other connecting factors would fail to reflect the peculiar features of dematerialised shares, but criticised the Court for localising the shares at the place where the deposit and custodial accounts were kept. The Financial Collateral Directive, the said author noted, clearly identifies the relevant intermediary, but does not determine its location.<sup>760</sup>

The law applicable to the liability of rating agencies was the object of debate among scholars. One author expressed the view that the liability of rating agencies would be most conveniently governed by the law of the country where the market in which the rated title is being traded<sup>761</sup>. To achieve that result, this author argued, one should be ready to resort to Art. 4(3) of the Rome II Regulation.

7. *The rule on product liability (Art. 5) and, where relevant, the interaction with the application of 1973 Hague Convention on the Law Applicable to Products Liability;*

No reported cases could be found in Italian databases applying, or considering, Art. 5 of the Rome II Regulation, on product liability. In the absence of documented practice, the impact of the provision on the professionals and consumers concerned remains difficult to assess. The relevance of the alleged shortcomings of Art. 5 is equally hard to evaluate. Those shortcomings result, among other things, from the alleged lack of clear guidance regarding the notion of marketing for the purposes of Art. 5<sup>762</sup>, and from the uncertainties that surround the treatment of product liability cases where the defective product was not marketed in any of the States specified in Art. 5(1)(a) to (c).<sup>763</sup>

Incidentally, no reported ruling could be retrieved in Italian databases regarding the application of Art. 63 of the Italian Statute on Private International Law, the domestic conflict-of-laws rule on product liability which existed prior to the adoption of the Rome II Regulation.

Italy is not a party to the 1973 Hague Convention on the Law Applicable to Products Liability.

8. *The specific rule on unfair competition (Art. 6)*

The practice of Italian courts concerning the rule in Art. 6 on unfair competition and acts restricting free competition is very limited. No judicial decision applying Art. 6 of the Regulation could be found in databases. As observed above, the Italian Supreme Court did refer to Art. 6 in a judgment of 2018, but only for the purposes of interpreting the special rule on jurisdiction in matters relating to torts or delicts in the Brussels I Regulation.

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<sup>759</sup> A. Gardella, 'La frode Madoff non sfugge alla giurisdizione italiana: responsabilità transfrontaliera da prospetto ed interpretazione del PRIMA' (2011) 64(6) *Banca borsa e titoli di credito* 706, at 710.

<sup>760</sup> Ibid 713. For further remarks, see A. Gardella, 'Prime considerazioni sulla legge applicabile al danno patrimoniale da false informazioni al mercato' (2012) 10(21) *Il Nuovo Diritto delle Società* 135.

<sup>761</sup> M.V. Benedettelli, 'La responsabilità civile delle agenzie di rating tra conflitti di leggi e conflitti di giurisdizioni' (2012) 2 *Analisi Giuridica dell'Economia* 475, at 487.

<sup>762</sup> L. Sandrini, *L'interpretazione del diritto internazionale privato dell'Unione europea – Il caso della responsabilità da prodotto* (Aracne 2018), 153 ff.

<sup>763</sup> F. Marongiu Buonaiuti, *Le obbligazioni non contrattuali nel diritto internazionale privato* (Giuffrè 2013), 121 f.

Art. 6, it is submitted, may call for application outside court proceedings, in particular where an undertaking is believed to carry out unfair commercial practices, and associations of consumers call for the intervention of the competent competition or consumer protection authorities.

The Italian Competition Authority has been occasionally seized of matters with a cross-border element. The Authority never explicitly referred to Art. 6 of the Rome II Regulation in relation to such matters. In some instances, however, it would seem that the Authority implicitly relied on that provision. In a decision given in 2016, for example, the Authority found that a low-cost airline company based in Norway was providing to consumers, via the Italian version of its website, misleading information on credit card charges.<sup>764</sup> It held that this was in breach of the Italian rules on unfair commercial practices and imposed a fine on the airline company. Plausibly, the Authority assumed that Italian law applied in the circumstance given that the practice affected the collective interests of consumers in Italy, and considered that that was enough to bring the matter within the purview of its regulatory powers.

#### 9. *The specific rule on environmental damage (Art. 7)*

No ruling discussing the application of the special conflict-of-law rule for environmental damage in Art. 7 of the Regulation could be retrieved in case law databases. It is difficult, in these circumstances, to assess the practical relevance of the questions raised by scholars with respect to this provision. One such question is about the causal link between an environmental damage and a 'damage sustained by persons or property as a result of such damage': it is unclear how closely should a personal damage, or a damage to property, be linked to an environmental damage in order to trigger the application of Art. 7 both to the environmental damage itself and to the connected personal or property damage.<sup>765</sup> The same author observed that the relevance to Art. 7 of authorisations issued by public authorities in the country in which the event giving rise to the alleged damage occurred remains unclear, that is, whether, outside the case where the governing law is the law of the country where the polluting event took place, the authorisations in question should be characterised as overriding mandatory provisions under Art. 16, as rules of conduct within the meaning of Art. 17, or otherwise.<sup>766</sup>

#### 10. *The specific rule on infringements of intellectual property rights (Arts. 8, 13)*

The case law of Italian courts regarding Art. 8 of the Rome II Regulation, on the law applicable to the infringement of intellectual property rights, consists of few cases.

The Tribunal of Bologna issued in 2018 a ruling involving a rather straightforward application of Art. 8.<sup>767</sup> An Italian company seized the Tribunal seeking a declaration that the use of a certain word to describe the goods advertised in its website did not amount to the infringement of German trademarks owned by a German company (the latter had complained precisely of such use). The Tribunal resorted to Art. 8 and applied German law to rule on the substance of the case.

A few months earlier, the Tribunal of Turin decided a slightly more complex case.<sup>768</sup> An Italian company, the holder of the television rights for Italy of several TV series, seized the Tribunal of Turin complaining that excerpts of those series had been unlawfully uploaded on an online platform, operated by a French company, by individual users of the platform itself, and had thus become available to other users without its authorisation. The Tribunal held that the alleged liability of the platform operator was to be assessed on the basis of Italian law. It relied for this both on Art. 8 of the Rome II Regulation and on Art. 4, noting that, in the circumstances, Italy was both the country where the protection of the rights at issue was claimed and the country in which the damage occurred. The ruling is illustrative of the doubts

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<sup>764</sup> Autorità Garante della Concorrenza e del Mercato, 28 September 2016, No 26183, *Norwegian Air Shuttle*, <<http://agcm.it>>.

<sup>765</sup> S. Marino, 'Il danno all'ambiente come bene comune e la disciplina della responsabilità: profili di diritto internazionale privato' (2016) *Rivista giuridica dell'ambiente* 3, at 22.

<sup>766</sup> S. Marino (fn 24), at 31 ff.

<sup>767</sup> Tribunal of Bologna, 15 February 2018, No 510, *Pluris*.

<sup>768</sup> Tribunal of Turin, 24 January 2018, No 342, *DeJure*.

surrounding the characterisation of rights over digital and other immaterial content for the purposes of Art. 8 of the Regulation.

The issue was raised by an author of the characterisation, for the purposes of the Rome II Regulation, of non-contractual obligations arising out of the infringement of undisclosed know-how and trade secrets within the meaning of Directive 2016/943.<sup>769</sup> While Italian law protects trade secrets through the rules on intellectual property law, the law applicable to the liability resulting from the infringement of such secrets does not necessarily come with the purview of Art. 8 of the Regulation, the said author submitted, and may rather need to be addressed in light of Art. 6, on unfair competition.<sup>770</sup>

#### *11. The specific rule on industrial action (Art. 9)*

No rulings are reported in caselaw databases regarding the liability for damages caused by industrial action, pursuant to Art. 9 of the Rome II Regulation.

### 2.3 Chapter III - Unjust enrichment, *negotiorum gestio* and *culpa in contrahendo*

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to the implementation of:*

#### *12. The specific rule on **unjust enrichment** (Art. 10), including its relationship with the general rule for tort/delict in Art. 4.*

The author of this report is not aware of any case decided by Italian courts involving the application of Art. 10 of the Rome II Regulation, on unjust enrichment.

#### *13. The specific rule on **negotiorum gestio** (Art. 11)*

In 2018, the Tribunal of Bergamo ruled on a case of *negotiorum gestio* under Art. 11 of the Regulation.<sup>771</sup> An Austrian company seized the Tribunal of Bergamo seeking the reimbursement of the costs it had borne to provide assistance to a racing cyclist who had been the victim of an accident during a cycling race in Austria. The cyclist, who lived in Italy, was transported by the Austrian company's helicopter to a nearby hospital. The Tribunal noted that the decision to transport the cyclist was taken at a time when the cyclist was unable to express his will. The Court argued that the relationship between the parties could not be characterised as contractual in nature and should rather be labelled as *negotiorum gestio* within the meaning of Art. 11 of the Rome II Regulation. Specifically, the Tribunal considered that the case fell under Art. 11(3), since the assistance provided did not concern a relationship existing between the parties and the parties did not have their habitual residence in the same country when the event occurred. The Tribunal ruled, accordingly, that the defendant's liability be assessed against the 'law of the country in which the act was performed', i.e. Austrian law.

#### *14. The specific rule on **culpa in contrahendo** (Art. 12)*

The Tribunal of Udine decided in 2018 a case of pre-contractual liability involving the application of Art. 12 of the Rome II Regulation.<sup>772</sup> A Slovenian company wished to submit a tender for the realisation of a storing facility at a port in Slovenia. It contacted an Italian company, proposing that, had the contract been awarded, the two would have joined forces to perform the resulting obligations. The contract was in fact awarded to the Slovenian company, but the

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<sup>769</sup> M. Libertini, 'Brevi note sui rimedi risarcitori e indennitari a tutela dei segreti commerciali' (2018) 1 *Contratto e impresa. Europa*, 3 ff.

<sup>770</sup> Ibid 24.

<sup>771</sup> Tribunal of Bergamo, 24 April 2018, No 958, *GiustUp*.

<sup>772</sup> Tribunal of Udine, 10 August 2018, No 1011, *GiustUp*.

two companies eventually failed to enter into a cooperation agreement. In fact, the Italian company complained that, under to the Slovenian company's tender, the remuneration for the work due to be carried out by the Italian company itself was significantly lower than originally discussed. The Slovenian company ultimately entered into a cooperation agreement with another undertaking. The Italian company sued the Slovenian company before the Tribunal of Udine, claiming that the defendant had breached its duties of good faith in pre-contractual dealings. The Tribunal ruled that Article 12(1) of the Rome II Regulation was not applicable in the circumstances, since the law that would have been applicable to the cooperation contract, had it been entered into, could not be determined. It turned then to Article 12(2)(a), according to which *culpa in contrahendo* is governed by the law of the country in which the damage occurred. The Tribunal concluded that Italian law applied, noting that the plaintiff alleged to have sustained the prejudice in Italy, where it was based.

The ruling, it is submitted, provides an illustration of the difficulties inherent in localising damage in pre-contractual liability cases. The Tribunal apparently found itself unable to carry out such localisation otherwise than relying on the plaintiff's own allegations. Without stating this explicitly, the Tribunal plausibly considered that – in the absence of stronger geographical indicia – the prejudice resulting from the alleged breach of good faith could not be localised elsewhere than in the country where the affected party was established, i.e. Italy in the circumstances. This seems to confirm the fear expressed by some authors, according to which the known difficulties raised by the localisation of pure economic loss, as addressed by the Court of Justice in *Marinari* and *Kronhofer*, among others, are set to resurface in the context of pre-contractual liability under a rule such as Art. 12(2)(a) of the Rome II Regulation.<sup>773</sup>

## 2.4 Chapter IV - Freedom of choice

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

**15. The implementation in legal/business practice and by courts of the rule on *freedom of choice*, any difficulties therein and *any discussion that has been carried out in your Member State regarding possible reasons which would justify the need to rethink it* (Art. 14)**

Few reported cases could be found where Italian courts applied, or considered, Art. 14 of the Rome II Regulation, on choice of law.

In a ruling of 2012, regarding the liability resulting from a road accident in Spain, the Tribunal of Varese began by observing that Spanish law would normally be applicable pursuant to Art. 4(1) of the Regulation.<sup>774</sup> It considered, however, that the parties to the dispute had agreed on the application of Italian law in accordance with Art. 14. The parties themselves did not explicitly stated their intention to have Italian law applied, but their attorneys – the Tribunal noted – consistently referred throughout the proceedings to Italian rules, as well as to concepts used in the Italian legal system and to the case law of Italian courts. In the Tribunal's view, this was enough to concluded that a choice of Italian law pursuant to Article 14 had occurred in the circumstances.

The ruling is illustrative of the uncertainties underlying the treatment of *accords procéduraux*, i.e. the agreements whereby the parties to a dispute stipulate – often tacitly – that a given law, notably the law of the forum, be applied to the merits of the dispute in a particular set of proceedings. The view has been expressed in literature that, failing a specific provision (such as the one found in Art. 7 of the Hague Protocol of 2007 on the law applicable to maintenance obligations), the agreements in question can only be enforced insofar as they comply with the relevant provisions on freedom of choice (Art. 14 of the Rome II Regulation, in the circumstances).<sup>775</sup> The statements made by the parties' attorneys in the course of the proceedings should not be lightly presumed to convey the will of the parties on an issue such as the identification of the law applicable to the legal relationship at issue. In fact, one thing is to pleas the law

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<sup>773</sup> P. Franzina, 'Il regolamento n. 864/2007/CE sulla legge applicabile alle obbligazioni extracontrattuali ("Roma II")' (2008) 31 *Le nuove leggi civili commentate* 971, at 1025 f.

<sup>774</sup> Tribunal of Varese, 13 January 2012, No 55, *DeJure*.

<sup>775</sup> P. Franzina, 'La scelta tacita della legge applicabile al contratto secondo il Regolamento Roma I' (2016) 8(2) *Cuadernos de Derecho Transnacional* 221, at 236 f.

and present the facts (that is what attorneys are meant to do), and another is to agree that the substance of a legal relationship should be governed by a law other than the law that would normally apply to the case. This means that, in order to assess whether such an agreement was validly concluded by the parties' representatives, one should determine whether the latter were granted the power to shape the substance of the parties' relationship, rather than simply assisting them in the framework of court proceedings.

Other courts took a more cautious posture towards choice of law. In a ruling of 2014, concerning a road accident in Romania, the Tribunal of Bologna dismissed an argument whereby the parties had tacitly chosen Italian law pursuant to Art. 14 of the Rome II Regulation.<sup>776</sup> An argument to that effect had been advanced on the ground that the victim of the accident had agreed to undergo a medical examination at the premises of the insurance company in Italy, and that an out-of-court settlement had been negotiated in Italy between the parties. The above circumstances, the Tribunal observed, did not provide evidence of the existence of a choice-of-law agreement between the parties.

Due to the limited number of reported cases relating to Art. 14, it is hard to appraise the practical relevance of the uncertainties which, according to scholars, surround this provision. Those uncertainties concern, in particular: the notion of 'commercial activity' for the purposes of Art. 14(1)(b), i.e., whether it includes activities other than those carried out in the field of industry or trade, such as the activities of artistic performers or athletes, or those of a company manager; the admissibility of *dépeçage*, as under Art. 3(1) of the Rome I Regulation, e.g., where the contemplated damage is likely to occur in two or more States, and the parties wish to have the various portions of the damage governed by the law of the country in which the portion concerned occurred; and the law applicable to the choice-of-law agreement itself, i.e. whether the approach in Art. 3(5) of the Rome I Regulation should be followed also in the framework of Art. 14 of the Rome II Regulation.<sup>777</sup>

## 2.5 Chapter V - Common rules

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

*16. The scope of the exclusion of 'evidence and procedure' in Art. 1(3) and any difficulties in relation to that exclusion or to questions of formal validity or the burden of proof (Arts. 21-22)*

Italian courts have very rarely discussed the exclusion of 'evidence and procedure' from the scope of the Rome II Regulation, pursuant to Art. 1(3).

A ruling of 2017 by the Tribunal of Florence noted that it is not for the law specified in accordance with the Regulation to decide whether the victim of a road accident should jointly sue the person whose liability is at stake and the insurer.<sup>778</sup> Procedural issues, the Tribunal observed, lie outside the scope of the Regulation and are governed by the *lex fori*.

No specific reference could be found in reported cases to issues of formal validity and burden of proof as dealt with under Articles 21 and 22 of the Regulation.

*17. The approach in your Member State to questions of pleading, proof and application to individual cases of the substantive rules of the law applicable under the Rome II Regulation governing non-contractual obligations.*

The approach of Italian courts to the pleading, proof and application of foreign law may be summarised as follows.

Based on Article 14 of the Italian Statute on Private International Law, the seised court is required to apply the pertinent conflict-of-laws provisions by its own motion, as soon as it is clear that the conditions for the application of such

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<sup>776</sup> Tribunal of Bologna, 17 March 2014, *Pluris*.

<sup>777</sup> P. Franzina, 'Il regolamento n. 864/2007/CE sulla legge applicabile alle obbligazioni extracontrattuali ("Roma II")' (2008) 31 *Le nuove leggi civili commentate* 971, at 1030 ff.

<sup>778</sup> Tribunal of Florence, 23 November 2017, No 3773, *GiustUp*.

provisions are met in the circumstances. If the issue of the applicable law is indeed raised *ex officio*, the parties are to be given an opportunity to express their views on the matter.

If the case appears to be governed by a foreign law, it is the task of the seised court to ascertain the content of the relevant provisions: the parties are of course permitted to provide the court with the information they consider to be useful (translations, affidavits, etc.), but they will not suffer any adverse procedural consequences if they fail to do so.

For the purposes of determining the content of the relevant foreign rules, the seised court may, basically, ask for the assistance of the Ministry of Justice, appoint an expert, or seek the cooperation of the consular or diplomatic representations in Italy of the State whose law is applicable.

According to Article 15 of the Statute on Private International Law, the court must ensure that the foreign rules in question are interpreted and applied consistently with the manner in which they are interpreted and applied in the State where they belong. The incorrect interpretation or application of the applicable foreign law justifies an appeal on point of law.

The practical operation of the described approach is not entirely satisfactory, in particular as regards the ascertainment of foreign law. Information collected through the Ministry of Justice and diplomatic or consular representations often consist in the mere reproduction of legal texts, without any background information and without an illustration of the way in which the texts in question are normally understood and applied in practice. Expert opinions, for their part, do provide such extra elements, but the drafting of such opinions obviously requires time, and the costs are borne by the parties (in practice, the parties are expected to remunerate both the court appointed expert and their own experts, if they wish to appoint any). Tariffs are set by the Ministry of Justice for opinions drafted by court-appointed experts, which the appointing court is not permitted to derogate from. As the remuneration owed to court-appointed experts pursuant to those tariffs is significantly lower than the fair market value of similar opinions by practicing lawyers or other experts, potential experts are often unwilling to make themselves available for court appointments.

*18. The delimitation of the scope of the applicable law (Art. 15(a)-(h)), including any difficulties as its relationship to the issues addressed at points 16 17 above)*

Apparently, no special difficulties were experienced by Italian courts in relation with Art. 15 of the Rome II Regulation. In most of the cases where the scope of the *lex causae* was the object of discussion, the above provision did not prove problematic. An illustration may be found in a ruling given in 2016 by the Tribunal of Bolzano regarding the liability arising from a ski accident which occurred in Italy, caused by a child whose habitual residence was in Germany.<sup>779</sup> Having found that Italian law was applicable in accordance with Art. 4(1) of the Regulation, the Tribunal resorted to Italian law for the purposes of determining – pursuant to Art. 15(a) and (b), respectively – whether the parents should be held liable for the acts performed by the child, and whether they should be deemed to be exempt from liability on some grounds, as they claimed in the proceedings.

Rather, doubts were expressed as to the relevance of the *lex causae* to the assessment of damage, as provided for in Art. 15(c).

As regards damages for non-monetary prejudice suffered as a result of an accident, Italian courts appear to be aware that the *rules* governing the assessment of those damages must be taken from *lex causae*. Conversely, doubts have been raised, for some time, as to whether the standards normally used to quantify such damages on an equitable basis apply also to cross-border cases, notably where the habitual residence of the victim is in a State whose cost of living and social conditions significantly differ from Italy's. In fact, the view was put forward (and occasionally endorsed by courts),<sup>780</sup> that in determining the quantum of damages regard ought to be had, *inter alia*, to the social and economic conditions of the victim's State of residence. In practice, according to this view, the amount resulting from the application of the standards normally used in Italy should be reduced in cases involving victims living in poorer countries. The Italian Supreme Court rejected the latter view in a ruling of 2016, regarding a case to which,

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<sup>779</sup> Trib. Bolzano, 13 October 2016, No 1196, *GiustUp*.

<sup>780</sup> Trib. Bologna, 17 March 2014, *Pluris*.

incidentally, the Regulation was not applicable.<sup>781</sup> Elaborating on a judgment of 2012,<sup>782</sup> the Supreme Court held that a person's right to compensation should be enforced irrespective of their economic conditions. To do otherwise, the Court observed, would result in unlawful discrimination.

*19. The application of the rule on **overriding mandatory provisions** (Art. 16)*

Overriding mandatory provisions have only seldom been referred to by Italian courts in cases regarding non-contractual obligations. Two rulings, both decided under the Italian Statute on Private International Law, rather than the Rome II Regulation, are relevant in this respect. In 2012, the Italian Supreme Court held that the Italian provisions mandating a particular public body (*Ufficio Centrale Italiano*) to compensate damages resulting from accidents involving a car registered abroad should be characterised as overriding mandatory provisions and should accordingly apply to any matters within their scope, whatever the law specified under the pertinent conflict-of-laws rules.<sup>783</sup> Lower courts have since reiterated this finding in cases with the purview of the Rome II Regulation.<sup>784</sup>

*20. The application of the specific rule on **direct action against the insurer** of the person liable (Art. 18)*

No rulings could be found which specifically discuss the rule on direct action against the insurer of the person liable in Art. 18 of the Rome II Regulation.

*21. The application the specific rule on **subrogation** (Art. 19)*

No explicit references to the rule on subrogation in Art. 19 of the Rome II Regulation could be retrieved in caselaw databases.

That said, a ruling rendered by the Court of Appeal of Milan in 2018 appears to raise precisely an issue of subrogation.<sup>785</sup> In 2010, an accident occurred at the Lugano Airport caused by the negligence of an employee of the Italian company in charge, as a sub-contractor, of aircraft-refuelling services. The accident resulted in the spill-over of fuel in a river nearby, for which the contractor's insurer paid the Municipality of Lugano the amount needed for clean-up and remediation. Years later, the insurer sued the Italian sub-contractor in Italy, seeking the repayment of that amount. The Italian company argued that Swiss law applied to the liability arising from the accident, and that repayment was foreclosed according to the relevant Swiss rules. At first instance, the Tribunal of Monza, too, ruled that Swiss law applied, but did so on the ground that Swiss law governed the insurance contract under which the insurer had satisfied the Municipality. The Court of Appeal affirmed the Tribunal's findings on the latter point. None of the rulings mentioned Article 19 of the Rome II Regulation.

*22. The application of the specific rule on **multiple liability** (Art. 20)*

The rule on multiple liability in Art. 20 of the Regulation has not been the specific object of any known ruling given by Italian courts.

## 2.6 Chapter VI - Other provisions

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

*23. The implementation of the concept of habitual residence in the Rome II Regulation, with reference both to persons covered by Art. 23 and natural persons acting otherwise than in the course of business*

No ruling could be found in caselaw databases discussing the notion of habitual residence in detail.

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<sup>781</sup> Corte di Cassazione, 7 October 2016, No 20206, *DeJure*.

<sup>782</sup> Corte di Cassazione, 18 May 2012, No 7932, *Pluris*.

<sup>783</sup> Corte di Cassazione, 18 May 2012, No 7932, *Pluris*.

<sup>784</sup> Tribunal of Ivrea, 4 July 2017, No 596, *GiustUp*.

<sup>785</sup> Court of Appeal of Milan, 11 July 2018, No 3323, *GiustUp*.

As regards natural persons, Italian courts generally rely on formal attestations of residence issued by the competent Municipalities, or similar authorities, rather than carrying out an inquiry aimed at determining the place where the individual concerned established, with the intention that it should be of a lasting character, the permanent or habitual centre of his or her interests.

In none of the cases examined for this report the seized court was asked to determine the habitual residence of a legal person or other body.

*24. The application of and any difficulties with the specific rules on exclusion of renvoi (Art. 24) and States with more than one legal system (Art. 25)*

No difficulties have been detected in connection with Art. 24 of the Rome II Regulation, on the exclusion of *renvoi*.

None of the rulings considered for this report involved the application of Art. 25, on States with more than one legal system. The familiarity of Italian courts with the identical rule in Art. 22 of the Rome I Regulation and, prior to that, Art. 19 of the Rome Convention of 1980 on the law applicable to contractual obligations, suggests that the application of the above provision should not give rise to particular difficulties.

*25. The application of and any difficulties with the specific rule on public policy of the forums (Art. 26)*

Italian courts are aware that foreign law (or a foreign judgment) may not be given effect in Italy where to do so would contravene the fundamental principles of the Italian legal system. The Italian Supreme Court often stressed that the public policy defence may not be raised unless it is established that, in the circumstances, the application of the foreign law in question would be irretrievably at odds with the core values of the Italian legal order, notably as they result from the Italian Constitution and the relevant international conventions in force for Italy (in particular, in the field of human rights). This approach equally applies to tort cases and cases touching other areas of law, and is generally followed by Italian courts regardless of whether the normally applicable foreign law was determined, in the circumstances, pursuant to domestic rather than uniform conflict-of-laws rules.

Various tort cases are known where Italian courts were asked to disregard foreign law, because of its alleged inconsistency with public policy. Those moves were dismissed in several of those cases. In a judgment of 2017, for example, the Tribunal of Trento dismissed the claimant's submission that the application of Lithuanian law – which the Tribunal had found to govern the liability resulting from a road accident occurred in Lithuania – would violate the public policy of Italy.<sup>786</sup> The claimant complained that the amount of damages he was entitled to in accordance with Lithuanian law rules was significantly lower than the amount he would obtain under Italian law. The Tribunal ruled that a difference as to the quantum of damages between the *lex causae* and the *lex fori* is not in itself a sufficient reason to trigger the public policy exception. The latter finding was upheld, and further reinforced, by the Court of Appeal of Trento in a ruling of 2020.<sup>787</sup>

Over the last few years, the Italian Supreme Court issued various rulings clarifying the scope of Italian public policy in the field of torts. Two of them are particularly significant for the purposes of this report.

The Court held in 2017 that Italian public policy no longer precludes as a matter of principle the recognition of foreign judgments under which the victim of a tort is awarded punitive damages.<sup>788</sup> Rather, a case-by-case analysis is needed of the grounds on which damages were awarded, and the interests pursued. Specifically, foreign judgments awarding non-compensatory damages may be recognised in Italy provided they rest on a particular provision of law, or a recognisable rule of the relevant legal order, and aim to ensure the effective realisation of an important policy. The finding, it is submitted, applies with the necessary adaptations to the application, via the relevant conflict-of-laws rules, of such foreign law as provides for the award of punitive damages.

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<sup>786</sup> Tribunal of Trento, 22 June 2017, No 683, *GiustUp*.

<sup>787</sup> Court of Appeal of Trento, 17 April 2020, No 88, *GiustUp*.

<sup>788</sup> Corte di Cassazione, 5 July 2017, No 16601, *DeJure*.



In 2018, the Italian Supreme Court ruled that the public policy of Italy opposes the application of a foreign law under which the close relatives of the victim of a fatal accident are denied *as a matter of principle* any compensation for the suffering sustained as a result of the death of a loved one.<sup>789</sup> In the circumstances, Serbian law, which applied to the case, provided that the spouse of the victim and his children were entitled to damages, but made compensation to other relatives, namely the victim's brothers and sisters, contingent on cohabitation at the time of the accident, and simply excluded the right of other relatives still, such as grandchildren, to obtain damages. The Court stressed that the right to reparation for the suffering entailed by the death of a next of kin is an aspect of the legal protection of family relations. It held that to deny such reparation would amount to disregarding the personal and emotional bonds between the relatives concerned and the deceased. This, the Court noted, would be inconsistent with the value recognised by the Italian legal system to family ties, as attested by the Italian Constitution. The Supreme Court conceded that the fundamental principle of family protection, including by the award of damages in case of harm, does not imply that all relatives be entitled to compensation, whatever the circumstances, for the suffering resulting from the loss of a loved one. Indeed, the existence (and the extent) of each relative's right to reparation depends on a range of factors, such as, notably, the nature and strength of their ties with the deceased. Indeed, cohabitation is among the relevant indicia, but it should not be treated as decisive in itself. A rigid rule in this respect would in fact jeopardise the protection of such non-cohabitating brothers and sisters who entertained meaningful ties with the deceased. A general exclusion of grandchildren from those entitled to reparation would involve, the Court argued, a similar danger and should accordingly be disapplied on grounds of public policy.

Whatever the grounds, where the public policy defence is raised, the application of the normally applicable foreign law is excluded, and the issue arises of which rules should govern the matter subsidiarily, i.e. instead of the law specified under the relevant conflict-of-laws provisions.

As the latter issue is not dealt with in the Rome II Regulation, the generally accepted view in Italy is that regard ought to be had to the domestic provisions on public policy.<sup>790</sup> According to Art. 16(2) of the Italian Statute on Private International Law, the seised court must turn to the law designated under a different connecting factor, if available, applicable to the case, which may in fact be a foreign law. The *lex fori* will only apply as such where the described process fails, notably because no other connecting factors are provided under the pertinent conflict-of-laws rule, or because such alternative connecting factor results in the designation of the same law as was ousted under the public policy defence, or in the designation of another law whose application would equally offend the core values of the forum.

While the practice of Italian courts does not provide evidence of any special difficulty in this connection, the lack of a uniform rule in the Rome II Regulation dealing with the identification of the subsidiarily applicable law may in some circumstances give rise to doubts and concerns. It is submitted that the Italian solution, though inherently complex, has the advantage of preserving the *effet utile* of the Regulation: for instance, if the law chosen by the parties pursuant to Art. 14 is disregarded on public policy grounds, then, instead of directly resorting to the *lex fori*, the seised court would turn to Art. 4 (or the special conflict-of-laws rule applicable in the circumstances) and apply the law specified thereunder.

26. *Practical interaction between the Rome II Regulation and other EU and international legal instruments, in specific areas such as environmental damages, intellectual property rights or data protection (Arts. 27, 28, 29)*

Very few indications could be retrieved in the case law of Italian courts regarding the interaction between the Rome II Regulation and other EU or international legal instruments.

A ruling given in 2009 by the Tribunal of Turin provides an illustration of the kind of difficulties that may arise from the coexistence of conflict-of-laws rules and conventions laying down uniform rules of substantive law.<sup>791</sup> An Italian

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<sup>789</sup> Corte di Cassazione, 30 April 2018, No 10231, *DeJure*. The ruling largely builds on an earlier decision: Corte di Cassazione, 22 August 2013, No 19405, *DeJure*.

<sup>790</sup> See e.g. Tribunal of Trento, 11 December 2014, No 1277, *GiustUp*.

<sup>791</sup> Tribunal of Turin, 8 April 2009 (2009) 1 *Giurisprudenza annotata di diritto industriale* 856.

company seized the Tribunal of Turin complaining about the acts of unfair competition allegedly committed in Japan by an English company, which involved an infringement of the former's intellectual property rights. The Tribunal did not refer to any conflict-of-laws rules and resorted instead to the Paris Convention on the Protection of Industrial Property of 1883, without considering whether, in the circumstances, the domestic law specified under the pertinent conflict-of-law rules could play a role (a residual one, as the case may be).

## 2.7 Comments on other practical problems

*These areas are of particular interest for the Commission. Please be as precise as possible regarding any issue that has been reported on:*

*27. The impact of the application of the 1971 Hague Convention on the law applicable to traffic accidents on legal certainty (where relevant for your Member State)*

Italy is not a party to the Hague Convention of 1971 on the law applicable to traffic accidents.

*28. Any other practical problems with respect to the application or interpretation of the Rome II Regulation, including but not limited to the suitability of the mosaic approach*

Some of the problems that scholars predicted, or warned about, in their analyses of the Rome II Regulation have not (yet) manifested themselves in the documented practice of Italian courts.

This applies, in particular, to the treatment, under Art. 4, of double- or multi-locality torts. The mosaic approach advocated in the report accompanying the Commission's proposal for what would become the Rome II Regulation was criticised by several authors, in that it fails to consider that the law of torts is not only concerned with the *consequences* of a tort (which might in fact express themselves in several countries, and thus be reasonably submitted to the laws of such countries, distributively), but also to the *bases* of tort: the latter call as such for a unitary assessment, which the mosaic approach might well frustrate.<sup>792</sup> Absent reliable information on the way in which the problem is being addressed by practitioners (in Italy), it is difficult to assess whether the alternative solutions proposed (notably, the application of the law of the country where the main damage occurred, or the application of the law of the country with which the non-contractual obligation in question is most closely connected) would better serve the goals of the Regulation in the various situations where the above problem might arise.

## 3. Comments on areas of interest

*These areas are of particular interest for the Commission. Please be as precise as possible regarding any issue that emerged in your Member State regarding:*

*29. The exclusion of violations of privacy and rights relating to personality, including defamation, from the scope of the Rome II Regulation and any difficulties arising out from differences among Member States' rules in cross-border situations*

For at least fifteen years, now, no cases have been decided by Italian courts which involved a determination of the law applicable to a violation of privacy or a violation of rights relating to personality. Accordingly, the difficulties arising from the exclusion of those matters from the scope of the Rome II Regulation remain difficult to assess.

Scholarly contributions on the above topics are not numerous, either. Various works were devoted to the issues regarding jurisdiction over defamation or the infringement of privacy and data protection rights, but none of them deals

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<sup>792</sup> P. Franzina, 'Il regolamento n. 864/2007/CE sulla legge applicabile alle obbligazioni extracontrattuali ("Roma II")' (2008) 31 *Le nuove leggi civili commentate* 971, at 995 ff; C. Honorati, 'Regolamento n. 864/2007 sulla legge applicabile alle obbligazioni extracontrattuali', in F. Preite (ed.), *Atti notarili - Diritto comunitario e internazionale*, vol. IV, t. 1 (Utet Giuridica 2011), 483, at 501 f.

extensively with conflicts of laws.<sup>793</sup> One article, published in 2009, concerned precisely the law applicable to the non-contractual obligations resulting from the said violations.<sup>794</sup> A more recent contribution to the same topic advocated the introduction of a special rule for the cases in question in the Italian Statute of Private International Law.<sup>795</sup> Under the proposed rule, if all the persons involved have their habitual residence in the same State, the law of that State shall apply. If the latter condition is not met, compensation for damages suffered in one State shall be governed by the law of that State. However, if the victim brings proceedings for the entire prejudice suffered based on such grounds of jurisdiction as his or her habitual residence, or the domicile of the person held to be liable, then the law of the forum shall apply to all of the damages.

30. *Any comment regarding the Interplay of the Rome II Regulation with the treatment of **defamation and data protection**, and, in these areas, the relevance of **Strategic Lawsuits Against Public Participation (SLAPPs)***

Consistent with the preceding remark, the interplay of the Rome II Regulation with the treatment of defamation and data protection, and, in these areas, the relevance of Strategic Lawsuits Against Public Participation (SLAPPs), represent largely unexplored topics in Italian literature.

31. *The extent to which Rome II Regulation has been applied to **corporate abuses against human rights** and lays down an effective set of rules to regulate non-contractual liability;*

No ruling could be found in Italian case law databases where the Rome II Regulation was considered in connection with, let alone applied to, cases relating to corporate violations of human rights. The author of this report is aware that cases of this kind were in fact commenced before Italian courts, but no information could be retrieved to determine the current status of those proceedings. One such case, brought by the Ikebiri community against ENI, the Italian oil company, before the Tribunal of Milan in 2018 for alleged pollution in the Niger delta,<sup>796</sup> was eventually the object of an out-of-court settlement in 2020. The suitability of the Regulation to deal with this class of cases cannot accordingly be tested, at this stage, against the practice of Italian courts.

32. *The impact of the development of **artificial intelligence** on the Rome II Regulation, and in particular on the suitability of the rules that it contains to regulate non-contractual liability.*

Lacking relevant developments, Italian practice similarly fails to provide indications as to the impact of artificial intelligence on the Rome II Regulation and the suitability of the latter to deal with liability arising from artificial intelligence applications.<sup>797</sup>

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<sup>793</sup> G. Zarra, 'Conflitti di giurisdizione e bilanciamento dei diritti nei casi di diffamazione internazionale a mezzo internet' (2015) *RDI* 1234; F. Marongiu Buonaiuti, 'La disciplina della giurisdizione nel regolamento (UE) n. 2016/679 concernente il trattamento di dati personali e il suo coordinamento con la disciplina contenuta nel regolamento (UE) "Bruxelles I-bis" in (2017) 9(2) *Cuadernos de Derecho Transnacional*, 448 ff; F. Marongiu Buonaiuti, 'La giurisdizione nelle controversie relative alle attività on-line' in G. Contaldi (ed.), *Il mercato unico digitale* (Nuova Editrice Universitaria 2017), 89.

<sup>794</sup> O. Feraci, 'La legge applicabile alla tutela dei diritti della personalità nella prospettiva comunitaria' (2009) 92 *Rivista di diritto internazionale* 1020.

<sup>795</sup> C. Campiglio, 'La legge applicabile alle obbligazioni extracontrattuali (con particolare riguardo alla violazione della privacy)' (2015) 51 *Rivista di diritto internazionale privato e processuale* 857.

<sup>796</sup> <<http://cdca.it/wp-content/uploads/2019/05/IKEBIRI-SPECIALE-2019.pdf>>.

<sup>797</sup> Italian scholars have so far investigated the liability regime in case of damages provoked by intelligent devices from the standpoint of substantive law (see M. Ratti, 'Responsabilità civile per danno prodotto da dispositivo intelligente' (2020) 3 *Contratto e impresa* 1174 ff.; M. Costanza, 'L'Intelligenza Artificiale e gli stilemi della responsabilità civile', (2019) *Giur. it.* 1686 ff.). Some authors have argued that the EU legal order is the best context for the development of common rules on the cross-border aspects of artificial intelligence: A. Amidei, 'Intelligenza Artificiale e *product liability*: sviluppi dell'Unione Europea' (2019) *Giur. it.* at 1715. Others, instead, submitted that domestic rules on liability are flexible enough to face new phenomena: U. Ruffolo, 'Intelligenza Artificiale, *machine*

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*learning e responsabilità da algoritmo'* (2019) *Giur. it.* 1689, at 1696. To date, no the challenges posed by artificial intelligence in the field of private international law have not been analysed by Italian scholars.

#### 4. List of national case law

<u>Court or tribunal</u>	<u>Case name and reference number</u> <u>Reference to decision of the Court of Justice if applicable</u>	<u>Date</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings (only for key cases)</u>
Tribunale di Torino		8 April 2009		Relationship between conflict-of-laws rules and uniform rules of substantive private law	
Tribunale di Varese	No 55	13 January 2012	Art. 14	Freedom of choice (tacit choice)	
Corte di Cassazione	No 7932	18 May 2012		Public policy	
Tribunale di Trieste		11 July 2013	Art. 4(1)	Law applicable to torts – General rule (place of damage)	
Corte di Cassazione	No 19405	22 August 2013		Assessment of damage; Public policy	The application of the normally applicable foreign law ought to be excluded if it fails, as a matter of principle, to provide reparation for the non-pecuniary prejudice consisting in the loss of a loved one.
Tribunale di Bologna	-	17 March 2014	Art. 4(1) and (3) / Art. 14	Law applicable to torts – General rule (place of damage) (escape clause); Freedom of choice (tacit choice)	

Tribunale di Trento	No 1277	11 December 2014	Art. 4(1)	Law applicable to torts – General rule (place of damage); Public policy	
Corte d’Appello di Genova	No 641 <i>Reference to Homawoo</i>	12 May 2015	Articles 31 and 32	Temporal scope	
Tribunale di Modena	-	4 December 2015	Art. 4(1) / Recital 33	Law applicable to torts – General rule (place of damage); Assessment of damage	
Autorità Garante della Concorrenza e del Mercato	No 25881	24 February 2016	Art. 6(1) (arguably)	Law applicable to torts – Unfair competition	
Tribunale di Livorno	-	6 July 2016	Art. 4(1)	Law applicable to torts – General rule (place of damage)	
Autorità Garante della Concorrenza e del Mercato	No 26183	28 September 2016	Art. 6(1) (arguably)	Law applicable to torts – Unfair competition	
Corte di Cassazione	No 20206	7 October 2016		Assessment of damage; Public policy	The socio-economic environment of the victim has no bearing as such on the determination of the quantum of damages.
Tribunale di Bolzano	No 1196	13 October 2016	Art. 4(1)	Law applicable to torts – General rule (place of damage)	
Tribunale di Milano	No 193 <i>Reference to Florin Lazar</i>	10 January 2017	Art. 4(1)	Law applicable to torts – General rule (place of damage); Assessment of damage	
Tribunale di Trento	No 177	17 February 2017	Art. 1(2)(d)	Material scope	The liability of a company director towards the creditors of that company falls outside the scope of the Regulation

Tribunale di Torino	No 1407 <i>Reference to Homawoo</i>	16 March 2017	Articles 31 and 32	Temporal scope	
Tribunale di Monza	No 1036	6 April 2017	Art. 4(2)	Law applicable to torts – General rule (parties having their habitual residence in the same country)	
Tribunale di Trento	No 683	22 June 2017	Art. 4(1) / Art. 26 (implicitly)	Law applicable to torts – General rule (place of damage); Public policy	The mere fact that the applicable foreign law provides for the award of damages that are lower than those awarded under the <i>lex fori</i> is not enough a reason to trigger the public policy exception.
Tribunale di Ivrea	No 596	4 July 2017	Art. 16	Overriding mandatory provisions	
Corte di Cassazione	No 16601	5 July 2017	Recital 32	Punitive damages	Foreign judgments awarding punitive damages are not necessarily at odds with Italian public policy.
Tribunale di Firenze	No 3773	23 November 2017	Art. 4(1) / Art. 1(3)	Law applicable to torts – General rule (place of damage); Excluded matters (evidence and procedure)	
Tribunale di Treviso	No 2438	28 November 2017	Art. 4(1)	Law applicable to torts – General rule (place of damage)	
Tribunale di Torino	No 342	24 January 2018	Art. 8(1); Art. 4(1)	Law applicable to torts – General rule (place of damage); Law applicable torts – Infringement of intellectual property rights	
Tribunale di Milano	No 1078 <i>Reference to Florin Lazar</i>	31 January 2018	Art. 4(1)	Law applicable to torts – General rule (place of	

				damage); Assessment of damage	
Tribunale di Bologna	No 510	15 February 2018	Art. 8(1)	Law applicable torts – Infringement of intellectual property rights	
Tribunale di Bergamo	No 958	24 April 2018	Art. 11	Law applicable to non-contractual obligations other than torts – <i>Negotiorum gestio</i>	An Austrian company provided assistance to the victim of an accident occurred during a cycling race in Austria, by making its helicopter available for the purposes of transporting the victim to a hospital nearby. The law applicable to the company's claim for reimbursement is to be determined in accordance with Art. 11 of the Regulation.
Corte di Cassazione	No 10231	30 April 2018		Public policy	Applying a foreign law under which the close relatives of the victim of a fatal accident would be denied any compensation, no matter the circumstances, for the non-material damages suffered as a result of the loss of a loved one, would run against the public policy of Italy.
Corte d'Appello di Milano	No 3323	11 July 2018		Subrogation	
Tribunale di Gorizia	No 351	3 August 2018	Art. 4(1) / Art. 26	Law applicable to torts – General rule (place of damage); Public policy	
Tribunale di Udine	No 1011	10 August 2018	Art. 12	Law applicable to non-contractual obligations other than torts – <i>Culpa in contrahendo</i>	
Corte di Cassazione	No 27164	26 October 2018	Art. 6	Consistent interpretation of the Brussels I <i>bis</i> and Rome II Regulations	



Corte di Cassazione	No 3165	1 February 2019	Recitals 7; Recital 15; Recital 17; Art. 4; Art. 15	Consistent interpretation of the Brussels I <i>bis</i> and Rome II Regulations	
Tribunale di Trieste	No 58	1 February 2019	Art. 4(1)	Law applicable to torts – General rule (place of damage)	
Tribunale di Reggio Emilia	No 503	1 April 2019	Art. 4(2)	Law applicable to torts – General rule (parties having their habitual residence in the same country)	
Tribunale di Viterbo	No 572	2 May 2019	Art. 4(1)	Law applicable to torts – General rule (place of damage)	
Corte d'Appello di Milano	No 2381 <i>Reference to Florin Lazar</i>	3 June 2019	Art. 4(1)	Law applicable to torts – General rule (place of damage)	
Tribunale di Bologna	- <i>Reference to Homawoo</i>	6 November 2019	Art. 32	Temporal scope	
Tribunale di Milano	No 10895	27 November 2019	Art. 4(1) / Art. 26	Law applicable to torts – General rule (place of damage); Public policy	
Tribunale di Siracusa	No 328	9 March 2020	Art. 4(1)	Law applicable to torts – General rule (place of damage)	
Corte d'Appello di Milano	No 774	19 March 2020	Art. 4(2)	Law applicable to torts – General rule (parties having their habitual residence in the same country)	
Corte d'Appello di Trento	No 88	17 April 2020	Art. 4(1) / Art. 26 (implicitly)	Law applicable to torts – General rule (place of damage) / Public policy	

Corte di Cassazione	No 26986	26 November 2020		Characterisation of an obligation as contractual rather than non-contractual	
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Note on the sources of information referred to in this country report: *DeJure* = <https://dejure.it>; *GiustUp* = <https://giustup.it>; *Pluris* = <http://pluris-cedam.utetgiuridica.it>; access to the above databases is limited to paying subscribers.

# Latvia

## Executive Summary

- Practitioners have a limited knowledge of the Rome II Regulation. The national law does not make any reference to the Regulation therefore either national conflict-of-laws rules that are very poorly drafted in the Introduction part of Civil Law adopted in 1937, or domestic substantive law, are applied (*see: part 1 and 2.5(17) of the Report*).
- There are not many cases applying the Rome II Regulation. Even if the representatives of the parties refer to the Regulation in their submissions, in most cases, the courts do not apply it. If the courts apply the Rome II Regulation, they tend to copy the reasoning from other judgments without comparing fact patterns or the validity of the arguments, thus building incorrect case law (*see: 2.5 (21) of the Report*). The commentaries are not used to substantiate the judgments as there are no academic literature on the Rome II Regulation in Latvian, and lack of foreign language knowledge limits judges to use international commentaries (*see: part 1 of the Report*).
- There is some knowledge about the methodology of applying European private international law, including the Rome II Regulation, even though the group of Latvian lawyers have developed the schema of application of the Rome II Regulation in Latvian, for example, guiding the potential users on how to check the temporal, geographical and material scopes of application (*see: part 2. 1. of the Report*).
- Most of the Latvian courts' case law where the Rome II Regulation is applied is related to insurance claims thus the references are made mostly to Art. 4 and 19 (*see: 2.5 (21) of the Report*). There is no case law, discussions or commentaries related to the rules applicable to non-contractual obligations other than general rules thus there is no material as regards areas that are of particular interest for the Commission.
- The case law shows that it is difficult to determine the interrelation between the Rome II Regulation and the 1971 Hague Convention. In one case the 1971 Hague Convention played an important role as – uncharacteristically – the court applied the foreign law (*see: 2.5 (28) of the Report*).
- Even if the parties and the judge acknowledge that the Rome II Regulation should be applied, they may avoid doing so if it leads to the application of foreign law and the determination of its substance. In the latter case, the national law does not give real guidance or help. Moreover, in practice it is difficult, time-consuming and expensive to determine the content of foreign law. The London Convention, unfortunately, is not helpful in this respect (*see: 2.5 (17) of the Report*).

## 1. Introduction

- *How aware of the Rome II Regulation are practitioners, businesses and citizens in your Member State?*

Even if practitioners are aware of the Rome II Regulation, they try not to apply the Regulation as it might lead to the application of foreign law. Moreover, in the opinion of practitioners, the content and the scope of foreign law is hard to determine because of inefficient national procedural law and international legal assistance.

Most likely, businesses and citizens are not aware of the Rome II Regulation.

- *Is the Rome II Regulation generally known and applied by courts in your Member State?*

There are only a few cases where courts have applied the Rome II Regulation. In some of them judges just mention the Regulation but do not refer to a particular article. There are also cases where parties request the judge to apply the Regulation but the judge ignores such request. Most likely again, it is connected with the fact that judges are reluctant to apply foreign law. Moreover, there are only one or two cases where the courts have applied foreign law in practice.

- *Are there any relevant statistics regarding the application of the Rome II Regulation in your Member State?*

No. It is even difficult to find case law where the Rome II Regulation is mentioned or applied.

- *How important is the doctrinal discussion on the Rome II Regulation in your Member State?*

There is no serious doctrinal discussion on the Rome II Regulation in Latvia.

- *Are there specific issues concerning the Rome II Regulation that have caused debate at a doctrinal or political level?*

No.

## 2. Analysis of the Rome II Regulation

### 2.1 Chapter I – Scope and Interpretation

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

1. *The determination of the material scope of application of the Rome II Regulation, including any difficulties in applying the category of “civil and commercial matters” or in defining the exact scope of any excluded matters (Art. 1(1)-(2))*

In most of the cases the representatives and judges do not check the scope of application of the Regulation thus there has not been discussion around the concept of “civil and commercial matters”.

To ensure a correct and systemic application of the Rome II (as well as Rome I and Brussels Ibis), the group of Latvian lawyers have proposed a schema of application of the Regulations<sup>798</sup> providing step by step guidance. Still, even if it is used in academic/university circles, it is rarely applied in practice.

2. *The determination of the temporal scope of application of the Rome II Regulation, Arts 31-32)*

Practitioners do not pay attention to the temporal scope of the Regulations. The Rome II Regulation has been in force for some time thus in practice, even if the practitioners do not check the temporal scope, they might not mistakenly assume that the Regulation applies. However, for example, there is still no understanding regarding the temporal scope of the Brussels I bis Regulation (Art. 66).

3. *The characterization of the **concept of “non-contractual obligations”**, its relationship to the concept of “contractual obligations” and any difficulties in relation to characterisation (Arts. 1(1), 2)*

In practice, there is no in-depth analyses of this concept.

In one case the court dealt with a traffic accident in Estonia and an insurance claim. The owner of the bus (the plaintiff, Latvian company) submitted a claim against the Lithuanian and Latvian insurer companies for compensation of damages, arguing that damages were caused by the insurer delaying payment of the compensation. By submitting the compensation request the plaintiff suggested that they had joined the insurance agreement concluded by the insurers and the insured person that caused an accident. The court concluded that there was no contractual relationship between the plaintiff and defendants. Moreover, if there had been, the claim was not within the temporal scope of the Rome I Regulation (an agreement was concluded 2 August 2009). The court decided that the traffic accident was a clear delict and the Rome II Regulation shall be applied.<sup>799</sup>

It shall be added that in this case at hand the court referred to some of the Estonian law articles which translation was submitted by the plaintiff but the main legal analysis was based on Latvian substantial law. The Court did not refer to the 1971 Hague Convention.

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<sup>798</sup> Dr. Kačevska I., Dr. Rudevska B., Dr Buka A., Dambergs M., Fillers A. Recommendation and Guidelines “Effective Adoption, Transposition, Implementation and Application of European Union Legislation in the Area of Civil Justice (Latvia, Hungary, Germany, Sweden and the United Kingdom), European Commission, Ministry of Justice of Latvia, 2015, p. 100. Available: [http://kacevska.lv/f/Vadlinijas\\_anglu.pdf](http://kacevska.lv/f/Vadlinijas_anglu.pdf)

<sup>799</sup> Riga City Latgales Suburb Court’s judgment in the case No. C29849910, 01.06.2016.

#### 4. *The universal application of the Regulation (Art. 3)*

After discussions with Latvian lawyers and judges, one can conclude that there is no understanding as to how any other state's law can be applied if the case is adjudicated in Latvia, even more if it is the law of a Non-Member State. Therefore the legal community either does not know that they have to apply foreign law or they seek to apply the escape clause to establish that the case is more closely connected with the law of the forum.

Moreover, in the national Civil Procedure Law there are two very brief articles on applying foreign law [Article 654 ('The Text of Foreign Law') and Article 655 ('Ascertaining Foreign Law')]. Both articles have been drafted in 2004 and have not been changed since. The articles do not clearly state whether the parties shall prove the content of foreign law and how or whether the judge shall apply it *ex officio*.

#### 5. *The approach to interpretation of the Rome II Regulation, and in particular its relationship to other EU private international law instruments (including the recast Brussels I Regulation and the Rome I Regulation) (Recital (7))*

The Brussels I bis Regulation is rather better known to the judiciary and other legal practitioners; however, in general there is no understanding of how these instruments interact. Also in practice, there is a lack of knowledge regarding autonomous qualification of EU concepts.

There are brief commentaries in Latvian regarding interpretation methods in EU private international law;<sup>800</sup> however, there are no references made to this publication in the case law.

## 2.2 Chapter II - Tort/Delict

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to the implementation of:*

#### 6. *The general conflict-of-laws rule for tort/delict, and difficulties that have arisen in your Member State with respect to its application (Art. 4), and in particular:*

There are only a few cases where parties have referred to or a court has applied Art. 4 of the Rome II Regulation.

##### *a. the approach to identifying the place of direct damage in Art 4(1)*

Reference to the Rome II Regulation are mostly made in cases involving traffic accidents caused in other countries and subsequent claims for insurance compensations, thus there had been no particular problems to determine the place of direct damages.<sup>801</sup>

In this regard, one hypothetical outcome can be elaborated. A plaintiff with a Latvian domicile got in a skiing accident with a defendant with a domicile in Italy. The defendant was proven guilty for the accident. A plaintiff submitted a European small claim before a Latvian court pursuant the Brussels I bis Regulation, Art. 7.2 as in the place where the damages continued to occur (the plaintiff had to undergo different surgeries, medical treatments etc.).<sup>802</sup> The parties reached a settlement but had it not been so, the outcome of the case would have been of interest. I.e., in accordance with the European Small Claims Regulation, Art. 12.1, the court shall not require the parties to make any legal assessment of the claim thus the court would have to determine applicable law by itself in accordance with the Rome II Regulation and Italian law would have applied. Firstly, the court was already not comfortable applying the Brussels I bis Regulation and the European Small Claims Regulations and doubtfully, whether it would realize that it shall determine applicable law in the case. Secondly, under national procedural law, most likely, the plaintiff would have to prove the content of the Italian law what would be in conflict with European Small Claims Regulation. Thirdly, one could doubt why jurisdiction but not the applicable law could be tied to Latvia.

##### *b. the approach to the first rule of displacement in Art 4(2) in cases involving multiple parties or claims*

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<sup>800</sup> Dr. Kačevska I., Dr. Rudevska B., Dr Buka A., Dambergs M., Fillers A. Recommendation and Guidelines "Effective Adoption, Transposition, Implementation and Application of European Union Legislation in the Area of Civil Justice (Latvia, Hungary, Germany, Sweden and the United Kingdom), European Commission, Ministry of Justice of Latvia, 2015, p. 16-62. Available: [http://kacevska.lv/f/Vadlinijas\\_anglu.pdf](http://kacevska.lv/f/Vadlinijas_anglu.pdf)

<sup>801</sup> See: Riga City Latgales Suburb Court's judgment in the case No. C29849910, 01.06.2016; Riga City Ziemeļu Suburb Court's judgment in the case No. C32288214, 14.11.2016.

<sup>802</sup> Zemgale District Court case No. C73301118, unpublished.

Publicly, there are no case or commentaries available where this Art. is applied.

*c. the approach to the escape clause in Art 4(3), and*

Publicly, there are no case or commentaries available where this Art. is applied. However, there is one case concerning the Rome I Regulation where the court found that since the habitual residence of the carrier and the place of receipt of goods agreed by the parties were in Estonia, Estonian law applied. However, after reaching this solution, it continued its analysis by referring to the escape clause of Article 4(3) of the Rome I Regulation. The court underlined that the habitual residence of the consignor (the forwarding agent) was in Latvia and it was the consignor who determined the place of receipt. Moreover, both parties had referred to Latvian law in their submissions, indicating their will to be subjected to Latvian law. The sum of these circumstances showed that the contract was manifestly more closely connected to Latvia than Estonia, hence Latvian law applied.

The only connecting factor to Latvia was the habitual residence of the consignor thus it is clearly shown that the court used the escape clause to ensure that its law applies and it did not even elaborate on the parties' implicit agreement on applicable law.<sup>803</sup>

In many cases the courts copy the reasoning of other judgments without comparing the factual background, applicable instrument or validity of arguments, very similar outcome could be also in applying Art.4(3) of the Rome II Regulation.

Even if Art. 4(3) is not applied directly, the courts still try to avoid the application of foreign law, i.e., just formally mentions it but then give a legal arguments based on the national substantive law. See example in part 2.1(3).

*d. the suitability of this set of rules to govern cases of prospectus liability or other financial market torts*

Publicly, there are no case available where this Art. is applied.

*7. The rule on **product liability** (Art. 5) and, where relevant, the interaction with the application of **1973 Hague Convention on the Law Applicable to Products Liability**;*

Publicly, there are any case or commentaries available where this Art. is applied. Latvia is not a party to the 1973 Hague Convention.

*8. The specific rule on **unfair competition** (Art. 6)*

There is no direct reference to this Art., but it was applied in one case. In one case the court had to decide whether a claim based on the infringement of a trade secret fell within the scope of an arbitration agreement, and it applied both national law and the Rome II Regulation, Art. 8, thus concluding that torts were not within the scope of the arbitration agreement.<sup>804</sup> The court had to apply the Regulation directly without any reference to the national substantive law. Moreover, it is doubtful whether Art. 8 applies in the case at hand as trade secrets do not fall within scope of Art. 8. Art. 6 would probably apply.

*9. The specific rule on **environmental damage** (Art. 7)*

Publicly, there are no case available where this Art. is applied.

*10. The specific rule on **infringements of intellectual property rights** (Arts. 8, 13)*

See above para. 8

*11. The specific rule on **industrial action** (Art. 9)*

Publicly, there are no case available where this Art. is applied.

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<sup>803</sup> City of Riga Northern District Court's judgment in the case No. C33687116, 03.08.2017.

<sup>804</sup> Supreme Court judgment in the case No.C04154813, 04.07.2013.

## 2.3 Chapter III - Unjust Enrichment, *Negotiorum Gestio* and *Culpa In Contrahendo*

Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to the implementation of:

12. The specific rule on **unjust enrichment** (Art. 10), including its relationship with the general rule for tort/delict in Art. 4.

13. The specific rule on ***negotiorum gestio*** (Art. 11)

14. The specific rule on ***culpa in contrahendo*** (Art. 12)

Publicly, there are no case or commentaries available where this Art. is applied.

## 2.4 Chapter IV - Freedom of Choice

Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:

15. The implementation in legal/business practice and by courts of the rule on **freedom of choice**, any difficulties therein and **any discussion that has been carried out in your Member State regarding possible reasons which would justify the need to rethink it** (Art. 14)

There is no discussion within the legal/business environment to rethink Art. 14 of the Regulation. However, there is one case of particular interest. This case between two Latvian companies concerned an insurance compensation claim arising from a traffic accident in Lithuania. The Appellate court agreed with the submissions of the plaintiff and decided that the defendant had tacitly agreed to apply Latvian law because the defendant had not referred to it and did not submit the Lithuanian law during proceedings. In the Supreme Court the defendant objected to the existence of an implied agreement pursuant Art. 14 of the Rome II Regulation.

In its decision the Supreme Court indicated, first, that a choice of forum did not automatically entail a choice of the applicable law. Then the Supreme Court briefly discussed the concept of 'an agreement freely negotiated' being a mandatory precondition for the consensus on the applicable law. The court annulled the judgment of the appeal court and sent the case back for re-consideration, noting that the lower court had to determine the relevant applicable law and also evaluate the interrelation between the Rome II Regulation and the Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents.<sup>805</sup>

See also the case cited in part 22 (6) c of this report.

## 2.5 Chapter V - Common Rules

Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:

16. The scope of the exclusion of 'evidence and procedure' in Art 1(3) and any difficulties in relation to that exclusion or to questions of formal validity or the burden of proof (Arts. 21-22)

Publicly, there are no case or commentaries available where this Art. is applied.

17. The approach in your Member State to questions of pleading, proof and application to individual cases of the substantive rules of the law applicable under the Rome II Regulation governing non-contractual obligations.

As indicated above, the national legal framework is not suitable for the application of foreign law therefore there is some professional discussion as to whether the burden of proof of the applicability of foreign law is on the party and whether the court shall examine conflict-of-laws rules only when one of the parties refers to conflict of law or foreign law.

In court practice, foreign law is treated as a 'fact' and the case law shows that the parties shall prove the content of the law.

One case seamlessly illustrates how it works in practice. In an insurance claim between two Latvian companies regarding a traffic accident in Germany, the court decided that German law should be applied pursuant to Article 4

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<sup>805</sup> Supreme Court of Latvia's judgment in the case No. SKC-90/2015 01.07.2015.

of the Rome II Regulation. The plaintiff only submitted the judgment of the German Supreme Court in which relevant German law had been referred to and interpreted. The court was of the opinion that the judgment was not a legal act on which the claim could be based and the plaintiff had to submit a translation of the text of the foreign law in the official language as required by the Civil Procedure Law. The plaintiff did not do so and the claim was dismissed.<sup>806</sup> The court of second instance disagreed with such a formal approach and decided that submission of the German law was not significant in the case at hand; firstly, because the judgment of the German Supreme Court was sufficient to determine the substance of the law; and secondly, because the defendant did not object on the application of this foreign court's judgment.<sup>807</sup>

It shall be indicated that Latvia is a party to the European Convention of 7 June 1968 on Information on Foreign Law; however, this instrument is not often used. Firstly, because judges may not know it; secondly, it is not so effective and delays the proceedings. There are no reported cases where this Convention is used but most likely, if the court does not receive the information on foreign law from other country, it would lead to the application of domestic substantial law.

*18. The delimitation of the scope of the applicable law (Art. 15(a)-(h)), including any difficulties as its relationship to the issues addressed at points 16 17 above)*

Publicly, there are no case or commentaries available where this Art. is applied.

*19. The application of the rule on **overriding mandatory provisions** (Art. 16)*

Publicly, there are no case or commentaries available where this Art. is applied. Moreover, as there is almost no case law involving the application of foreign law, this issue has not been treated or discussed. And in practice it would be rather difficult to recognize the overriding mandatory rules as they are usually not identified.

*20. The application of the specific rule on **direct action against the insurer of the person liable** (Art. 18)*

Most of the case law in Latvian where Rome II is referred to relates to claims against insurers but this particular Art. is not applied in those cases.

*21. The application the specific rule on **subrogation** (Art. 19)*

There are a few cases with very similar factual background<sup>808</sup> where the judges have borrowed legal argumentation from each other.

A car was stolen from a person domiciled in another Member State. The foreign insurer paid compensation and received property rights. Then the insurer identified a person in Latvia who had bought the stolen car (in good faith) and then this foreign insurer brought a claim before a Latvian court against a person domiciled in Latvia. The plaintiffs framed their claims as property claims for the return of possession of the vehicle.

The courts had very similar judgments and in all cases, Art. 19 of the Rome II Regulation was referred to in order to verify whether the insurer was the owner of the vehicle without further elaboration. Namely, the courts did not use the Rome II Regulation to determine the law applicable to the claim, but only used Article 19 to justify the right of the insurer to bring a claim against the third party.

From a theoretical point of view, it is interesting to know whether the Rome II Regulation applies to *rei vindicatio*, i.e. a claim for return of the property at all, as there are different international opinions.

One could suggest that this could be defined as claim deriving from unjust enrichment.

*22. The application of the specific rule on **multiple liability** (Art.20)*

Publicly, there are no case available where this Art. is applied.

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<sup>806</sup> Riga City Ziemeļu Suburb Court's judgment in the case No. C32288214, 14.11.2016.

<sup>807</sup> Riga District Court's judgment in the case No. C32288214, 15.03.2017.

<sup>808</sup> Supreme Court of Latvia's judgment in the case No. SKC-79/2015, 17.12.2015; Riga Regional Court's decision in the case No. CA-2554-12/9, 20.11.2012; Kurzeme Regional Court's decision in the case No. C28381812, 14.07.2014.



## 2.6 Chapter VI - Other Provisions

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

*23. The implementation of the concept of habitual residence in the Rome II Regulation, with reference both to persons covered by Art 23 and natural persons acting otherwise than in the course of business*

There is no discussion regarding this issue neither in case law or academic papers; however, in practice there might be problems to define a natural person's habitual residence and to distinguish it from the concept "domicile".

Moreover, after some comparative research regarding MS national law, it might be concluded that the concept of a natural person's "domicile" is defined very similarly thus it is questioned why the EU legislator cannot make it an autonomous concept?

*24. The application of and any difficulties with the specific rules on exclusion of renvoi (Art.24) and States with more than one legal system (Art.25)*

There has been no academic discussion on those issues. In theory, since the Member States have adopted the Rome II Regulation, they have agreed to avoid the application of their own conflict-of-laws rules. Hence, when the said Regulation indicates the law of a Member State, *renvoi* is technically impossible.

But *renvoi* could be more relevant where the applicable law is that of a third state having their own conflict-of-laws system.

*25. The application of and any difficulties with the specific rule on public policy of the forums (Art. 26)*

Publicly, there are no case available where this Art. is applied.

*26. Practical interaction between the Rome II Regulation and other EU and international legal instruments, in specific areas such as environmental damages, intellectual property rights or data protection (Arts. 27, 28, 29)*

Publicly, there are no case available where this Art. is applied.

## 2.7 Comments on other Practical Problems

*These areas are of particular interest for the Commission. Please be as precise as possible regarding any issue that has been reported on:*

*27. The impact of the application of the 1971 Hague Convention on the law applicable to traffic accidents on legal certainty (where relevant for your Member State)*

Interaction between the Regulation and the Convention is a very topical question in court practice.

The 1971 Hague Convention entered into force in Latvia on 15 October 2000.<sup>809</sup> There are no official statistics regarding the application of this Convention in Latvia but there are cases. One of the cases is unique, as the appellate court applied foreign law, which is very rare in Latvian case law. The court applied Lithuanian law, which was submitted by the claimant because the traffic accident occurred in Lithuania (Article 3 of the 1971 Hague Convention).<sup>810</sup> It did so because the Supreme Court returned this case for reconsideration to the second instance and instructed the court of appeal to consider the interrelation between the Rome II Regulation and the 1971 Hague Convention. Specifically, the Supreme Court noted that the 1971 Hague Convention did not allow the parties to implicitly choose the applicable law.<sup>811</sup>

In the case at hand, the 1971 Hague Convention played an important role as – uncharacteristically – the court applied foreign law. However, since the practice is so limited, it is hard to elaborate on other aspects of the application of the Regulation and Convention.

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<sup>809</sup> Par 1971. gada 4. maija Hāgas konvenciju par ceļu satiksmes negadījumiem piemērojamo likumu (Law on Convention on the Law Applicable to Traffic Accidents) [2000] Latvijas Vēstnesis No. 244/246, 30.06.2000.

<sup>810</sup> Riga Regional Court's judgment in the case No. C30631610, 28.09.2015.

<sup>811</sup> Supreme Court of Latvia's judgment in the case No. C30631610 SKC-90/2015, 01.07.2015.

28. *Any other practical problems with respect to the application or interpretation of the Rome II Regulation, including but not limited to the suitability of the mosaic approach*

Publicly, there are no case available where this Art. is applied.

### 3. Comments on areas of interest

*These areas are of particular interest for the Commission. Please be as precise as possible regarding any issue that emerged in your Member State regarding:*

29. *The exclusion of violations of privacy and rights relating to personality, including defamation, from the scope of the Rome II Regulation and any difficulties arising out from differences among Member States' rules in cross-border situations*

Publicly, there are no case or commentary available where this Art. is applied.

30. *Any comment regarding the Interplay of the Rome II Regulation with the treatment of defamation and data protection, and, in these areas, the relevance of Strategic Lawsuits Against Public Participation (SLAPPs)*

Publicly, there are no case or commentary available where this Art. is applied.

31. *The extent to which Rome II Regulation has been applied to corporate abuses against human rights and lays down an effective set of rules to regulate non-contractual liability;*

Publicly, there are no case or commentary available where this Art. is applied.

32. *The impact of the development of artificial intelligence on the Rome II Regulation, and in particular on the suitability of the rules that it contains to regulate non-contractual liability.*

Publicly, there are no case or commentary available where this Art. is applied.

#### 4. List of national case law

<u>Court or tribunal</u>	<u>Case name and reference number</u>  <u>Reference to decision of the Court of Justice if applicable</u>	<u>Date</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings (only for key cases)</u>
Riga District Court	C29298118 <sup>812</sup>	4.12.2019	Art. 4.1 Art. 15	Insurance, traffic accident	
Riga City Vidzeme Suburb Court	C30482117 <sup>813</sup>	11.10.2018	Art. 19	Insurance	
Riga District Court	C32288214 <sup>814</sup> C-359/14 and C-475/14 Ergo Insurance	15.03.2017	Art. 4.1	Insurance, traffic accident	
Riga City Latgale Suburb court	C29849910 <sup>815</sup>	01.06.2016	Art. 4.1 Art. 28	Insurance, traffic accident	
Supreme Court	SKC-79/2015 (C39067707) <sup>816</sup>	17.12.2015	Art. 19	Insurance, theft, Subrogation	§ 7.3. "Taking into consideration that legal relationship between insured /pers. F/ and

<sup>812</sup> <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/396357.pdf>

<sup>813</sup> <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/398425.pdf>; ECLI:LV:RVPT:2018:1011.C30482117.1.S

<sup>814</sup> <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/303336.pdf>

<sup>815</sup> <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/276212.pdf>

<sup>816</sup> <http://at.gov.lv/downloadlawfile/2917>

				<p>A foreign insurer brought a claim before a Latvian court against a person domiciled in Latvia. A car was stolen from a person domiciled in another Member State. The insurer paid compensation and received property rights. Then the insurer identified a person in Latvia who has bought the stolen car.</p> <p>The plaintiff requested property claims for the return of possession of the vehicle.</p>	<p>insurer SAS "ERGO Lietuva" emerges from the insurance contract concluded in Lithuania, the question about insurers obligation to satisfy claims of insured as well as the transfer of ownership or subrogation are governed by the Lithuanian law, which within the meaning of the Regulation is imperative for resolving the dispute of non-contractual obligations."</p> <p>§ 7.5. "In the conclusions of the appealed judgment the Appeal court regarding the transfer of property rights of movable assets from /pers. F/ (insured) to SAS "Ergo Lietuva" (insurer) has not considered whether the foreign law shall be applied; instead the court has applied the Civil Law of the Republic of Latvia to determine the property rights of the claimant to the reclaimed assets. These grounds are reason to revoke the appealed judgment in part."</p>
Supreme Court	SKC -90/2015 (C30631610) <sup>817</sup>  C-463/06 FBTO Schadeverzekeringen NV v Jack Odenbreit	01.07.2015	Art. 14 Art. 28 Art. 31	<p>Plaintiff SIA "Ugo auto" submitted claim against insurer "ERGO Latvija" for insurance compensation.</p> <p>The court applied Lithuanian law, which was submitted by the plaintiff because the traffic accident occurred in</p>	<p>§ 11 [...] [<i>Regarding Art. 14.1 of Regulation</i>] "Freedom of choice is mandatory precondition for agreement on applicable law but in the case at hand the parties have not agreed on applicable law in writing or orally (evidenced in writing). There is no such agreement in this case as the defendant has objected to the plaintiff's suggestion to apply the Latvian law both in the first and appeal's instance."</p>

<sup>817</sup> <http://www.at.gov.lv/downloadlawfile/2906>

				Lithuania (Article 3 of the 1971 Hague Convention).	<p>§ 14 [...] "1971 Hague Convention does not directly allow parties to agree on applicable law .</p> <p>Therefore the court, reviewing the dispute, initially shall consider the interaction between mentioned convention and regulation No. 864/2007 what was not done. [...]</p> <p>Only after determination of the applicable material law (Latvian and/or foreign) the court can decide whether SIA "Ugo auto" is the person suffering damages from the traffic accident and it is entitled to insurance compensation and whether the insurer has obligation to pay any sums of damages".</p> <p>The judgment of appeal court was revoked and sent for reconsideration.</p>
Riga District Court	C28375210 <sup>818</sup>	7.04.2014	Plaintiff mentions regulation without specific article, the court did not apply regulation	Insurance Unlawful possession	
Kurzeme District Court	C28381812 <sup>819</sup>	14.07.2014	Ar.19	Insurance	

<sup>818</sup> <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/223480.pdf>

<sup>819</sup> <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/183479.pdf>

Riga District Court (also Supreme Court)	C04154813 <sup>820</sup>	27.08.2013	Art. 8	Interim measures, trade secret	
Riga District Court	C31198708	20.11.2012	Art. 19	Insurance	

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<sup>820</sup> <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/369747.pdf>

# Lithuania

## Executive Summary

After the analysis of the relevant regulations of the Republic of Lithuania and European Union international legal acts, national case law and doctrine cited herein, the following main conclusions related to the application of the Rome II Regulation and interpretation of the provisions thereof can be presented:

- In the event of a conflict over the law applicable to non-contractual relations, it shall be decided in accordance with the private international law. Conflict-of-law rules of private international law are regulated in Chapter II "Private International Law" of the Civil Code of the Republic of Lithuania and in other laws and bilateral or multilateral international treaties. Paragraph 1 of Article 1.10 of the Civil Code of the Republic of Lithuania states that foreign law shall apply to civil relations when international agreements, agreements between the parties or laws of the Republic of Lithuania so provide. It is noted that the Rome II Regulation is directly applicable in all EU Member States and therefore national rules of private international law do not apply when they overlap with the rules of the Rome II Regulation.
- It must be acknowledged that areas of special interest to the European Commission - financial market torts, corporate abuses against human rights, artificial intelligence, and SLAPPs - have not been examined in the works of researchers of the Republic of Lithuania, and there is no case law in Lithuania related to these areas.
- After analysing the case law of Lithuanian courts of all instances, it can be concluded that the Rome II Regulation is applied in Lithuania to a narrow scope of cases. Almost all disputes related to the provisions of the Rome II Regulation concerned the determination of the applicable law in cases regarding recourse claims in insurance legal relationships, such as between insurers of a towed and towing motor vehicles, or the insurer and the person responsible for the damage.
- The main problems related to the application of the Rome II Regulation and / or interpretation of the provisions thereof are the following: 1) the "Rome II" Regulation is applied in a narrow scope of cases; 2) the courts avoid developing and interpreting the provisions of the "Rome II" Regulation and simply rely on the previous precedents of courts in similar cases; 3) the courts do not refer to a specific paragraph of the article when they apply a certain provision of the "Rome II" Regulation (usually Article 4 (1)).
- The Supreme Court of Lithuania referred a question regarding the determination of the applicable law to the CJEU for a prejudicial ruling in 2014 in a case between two insurers concerning a recourse claim, etc.

## 1. Introduction

- *How aware of the Rome II Regulation are practitioners, businesses and citizens in your Member State?*

Due to limited number of relevant cases in LT, practitioners, businesses and citizens in Lithuania lack practical experience in examining and applying the Rome II Regulation. .

- *Is the Rome II Regulation generally known and applied by courts in your Member State?*

The principles of direct application and universal binding nature of the Rome II Regulation are recognised in Lithuanian courts of all instances. However, the Rome II Regulation is applied to a narrow scope of situations. In most cases, the application and interpretation of the provisions of the Rome II Regulation in national case law relate exclusively to a number of provisions, such as Article 1 (Scope), Article 4 (General rule), Article 20 (Multiple liability), Article 31 (Application in time), Article 32 (Date of application). In applying the provisions of the Rome II Regulation, Lithuanian courts avoid interpreting and developing the contents of the provisions of the Regulation and mainly rely on the precedents established by courts in previous similar cases.

- *Are there any relevant statistics regarding the application of the Rome II Regulation in your Member State?*

There are no statistical data on the application of the Rome II Regulation in the Republic of Lithuania.

- *How important is the doctrinal discussion on the Rome II Regulation in your Member State?*

In Lithuania, at the doctrinal level, insufficient attention is paid to issues related to the application of the Rome II Regulation. For researchers and their research topics related to the Rome II Regulation, please see the previously provided List of the main doctrinal sources and List of key experts in Lithuania.

- *Are there specific issues concerning the Rome II Regulation that have caused debate at a doctrinal or political level?*

The issues examined by the researchers in relation to the Rome II Regulation can be seen from the provided *List of the main doctrinal sources*. Specifically, V. Mizaras, in his article "Results of the unification of private international law in the European Union: the Rome I and Rome II Regulations", has analysed the provisions of these regulations in comparison with the national provisions of private international law<sup>821</sup>. J. Grigienė and E. Laurišaitė in their article "Abuse of the conflict of law rules" examined cases of the abuse of the conflict of law provisions, including *law shopping* and *forum shopping*<sup>822</sup>. Other specific issues have not been addressed yet.

To date, no discussions have taken place at the political level in Lithuania regarding the Rome II Regulation.

## 2. Analysis of the Rome II Regulation

### 2.1 Chapter I – Scope and Interpretation

1. *The determination of the material scope of application of the Rome II Regulation, including any difficulties in applying the category of "civil and commercial matters" or in defining the exact scope of any excluded matters (Art. 1(1)-(2)).*

The court shall determine each time *ex officio* whether the Rome II Regulation is applicable in a particular case. Taking into account that, as mentioned, in the case law of Lithuanian courts the Rome II Regulation is applied in almost all cases regarding the right to recourse claims, the courts follow the previously established court precedents, therefore there are no special difficulties.

As regards the legal term "civil and commercial matters" used in Article 1(1) of the Rome II Regulation, there are no difficulties in applying or delimiting this term. The concepts provided in this term are the subject of national regulation.

2. *The determination of the temporal scope of application of the Rome II Regulation (Arts 31-32).*

In the case law of Lithuanian courts, when interpreting the provisions of Articles 31-32 of the Rome II Regulation, the practice of the Court of Justice of the European Union is taken into account<sup>823</sup>.

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<sup>821</sup> Vytautas Mizaras. "Results of the unification of private international law in the European Union: The Rome I and Rome II Regulations." Vilnius: *Justitia*, 2008, nr. 4 (70), p. 2 – 24; 2009, nr. 1 (71), p. 2-18.

<sup>822</sup> [https://www.vdu.lt/cris/bitstream/20.500.12259/30767/1/ISSN2029-4239\\_2012\\_N\\_1\\_8.PG\\_5-24.pdf](https://www.vdu.lt/cris/bitstream/20.500.12259/30767/1/ISSN2029-4239_2012_N_1_8.PG_5-24.pdf)

<sup>823</sup> For instance, the ruling of 17 November 2011 in *Deo Antoine Homawoo v Commission GMF Assurances SA* (C-412/10), clarified that: 1) the national court should apply the Rome II Regulation only for the events causing damages that took place since 11 January 2009; 2) the only moment to be taken into account is when the event which caused the damage occurred (Article 31); 3) Article 31 of the Rome II Regulation cannot be interpreted irrespective of the date of application laid down in Article 32.



Only two cases have been identified in the national case law where the question of the temporal application of the Rome II Regulation was raised.

For example, the Supreme Court of Lithuania in its ruling in the civil case no. 3K-3-292/2014 held that the Rome II Regulation was not applicable in the case because the accident which caused the damage occurred on 24 April 2008, and in accordance with Article 32 of the Regulation, the Rome II Regulation only entered into force on 11 January 2009 (with the exception of Article 29, which entered into force on 11 July 2008). Article 31 of the Regulation also provides that the Regulation is to apply only to events occurring after its entry into force.

The Supreme Court in its case No. 3K-3-415/2014 (wherein the court referred for a prejudicial ruling) stated that "In the examined case, the insurance contracts of both vehicles were concluded later than 17 December 2009, and the traffic accident occurred in 21 January 2011, therefore, in terms of time, the provisions of the Rome I and Rome II Regulations, which replace national conflict-of-law rules in their scope of application (Articles 31 and 32 of the Rome II Regulation), should be applied."

The analysis of the case law suggests that there are no problems with the application of Articles 31 and 32 of Rome II Regulation, as the court decides, depending on the date of the accident and the date of entry into force of this Regulation, whether the provisions of the Rome II Regulation can be invoked in a particular dispute.

3. *The characterization of the concept of "non-contractual obligations", its relationship to the concept of "contractual obligations" and any difficulties in relation to characterisation (Arts. 1(1), 2).*

In its prejudicial ruling of 21 January 2016 in joined cases C-359/14 and C-475/14, the Court of Justice of the European Union stated that, as regards the respective scopes of application areas of the Rome I and Rome II Regulations, it should be noted that the terms "contractual obligations" and "non-contractual obligations" used therein must be interpreted independently, largely on the basis of the scheme and objectives of these regulations (see paragraph 44 of the prejudicial ruling for reference).

A "non-contractual obligation" must also be understood as an obligation arising from one of the events listed in Article 2 of this Regulation, i.e. in accordance to the Article 2 of the Rome II Regulation, it applies to obligations arising out of damages, i.e. any consequences arising from delict, unjust enrichment, *negatorium gestio* or *culpa in contrahendo*. This interpretation was provided in a preliminary ruling on which national courts of all instances rely.

Recital 11 of Rome II Regulation states that "The concept of a non-contractual obligation varies from one Member State to another. For the purposes of this Regulation, a non-contractual obligation should therefore be understood as an independent concept." Thus, the concept of a "non-contractual obligation" is the subject of Lithuanian national regulation.

In addition, the scope of the Rome II Regulation (Article 1) is directly linked to the list of non-contractual obligations (Article 2). Therefore, in accordance with the above-mentioned interpretation of the CJEU, Lithuania follows the list of non-contractual obligations established in Article 2 of the Rome II Regulation.

As regards the relationship between "non-contractual obligations" and "contractual obligations", it is necessary to pay attention to the following. In the past, there was a lack of consensus regarding the separation of contractual and non-contractual obligations. However, it is currently the established case law of the Supreme Court of Lithuania in its ruling of 7 december 2017 in civil case no. 3K-3-389-915/2017 mentioned, that, for example, in resolving disputes regarding a traffic accident in a foreign country, the civil legal relations based upon the vehicle driver's mandatory civil liability insurance agreement between an insurer and a third person who was inflicted with damage is a delict liability relation. Meanwhile, the civil legal relationship between the policyholder and the insurer or between both insurers is of a contractual nature.

No other disputes concerning delimitation of "contractual obligations" and "non-contractual obligations" have arisen in Lithuania to date.

4. *The universal application of the Regulation (Art. 3)*

The general application of the Rome II Regulation is recognised in Lithuania, therefore there are no difficulties with the interpretation or application of this provision in practice and doctrine.

5. *The approach to interpretation of the Rome II Regulation, and in particular its relationship to other EU private international law instruments (including the recast Brussels I Regulation and the Rome I Regulation)(Recital (7))*

The relationship between the Rome II Regulation and other private international law instruments of the European Union inevitably give rise to new conflicts.

As regards the relationship between the Rome II Regulation and the Brussels I Regulation, recital 7 of the Rome II Regulation provides that "the substantive scope of application and provisions of this Regulation should be aligned with the 22 December 2000 Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I") and on instruments relating to the law applicable to contractual obligations."

In this context, the Vilnius City District Court and the Supreme Court of Lithuania in cases no. C-359/14 and C-475/14 sought, in their references for a preliminary ruling, an interpretation of the Rome I and Rome II Regulations and Directive 2009/103 in order to determine the law applicable to the right of recourse of the insurer of the truck, which had compensated the person injured during the accident, towards the insurer of the trailer which was towed during the accident.

## 2.2 Chapter II – Tort /Delict

6. *The general conflict-of-laws rule for tort/delict, and difficulties that have arisen in your Member State with respect to its application (Art. 4), and in particular:*

a. *the approach to identifying the place of direct damage in Art 4(1)*

As can be seen from the Case Summary Form, in Lithuania the most common cases involve recourse claims, in which the court decides on the applicable law in accordance with Article 4 (1) of the Rome II Regulation. For instance, ruling of the Supreme Court of Lithuania of 15 June 2016 in civil case no. 3K-3-203-969/2016; ruling of Vilnius Regional Court of 20 September 2016 in civil case no. 2A-19-585/2016; ruling of Kaunas Regional Court of 6 October 2016 in civil case no. 2A-1228-657/2016, etc.

b. *the approach to the first rule of displacement in Art 4(2) in cases involving multiple parties or claims*

The analysis of the national case law reveals only one case in which Article 4 (2) of the Rome II Regulation had been applied.

The Panevėžys Regional Court, which heard an appeal in the civil case No. 2A-749-212/2018 has ruled that, in accordance with Article 4(2) of the Rome II Regulation, the law of the State of registration of the vehicles applies to the administration of damages. As both the wrongdoer's and the victim's vehicles were registered in the Republic of Lithuania, the Lithuanian law has been applied instead of the law of Germany. Thus, the court interpreted the *habitual residence* of the defendant and the injured party at the time of the infliction of damage as the law of the place of registration of the vehicles of both parties.

c. *the suitability of this set of rules to govern cases of prospectus liability or other financial market torts*

Until this date, there have been no instances in Lithuanian case law on the issue.

7. *The rule on product liability (Art. 5) and, where relevant, the interaction with the application of 1973 Hague Convention on the Law Applicable to Products Liability;*

Paragraph 5 of Article 1.43 of the Civil Code of the Republic of Lithuania states that the obligations arising from damage caused by products of inadequate quality are governed by the law of the place of damage if the victim has a permanent residence in that country or the business of the person responsible for the damage is located in this country or the injured party has purchased the product in that country. If the injured party's habitual residence state is the same

state the person, responsible for the damage, has his business in, or the injured party has bought the product in that country, the injured party's habitual residence state's law is applied. If the law applicable cannot be determined on the basis of the criteria listed in this paragraph, the law of the State of the person liable shall apply, unless the claimant bases his claim on the law of the State where the damage was caused.

Lithuanian courts' practice is based on the provisions of the national civil law, without referring to the 1973 Hague Convention on Product Liability.

8. *The specific rule on **unfair competition** (Art. 6)*

Article 6 of the Rome II Regulation refers to the national law of the states, therefore Lithuanian law is applied to competition disputes in accordance with the Law on Competition of the Republic of Lithuania.

9. *The specific rule on **environmental damage** (Art. 7)*

The analysis of the case law of the Lithuanian courts has not revealed any cases where Roma II applied, specified in Article 7 of the Rome II Regulation, relating to *Environment damage*, as all the cases examined so far have been of a national nature.

10. *The specific rule on **infringements of intellectual property rights** (Arts. 8, 13)*

To date, the case law of Lithuanian courts has not included the application of the choice of law provisions enshrined in Articles 8 and 13 of the Rome II Regulation relating to infringements of intellectual property rights.

11. *The specific rule on **industrial action** (Art. 9)*

In the case law of the Lithuanian courts, no cases in which Article 9 of the Rome II Regulation, establishing choice of law rules for *Industrial actions*, was applied were found.

## 2.3 Chapter III – Unjust Enrichment, *Negotiorum Gestio* and *Culpa In Contrahendo*

12. *The specific rule on **unjust enrichment** (Art. 10), including its relationship with the general rule for tort/delict in Art. 4.*

No instances of application of the *Unjust enrichment* provision established in Article 10 of the Rome II Regulation were found in Lithuanian case-law, including its relationship to the general tort rule in Article 4 of the Rome II Regulation.

13. *The specific rule on **negotiorum gestio** (Art. 11)*

There have been no cases in Lithuanian case law in which the special rule of *Negotiorum gestio* enshrined in Article 11 of the Rome II Regulation had been applied.

14. *The specific rule on **culpa in contrahendo** (Art. 12)*

Up to date, there are no instances in Lithuanian case law of application of the *Culpa in contrahendo* provision, enshrined in Article 12 of the Rome II Regulation.

## 2.4 Chapter IV – Freedom of Choice

15. *The implementation in legal/business practice and by courts of the rule on **freedom of choice**, any difficulties therein and **any discussion that has been carried out in your Member State regarding possible reasons which would justify the need to rethink it** (Art. 14)*

The analysis of case-law shows that the exercise of the freedom of choice enshrined in Article 14 of the Rome II Regulation is rarely encountered in case law. It is much more common for the parties to agree on the applicable law

in a contractual relationship. In Lithuania, there have been no discussions so far on the application of the provision enshrined in Article 14 of the Rome II Regulation and other related problematic issues.

It should be noted that the right of the parties to choose the applicable law is limited. The freedom of choice must be clearly expressed or clear from the circumstances of the case and shall not affect the rights of third parties.

## 2.5 Chapter V – Common Rules

16. *The scope of the exclusion of ‘evidence and procedure’ in Art 1(3) and any difficulties in relation to that exclusion or to questions of formal validity or the burden of proof (Arts. 21-22).*

There are no difficulties in applying Article 1(3) of the Rome II Regulation concerning the non-application of the Rome II Regulation to evidence and procedure and the relationship with the provisions of Article 21-21 of the Rome II Regulation. Article 780 of the Civil Code of the Republic of Lithuania establishes that the provisions of Part VII of this Code regulating international civil proceedings are applied unless an international agreement to which the Republic of Lithuania is a party regulates the respective relations otherwise.

17. *The approach in your Member State to questions of pleading, proof and application to individual cases of the substantive rules of the law applicable under the Rome II Regulation governing non-contractual obligations.*

Due to a limited number of cases, to date, no specific approach could be identified regarding questions of pleading, proof and application to individual cases of the substantive rules of the law applicable under the Rome II Regulation governing non-contractual obligation.

18. *The delimitation of the scope of the applicable law (Art. 15(a)-(h)), including any difficulties as its relationship to the issues addressed at points 16 17 above)*

There are several cases in the case law of the Lithuanian courts, for example ruling of the Supreme Court of Lithuania of 15 December 2017 in case no. 3K-3-390-701/2017; the Supreme Court of Lithuania of 6 May 2016 in case no. 3K-3-187-701/2016, in which Articles 15(a) and (b) of the Rome II Regulation have been invoked, but other Articles have not been applied. For example, the Supreme Court of Lithuania in its ruling of 6 May 2016 in civil case no. 3K-3-187-701/2016, based on a prejudicial ruling from the CJEU, stated that “it is for the national court first to determine how the injured persons should be compensated under national law determined in accordance with the Rome II Regulation (in this case German law), while the fault must be distributed among the driver and manager of the truck and to the manager of the trailer (paragraph 61 of the prejudicial ruling). Under Articles 15(a) and (b) of the Rome II Regulation, German law governs the basis, scope and substantiation for the division of liability.”

There was no relationship with the issues addressed in paragraphs 16 and 17.

19. *The application of the rule on **overriding mandatory provisions** (Art. 16)*

Although this rule<sup>824</sup> is usually applied in foreign court decisions within the scope of the statute of limitations, in Lithuania, this provision has not been applied in courts’ practice.

20. *The application of the specific rule on **direct action against the insurer of the person liable** (Art. 18)*

The case law of Lithuanian courts has not included the application of the specific rule on direct action against the insurer of the person liable in Article 18 of the Rome II Regulation.

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<sup>824</sup> For example, in the ruling of 31 January 2019 in Case C-149/18 *Agostinho da Silva Martins*, the CJEU ruled on whether Article 16 of the Rome II Regulation must be interpreted as meaning that a national provision which provides for a limitation period of three years for bringing an action for damages in an accident may be regarded as overriding imperative provision within the meaning of this Article (see: <https://op.europa.eu/en/publication-detail/-/publication/c42dc5ba-518e-11e8-be1d-01aa75ed71a1/language-en/format-PDF> ).

Persons who have suffered damage in Lithuania actively exercise the right to file a direct claim for compensation for damage (pecuniary and / or non-pecuniary) to the insurer of the responsible person.

The obligation of the insurer to pay the insurance indemnity to the injured person amounts to the fulfilment of the contractual obligations arising from the compulsory civil liability insurance contract.

The obligation of the Insurer to indemnify non-pecuniary damage arises on the basis of law, general grounds for indemnification of non-pecuniary damage, i.e. in accordance with Article 6.250, Article 6.283, Article 6.284 of the Civil Code of the Republic of Lithuania.

#### 21. *The application the specific rule on subrogation (Art. 19)*

The Supreme Court of Lithuania indicated<sup>825</sup> the position of the CJEU which provided in its prejudicial ruling that the question of whether the truck's insurer acquires a right of recourse towards the insurer of the trailer after compensating the injured person, must be decided in accordance with Article 19 of the Rome II Regulation, which distinguishes between non-contractual and contractual matters. Under Article 19 of Rome II, the possible exercise of the right of recourse is governed by the law applicable to the obligation of the civil liability insurer to compensate the injured person. The insurer's obligation to cover the policyholder's civil liability rises from an agreement concluded with the policyholder, therefore conditions, under which the insurer can exercise the rights of the person injured during the event against the persons responsible for the event depends on the national legislation regulating the insurance agreement, which is determined according to Article 7 of Rome I Regulation (prejudicial ruling points 56-58).

#### 22. *The application of the specific rule on multiple liability (Art.20)*

The Supreme Court of Lithuania in its ruling of 8 October 2014<sup>826</sup> had referred questions to the CJEU for a prejudicial ruling. One of the questions was whether vehicle insurers should be regarded as debtors liable under the same requirement within the meaning of Article 20 of the Rome II Regulation and the law applicable to their relationships should be determined in accordance with that rule.

The CJEU<sup>827</sup> had explained that, in view of the joint civil liability of the managers of the truck and the trailer, the corresponding obligation to pay the insurance benefit to the injured party arose accordingly for the insurers of both vehicles. An insurer who has performed the joint obligation, acquires the right to claim from another insurer a part of the indemnity paid to the injured party.

However, there has been no *specific case* in Lithuania where Article 20 of the Rome II Regulation was applied.

## 2.6 Chapter VI – Other Provisions

#### 23. *The implementation of the concept of habitual residence in the Rome II Regulation, with reference both to persons covered by Art 23 and natural persons acting otherwise than in the course of business*

Until this date, there have been no instances in Lithuanian case law of application of Article 23 of the Rome II Regulation.

#### 24. *The application of and any difficulties with the specific rules on exclusion of renvoi (Art.24) and States with more than one legal system (Art.25)*

Paragraph 1 of Article 1.14 of the Civil Code of the Republic of Lithuania states that if the applicable foreign law provides for a reference back to the law of the Republic of Lithuania, the law of the Republic of Lithuania shall apply only in the cases provided for in this Code or foreign law.

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<sup>825</sup> Ruling of the Supreme Court of Lithuania of 6 May 2016 in civil case no. 3K-3-187-701/2016.

<sup>826</sup> Ruling of the Supreme Court of Lithuania of 8 October 2014 in civil case No. 3K-3-415/2014.

<sup>827</sup> Ruling of the Supreme Court of Lithuania of 6 May 2016 in civil case no. 3K-3-187-701/2016.

Paragraph 2 of Article 1.14 states that where the applicable foreign law provides for a reference to the law of a third country, the law of the third country shall apply only in the cases provided for in this Code or in the law of the third country.

Paragraph 3 of Article 1.14 provides that if the applicable foreign law in determining the civil legal status of a person refers back to the law of the Republic of Lithuania, the law of the Republic of Lithuania shall apply.

Paragraph 4 of Article 1.14 indicates that paragraphs 1, 2 and 3 of this Article shall not apply if the applicable law is chosen by the parties, as well as in identifying law applicable to the form of the transaction and the law applicable to non-contractual obligations. Paragraph 5 states that if an international agreement (convention) is to be applied in accordance with the provisions of this chapter, the issues of reversal and referral to the law of a third country shall be governed by the provisions of the applicable international agreement (convention).

Article 607 of the Code of Civil Procedure of the Republic of Lithuania provides that if the applicable law of a foreign state refers back to the law of the Republic of Lithuania, the law of the Republic of Lithuania shall apply. The question is dealt with in the same way as in the case of a reference to the law of a third country: if the applicable law refers to the law of a third country, the law of a third country must be applied. According to Article 1.10 of the Civil Code, the term "foreign law" refers only to the substantive law of a foreign State and not to its conflict-of-law rules.<sup>828</sup>

Given that there is one common legal system throughout the territory of Lithuania, the application of the provisions enshrined in Articles 25(1) and (2) of the Rome II Regulation is not relevant.

#### *25. The application of and any difficulties with the specific rule on public policy of the forums (Art. 26).*

The analysis revealed no cases in Lithuania in which national courts had applied the public policy/ordre public clause established in Article 26 of the Rome II Regulation

#### *26. Practical interaction between the Rome II Regulation and other EU and international legal instruments, in specific areas such as environmental damages, intellectual property rights or data protection (Arts. 27, 28, 29)*

Disputes arising in Lithuania regarding environmental damage, intellectual property rights or data protection are of a national character, therefore, to date, there are no practical questions regarding the interaction between the Rome II Regulation and other EU and international legal instruments in the above-mentioned areas.

It is also clear from the provisions of Articles 27, 28, 29 of the Rome II Regulation, that the Rome II Regulation will take precedence, when the provisions of EU law or conventions concluded between Member States will be applicable.

## 2.7 Comments on other Practical Problems

#### *27. The impact of the application of the 1971 Hague Convention on the law applicable to traffic accidents on legal certainty (where relevant for your Member State)*

Lithuania has ratified<sup>829</sup> The Hague Convention on the Law Applicable to Traffic Accidents (hereinafter - the Hague convention) and is therefore subject to the provisions of the Hague Convention.

The obligation to ensure the principle of legal certainty in situations where the conflict of application between the Rome II Regulation and the Hague Convention arises in a specific case falls on the Lithuanian courts.

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<sup>828</sup> The Summary review of the Supreme Court of Lithuania of 21 December 2000 of case law in application of the rules of private international law No. A2-14. Case law. 2000, 14.

<sup>829</sup> Lithuania ratified the Hague Convention on 2 August 2001 by Law no. IX-483.

There are only a few cases in the practice of Lithuanian courts regarding the relationship between the Rome II Regulation and the Hague Convention and the determination of the applicable law to claims for compensation for injury to health or life, which was suffered during a traffic accident.

Article 1.44 of the Civil Code of the Republic of Lithuania provides that the law applicable to claims for compensation for damage caused by an accident is to be determined in accordance with 4 May 1971 Hague Convention on the Law Applicable to Traffic Accidents.

the Supreme Court of Lithuania in its ruling of 6 May 2016 in civil case no. 3K-3-187-701/2016

The Supreme Court of Lithuania in its ruling of 15 June 2016 in civil case no. 3K-3-203-969/2016<sup>830</sup> has emphasized that *"Article 1.44 of Civil Code is a rule referring in all cases to the Hague Convention when deciding the question of the law applicable to claims for compensation for damage caused by an accident. In accordance with Article 1.44 of the Civil Code, the provisions of the Hague Convention shall apply whether or not the conditions laid down in Article 18(4) of that Convention are fulfilled in a particular case."* Consequently, the Hague Convention applies in all cases where a claim for damages is made in the event of an accident. The Hague Convention applies even if the State in which the traffic accident took place has not ratified or otherwise joined the Convention.

For example, the Supreme Court, in its ruling of 3 June 2014 in criminal case No. 2K-280/2014<sup>831</sup> has stated that *"recital 36 and Article 28(1) of the Rome II Regulation provide that the Regulation does not affect the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to non-contractual obligations. One such international convention is the 1971 Hague Convention on the Law Applicable to Traffic Accidents."*

Also in its ruling in civil case no. 3K-3-292/2014 the Supreme Court of Lithuania found that *"the 4 May 1971 The Hague Convention on the Law Applicable to Accidents of 4 May 1971 does not apply to recourse claims and subrogation as far as insurance companies are concerned (Article 2 (5) of the Hague Convention)."*

**28. Any other practical problems with respect to the application or interpretation of the Rome II Regulation, including but not limited to the suitability of the mosaic approach.**

As mentioned above, the main practical problem with the application or interpretation of the Rome II Regulation in Lithuanian law is that the Rome II Regulation is applied in Lithuania only to a narrow scope of cases, i.e. almost only to cases related to disputes arising from the right of recourse.

### 3. Comments on areas of interest

**29. The exclusion of violations of privacy and rights relating to personality, including defamation, from the scope of the Rome II Regulation and any difficulties arising out from differences among Member States' rules in cross-border situations**

Disputes related to privacy and personal rights violations in Lithuania, including defamation, are mostly of a national character<sup>832</sup> or governed by European Union legal acts (i.e. the protection of individuals with regard to the processing

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<sup>830</sup>Ruling of the Supreme Court of Lithuania of 15 June 2016 in civil case no. 3K-3-203-969/2016.

<sup>831</sup>In addition, ruling of the Supreme Court of Lithuania of 13 May 2016 in civil case No. 3K-3-189-469/2016.

<sup>832</sup>To the best of our knowledge, there have been no defamation disputes in Lithuania with a cross-border element.

of personal data<sup>833</sup>), so there are currently no major difficulties found due to differences in Member States' rules in cross-border situations.

30. *Any comment regarding the Interplay of the Rome II Regulation with the treatment of **defamation and data protection**, and, in these areas, the relevance of **Strategic Lawsuits Against Public Participation (SLAPPs)***

Defamation is recognised as a criminal offense in Lithuania, *expressis verbis* enshrined in Article 154 of the Criminal Code of the Republic of Lithuania, therefore the issue of the interaction of defamation with the Rome II Regulation, including SLAPP, does not arise. Meanwhile, to date, all disputes related to the protection of personal data in Lithuania are national. Although manifestations of SLAPP can be detected in Lithuania, as in other countries, they have not been reported to be related to the provisions of the "Rome II" Regulation.

31. *The extent to which Rome II Regulation has been applied to **corporate abuses against human rights** and lays down an effective set of rules to regulate non-contractual liability;*

To date, there have been no cases in Lithuania where the Rome II Regulation had been applied to human rights abuses by companies.

32. *The impact of the development of **artificial intelligence** on the Rome II Regulation, and in particular on the suitability of the rules that it contains to regulate non-contractual liability.*

In the light of active discussions at the level of the European Union on the establishment of common regulation of artificial intelligence in European law and its incorporation into the national legal systems of the Member States, Lithuania also<sup>834</sup> conducts intense discussions regarding the possibility of incorporating the regulation of artificial intelligence into the national legal system.

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<sup>833</sup> For example, in Lithuania, disputes concerning the protection of the rights of natural persons with regard to the processing of personal data are governed by Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, which is a directly applicable legal act.

<sup>834</sup> Since 1992 Lithuanian scientists and researchers consistently conduct research in the field of law and artificial intelligence. The relationship between the information society, artificial intelligence and law has been researched on a national level (<https://repository.mruni.eu/bitstream/handle/007/14284/3820-7942-1-SM.pdf?sequence=1&isAllowed=y>), dirbtinio intelekto ir besiformuojančių technologijų etikos klausimas ([https://www.vdu.lt/cris/bitstream/20.500.12259/35657/1/ISSN1392-6845\\_2017\\_N\\_4.PG\\_19-24%20.pdf](https://www.vdu.lt/cris/bitstream/20.500.12259/35657/1/ISSN1392-6845_2017_N_4.PG_19-24%20.pdf)), dirbtinio intelekto sistemų taikymo teismų veikloje problematika bei kylančios rizikos dėl žmogaus teisių apsaugos užtikrinimo problematika (<file:///C:/Users/d.mamone/Downloads/64349755.pdf>). (<https://repository.mruni.eu/bitstream/handle/007/14284/3820-7942-1-SM.pdf?sequence=1&isAllowed=y>), dirbtinio intelekto ir besiformuojančių technologijų etikos klausimas ([https://www.vdu.lt/cris/bitstream/20.500.12259/35657/1/ISSN1392-6845\\_2017\\_N\\_4.PG\\_19-24%20.pdf](https://www.vdu.lt/cris/bitstream/20.500.12259/35657/1/ISSN1392-6845_2017_N_4.PG_19-24%20.pdf)), dirbtinio intelekto sistemų taikymo teismų veikloje problematika bei kylančios rizikos dėl žmogaus teisių apsaugos užtikrinimo problematika (<file:///C:/Users/d.mamone/Downloads/64349755.pdf>). (<https://repository.mruni.eu/bitstream/handle/007/14284/3820-7942-1-SM.pdf?sequence=1&isAllowed=y>), artificial intelligence and the issue of ethics of emerging technologies ([https://www.vdu.lt/cris/bitstream/20.500.12259/35657/1/ISSN1392-6845\\_2017\\_N\\_4.PG\\_19-24%20.pdf](https://www.vdu.lt/cris/bitstream/20.500.12259/35657/1/ISSN1392-6845_2017_N_4.PG_19-24%20.pdf)), the problem of application of artificial intelligence systems in court activities and emerging risks on the issue of ensuring the protection of human rights (<file:///C:/Users/d.mamone/Downloads/64349755.pdf>). A scientific debate is currently taking place on the possibility of considering a smart robot as a subject of legal responsibility in general, recognizing that this innovative area is incompatible with current legal regulation (<http://www.tf.vu.lt/wp-content/uploads/2018/09/TM-pavasaris-2018-elektroninis-PDF.pdf>). In addition, starting from 1 September 2020,



In Lithuania, the issue of the impact of the development of artificial intelligence on the Rome II Regulation has not been analysed. At the level of the doctrinal discussion<sup>835</sup>, the question of whether an intelligent robot can be considered subject to legal liability in general is still addressed, and only thereafter the possibility of the application of non-contractual liability to it can be analysed.

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Lithuanian universities have launched new study programs, such as the Master of Laws program in Technology and Business.

<sup>835</sup> J. Bartkus, T. Stundys in article "LIABILITY OF ARTIFICIAL INTELLIGENCE. WHAT WE CAN EXPECT?" ([TM-pavasaris-2018-perziurai.indd \(vu.lt\)](#)).

#### 4. List of national case law

<u>Court or tribunal</u>	<u>Case name and reference number</u>  <u>Reference to decision of the Court of Justice if applicable</u>	<u>Date</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings</u>
1. Vilnius Regional Court	No. 2A-1619-565/2019	3 December 2019	Article 4 [ <i>aut.</i> Part 1 <sup>836</sup> ]	The issue of applicable law was considered in the dispute concerning compensation of damage by the right of recourse where the Motor Insurers' Bureau of the Republic of Lithuania having compensated such damage to the National Insurers' Bureau of Germany filed a recourse claim against a private limited liability company as the employer of the natural person liable for the damage caused.	
2. Šiauliai Regional Court	No. e2A-600-368/2019	28 November 2019	Article 4	The issue of applicable law was considered in the dispute concerning compensation of damage by the right of recourse where <i>AB Lietuvos draudimas</i> having paid the insurance claim to the person who had suffered damage	The law applicable in the proceedings was determined on the basis of the provisions of the Law on Compulsory Insurance Against Civil Liability in Respect of the Use of Motor Vehicles, however, the court pointed out that the provisions of the Law on

<sup>836</sup> Where the court does not refer to a specific part in the judgment, the content of the judgment shows which specific part the court relied on.

				during a traffic accident in France filed a recourse claim against a public establishment as the employer of the natural person liable for the damage caused.	Compulsory Insurance Against Civil Liability in Respect of the Use of Motor Vehicles <i>correlated</i> with Article 4 of Rome II according to which the law applicable to a non-contractual obligation is the law of the country in which the damage occurred (Paragraph No. 19).
3. Kaunas Regional Court  (the Ruling was rendered after the Supreme Court of Lithuania referred 3K-3-390-701/2017 for re-examination to that court).	No. 2A-14-254/2019	12 March 2019	Article 4	The issue of applicable law was considered in the dispute concerning compensation of damage by the right of recourse where the Motor Insurers' Bureau of the Republic of Lithuania having reimbursed the National Insurers' Bureau of Germany claimed compensation of the said amount from a private limited liability company as the employer of the natural person liable for the damage caused.	The court states that the provisions of the Law on Compulsory Insurance Against Civil Liability in Respect of the Use of Motor Vehicles <i>are in accord with</i> the provisions of Article 4 of Rome II (Paragraph No. 26).
4. Kaunas Regional Court	No. 2A-13-601/2019	14 February 2019	Article 4 [ <i>aut.</i> Part 1 d.]	The issue of applicable law was considered in the dispute concerning compensation of damage by the right of recourse where the Motor Insurers' Bureau of the Republic of Lithuania having reimbursed the amount paid by the National Insurers' Bureau of Germany, claimed compensation of the said amount from	Similar to Case No. 3 (Paragraph No. 20).

				a private limited liability company as the employer of the natural person liable for the damage caused.	
5. Kaunas Regional Court	No. 2A-9-945/2019	5 February 2019	Article 4 [aut. Part 1]	The issue of applicable law was considered in the dispute concerning compensation of damage by the right of recourse where the National Insurers' Bureau of the Republic of Lithuania having compensated the amount paid by the National Insurers' Bureau of Germany, claimed compensation of the said amount from a private limited liability company as the employer of the natural person liable for the damage caused.	Similar to Cases No. 3, No. 4 (Paragraph No. 22).
6. Panevėžys Regional Court	No. 2A-749-212/2018	19 November 2018	Article 4(2)	The issue of applicable law was considered in the dispute concerning compensation of damage by the right of recourse where the National Insurers' Bureau of the Republic of Lithuania having compensated the amount paid by the National Insurers' Bureau of Germany, claimed compensation of the said amount from a private limited liability company as the employer of the natural person liable for the damage caused.	The court has ruled out that under Article 4(2) of Rome II the applicable law is the law of the Republic of Lithuania because the vehicles of both the perpetrator and the victim are registered in the Republic of Lithuania, and that the damage has been administered in accordance with the law of the state of registration of the vehicles, i.e. the law of the Republic of Lithuania (Paragraphs No. 28-29).
7. Kaunas Regional Court	No. 2S-999-601/2018	10 May 2018	Article 4 [aut. Part 1]	The issue of applicable law was considered in the dispute concerning compensation of damage by the right of recourse where the Motor Insurers' Bureau of the Republic of	

				Lithuania having reimbursed the damage suffered by the victim filed a recourse claim against the natural person directly liable for the damage caused.	
8. Supreme Court of Lithuania  (The Supreme Court of Lithuania referred the dispute for re-examination in the appellate procedure to the Kaunas Regional Court Case No. 2A-13-601/2019)	No. 3K-3-389-915/2017	7 December 2017	Article 4	The dispute arose over the rules of law governing a recourse claim filed by the Motor Insurers' Bureau of the Republic of Lithuania having paid the insurance claim to the National Insurers' Bureau of another state against the person liable for the damage caused.	Similar to Case No. 2, No. 4, No. 7, No. 9, No. 10 (Paragraph No. 32).
9. Supreme Court of Lithuania	No. 3K-3-390-701/2017	15 December 2017	Article 4 [ <i>aut.</i> Part 1]	The issue of applicable law was considered in the dispute concerning compensation of damage by the right of recourse where the Motor Insurers' Bureau of the Republic of Lithuania having paid the insurance claim to the National Insurers' Bureau of another state filed a recourse claim against the person liable for the damage caused.	Similar to Case No. 2, No. 4, No. 7 (Paragraph No. 30).

<p>10. Supreme Court of Lithuania</p> <p>The Supreme Court of Lithuania referred the case for re-examination to the court of appellate instance (Order of the Kaunas Regional Court rendered on 5 February 2019 in civil proceedings No 2A-9-945/2019),</p>	<p>No. 3K-3-393-313/2017</p>	<p>15 November 2017</p>	<p>Article 4</p>	<p>The issue of applicable law was considered in the dispute concerning compensation of damage by the right of recourse where the National Insurers' Bureau of the Republic of Lithuania having reimbursed the damage to the National Insurers' Bureau of another state filed a recourse claim against the person liable for the damage caused.</p>	<p>Similar to Case No. 2, No. 4, No. 7, No. 9 (Paragraph No. 39).</p>
<p>11. Panevėžys Regional Court</p>	<p>No. 2S-6-755/2017</p>	<p>12 September 2017</p>	<p>Article 4 [aut. Part 1]</p>	<p>The issue of applicable law was considered in the dispute concerning compensation of damage by the right of recourse where the Motor Insurers' Bureau of the Republic of Lithuania having reimbursed the damage suffered by the victim filed a recourse claim against a private limited liability company as the employer of the natural person liable for the damage caused.</p>	

12. Supreme Court of Lithuania	No. 3K-3-162-415/2017	29 March 2017	Article 4	The issue of applicable law was considered in the dispute concerning compensation of damage by the right of recourse where the Motor Insurers' Bureau of the Republic of Lithuania having reimbursed the amount paid by the National Insurers' Bureau of Germany filed a recourse claim against a private limited liability company as the employer of the natural person liable for the damage caused.	
13. Kaunas Regional Court	No. 2A-1228-657/2016	6 October 2016	Article 4 [ <i>aut.</i> Part 1]	The issue of applicable law was considered in the dispute concerning compensation of damage by the right of recourse where the Motor Insurers' Bureau of the Republic of Lithuania having reimbursed the damage paid by the National Insurers' Bureau of Great Britain filed a recourse claim against a private limited liability company as the employer of the natural person liable for the damage caused.	
14. Court of Appeal of Lithuania  Court of Justice of the European Union joined cases C-	No 2A-20-241/2016	27 September 2016	Article 4, 31 and 32.	The dispute in the proceedings arose over the award of the paid portion (i.e. 50 per cent) of the insurance claim where Plaintiff <i>AAS Gjensidige Baltic</i> operating in Lithuania through <i>AAS Gjensidige Baltic Lithuanian Branch</i> reimbursed the damage to Defendant <i>AAS BTA Baltic Insurance Company</i> operating in Lithuania through <i>AAS BTA Baltic Insurance Company Lithuanian Branch</i> .	The court has noted that the issue of the applicable law governing liability of the persons responsible for the damage was not raised in the appeal, nor was the said issue examined by the court of first instance, however, in the light of the explanations presented in the CJEU preliminary ruling and considering the fact that the insurers' obligation to compensate the damage is directly linked to civil liability of

359/14 and C-475/14  <i>Regarding the Supreme Court of Lithuania of 8 October 2014 and the Vilnius City District Court of 15 July 2015.</i>					persons responsible for such damage it is primarily necessary to determine the law applicable to civil liability of the persons responsible for the damage in order to resolve the pending dispute correctly.  The court has relied on the explanations presented in the CJEU preliminary ruling.
15. Vilnius Regional Court  (on the basis of the Order of the Supreme Court of Lithuania rendered in civil proceedings No 3K-3-187-701/2016)	No. 2A-19-585/2016	20 September 2016	Article 4 [ <i>aut.</i> Part 1]	The issue of applicable law was considered in the dispute between the vehicle insurer and the trailer insurer concerning compensation of damage by the right of recourse.	
16. Vilnius Regional Court	No. 2A-173-565/2016	30 August 2016	Article 1, 4, 20 [ <i>aut.</i> Part 1]	The issue of applicable law was considered in the dispute concerning invalidation of a set-off and compensation of damage by the right of recourse.  <u>Issues – whether the statutory legal relationship existing between the two different insurers are of non-contractual or contractual nature.</u>	<u>It has been noted by the court that Article 14(b) of the Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure such liability lays down a conflict-of-law rule which must apply <i>ratione personae</i> not only to the</u>



					<p><u>victims of traffic accidents but also to the vehicle insurers liable for the damage caused during the traffic accident by determining the law applicable to their relationship, the said rule is special vis-à-vis the rules of applicable law laid down in Rome I and Rome II.</u></p> <p><u>Rome II should be applicable to the case and the legal relationship of the parties should be regarded as falling outside the concept of non-contractual obligation and thus be viewed as derivative legal relationship arising out of a tort. As there was no contract concluded between the Plaintiff and the Defendant, the provisions under Rome I applicable to contractual relations could not be applicable to such legal relationship as the latter should be deemed to fall within the scope of Article 20 of Rome II.</u></p>
17. Supreme Court of Lithuania	No. 3K-3-305-378/2016	3 June 2016	Art 4.	The issue of applicable law was considered in the dispute concerning compensation of damage by the right of recourse where <i>ADB Gjensidige</i> having compensated the damage to the victim of a traffic accident in Germany filed a recourse claim against the person liable for the damage caused.	The court has noted that in the light of Article 4 of Rome II regarding the applicable law and considering the content of the German law, it follows that in the event of a traffic accident in Germany where damage was caused by a vehicle and trailer combination, operators of such vehicle and trailer

				<u>Issues – scope of liability of the vehicle insurer and of the trailer insurer in the traffic accident in Germany under Rome II and the German national law.</u>	have joint liability and <u>the insurers having insured civil liability of the vehicle operator and of the trailer operator usually pay the insurance claim in equal parts</u> (Paragraph No. 23).
18. Supreme Court of Lithuania  (the said Ruling was rendered by the Supreme Court of Lithuania on the basis of the CJEU preliminary ruling in joined cases C-359/14 and C-475/14).	No. 3K-3-187-701/2016	6 May 2016	Art 4, 15 (a), (b), 19, 27, 28, 31, 32.	The issue of applicable law was considered in the dispute between the insurers of operators of different vehicles, i.e. a tractor unit and a trailer, concerning the obligation to compensate the damage caused in a traffic accident in Germany.	In the light of the arguments presented in the CJEU preliminary ruling, the Supreme Court of Lithuania has stated that in the event of a traffic accident in Germany where damage was caused by a vehicle and trailer combination, operators of such vehicle and trailer have joint liability.  Therefore, the tractor unit insurer has the right to claim from the trailer insurer compensation of 50 per cent of the amount paid to the victim (Paragraphs No. 23, 23(1), 38, 39, 31, 33, 35).
19. Supreme Court of Lithuania	No. 3K-3-415/2014  CJEU number joined cases C-359/14 and C-475/14 on 21 January 2016	8 October 2014	Articles No. 1, 4 (1), 20.		The Supreme Court of Lithuania issued an order requesting the CJEU to pass a preliminary ruling.

	<i>Regarding the Supreme Court of Lithuania of 8 October 2014 and the Vilnius City District Court of 15 July 2015</i>				
20. Supreme Court of Lithuania	No. 2K-280/2014	3 June 2014	Articles 1(1), 28(1) and 32, preamble recital 36.	<p>A civil claim for compensation of the survivor's damage was filed in the criminal proceedings when 2 citizens of the Republic of Kazakhstan died during a traffic accident that was caused in the Republic of Lithuania through the fault of a citizen of the Republic of Latvia who was driving the tractor unit registered in the Republic of Latvia.</p> <p><u>Issues – relationship between Roma II and other international conventions governing the issues of applicable law in the non-contractual legal relationship dealing with compensation of damage.</u></p>	<p><u>The court has commented on the provisions of Rome II to the extent that</u> recital 36 of the Preamble and Article 28(1) of Rome II lay down that the Regulation does not affect the application of international conventions to which one or more Member States are a party at the time of adoption of this Regulation and lay down conflict-of-law rules relating to non-contractual obligations. One of such international conventions is the 1971 Hague Convention on the Law Applicable to Traffic Accidents.</p>
21. Vilnius Regional Court	No. 2A-2079-560/2013	8 November 2013	[aut. Article 1]	<p><u>The issue of applicable law was considered in the dispute between the vehicle insurer and the trailer insurer regarding compensation of damages by the right of recourse in a traffic accident that occurred in a foreign state.</u></p> <p><u>Point at issue – whether the legal relationship between the two different insurers derives from non-contractual or contractual legal relationship which directly relates to the possibility of (non)application of Rome II.</u></p>	<p>The court held that the issues of insurance against civil liability in respect of the use of motor vehicles should be decided on the basis of a contract of compulsory insurance against civil liability in respect of use of motor vehicles and that Rome II should not be applicable because the existence of the contract of compulsory insurance against civil liability in respect of use of motor vehicles does not give grounds for non-contractual civil liability to arise.</p>

22. Supreme Court of Lithuania	No. 3K-3-292/2014	9 May 2014		<p><u>The issue of applicable law was considered in the dispute regarding a claim filed by the insurer having compensated the damage against the insurer having insured the person's civil liability when a traffic accident occurs in the state other than the state of registration of the vehicle.</u></p> <p><u>Point at issue – to assess the nature of the existing legal relationship – whether such obligations are contractual or non-contractual which directly relates to the possibility of (non)application of Rome II.</u></p>	<p>The Supreme Court of Lithuania decided not to apply the provisions of Rome II because it considered that the legal relationship between the insurer having compensated the damage and the insurer having insured the civil liability of the person who caused such damage were of contractual nature.</p>
23. Klaipeda Regional Court	No. 1A-43-361-2013	14 February 2013	[aut. Article 1]	<p>The issue of applicable law was considered in the dispute regarding compensation of damage where 4 persons suffered damage during a traffic accident caused by criminal offences committed by a natural person that involved violation of the Road Traffic Rules.</p> <p><u>Issues – whether due to the existence of a contract of compulsory insurance against civil liability in respect of use of motor vehicles between the insurer and the insured the insurer's obligation to compensate the damage derives from non-contractual civil liability rules or from the insurance contract and the rules of law governing insurance relationship</u></p>	<p>The court found that the appeal was groundlessly based on Rome II determining the law applicable to non-contractual obligations because the insurer's obligation to compensate the damage was deriving from contractual relationship.</p>
24. Court of Justice of the European Union	Joined cases C-359/14 and C-475/14 (regarding the Orders rendered in the civil	21 January 2016	Articles 1, 2, 4, 15 (a) and (b)	<p>This preliminary ruling was issued in the context of disputes between insurance companies, namely those concerning the law applicable to recourse claims between the parties in the event of traffic accidents in Germany.</p>	<p>It was clarified by the CJEU among other things that the liability of the two insurers was non-contractual.</p> <p>Apart from that: the existence of <u>the right</u> of the insurer having insured the tractor unit, whose driver had caused</p>

	<p>proceedings on 8 October 2014 by the Supreme Court of Lithuania and on 15 July 2015 by the Vilnius City District Court)</p>			<p>In particular, the uncertainty as to the determination of the law applicable to the dispute between the two insurers was resolved. The law applicable to the recourse claim filed by the tractor unit's insurer having paid the insurance claim to the person having suffered damage in the traffic accident caused by the said tractor unit's driver against the insurer of the trailer pulled during the said traffic accident.</p>	<p>the accident, to file a claim against the trailer's insurer after payment of the insurance claim to the victim may not be deemed to arise from the insurance contract though it implies at the same time non-contractual liability of the said trailer operator vis-à-vis the said victim. Therefore, such duty of the trailer operator to compensate the damage must be regarded as a "non-contractual obligation" within the meaning of Article 1 of Rome II.</p>
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# Luxembourg

## Executive Summary

- The Rome II Regulation is rarely applied in Luxembourg.
- Awareness of the Rome II Regulation among practitioners is unclear.
- The practical importance and awareness of the 1971 Hague Convention on the law applicable to traffic accidents is possibly higher than that of the Rome II Regulation.
- Two cases decided before the entry into force of the Regulation suggest that the suitability of the Regulation for regulating financial market torts might become an issue, including for the uncertainty surrounding its material scope.

## 1. Introduction

The Grand Duchy of Luxembourg is a small country where half of the working force commutes from neighbouring countries and most economic activity is international. Private international law is thus used on a daily basis by practitioners. This would suggest that the Rome II Regulation is probably well known. There is anecdotal evidence suggesting the contrary, however. Certain judgments of the highest courts in the country have addressed issues of choice of law in tort matters without even mentioning the Regulation, and, conversely, certain judgments have referred to the Regulation in divorce and traffic accident cases.

The size of the country also results in a low number of cases and limited scholarly production. It is only in 2019 that Luxembourg authorities have made public a database including a large number of cases (though probably not all of them, which explains why this author cannot be certain to have identified all relevant cases), and there are no judicial statistics on the use of the Regulation. The doctrinal discussion on the Regulation is almost inexistent, with the exception of two books presenting the private international law of Luxembourg (J.-Cl. Wiwinius *Le droit international privé au Grand-Duché de Luxembourg*, Bauler, 3<sup>ème</sup> éd. 2011 ; G. Cuniberti, *Droit international privé luxembourgeois*, vol. 1, Legitech 2020) and a contribution to a recent book (E. Fronczak "Luxembourg", in E. Guinchard (ed.), *Rome I and Rome II in Practice*, Intersentia 2020). This author is unaware of any discussion at a political level on the regulation.

## 2. Analysis of the Rome II Regulation

### 2.1 Chapter I – Scope and Interpretation

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to :*

1. *The determination of the material scope of application of the Rome II Regulation, including any difficulties in applying the category of "civil and commercial matters" or in defining the exact scope of any excluded matters (Art. 1(1)-(2))*

Luxembourg courts have applied several times the Rome II Regulation to tort claims made in the context of divorce proceedings. Art 1(2)(a) was not raised.

The scope of the exclusion of corporate matters is also an issue: see below Question 6.

2. *The determination of the temporal scope of application of the Rome II Regulation, Arts 31-32)*
3. *The characterization of the **concept of "non-contractual obligations"**, its relationship to the concept of "contractual obligations" and any difficulties in relation to characterisation (Arts. 1(1), 2)*
4. *The universal application of the Regulation (Art. 3)*
5. *The approach to interpretation of the Rome II Regulation, and in particular **its relationship to other EU private international law instruments (including the recast Brussels I Regulation and the Rome I Regulation)**(Recital (7))*

To the knowledge of this author, none of these provisions has raised any issue in Luxembourg.

## 2.2 Chapter II - Tort/Delict

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to the implementation of:*

6. *The general conflict-of-laws rule for tort/delict, and difficulties that have arisen in your Member State with respect to its application (Art. 4), and in particular:*
  - a. *the approach to identifying the place of direct damage in Art 4(1)*
  - b. *the approach to the first rule of displacement in Art 4(2) in cases involving multiple parties or claims*
  - c. *the approach to the escape clause in Art 4(3), and*

To the knowledge of this author, none of these provisions has raised any issue in Luxembourg.

- d. *the suitability of this set of rules to govern cases of **prospectus liability or other financial market torts***

The suitability of the various paragraphs of Art 4 to govern financial market torts was not discussed as such. The Luxembourg Court of Appeal has decided two cases concerned with cross-border financial market torts (CA, 1<sup>st</sup> April 2015, case no 38886; 21 December 2016, case no 41086), but the Rome II Regulation did not apply *rationae temporis*. In one of the cases, however, the court referred to the Regulation as a persuasive authority (CA, 1<sup>st</sup> April 2015, case no 38886).

In each of the two cases, the court found that Luxembourg law applied. In the first (CA, 1<sup>st</sup> April 2015, case no 38886), the reason was because the loss had occurred in Luxembourg, as the account on which the securities were held was situated. The court referred to the Rome II Regulation as a persuasive authority. In the second (CA, 21 December 2016, case no 41086), the reason for applying Luxembourg law was that the securities (issued by a foreign company established in the British Virgin Islands) were marketed in Luxembourg in violation of certain provisions of Luxembourg law. The court did not refer to the Rome II Regulation, which would not have supported its decision, as Luxembourg was arguably the place of the event giving rise to the damage. This second case raises the issue of the legitimate interest of Member States to apply their law to regulate the marketing on their territory of securities issued by foreign companies.

Finally, such cases raise the issue of the scope of the Rome II Regulation and whether actions against directors of companies are governed by the law of the tort or by the law of the company. The issue is unsettled and creates uncertainty. In the second case (CA, 21 December 2016, case no 41086), the issue was raised (at least implicitly), but the court did not address it.

CA, 1<sup>st</sup> April 2015, case no 38886

### **Facts:**

The defendants own a bank account from the claimant, a Luxembourgish bank, on which were made several purchases of securities. This bank transferred the securities to another account owned by a German company following a written instruction order from the defendants to do so by a person who usurped their identity. The defendants seek compensation for their damage.

### **Held:**

Rome II regulation embodies Luxembourgish case-law by opting for the law of the place where the damage occurred.

The place where the damage occurred is the place where the fact generating liability directly produced its effects on the direct victim, in this case Luxembourg, the damage being the defendants' spoliation resulting from the fraudulent transfer and sale of their securities. Since the damage occurred in Luxembourg, the conditions, nature and scope of the liability are determined by Luxembourgish law.

CA, 21 December 2016, case no 41086

### **Facts:**

The claimants bought securities of a company established in the British Virgin Islands managed in Luxembourg by the defendants. The offer was made in Luxembourg, and the marketing materials contained false information about them, notably regarding its investment policy, wrongly qualified as cautious. The claimants lost all the money they invested and seek to trigger the defendants' liability for fraudulent placement of their securities.

**Held:**

The liability of the defendants is tortious because it is not shown that the operating costs paid by the securities' subscriber were also paid by his successors.

Since the offer of securities by the company constituted in the British Virgin Islands was made in Luxembourg and the company is run and managed from Luxembourg, the defendants were subject to Luxembourg company law. Its provisions impose criminal sanctions on any person inducing subscriptions or payments through means of false information knowing that they are not accurate (art. 164 Luxembourg Company Act). The defendants could not have ignored that the information given to the claimants was false, and the loss of their investments is linked to the fund's policy which is in no way cautious as described to the claimants. The defendants are thus liable and must compensate the claimants' damage as they violated Luxembourgish law in marketing the securities.

*7. The rule on **product liability** (Art. 5) and, where relevant, the interaction with the application of **1973 Hague Convention on the Law Applicable to Products Liability**;*

Luxembourg is a party to the 1973 Hague Convention. However, to the knowledge of this author, the Convention has never been applied. As recently as 2019, the Court of Appeal ignored both the Rome II Regulation and the 1973 Hague Convention to determine the law governing a product liability claim (Luxembourg Court of Appeal, 19 June 2019, case no 41449).

*8. The specific rule on **unfair competition** (Art. 6)*

To the knowledge of this author, this provision was only applied by one Luxembourg court of first instance (District Court of Diekirch, 27 November 2018, case no 21057 and 21295). The court applied Art. 6(2), but it might be that the case fell rather in the scope of Art 6(1).

Ms Fronczak presents the case as follows:

"A Belgian transport and logistics company took issue with the fact that the Luxembourg company it had hired to perform transport services on its behalf for a client did not inform it about its – eventually successful – participation in the following procurement procedure launched by that client. Considering that the Luxembourg company committed an act of unfair competition, the Belgian company refused to pay the latest invoices for transport services. In this case, the Luxembourg company started legal action. In response, the Belgian company requested compensation for an alleged damage resulting from the act of unfair competition allegedly committed by the Luxembourg company.

Given the facts of the case, the court applied Article 6(2) Rome II. It therefore had to establish the place where the alleged damage occurred in order to identify applicable law. This should have been the country where the specific competitor's interests, i.e. his competitive position vis-à-vis the acting competitor, had been affected. From the judgment we know only that the transport services concerned goods from a warehouse located in France to the client's affiliates, authorised retailers and ateliers located in Belgium. Without any in-depth analysis the court stated that the alleged damage occurred in the place where the alleged victim was established, i.e. in Belgium. It therefore applied Belgian law.

In the case at hand, it seems that the competitor's interests in the Belgian market were affected and therefore the choice of law was correct, however the justification was not. Nevertheless, one case decided by a first instance court does not allow one to draw a general conclusion that the Luxembourg courts have difficulties with the application of the specific rules established by the Rome II Regulation." (extract from Fronczak, *Rome I and Rome II in Practice*, p. 406).

*9. The specific rule on **environmental damage** (Art. 7)*

To the knowledge of this author, there has been no debate or interest in any of these two provisions in Luxembourg. It does not seem that they were ever applied by Luxembourg courts either.

*10. The specific rule on **infringements of intellectual property rights** (Arts. 8, 13)*



To the knowledge of this author, these provisions were never applied in Luxembourg and did not generate any debate. They raise, however, issues of coordination with existing international conventions. It is unclear, for instance, whether the Berne Convention includes rules (art 5(2)) which could be characterised as choice of law rules and would thus exclude the application of the Rome II Regulation (see G. Cuniberti, *Droit international privé luxembourgeois*, vol. 1, Legitech 2020, para. 281).

It should be noted that the position of Luxembourg with respect to trademarks and designs is peculiar as Luxembourg belongs to the BENELUX area (BENELUX IP Convention of 25 February 2005) which has adopted common rules and established a single court, which suppresses most choice of law issues within this area.

The BENELUX IP Convention establishes BENELUX trademarks and designs. These regional IP rights can be registered by filing either with the regional BENELUX Office for IP (seat: the Hague) or with one of the three national administrations (which shall then forward the application to the regional office). Arts 2.20 and 3.16 of the Convention define the extent of the protection of the holder of respectively trademarks and designs. Additionally, other provisions of the Convention define the remedies available in case of infringements of trademarks and designs. These provisions are authoritatively interpreted by a regional BENELUX court. In these fields, the law of the three countries is uniform. If the Rome II Regulation designates the law of either of them, the BENELUX uniform law is applicable. If the dispute is intra-BENELUX, choice of law issues do not arise.

However, both arts 2.20 and 3.16 (respectively for trademarks and designs) of the Convention reserve the application of the common law of torts. As the law of torts was not harmonised among BENELUX countries, this necessarily refers to the national law of torts, which should be designated by the choice of law rule in the Rome II Regulation. From a practical standpoint, however, it is unclear why claimants might need to refer to national law to supplement the Convention. Luxembourg courts have referred to Luxembourg law to grant certain provisional measures, but arts 2.22 and 3.18 (respectively for trademarks and designs) expressly provide that national law governs provisional measures.

#### *11. The specific rule on industrial action (Art. 9)*

To the knowledge of this author, there has been no debate or interest in this provision in Luxembourg. It does not seem that they were ever applied by Luxembourg courts either.

### 2.3 Chapter III - Unjust Enrichment, *Negotiorum Gestio* And *Culpa In Contrahendo*

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to the implementation of:*

#### *12. The specific rule on **unjust enrichment** (Art. 10), including its relationship with the general rule for tort/delict in Art. 4.*

This provision was applied in two cases. The first allowed the clarification of certain interesting issues.

#### **CA, 13 October 2010, case no 32035**

##### **Facts:**

The claimant, a German municipality, transferred a sum of money on the account of a bank (whose successors, two Luxembourgish companies, are the defendants). This transfer was made in performance of a loan agreement between the claimant and a Luxembourg municipality, at the request of a broker who embezzled money by dealing with the parties without ever putting them in touch. The claimant demands reimbursement on the basis of unjust enrichment. The recipients of the payment (ie the bank) argue that it was made in the context of a loan from the bank to the Luxembourg municipality.

##### **Held:**

The court addresses the issue of the law governing the claim for unjust enrichment made by the German municipality against the bank. The Rome II did not apply.

The court finds that a loan contract existed between the Luxembourg municipality and the bank, and that it was governed by Luxembourg law. The parties disagree as to whether the law governing the claim for unjust enrichment should be the law of the underlying relationship (the loan contract governed by Luxembourg law) or the law of the place of the enrichment, i.e. Germany.

Part of Luxembourgish case-law already applied to quasi-contracts the law governing the underlying legal relationship on which the quasi-contract is based before the entry into force of Rome II for three reasons: the link with the underlying legal relationship is presumed to be the closest; quasi-contracts are remedies to ordinary rules which justified the mere extension of the law applicable to the latter; and the parties expect this law to also govern the indirect consequences of their legal relationship.

A first issue is whether the relevant underlying legal relationship can bind only one of the parties to the quasi-contract claim to a third party; the court relies on a Swiss case of Nov. 1<sup>st</sup>, 1952 and French scholarship to decide that the underlying relationship need not be between the two parties to the unjust enrichment claim. The court also rules that the underlying relationship must have existed. If a payment is made in execution of an existing legal relationship which is then declared void, the creditor's enrichment, of which the "cause" rested on this relationship, has no more "cause" and the law applicable to the annulment of the relationship also applies to the unjust enrichment resulting from it.

Mrs Fronczak cites another case that she presents as follows:

In two more parallel cases (TA Luxembourg, 09.01.2015, no. 8/2015, no. 166.013 du rôle, and 09.01.2015, no. 5/2015,

no. 166.014 du rôle), a person residing in Luxembourg received invalidity and survivor's benefits granted to his mother for over four years after her death. In both cases, the law applicable to the action lodged by the social security institution and based on *répétition de l'indû* was determined on the basis of Article 10 of the Rome II Regulation. In these cases, the applicability *ratione temporis* of the Rome II Regulation was not self-evident, since the pensions were received between 1 July 2006 and 31 October 2010, and the Regulation only applies to events occurring after 11 January 2009. Consequently, the law applicable to the damage caused by the payments made before 11 January 2009 should have been ascertained on the basis of national private international law rules. Unfortunately, the court did not explain its choice to apply the Rome II Regulation to all events giving rise to the alleged damage (extract from Fronczak, *Rome I and Rome II in Practice*, p. 408).

#### 13. The specific rule on *negotiorum gestio* (Art. 11)

This provision was applied in one case but did not raise any particular issue.

In this case (TA Luxembourg, 31.01.2014, no. 204/2014 and 19.12.2014, no. 2585/2014, no. 149.694

du rôle), an aeroplane engine was shipped from Canada, where it had undergone a technical check, to Germany, from where it was to be shipped onwards to Luxembourg. The engine was supposed to undergo customs clearance in Luxembourg but, since this did not happen, the engine was sent to a depository in Germany where it stayed for over 20 days, which triggered its customs clearance in Germany. The VAT imposed on the company running the German depository was re-invoiced to the German company that was supposed to perform the customs clearance in Luxembourg. This company paid this sum and requested reimbursement from the Luxembourg company – i.e. the owner of the plane. Since that company refused to pay, the German company seised a Luxembourg court. Having found a document entitled 'Customs Clearance Instructions for Fiscal Representation' insufficient to prove a contractual relationship between the parties, the court analysed the possible existence of *negotiorum gestio*. Going through the plethora of rules indicated in Article 11 Rome II and in the absence of a contractual relationship or the habitual residence of the parties in the same Member State, the law of the place where the management of affairs was performed was found to apply. Payment of the invoice was identified as an action of management and therefore German law was applicable (extract from Fronczak, *Rome I and Rome II in Practice*, p. 407).

#### 14. The specific rule on *culpa in contrahendo* (Art. 12)

This provision was applied in one case but has not raised any particular issue.

District Court of Luxembourg, 18 November 2008, case no 108103

#### Facts:

The claimant and the first defendant, an Italian company, entered into a cooperation agreement for counselling a subsidiary of the defendant located in Argentina. The claimant was the subsidiary's manager and owned 1% of its share capital. The defendant sells off 99% of it to the second defendant, a Luxembourg company, which sent to the claimant a framework contract aiming at reorganising the subsidiary and partly transferring the share capital to the claimant. The latter warns the Luxembourg defendant that she will resign were the promised investments not performed.

She then resigns and the subsidiary informs her of her dismissal from her manager position. The claimant brought proceedings in Argentina for unfair dismissal, in which the 2 defendant companies are held severally liable to pay termination indemnity.

Held:

As the dispute deals with the breakdown of talks regarding the framework contract and not with the cooperation agreement, the applicable law is that which is designated in the draft framework agreement. This solution is in conformity with Art. 12 of Rome II Regulation, although not in force yet, which designates the law of the contract which was not concluded in case of a fault committed during the precontractual stage and of a breach of a precontractual obligation.

Luxembourg law applies, as the contemplated framework contract provided for the application of Luxembourg law, the contract was to be signed in Luxembourg and one of the parties was a company incorporated in Luxembourg.

## 2.4 Chapter IV - Freedom of Choice

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

15. *The implementation in legal/business practice and by courts of the rule on **freedom of choice**, any difficulties therein and **any discussion that has been carried out in your Member State regarding possible reasons which would justify the need to rethink it** (Art. 14)*

To the knowledge of this author, the application of this provision was never discussed by courts and did not raise any issue in Luxembourg.

## 2.5 Chapter V - Common Rules

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

16. *The scope of the exclusion of 'evidence and procedure' in Art 1(3) and any difficulties in relation to that exclusion or to questions of formal validity or the burden of proof (Arts. 21-22)*
17. *The approach in your Member State to questions of pleading, proof and application to individual cases of the substantive rules of the law applicable under the Rome II Regulation governing non-contractual obligations.*
18. *The delimitation of the scope of the applicable law (Art. 15(a)-(h)), including any difficulties as its relationship to the issues addressed at points 16 17 above)*
19. *The application of the rule on **overriding mandatory provisions** (Art. 16)*

To the knowledge of this author, none of these issues was raised in Luxembourg.

20. *The application of the specific rule on **direct action against the insurer** of the person liable (Art. 18)*

While it does not seem that this provision was applied by Luxembourg courts, the issue of its wider influence and potential extension to the context of contractual obligation was discussed and rejected in the case below.

### District Court of Luxembourg, March 2014, case no 79 / 201412

**Facts:**

The claimant is a Luxembourgish company who asked the first defendant, also a Luxembourgish company, to file a request for hiring subsidies. It was rejected on the ground that the deadline to file it had passed. The claimant sues the first defendant and his insurer, the Belgian subsidiary of a Dutch company, to be compensated for the damage resulting from the refusal.

**Held:**

The claimant and the first defendant entered into a contract for the provision of services; the claim should thus be subject to contractual liability principles.

The direct action being contractual, the Rome II Regulation does not apply.

Applying to the direct action the law of the place of the damage is not an appropriate solution as it is not suitable to contractual matters for two reasons: the accidental nature of the damage, and the fact that it requires the delimitation of the scope with regard to both the law governing the insurance contract and the law governing liability, which is the law of the contract concluded between the victim and the insured party.

Thus the law governing the contract concluded between the victim and the insured party should be applied to the question of the admissibility of the direct action, Luxembourgish law here, although the insurance contract concluded between the two defendant is subject to Belgian law.

21. *The application the specific rule on **subrogation** (Art. 19)*

22. *The application of the specific rule on **multiple liability** (Art.20)*

While it does not seem that any of these provisions was applied by Luxembourg courts, an academic writer has raised the issue of the absence of provision regulating cases where rights are transferred in the absence of a duty to satisfy the creditor, and the resulting uncertainty (G. Cuniberti, *Droit international privé luxembourgeois*, vol. 1, Legitech 2020, para. 242).

## 2.6 Chapter VI - Other Provisions

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

23. *The implementation of the concept of habitual residence in the Rome II Regulation, with reference both to persons covered by Art 23 and natural persons acting otherwise than in the course of business*

24. *The application of and any difficulties with the specific rules on exclusion of renvoi (Art.24) and States with more than one legal system (Art.25)*

To the knowledge of this author, none of these issues was raised in Luxembourg.

25. *The application of and any difficulties with the specific rule on public policy of the forums (Art. 26)*

The rule in Art 26 raises a couple of issues (G. Cuniberti, *Droit international privé luxembourgeois*, vol. 1, Legitech 2020, para. 71). The first is the extent to which Member States are free to apply various doctrines to limit its operation (effet atténué, ordre public de proximité, etc...). The second is that the meaning (and usefulness) of the limitation introduced by the term "manifestly" is unclear.

26. *Practical **interaction between the Rome II Regulation and other EU and international legal instruments**, in specific areas such as **environmental damages, intellectual property rights or data protection** (Arts. 27, 28, 29)*

A specific issue of coordination with international legal instruments arises in the field of intellectual property rights, creating uncertainty as to whether the Rome II Regulation applies at all (*supra*, question 10).

## 2.7 Comments on other Practical Problems

*These areas are **of particular interest** for the Commission. Please be as precise as possible regarding any issue that has been reported on:*

27. *The impact of the application of the **1971 Hague Convention** on the law applicable to traffic accidents on legal certainty (where relevant for your Member State)*

The 1971 Hague Convention is frequently applied and of huge practical significance in a country where half of the work force (i.e. 200 000 workers) commutes every day from France, Belgium and Germany.

Because the 1971 Convention is old and often applied, it is well known by courts and lawyers in Luxembourg, and this author is unaware of cases where it was wrongly applied (in contrast, cases where the Rome II Regulation was wrongly applied are numerous, including in traffic accident cases: see below). Importantly, it is also applicable in the countries where 75% of the commuters come from, i.e. France (50%) and Belgium (25%). The only issue is that different

rules apply in the third neighbouring country (Germany, 25% of commuters), and might thus create incentives for forum shopping, but they are limited under the Brussels Ibis Regulation.

As an old instrument, the Hague Convention is silent on a number of important issues such as the admissibility of applying overriding mandatory provisions or choosing the applicable law. Contrary to French and Belgian courts, Luxembourg courts have not addressed these issues.

Whether the Hague Convention often leads to results different from the Rome II Regulation is unclear. The statistics of the Luxembourg government on traffic accidents in Luxembourg show that in about 25% of accidents, the car hit a tree (typically in the middle of the countryside) or some other similar immobile object: the Hague Convention provides for the application of the law of the place of the accident. In about 47% of accidents, the accident involved several cars. As half of the workforce commutes from neighbouring countries, a rough estimate is that half of the accidents occurring during the week might involve cars matriculated in different states (although certain non residents/commuters have cars matriculated in Luxembourg, their matriculation would not be taken into account for the purpose of the Hague Convention) and thus lead to the application of the law of the place of the accident. Furthermore, 73% of lethal accidents occur between Friday night and Sunday, and are much less likely to involve foreign residents: the law of the place of accident and the law of the matriculation and residence of all parties would apply. In the vast majority of cases, therefore, it does not seem that the Hague Convention leads to results different from the Rome II Regulation.

Ms Fronczak has identified some cases where the Rome II Regulation was wrongly applied instead of the Hague Convention, and argued that this resulted from the misleading understanding that the scope of the Hague Convention was limited. She noted, however, that the application of the right instrument in these cases would not have resulted in a different outcome.

In three cases, the Luxembourg courts directly applied Rome II to find the applicable law, without considering the possibility of applying the 1971 Hague Convention.

One of these cases concerned a traffic accident that occurred in Luxembourg involving a Belgian and a Dutch car. The court applied the law of the place of the accident on the basis of the Rome II Regulation, although it seems that the 1971 Hague Convention should have been applied (TA Luxembourg, 15.11.2011, no. 156/2011, no. 138.290 du rôle.). It should be noted, however, that this case was decided before the French *Cour de cassation* confirmed that, under Article 28 of the Rome II Regulation, the 1971 Hague Convention, as a convention non-exclusively concluded between the EU Member States, shall take precedence over the Regulation. The Luxembourg literature at that point was of the opinion that after the entry into force of the Rome II Regulation, the 1971 Hague Convention was to apply only to relations between Luxembourg and third countries (J.-C. Wiwinius, *Le droit international privé au Grand-Duché de Luxembourg*, Paul Bauler, Luxembourg 2011, p. 203).

In another case, the accident occurred in Belgium but the parties were all (except one passenger) domiciled in Luxembourg. Although it is not specified in the judgment, it seems that the cars involved in the accident were also registered in Luxembourg. In this case, the accident took place in April 2013, the first instance decision was taken on 9 July 2014 – shortly after the abovementioned decision of the *Cour de cassation*. However, the appeal judgment was only delivered on 1 December 2015. In this case, an application of the 1971 Hague Convention would have allowed for a clear solution, as it provides for the application of the law of the state of the common registration of the vehicles involved in an accident. In fact, this Convention explicitly excludes in Article 4(a) the use of the habitual residence of a victim as a linking factor. On the contrary, for the Luxembourg court to designate, on the basis of the Rome II Regulation, *lex fori* as applicable law required ‘ignoring’ the fact that one of the defendants was domiciled in Belgium. This was achieved on the basis that his involvement in the accident, apart from being just another passenger, was not proven (TA Luxembourg, 01.12.2015, no. 251/2015, no. 164.190 du rôle.). The implications for the applicability of the 1971 Hague Convention stemming from the subrogation of one of the insurance companies involved was not discussed in the judgment.

In addition, in a case where two motorbikes owned by persons domiciled in Belgium were involved in an accident in Luxembourg, Belgian law was identified as the applicable law on the basis of Article 4(2) Rome II (TP Luxembourg, 05.06.2014, Rép. fisc. no. 2389/14.).

In all these cases, the application of the Rome II Regulation did not lead to the application of a different law than the one that would have been applied under the 1971 Hague Convention. One may therefore say that in these cases the

solutions were different only in theory, but not in practice. (extract from Fronczak, *Rome I and Rome II in Practice*, p. 400).

*28. Any other practical problems with respect to the application or interpretation of the Rome II Regulation, including but not limited to the suitability of the mosaic approach*

No.

### 3. Comments on areas of interest

*These areas are of particular interest for the Commission. Please be as precise as possible regarding any issue that emerged in your Member State regarding:*

- 29. The exclusion of violations of privacy and rights relating to personality, including defamation, from the scope of the Rome II Regulation and any difficulties arising out from differences among Member States' rules in cross-border situations*
- 30. Any comment regarding the Interplay of the Rome II Regulation with the treatment of defamation and data protection, and, in these areas, the relevance of Strategic Lawsuits Against Public Participation (SLAPPs)*
- 31. The extent to which Rome II Regulation has been applied to corporate abuses against human rights and lays down an effective set of rules to regulate non-contractual liability;*
- 32. The impact of the development of artificial intelligence on the Rome II Regulation, and in particular on the suitability of the rules that it contains to regulate non-contractual liability.*

This author is unaware of any discussion concerning any of these issues in Luxembourg in the context of the Rome II Regulation.

For instance, while there has been increasing awareness of Luxembourg authorities on the issue of business and human rights (with the establishment of a working group on the topic in the ministry of foreign affairs), there is no reported case where the issue of the applicable law was discussed

#### 4. List of national case law

<u>Court or tribunal</u>	<u>Case name and reference number</u>  <u>Reference to decision of the Court of Justice if applicable</u>	<u>Date</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings (only for key cases)</u>
District Court of Diekirch	21057 and 21295	27 November 2018	6(2)	Unfair competition	See summary above at 8.
Court of appeal	118/18	12 July 2018	31	Temporal scope	
Court of appeal	38886	1 April 2015	4(1)	Liability of bank for allowing fraudulent sale of securities	Loss occurred in country where the account on which the securities were held was situated (see summary above at 6)
Court of appeal	32035	13 Oct 2010	10	Law governing loan contract applies to a claim of unjust enrichment	See summary above at 12.
Court of appeal	32124	13 Oct 2010	10	Same	The content of the judgment is identical to the previous one.
District Court of Luxembourg city	251/2015 (no. 164.190 du role)	1 Dec 2015	4(2)	Traffic accident	See summary above at 27.
District Court of Luxembourg city	313/2015	28 May 2015	4(1)	Damages for adultery in divorce proceedings	

				Material scope of Regulation not discussed	
District Court of Luxembourg city	8/2015 (no. 166.013 du rôle)  5/2015 (no. 166.014 du rôle)	9 Jan 2015	10	Unjust enrichment	See summary above at 12.
District Court of Luxembourg city	case no. 149.694 (role)  Judgments no. 2585/2014 and 204/2014	19 Dec 2014 31 Jan 2014	11	Negotiorum gestio	See summary above at 13.
Justice of the Peace of Luxembourg city	Rép. fisc. no. 2389/14.	5 June 2014	4(2)	Traffic accident	See summary above at 27.
District Court of Luxembourg city	246/2014	22 May 2014	4(1)	Nervous shock for divorce  Material scope of Regulation not discussed	
District Court of Luxembourg city	79 / 2014	12 March 2014	18	Direct action in <u>contractual</u> matters	Law governing the insurance contract applies (see summary above at 20)
District Court of Luxembourg city	11 / 14	17 Jan. 2014	31	Temporal scope	



District Court of Luxembourg city	369/12	6 Dec 2012	4(2)	Nervous shock for divorce Material scope of Regulation not discussed	
District Court of Luxembourg city	156/2011 (no. 138.290 du rôle).	15 Nov 2011	4(1)	Traffic accident	See summary above at 27.
District Court of Luxembourg city	202 / 08	18 Nov 2008	12	Culpa in contrahendo	See summary above at 14.

# Malta

## Executive Summary

- In Malta, the understanding and use of the Rome II Regulation is limited amongst the majority of practitioners, businesses and citizens. However, practitioners who regularly work on cross-border issues are more likely to be aware of the regulation. There are no statistical data available on the Regulation. (1. Introduction)
- Due to the limited case law, there are no data on general trends and difficulties in addressing the scope or interpretation under Chapter 1 of the Regulation. Nonetheless, the universal application of the Regulation (art.3) is dealt with in the case of *Xerri Godwin Nomine vs Zejt Marine Services Limited*. (2.1 Chapter I – Scope and Interpretation)
- The case of *Xerri Godwin Nomine vs Zejt Marine Services Limited* involved a collision incident between two Maltese flagged vessels, where the plaintiff had leased the vessel from a Polish company. Although both companies were registered and flagged by Malta, the court held that because the place of direct damage took place in Tunisian waters, Tunisian law applies (art 4(1)). (2.2 Chapter II - Tort/Delict a)
- The same case goes on to examine whether Tunisian law should not apply because the both parties have the same habitual residence. The court decided that with one of the plaintiffs being the Polish owners of the vessel, article 4(2) could not apply. (2.2 Chapter II - Tort/Delict b) Further, the court dismissed the plaintiff's argument that due to the Maltese nationality, Malta as the flag state and the court's jurisdiction, Maltese law should apply, as the collision and damages, clearly happened in another country. (2.2 Chapter II - Tort/Delict c)
- In the context of the adversarial system, Maltese law applies, unless parties wishing to rely on foreign law plead its application and provide evidence to the court. In cases where there are conflict of laws, Maltese law has a privileged status, thus, application of foreign law would 'not prevent the application of mandatory provisions of Maltese law' (2.5 Chapter V - Common Rules).
- The Court in *Xerri v Zejt Marine Services* in its implementation of the concept habitual residence noted that the registered state of a company is not necessarily the same as the company's central administration (art 23). The party invoking the article 4 exception, has the burden of proof. (2.6 Chapter VI - Other Provisions)
- Maltese Private International Law fosters that in the application of a provision of the *lex causae* there should not be any breach of Maltese public policy, a 'juridical or moral principle which is regarded as being fundamental for Maltese society'. (2.6 Chapter VI - Other Provisions)
- Malta, not being a party to the 1971 Hague Convention on the law applicable to traffic accidents, faces concerns on the quantification of damages in incidents involving cross-border motor accident, as this does not fall under the scope of Rome II Regulation. (2.6 Chapter VI - Other Provisions)
- The treatment of defamation as regards SLAPP suits in Malta is subject to public debate at the moment. Following the murder of journalist Daphne Caruana Galizia, NGOs, political parties, and the public have been lobbying for anti-SLAPP legislation. As Rome II Regulation 1(2)(g) excludes from its scope defamation cases, claimants can still engage in forum shopping – which raises human rights implications – especially in a context of small media houses. (2.7 Comments on other Practical Problems)

## 1. Introduction

The Rome II Regulation seems to be little applied and understood by the majority of practitioners, business and citizens in Malta although those practitioners who regularly work on cross-border issues are more likely to be aware of the regulation.

No statistics are available regarding the application of the Rome II Regulation in Malta. Statistics can be gleaned from searches on the Judgments Website. Indeed a search for Rome II Regulation Results in 2 judgments (same case, 2 decisions) whilst a search for 864/2007 results in 9 records. Of these, 2 are excluded on the basis that the Regulation

is not referenced (they arise because the reference number of the cases is 864/2007); another 6 records are doubles linked to the same set of parties and facts, whilst a final 2 decisions are left. These have been reviewed and whilst the Regulation is referenced at least once in these decisions, it is not addressed by the Court or explored in any depth by the Parties. One decision, *Xerri Godwin Nomine vs Zejt Marine Services Limited* is the most directly applicable decision and will be subject to analysis in this report.

Doctrinal discussion in Malta has been evolving over the past decade and there has been a series of new books published about Maltese law. However, analysis of the Rome II in that literature is limited to a handful of pieces including a book chapter, a dissertation and a relevant policy brief. By contrast however, particular issues, including anti-SLAPP legislation, where the Rome II Regulation can have significant implications have been discussed extensively in the public domain. Here, aspects of EU law were raised as part of the discussion.

## 2. Analysis of the Rome II Regulation

### 2.1 Chapter I – Scope and Interpretation

The limited case law addressing the Rome II Regulation in Malta has addressed the question of scope or interpretation or matters arising under Chapter 1 of the Regulation. A number of decisions that mention the Regulation have in fact been dealt with primarily under other EU private international law instruments, notably the Recast Brussels Regulation.

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to :*

1. *The determination of the material scope of application of the Rome II Regulation, including any difficulties in applying the category of “civil and commercial matters” or in defining the exact scope of any excluded matters (Art. 1(1)-(2))*
2. *The determination of the temporal scope of application of the Rome II Regulation, Arts 31-32)*
3. *The characterization of the **concept of “non-contractual obligations”**, its relationship to the concept of “contractual obligations” and any difficulties in relation to characterisation (Arts. 1(1), 2)*
4. *The universal application of the Regulation (Art. 3)*

Whilst the case law does not specifically address Article 3 of the Regulation, it is worth noting that the application of a foreign law was considered in obiter in *Xerri Godwin Nomine vs Zejt Marine Services Limited* where the court noted the possibility of the application of either Tunisian or Polish Law. Indeed the final decision in the case was that Tunisian law applied.

5. *The approach to interpretation of the Rome II Regulation, and in particular **its relationship to other EU private international law instruments (including the recast Brussels I Regulation and the Rome I Regulation)**(Recital (7))*

### 2.2 Chapter II - Tort/Delict

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to the implementation of :*

6. *The general conflict-of-laws rule for tort/delict, and difficulties that have arisen in your Member State with respect to its application (Art. 4), and in particular:*
  - a. *the **approach to identifying the place of direct damage** in Art 4(1)*

Article 4 of Rome II Regulation was the subject of extensive determination by the Maltese Courts in *Xerri Godwin Nomine vs Zejt Marine Services Limited*. The court entered into a detailed analysis of the provisions, and the relationship between the different subsections of Article 4. Briefly, the case revolved around an incident involving a collision between 2 Maltese Flagged vessels having taken place in Tunisian waters (Sousse Port). The first vessel (plaintiff) was owned by a Polish company but leased under a bareboat charter to a Maltese company (p. 7). The second vessel was owned by a Maltese company. The court starts from the premise, uncontested by the parties, that the jurisdiction of the Maltese courts is established under Article 742(1)(b) of the Code of Organisation and Civil Procedure. Furthermore, the Court noted the application of Rome II, highlighting that there is no doubt that this case

should be determined, not on the basis of general private international law rules, but rather on the basis of the Rome II Regulation, quoting the final statement of the regulation stating 'this regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community'. On this point, the Court goes on to quote from Liz Heffernan about the geographical reach of the Regulation and in particular that it 'extends to any proceedings in tort that contain an international element whether European or not'.<sup>837</sup>

The contestation then arises from the challenge by the defendant regarding the proper law. The defendants excepted that: 'in any case the incident occurred in Tunisia and therefore the responsibility for the incident and any damage should be determined according to Tunisian law' (P.5). On the contrary, the plaintiffs argued that a distinction must be drawn between the *lex loci damni* and the *lex loci delicti commissi*. They note that whilst the incident did occur in Tunisia, both vessels flew the Maltese flag and as such should be considered as an extension of Maltese nationality and therefore Maltese law should be applied as the *lex loci delicti*. The court was not convinced by this interpretation and noted that this was not a case where the incident happened in one place but the damage occurred elsewhere. The case revolves around an incident (collision) that occurred in Tunisian waters and the damage was suffered in the same place. Therefore, the court noted, these facts fall directly within the ambit of Article 4(1) of the regulation.<sup>838</sup>

On this, the court goes on to explore the particular application to the maritime sphere. The Court does not consider the matter of where a vessel is flagged under the Civil law as a factor that would result in an exception to the general applicability of 4(1). Indeed, the court notes, the same article does not distinguish between physical persons, moral persons or a vessel. In support of this, the court quotes Cheshire, North and Fawcett Private International Law 14<sup>th</sup> Edition, in part saying 'the deletion of the special provision indicates that when interpreting the regulation, a country should not be identified by looking at the law of the flag'.<sup>839</sup>

*b. the approach to the first rule of displacement in Art 4(2) in cases involving multiple parties or claims*

On this basis, the court argues that in principle Article 4(1) is applicable and therefore *prima facie* Tunisian law should be applied to the case at hand. However, the court continues, the Regulation allows exceptions to this general rule, in the form of Article 4(2), which provides that 'where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply'. Given that the parties are all legal persons, the Court makes reference to Article 23(1) of the Regulation which clarifies the meaning of habitual residence for legal persons. The plaintiffs note that Article 4(2) is applicable given that one of the plaintiffs and the defendant are both Maltese companies. The court considers this to be fallacious noting the distinction between registration and central administration (we return to this discussion elsewhere in this report). In brief the court notes that 'the place where a company is registered is not necessarily where it has its central administration'. More broadly the court notes that any exception to the rule must be narrowly interpreted and that what renders 4(2) inapplicable is that not all the parties involved in the case are habitually resident in Malta. Indeed one of the plaintiffs, the owner of the vessel that was allegedly damaged in the collision is a Polish company. The other plaintiff, that is the one registered in Malta, seems to lease the vessel (bareboat charter) and therefore it is not clear who exactly suffered the damage between the plaintiffs. Since one of the parties with a direct and certain interest, that is the owner of the vessel is certainly not habitually resident in Malta, the exception (4(2)) is not applicable.<sup>840</sup>

Moreover, the plaintiffs noted that the non-Maltese resident plaintiff had submitted to the application of Maltese law by virtue of having filed the case in Malta. The court rejected this argument, noting that this is not strictly correct as the jurisdiction is established by the fact that the defendant is registered in Malta. Moreover, the exception of Article 4(2) is not intended to be used at the discretion of the party to sue where the plaintiff considers it most fit as to the applicable law, but rather, it is based on the objective criterion that, as the article notes, does not leave doubt that all parties

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<sup>837</sup> Karl Grech Orr, 'Collision of Ships in a Foreign Port' (*Malta Maritime Law Association* 23/12/2013) <<http://mmla.org.mt/category/malta/pag,e/10/>>.

<sup>838</sup> Edward Meli, 'An Analytical Overview Of The Application Of Rome II Regulation Within A Maritime Context' (University of Malta 2016) 38.

<sup>839</sup> *ibid* No. 1

<sup>840</sup> *ibid* No 2, at 29-34.

involved must have their habitual residence in the same country. It is not a question of choice or indeed of a qualified or absolute majority, but all of the parties.

Therefore the determination of the Court is that in cases involving multiple parties, all must be habitually resident for Article 4(2) to apply, rather than a majority of the parties. The fact that non-resident parties agree to the application of Maltese law is irrelevant.

*c. the approach to the escape clause in Art 4(3), and*

The plaintiffs further argued that even if 4(2) was not applicable, the court should find Article 4(3) to be applicable. They note that the nationality of the concerned parties, the flag state of the vessels, the injury suffered which is limited to the two vessels and the jurisdiction of the Maltese courts all favour the application of Maltese law to the case. The Court considered that 4(3) provides scope for discretion for a claim to be decided on the basis of the law that best fits the circumstances. It quotes from Cheshire, North and Fawcett regarding the exceptional nature of 4(3); the fact that the connection must be with a country rather than the law of a country and that 4(3) is likely to operate more commonly as an exception to Article 4(1) rather than Article 4(2) and that situations that merit its application 'are likely to be relatively rare'.<sup>841</sup>

In the particular case, the Court noted that this situation of an exceptional nature does not exist. It addressed specifically the question of the flag states and drew a distinction between events occurring between two ships and those that may have happened aboard a ship. The court further noted that the nationality of one of the parties in Polish and not Maltese which is relevant especially as they are the ones who suffered the most direct damage. The court concludes that no evidence had been brought suggesting that, beyond the registration of the vessels, there is some intrinsic connection to Maltese law arising from the collision and damages, which clearly happened in another country (Tunisia).

The Court further noted that 'the fact that Maltese courts have jurisdiction, does not create any presumed right that the claim be decided on the basis of Maltese law'.

In the view of the court, the connection identified by plaintiffs is too tenuous to ignore the principle of 4(1).

*d. the suitability of this set of rules to govern cases of **prospectus liability or other financial market torts***

No analysis of this question has been found.

*7. The rule on **product liability** (Art. 5) and, where relevant, the interaction with the application of **1973 Hague Convention on the Law Applicable to Products Liability**;*

No specific cases have arisen dealing with the specific rule on product liability. It should be noted that Malta is not party to the 1973 Hague Convention on the Law Applicable to Product Liability.

*8. The specific rule on **unfair competition** (Art. 6)*

No specific cases have arisen dealing with the specific rule on unfair competition.

*9. The specific rule on **environmental damage** (Art. 7)*

No specific cases have arisen dealing with the specific rule on environmental damage.

*10. The specific rule on **infringements of intellectual property rights** (Arts. 8, 13)*

No specific cases have arisen dealing with infringements of intellectual property rights.

*11. The specific rule on **industrial action** (Art. 9)*

No specific cases have arisen dealing with the specific rule on industrial action.

## 2.3 Chapter III - Unjust Enrichment, *Negotiorum Gestio* And *Culpa In Contrahendo*

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<sup>841</sup> *ibid* No 2, at 34.

Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to the implementation of:

12. The specific rule on **unjust enrichment** (Art. 10), including its relationship with the general rule for tort/delict in Art. 4.

Article 10 has not been subject to any court decision or literature analysis.

13. The specific rule on **negotiorum gestio** (Art. 11)

Article 11 has not been subject to any court decision or literature analysis.

14. The specific rule on **culpa in contrahendo** (Art. 12)

Article 12 has not been subject to any court decision or literature analysis.

## 2.4 Chapter IV - Freedom of Choice

Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:

15. The implementation in legal/business practice and by courts of the rule on **freedom of choice**, any difficulties therein and **any discussion that has been carried out in your Member State regarding possible reasons which would justify the need to rethink it** (Art. 14)

No public discussion has taken place in Malta on this matter.

## 2.5 Chapter V - Common Rules

Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:

16. The scope of the exclusion of 'evidence and procedure' in Art 1(3) and any difficulties in relation to that exclusion or to questions of formal validity or the burden of proof (Arts. 21-22)

No difficulties are alluded to in the literature or case law as relates to this question. As Cachia notes: 'A foreign applicable law will be applied only to matters of substance. In accordance with the principle *forum regit processum*, Maltese law enjoys a privileged status on issues which are characterised as matters of procedure. Once an issue is characterised as procedural, Maltese law applies to the issue, a principle which is also recognised by art 1(3) of the Rome I and Rome II Regulations, which exclude the application of the regulations to evidence and procedure'.<sup>842</sup>

17. The approach in your Member State to questions of pleading, proof and application to individual cases of the substantive rules of the law applicable under the Rome II Regulation governing non-contractual obligations.

No significant difficulties are alluded to in the literature or case law as relates to this question. Cachia summarises the state of play as follows: 'the general trend that can be identified from the judgments of the Maltese courts is that where the parties do not plead the application of foreign law to the dispute and do not prove its content, Maltese law will apply. There is no provision of Maltese law requiring a Maltese court to apply foreign law *ex officio*. If a party wishes to rely on foreign law, that party has to plead its application. The approach of the Maltese courts on the pleading of foreign law is similar to the approach in England and indeed, Maltese jurisprudence has made reference to the position adopted by the English courts. This is not surprising, since as noted above, in this field of private international law, any lacuna in Maltese law is usually filled by reference to English common law. Moreover, such an approach is consistent with the adversarial system of Maltese Civil Procedure'.<sup>843</sup>

The content of foreign law is a question of fact and must therefore be proved by the parties. As Cachia further explains: As Maltese procedural law follows the adversarial system, the judge will not, and should not, make his own private investigation as to the content of foreign law, but is to rely on the proof brought during the trial. The presentation of the

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<sup>842</sup> Paul Cachia, 'Malta', *Encyclopedia of Private International Law* (Edward Elgar Publishing Limited 2017) 2329.

<sup>843</sup> *ibid* 2331.

evidence is left to the parties and the court will decide the case on the basis of the facts that have been proved by the parties during the judicial process.<sup>844</sup> [...]

Given this, in line with Article 562 of the Code of Organisation and Civil Procedure, the burden of proving the content of a foreign law is on the party who pleads its application. As Cachia further explains: 'In Malta proof of foreign law is usually made by means of the evidence of a competent expert on the foreign law in question. The COCP has a specific article dealing with evidence of foreign law. Article 563B(1) COCP states that "a person who is suitably qualified one account of his knowledge or experience, is competent to give expert evidence as to the law of any other foreign state, irrespective of whether he has acted or is entitled to act as an advocate, or in any judicial or legal capacity in that state". This provision essentially operates as follows. The party invoking the application of foreign law will produce the evidence of an expert on the content of foreign law. The expert must be suitably qualified to give expert evidence as to the foreign law on account of his knowledge or experience. The expert usually submits a report in writing which is confirmed on out. He may also give evidence *viva voce* and he should be available for cross examination by the other party. A copy of the legal provisions of the following state may be attached to the report. Evidence may also be given by the expert as to the rules of construction recognised by the foreign legal system and the manner in which the courts of the foreign state have interpreted the foreign provisions. The other party is not obliged to bring his own expert, but if he wants to contest the content of the foreign law as proved by the other party, it is in his own interest to bring his own expert in order to prove what he considers to be the real content of foreign law. Where the two experts disagree it would be for the court to decide what it believes to be the true content of the foreign law, either by preferring the evidence of one expert over the other, or by accepting some parts of the evidence of one expert and some parts of the evidence of the other. There is nothing which stops the court from appointing its own experts to give evidence on foreign law.'<sup>845</sup>

*18. The delimitation of the scope of the applicable law (Art. 15(a)-(h)), including any difficulties as its relationship to the issues addressed at points 16 17 above)*

This has not been subject to any court decision or literature analysis.

*19. The application of the rule on **overriding mandatory provisions** (Art. 16)*

Whilst no specific cases appear to have arisen in this regard, Maltese Law has a privileged status where it is mandatory, irrespective of the law otherwise applicable to the dispute or legal relation between the parties. As Cachia notes 'hence, the fact that the dispute between the parties is governed by a foreign law does not prevent the application of mandatory provisions of Maltese law'.<sup>846</sup> For instance, Article 47A of the Consumer Affairs Act provides that 'the provisions of this Part shall apply notwithstanding any term in a consumer contract which applies or purports to apply the law of a non-Member State, if the contract has a close connection with the territory of any Member State'.

Moreover, as Cachia also argues, 'it is also an important principle of Maltese Private International Law (...) that the application of a provision of the *lex causae* may be refused if such application is in breach of public policy (ordre public) of Malta.<sup>847</sup> The Maltese Courts have held that there is a breach of Maltese public policy only where there is a breach of a juridical or moral principle which is regarded as being fundamental for Maltese society'. (See Q25 below)

*20. The application of the specific rule on **direct action against the insurer** of the person liable (Art. 18)*

No cases have arisen in Malta regarding direct action against the insurer neither has this been discussed in the literature.

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<sup>844</sup> *ibid.*

<sup>845</sup> *ibid* 2331–2332.

<sup>846</sup> *ibid*

<sup>847</sup> *ibid*

21. *The application the specific rule on subrogation (Art. 19)*

No cases have arisen in Malta regarding the specific rule on subrogation neither has this been discussed in the literature.

22. *The application of the specific rule on multiple liability (Art.20)*

No cases have arisen in Malta regarding the specific rule on multiple liability neither has this been discussed in the literature.

## 2.6 Chapter VI - Other Provisions

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

23. *The implementation of the concept of habitual residence in the Rome II Regulation, with reference both to persons covered by Art 23 and natural persons acting otherwise than in the course of business*

The question of habitual residence was discussed in some depth by the Court in *Xerri v Zejt Marine Services*. In that case, the court made the following determinations. First it noted that 'the place where a company is registered is not necessarily the same place where the company has its central administration. The burden of proof fall on the party claiming the applicability of the exception (in article 4) to the general rule and cannot be presumed on the simple basis of the company's registration. Every exception to the rule, the court notes, must be narrowly construed.

24. *The application of and any difficulties with the specific rules on exclusion of renvoi (Art.24) and States with more than one legal system (Art.25)*

No cases have arisen in Malta regarding the specific rules on exclusion of renvoi neither has this been discussed in the literature.

25. *The application of and any difficulties with the specific rule on public policy of the forums (Art. 26)*

This question does not arise in the case law. Cachia notes: 'it is also an important principles of Maltese Private International Law (...) that the application of a provision of the lex cause may be refused if such application is in breach of public policy (ordre public) of Malta. The Maltese Courts have held that there is a breach of Maltese public policy only where there is a breach of a juridical or moral principle which is regarded as being fundamental for Maltese society'. Writing in the context of enforcement of judgments and arbitral awards, Bugeja notes that: 'there is no specific definition of 'public policy'. However, typically the exception is applied to the following circumstances:

- Cases where interest rates exceed the legally permitted rates.
- Cases concerning activities that are licensable by public authorities in Malta.
- Matters that constitute a criminal offence in Malta or that constitute a breach of fundamental human rights.
- Cases where the foreign pocedures is fundamentally contrary to the principles of natural justice as applied in Malta'.<sup>848</sup>

26. *Practical interaction between the Rome II Regulation and other EU and international legal instruments, in specific areas such as environmental damages, intellectual property rights or data protection (Arts. 27, 28, 29)*

None of these issues have arisen in the Maltese context or have they been discussed in the Malta specific literature.

## 2.7 Comments on other Practical Problems

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<sup>848</sup> Thomas Bugeja, Fenech & Fenech Advocates 'Enforcement of judgments and arbitral awards in Malta: overview' (*Practical Law*, 01/10/2020) Accessed 19/01/2021 <[https://uk.practicallaw.thomsonreuters.com/1-619-2993?transitionType=Default&contextData=\(sc.Default\)&firstPage=true#co\\_anchor\\_a945796](https://uk.practicallaw.thomsonreuters.com/1-619-2993?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a945796)>.



*These areas are of particular interest for the Commission. Please be as precise as possible regarding any issue that has been reported on:*

27. *The impact of the application of the 1971 Hague Convention on the law applicable to traffic accidents on legal certainty (where relevant for your Member State)*

Malta is not a party to the 1971 Hague Convention on the law applicable to traffic accidents. A dissertation (grade unknown) for the University of Malta, Valletta notes: 'One can conclude that the overall position of the Maltese Motor Insurer related to the applicable law in cross-border motor accidents, on account of Rome II was indeed improved. However, the main issue relating to the quantification of damages, that existed prior the introduction of Rome II still poses a major concern to the Maltese insurer and which does not fall under the competence of Rome II. This problem reflects the same issue which was raised by the European Parliament in questioning the procedure of the quantification of damages in relation to the injured person and which the Commission rejected on the basis that it 'constitutes harmonisation of the Member States' substantive civil law which is out of place in an instrument harmonising the rule of PIL.'<sup>849</sup>

28. *Any other practical problems with respect to the application or interpretation of the Rome II Regulation, including but not limited to the suitability of the mosaic approach*

No other practical problems have been identified. The only broader question is about the application for the Regulation to maritime situations however this has been addressed within the parameters of the regulation.

### 3. Comments on areas of interest

*These areas are of particular interest for the Commission. Please be as precise as possible regarding any issue that emerged in your Member State regarding:*

29. *The exclusion of violations of privacy and rights relating to personality, including defamation, from the scope of the Rome II Regulation and any difficulties arising out from differences among Member States' rules in cross-border situations*

See reply to Q30 below.

30. *Any comment regarding the Interplay of the Rome II Regulation with the treatment of defamation and data protection, and, in these areas, the relevance of Strategic Lawsuits Against Public Participation (SLAPPs)*

The Rome II regulation and its exclusion of defamation violations has come up in discussions and literature surrounding SLAPP. This is a matter of grave concern in Malta, highlighted in no small part by the cases identified after the murder of journalist Daphne Caruana Galizia in 2017, and the SLAPP actions against various Maltese media outlets that due to their size and financial capacity felt they had to withdraw stories faced by actual or threatened lawsuits in other jurisdictions. Maltese MEPs have called for EU action on SLAPP, whilst national parliamentarians have also recommended the adoption of national legislation to curtail such actions.<sup>850</sup> Jose Herrera noted in an editorial: 'Unfortunately, however, defamation was again excluded from the scope'.<sup>851</sup> Xuereb in turn argues that because defamation is caught by EU rules determining jurisdiction and enforcement of judgments (the Brussels Regulations) but is excluded from other rules that determine the applicable law (the Rome Regulations) this has inadvertently facilitated

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<sup>849</sup> Kevin Valletta, 'The Impact of the Rome II Regulation on Maltese Motor Insurers' (University of Malta 2012) 86.

<sup>850</sup> 'Nothing stopping Malta from introducing anti-SLAPP laws - EU Commissioner' (*Times Malta* 13/-6/2018) Accessed 26/11/2020 <<https://timesofmalta.com/articles/view/no-legal-obstacle-to-malta-introducing-anti-slapp-legislation.681648>>.

<sup>851</sup> José Herrera, 'Anti-SLAPP legislation' (*Times Malta* 17/03/2018) Accessed 26/11/2020 <<https://timesofmalta.com/articles/view/anti-slapp-legislation-jose-herrera.673584>>.

forum shopping in matters relating to defamation.<sup>852</sup> As both Xuereb and Borg Barthet contend part of the issue is the reality of the Maltese media sector which is not financially in a position to defend foreign lawsuits as a result of its size.

Xuereb notes: 'While the reasoning behind these regulations and the related jurisprudence is to ensure equality of arms between an individual plaintiff with limited resources and large multinational media groups, in Malta the reverse holds true: the plaintiffs that threatened cross-border lawsuits have more resources and deeper pockets than the largest media houses in the country combined, let alone individual journalists and bloggers.'<sup>853</sup> He continues: 'if there was a possibility that applicable law to decide the matter in a foreign court is Maltese law; the maximum damages awarded under Maltese law are far lower than those that could be imposed for example under UK law, thus substantially reducing the attraction of filing an action in a foreign court for the 'SLAPP-er' whose sole purpose is cowering a defendant into silence.'<sup>854</sup>

Amendments proposed to remedy the situation have focused on the issue of recognition and enforcement of judgments rather than on the applicable law question. As Xuereb summarised it: 'The amendments to the Media and Defamation Act tabled by the Opposition in 2018 were an attempt to subject defamation lawsuits filed abroad to the test of Maltese public policy. But to conduct such a test, the Courts in Malta would invariably be exercising jurisdiction that they do not have, and the Brussels Regulation specifically prohibits courts of Member States to use the test of public policy to alter the rules of jurisdiction.'<sup>855</sup> This argument was put forward by the Government in its rejection of the proposed amendments. Later, the European Commission was reported as stating that 'The Commission said that an EU member state has a right to legislate against SLAPP originating in a jurisdiction outside the EU; and that EU member states have a right to protect their nationals against SLAPP originating from within the EU as long as it is done in good faith and in line with declared public policy'.<sup>856</sup>

The question continues to be debated in Malta and there is a clear political divide on the question, linked to the accusations made.

*31. The extent to which Rome II Regulation has been applied to corporate abuses against human rights and lays down an effective set of rules to regulate non-contractual liability;*

No cases have arisen / analysis undertaken regarding the application of the Rome II Regulation to corporate abuses of human rights.

*32. The impact of the development of artificial intelligence on the Rome II Regulation, and in particular on the suitability of the rules that it contains to regulate non-contractual liability.*

No cases have arisen / analysis undertaken regarding the impact of the development of Artificial intelligence on the Rome II Regulation.

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<sup>852</sup> Kenneth Xuereb 'Are EU regulations facilitating SLAPP suits?' (*The Independent* 11/06/2020) Accessed 26/11/2020 <<https://www.independent.com.mt/articles/2020-06-11/newspaper-opinions/Are-EU-regulations-facilitating-SLAPP-suits-6736224072>>.

<sup>853</sup> *ibid*

<sup>854</sup> *ibid*.

<sup>855</sup> *ibid*

<sup>856</sup> David Casa; Matthew Bonett 'EU Commission says no legal obstacle to introduce Anti-SLAPP legislation in Malta' (*EPP group* 13/06/2018) Accessed 21/01/2021 <<https://www.eppgroup.eu/how-we-make-it-happen/with-eu-countries/malta/news/no-legal-obstacle-to-introduce-anti-slapp-legislation>>.

#### 4. List of national case law

<u>Court or tribunal</u>	<u>Case name and reference number</u>  <u>Reference to decision of the Court of Justice if applicable</u>	<u>Date</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings (only for key cases)</u>
First Hall Civil Court	Cit: 856/2012 Godwin Xerri v Zejt Marine Services Limited	12 December 2013	Article 4	General Rule re: Torts/Delicts	<ul style="list-style-type: none"> <li>- Narrow interpretation of exceptions in 4(2) and 4(3)</li> <li>- Distinction between Registration and Habitual Residence even for legal persons</li> <li>- Global applicability of the Regulation</li> </ul>

# The Netherlands

## Executive Summary

- The Rome II Regulation is well-known by practitioners and academics having any involvement in or expertise on cross-border litigation. Dutch courts apply the Regulation regularly. Between 30 to 50 cases have been published per year, but as not all cases are published the real number of courts cases in which the Rome II Regulation was is higher (Section 1).
- The material scope of application has not raised significant problems, also resulting from a Dutch provision stating that the rules of the Rome II Regulation also apply in cases that are excluded from the material scope of the Regulation. However, a demarcation problem in case law and doctrine became apparent in torts relating to director's liability as to whether this should be considered a tort under Rome II or a company law matter that is excluded from the Regulation (Section 2.1). In addition, the application of Rome II in matters excluded from the Regulation pursuant to Dutch law, may have undesirable results. This is true for defamation cases in particular (Section 3.1).
- As regards the interpretation of the Regulation, Dutch courts regularly refer to the relevant rules and case law of the European Court of Justice on the Brussels I bis Regulation, most notably as regards the concept of non-contractual liability and the application of Article 7(2) thereof (Section 2.1).
- In some cases, the demarcation between the general rules of Article 4 and the specific rules on unfair competition in Article 6 and intellectual property in Article 8 is not clear, and the case law is not always consistent in this respect (Section 2.2).
- The application of the general rule of Article 4 does not lead to specific problems. In some instances, the localisation of the damage proved difficult, particularly in the case of financial damage. In some instances, the CJEU case law on Article 7(2) Brussels I bis provided guidelines. Occasionally, Article 4(3) is applied as the localisation of the damage was difficult or did not lead to a desirable outcome in terms of a closely connected law (Section 2.2).
- Freedom of choice is exercised occasionally under the Regulation, usually to designate Dutch law as the implicitly chosen law during the procedure. In doctrine, occasionally the scope of the prohibition to choose the law for cases relating to unfair competition has been questioned as well as the prohibition to select the applicable law in intellectual property cases (Section 2.4).
- The mosaic rule does not pose substantial difficulties in practice, though in the digital context – torts arising from internet and social media use – the application of the *lex loci damni* rule poses challenges. In a defamation case to which the Rome II Regulation applied by virtue of Dutch private international law, the Dutch Supreme Court resorted to the CJEU case law on Article 7(2) Brussels I bis, in particular *e-Date Advertising and Martinez*, leading to the application of the law of the country where the victim had its centre of main interests (Section 2.7 and 3.1).
- SLAPPs are not (yet) common in the Netherlands, and so far no issues as regards the application of the Rome II Regulation have arisen. This may, however, change and this may require special attention (Section 3.2). The same goes for human rights violations and foreign direct liability claims, though it can be argued that application of the law of the host state in environmental cases as a result of Article 4 may weaken human rights protection (Section 3.3). As regards AI and tort liability, so far the application of Rome II has not yet received attention in the Netherlands (Section 3.4).

# 1. Introduction

The Rome II Regulation is well known in the Netherlands. It is safe to say that all practitioners working at an international law firm or dealing with cross-border cases on a more regular basis (judges, bailiffs, etc.) are familiar with the Regulation. Businesses and citizens will have less knowledge of the Regulation. Businesses are usually represented by lawyers or have in-house lawyers available for legal issues (e.g. insurance companies). Citizens will usually not have any direct involvement with the applicable law or should they be involved in international litigation they will usually be represented as well.

The eleven Districts Courts in the Netherlands apply the Rome II Regulation regularly. Over the past five years, thirty to fifty cases are published per year. As not all cases are published, it is applied more often in practice. The courts do not face particular problems applying the Regulation, although in some instances the scope of applicability (see Section 2.1.1), the localisation of the place in which the damage occurs (see Section 2.2.1 a) and the determination which of the provisions applies (See Section 2.2.3 and 2.2.5) raise questions.

Being a small country there is no huge amount of doctrinal discussion on Rome II, but all handbooks and commentaries on private international law cover the Rome II Regulation. In the year after the Regulation was adopted, two major journals on private (international) law dedicated a full issue to the Regulation.<sup>857</sup> There are a few books dedicated on international torts or specific torts, and occasionally articles or PhD dissertations include sections or chapters to Rome II. Private international law is part of the curriculum (usually masters) at Dutch universities and Rome II is one of the obligatory instruments.

Rome II has not caused debate at a political level, apart from the (active) Dutch involvement in the Rome II negotiations. Doctrinal discussions focus on different issues – not on just one or two in particular –, including on the localisation of damage (often in relation to the Brussels I-bis Regulation), prospectus liability, intellectual property, defamation, environmental pollution, and in the context of collective redress.

## 2. Analysis of the Rome II Regulation

### 2.1 Chapter I – Scope and Interpretation

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

1. *The determination of the material scope of application of the Rome II Regulation, including any difficulties in applying the category of “civil and commercial matters” or in defining the exact scope of any excluded matters (Art. 1(1)-(2))*

Little difficulties have arisen in determining the material scope. A particularity of Dutch private international law is that Article 10:159 of the Dutch Civil Code provides that Rome II applies *mutatis mutandis* to obligations that can be regarded as torts yet fall outside of its material scope, unless a specific rule applies. This means that the same rules apply to those obligations that have been excluded from the Regulation in Article 1(2). Article 10:159 Civil Code is applied regularly by Dutch courts, either explicitly or implicitly.<sup>858</sup> This application vastly broadens the material scope of the Rome II Regulation.

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<sup>857</sup> *Nederlands Internationaal Privaatrecht* 2008 (special issue Rome II) 26/4 (in English); *Weekblad voor Notariaat en Registratie* (WPNR) 2008 (special issue Rome II) volume 139, no. 6780 (in Dutch).

<sup>858</sup> District Court Overijssel 2 May 2014, ECLI:NL:RBOVE:2014:2344, para 4.2 (implicit); District Court Noord-Holland 5 July 2016, ECLI:NL:RBNHO:2016:5535, para 4.3 (explicit); Court of Appeal Amsterdam 25 April 2017, ECLI:NL:GHAMS:2017:1629, para 3.6 (implicit); District Court Den Haag 27 December 2017, ECLI:NL:RBDHA:2017:16565, para 4.2 (explicit); District Court Gelderland 28 June 2019, ECLI:NL:RBGEL:2019:4088, para 4.3 (implicit); District Court Gelderland 22 January 2020 ECLI:NL:RBGEL:2020:1082, para 4.5 (explicit).

The most notable exclusion in Article 1(2) concerns torts related to violation of privacy and rights relating to personality, including defamation. In these cases, the courts did not have difficulties in deciding on the scope, and applied Rome II indirectly on the basis of Article 10:159 of the Dutch Civil Code.

Regarding directors' liability, however, uncertainty exists as to which situations do or do not fall under the material scope. It is not clear when a situation involving a director, flips from the excluded field of *company law*, into an included sovereign *tort* claim. This qualification problem has been the topic of discussion in the Netherlands.<sup>859</sup> Different conflict rules have been applied to similar cases.<sup>860</sup> The demarcation between the two fields of law could therefore benefit from a clarification.

### 2. *The determination of the temporal scope of application of the Rome II Regulation, Arts 31-32*

The fact that the temporal scope focuses on the moment of damage-occurring, rather than the moment of referral, has occasionally been forgotten.<sup>861</sup> In some cases the moment of damage-occurring could not be pinpointed specifically, causing the courts to be unsure whether or not Rome II applied. This could also be caused by the fact that different, subsequent links in the chain might be designated by parties as the basis of their tort-claim. In these cases, courts found a solution through referring to a combination of both national rules of international private law that were in place before Rome II became applicable (specifically regarding tort: *Wet Conflictenrecht Onrechtmatige Daad*; Act on Conflict of Law on Torts) and Rome II. This way it was ensured that all links were brought under some rule of private international law. Fortunately, these two instruments usually pointed to the same substantive law.<sup>862</sup>

The temporal scope of application of the Rome II Regulation therefore has led to some difficulties, which are inherent to the fact that the moment of occurrence of damage cannot always be easily distinguished. It is to be expected that this problem will be somewhat reduced by the passing of time, as more and more of the litigated damages will be occurring after the entry into force.

### 3. *The characterization of the concept of "non-contractual obligations", its relationship to the concept of "contractual obligations" and any difficulties in relation to characterisation (Arts. 1(1), 2)*

Regarding the characterization of the concept of 'non-contractual obligations' as well as its relationship to the concept of 'contractual obligations', there are no specific difficulties apparent from case law and Dutch literature. The qualification takes place smoothly and (mostly) implicitly.<sup>863</sup> The fact that both concepts are to be interpreted autonomously, with reference to the Brussel I bis Regulation as well, is occasionally explicitly stated<sup>864</sup>, and also in doctrine the interaction between those instruments has been emphasized.<sup>865</sup>

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<sup>859</sup> Asser/*Kramer & Verhagen 10-III* (1st edn, 2015), para 68; TMC Arons, 'Verkenning van de internationale bevoegdheid en het toepasselijk recht bij geschillen over de aansprakelijkheid van bestuurders', (2017/138) 16 *Ondernemingsrecht* 768, 775; Marek Zilinsky, *De bestuurdersaansprakelijkheid in het internationaal privaatrecht: een probleem van kwalificatie* (1st edn, Boom Juridisch 2017).

<sup>860</sup> Court of Appeal Amsterdam 20 December 2016, ECLI:NL:GHAMS:2016:5498, para 3.9 (Rome II applies directly); District Court Rotterdam 12 June 2019, ECLI:NL:RBROT:2019:5118, para 4.1 (Rome II applies directly); District Court Overijssel 27 August 2014, ECLI:NL:RBOVE:2014:4875, para 4.3 (exclusion applies, 10:159 CC was used); District Court Noord-Nederland 28 June 2017, ECLI:NL:RBNNE:2017:2318, para 4.3 (exclusion applies, but 10:159 CC was used); District Court Den Haag 11 February 2020, ECLI:NL:RBDHA:2020:1088, para 4.6 (court named both routes, but avoided making a decision between them as they pointed in the same direction).

<sup>861</sup> District Court Midden-Nederland 18 December 2013, ECLI:NL:RBMNE:2013:7229, para 4.2.

<sup>862</sup> Court of Appeal Arnhem-Leeuwarden 7 July 2015, ECLI:NL:GHARL:2015:4859, para 4.3; Court of Appeal 's-Hertogenbosch 12 november 2019, ECLI:NL:GHSHE:2019:4155, para 3.5.2; District Court Amsterdam 20 November 2019, ECLI:NL:RBAMS:2019:8741, para 7.14.

<sup>863</sup> Court of Appeal Den Haag, 25 November 2014, ECLI:NL:GHDHA:2014:4285, para 9.

<sup>864</sup> Supreme Court 24 January 2014, ECLI:NL:HR:2014:164, para 3.9.2; Supreme Court 26 February 2016, ECLI:NL:HR:2016:346, para 2.4; Supreme Court 3 June 2016, ECLI:NL:HR:2016:1054, para 2.7 of the conclusion by A-G P Vlas (followed); Court of Appeal Den Haag 30 April 2019, ECLI:NL:GHDHA:2019:1021, para 6.2.5.

<sup>865</sup> Asser/*Kramer & HLE Verhagen 10-III* 2015/980; EJM Schrage, *Verbintenissen uit andere bron* (Wolters Kluwer 2017), para 4.10.3.

#### 4. *The universal application of the Regulation (Art. 3)*

The universal application of the Regulation does not cause particular issues in the Netherlands. Application of the substantive law of a non-member state is not very common.<sup>866</sup> Sometimes, as if to clarify the reasoning for applying a certain law, Dutch courts have explicitly referred to the universal character of the scope.<sup>867</sup> In one incidental example case a Dutch court seems to have overlooked the universal scope in relation to a claimant resident Switzerland. However, this was in a superfluous part of the judgment and ultimately had no effect on the outcome.<sup>868</sup>

#### 5. *The approach to interpretation of the Rome II Regulation, and in particular its relationship to other EU private international law instruments (including the recast Brussels I Regulation and the Rome I Regulation)(Recital (7))*

Dutch courts occasionally mention the autonomous character of the concepts ‘contractual obligations’ and ‘non-contractual obligations’, with reference to Article 7(1)(a) of the Brussels I Regulation.<sup>869</sup> Overall, Dutch courts seem to be very willing to read Rome II in light of, and in line with, other EU private international law instruments.<sup>870</sup> The objective to secure of recital 7, being consistency between the EU instruments, therefore is generally fulfilled.

## 2.2 Chapter II - Tort/Delict

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to the implementation of:*

#### 6. *The general conflict-of-laws rule for tort/delict, and difficulties that have arisen in your Member State with respect to its application (Art. 4), and in particular:*

##### a. *the approach to identifying the place of direct damage in Art 4(1)*

Courts generally do not encounter problems in applying Art 4(1) and identifying the place of direct damage. The majority of the cases concern torts where material damage or personal injuries are suffered. Resulting from the *lex loci damni* rule the applicable law is the law where these damages occur. The damage occurs where the good or person is situated at the moment the damage is impaired and the location of this place is unproblematic.<sup>871</sup>

A difficulty arises with the respect to the localisation of damage in case of unlawful publications or damaging public statements, to which Rome II applies *mutatis mutandis* pursuant to Article 10:159 of the Dutch Civil Code, despite defamation being excluded from the scope of Rome II. The Dutch Supreme Court, referring to relevant case law of the CJEU on Article 7(2) Brussels I bis, ruled that in this case the law of the county where the center of interests is situated is applicable.<sup>872</sup>

More difficulties emerge with respect to the localisation of pure financial loss. According to doctrine<sup>873</sup>, and in line with the CJEU approach under the Brussels I Regulation, generally the location of the damage takes place by attributing it to a specific event or asset of the injured party. The location of this asset is considered to be the location of the tort.<sup>874</sup>

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<sup>866</sup> District Court Rotterdam 21 September 2016, ECLI:NL:RBROT:2016:7258, para 4.3 (Malaysian law); Court of Appeal Amsterdam 20 June 2017, ECLI:NL:GHAMS:2017:2416, para 3.5 (Surinamese law); Court of Appeal Amsterdam 19 February 2019, ECLI:NL:GHAMS:2019:484, para 3.13, (Somali law). See also: Joris den Hartog, ‘Rome II in de rechtspraak: probleemloze toepassing of redenen tot zorg?’ (2020) 3 NIPR 420, 422.

<sup>867</sup> District Court Arnhem 25 May 2011, ECLI:NL:RBARN:2011:BQ7713, para 4.2.

<sup>868</sup> Joris den Hartog, ‘Rome II in de rechtspraak: probleemloze toepassing of redenen tot zorg?’ (2020) 3 NIPR 420, 422-423; Court of Appeal Amsterdam 19 August 2014, ECLI:NL:GHAMS:2014:3428, para 3.3; Conclusion of A-G Vlas, Supreme Court 11 March 2016, ECLI:NL:HR:2016:394, RvdW 2016/384, para. 2.5.

<sup>869</sup> Court of Appeal Den Haag 30 April 2019 ECLI:NL:GHDHA:2019:1021, para 6.2.5; Supreme Court 3 June 2016, ECLI:NL:HR:2016:1054, para 2.7.

<sup>870</sup> Another example of this is the *Dahabshil* case, in which the *lex loci damni* was decided to be the victims’ center of main interests, with reference to the Brussels I-bis-Regulation, Supreme Court 3 June 2016, ECLI:NL:HR:2016:1054, para 3.5.1.

<sup>871</sup> Asser/Kramer & Verhagen 10-III 2015/997 and 989.

<sup>872</sup> Supreme Court 3 June 2016, ECLI:NL:HR:2016:1054, para 3.9.

<sup>873</sup> Asser/Kramer & Verhagen 10-III 2015/998.

<sup>874</sup> See for example Supreme Court 12 October 2001, NJ 2002/255 (*Diner/Igielko*).

If there is no specific asset, the residence of the injured party will be decisive. Specific implementations of Art 4(1) in the Dutch courts in difficult situations with pure financial losses are incidental and cause not much follow-up or appeal cases. Examples of possible problematic situations regarding the location of damages which the Dutch court ruled are unpaid invoices. With unpaid invoices the location of the damage is then the payment location instead of the location of processing of the goods.<sup>875</sup> In case of directors' liability, as far as it is not considered as a company law related cases, the registered office of the injured party is considered to be the location of the damage.<sup>876</sup> In case of torts taking place on multiple markets in Europa where it is not clear where the torts occurred, the Dutch court has decided that the damage occurred in the country where the production and the sales took place in the Netherlands.<sup>877</sup>

*b. the approach to the first rule of displacement in Art 4(2) in cases involving multiple parties or claims*

The Dutch courts have applied Art 4(2) in only a few cases.<sup>878</sup> There have been no cases with multiple parties or claims judging from the case law, apart from one published case concerning a collective action. The District Court of Rotterdam judged that the law of multiple countries is applicable in case of damage of investors in a collective action, looking at the parties involved.<sup>879</sup> It applied Art 4(2) in so far as the investor and the liable party were resident in the same country, while to other parties Art 4(1) was applied, *i.e.* the law of the country where the stocks were listed as the place where the damage occurred.

*c. the approach to the escape clause in Art 4(3)*

The escape clause of Art 4(3) is used mostly when there is a manifestly close connection because of a pre-existing relationship in the form of a contract.<sup>880</sup> In most cases the court referred to the law which was applicable to the contractual relationship from which the tort had arisen.<sup>881</sup> In some instances, Article 4(3) has been used where the localization of the damage within the meaning of Article 4(1) proved difficult.<sup>882</sup> There are no major difficulties in the implementation of Art 4(3).

*d. the suitability of this set of rules to govern cases of prospectus liability or other financial market torts*

Financial market torts in which Rome II was applied have not occurred often. According to doctrine prospectus liability falls under the scope of Article 4.<sup>883</sup> In doctrine, it has been argued that Article 4 is not always suitable for prospectus liability.<sup>884</sup> It may result in a multiplicity of applicable laws and is not geared to the specificities of prospectus liability. In one case, a collective action by investors brought in the District Court Rotterdam (see also above, sub b), Article 4 was sufficiently suitable to localize the damage. In another case, the District Court of Amsterdam ruled that with respect to the localisation of a tort resulting from fraudulent tradeable bonds, the general rule of Art 4(1) was difficult to apply in view of the multiplicity of claims and damage located in multiple countries.<sup>885</sup> Art 4(3) was applied in this case to localise the damage for the different claims by means of the close connection.<sup>886</sup>

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<sup>875</sup> District Court Midden-Nederland 18 December 2013, ECLI:NL:RBMNE:2013:6196, par 4.2.

<sup>876</sup> J. den Hartog, 'Hoe leiden de wegen vanuit Rome (II)? De toepassing van de conflictregels van Rome II in de Nederlandse rechtspraak', (2020) *NIPR*, para 4.2.3.

<sup>877</sup> Court of Appeal 's-Hertogenbosch 12 November 2019, ECLI:NL:GHSHE:2019:4155, para 3.5.2.

<sup>878</sup> J. den Hartog, 'Hoe leiden de wegen vanuit Rome (II)? De toepassing van de conflictregels van Rome II in de Nederlandse rechtspraak', (2020) *NIPR*, para 4.2.3.

<sup>879</sup> District Court Rotterdam 29 January 2020, ECLI:NL:RBROT:2020:614, para 2.

<sup>880</sup> J. den Hartog, 'Hoe leiden de wegen vanuit Rome (II)? De toepassing van de conflictregels van Rome II in de Nederlandse rechtspraak', (2020) *NIPR*, para 5.1.

<sup>881</sup> J. den Hartog, 'Hoe leiden de wegen vanuit Rome (II)? De toepassing van de conflictregels van Rome II in de Nederlandse rechtspraak', (2020) *NIPR*, para 5.1.

<sup>882</sup> *See*, for instance, District Court Amsterdam 21 October 2020, ECLI:NL:RBAMS:2020:5336

<sup>883</sup> Asser/Kramer & Verhagen 10-III 2015/1029.

<sup>884</sup> Asser/Kramer & Verhagen 10-III 2015/1029; T.M.C. Arons, *Cross-border Enforcement of Listed Companies' Duties to Inform* (2012), Kluwer: Deventer, p. 300-307.

<sup>885</sup> District Court Amsterdam 21 October 2020, ECLI:NL:RBAMS:2020:5336, par 5.9.

<sup>886</sup> District Court Amsterdam 21 October 2020, ECLI:NL:RBAMS:2020:5336, par 5.10-12.



7. *The rule on product liability (Art. 5) and, where relevant, the interaction with the application of 1973 Hague Convention on the Law Applicable to Products Liability;*

Art 5 on product liability has been applied in Dutch (published) case law only twice.<sup>887</sup> In both cases the courts followed the general rule of Art 5 without difficulties. In general the 1973 Hague Convention on the Law Applicable to Products Liability is applicable instead of Art 5 Rome II, since the Netherlands is a contracting party.<sup>888</sup> Only where the case falls outside the scope of the Convention is the Rome II Regulation applicable.<sup>889</sup> This is particularly relevant in view of the exclusion of the situation where the property, or right to use, the product was transferred between the party held liable and victim, within the meaning of Art 1(1) Hague Product Liability Convention.

8. *The specific rule on unfair competition (Art. 6)*

There are fourteen references of Dutch courts to the rule of unfair competition in the published case law. In most of the cases (9) the court applies Art 6(2) and refers back to Art 4(1) since there is only one damaged party (competitor).<sup>890</sup> In the other cases where there is a relationship between unfair competition and other specific Rome II rules, such as Infringement of intellectual property rights, the courts seem to have the tendency to decide the applicable law based on those specific rules instead of art 6(2).<sup>891</sup> Hence it is discussed in doctrine whether the scope of Art 6 is defined adequately, since different Member States seem to have different interpretations of what is covered by the unfair competition rule. By way of example, slavish imitation in the Netherlands falls under the general rule of Art 4, while under Rome II it seems to come under unfair competition based on the Explanatory Memorandum to the Commission proposal.<sup>892</sup> As a result of this Dutch courts are more reluctant to apply Art 6 and instead apply Art 4.<sup>893</sup>

There are other cases where the court decides based law of the county where the competition has been affected, but these are a minority. It seems that implementation of other Articles instead of Art 6 does not affect the specific law which is applied, since that is almost always the same as in Art 6.<sup>894</sup> However it is argued that it might trigger a sense of legal uncertainty which is not desirable.<sup>895</sup> Therefore in application Art 6 does not seem to be the cause of much courtroom disputes. However, the scope of Art 6 can be considered to be too little elaborated, this possibly leads to legal uncertainty.

9. *The specific rule on environmental damage (Art. 7)*

The rule on environmental damage has not been applied much in the Netherlands. Only two cases came before court according to published case law. In both cases parties agreed on the application of Dutch law since that damages occurred in the Netherlands.<sup>896</sup> There has been some doctrinal discussion about possible voids in Art 7, including how to deal with choice of law in the case of environmental damages and material or personal damages due to the environmental damages.<sup>897</sup> So far Dutch courts have not encountered these possible difficulties.

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<sup>887</sup> District Court Noord-Holland 8 December 2015, ECLI:NL:RBNHO:2015:10485, para 4.2; Rb Midden-Nederland 11 July 2018, ECLI:NL:RBMNE:2018:3817 para 4.6.

<sup>888</sup> Asser/Kramer & Verhagen 10-III 2015/1082.

<sup>889</sup> J.A. Pontier, *Onrechtmatige daad en andere niet-contractuele verbintenissen*, Antwerpen: Maklu 2015 p. 227-229.

<sup>890</sup> i.e. Court of Appeal Arnhem-Leeuwarden 20 December 2016, ECLI:NL:GHDHA:2016:2720 para 5.40; District Court Midden-Nederland 15 July 2015, ECLI:NL:RBMNE:2015:5500, para 4.3.

<sup>891</sup> i.e. District Court Midden-Nederland 8 August 2018, ECLI:NL:RBMNE:2018:3715, par 2.2; District Court Oost-Brabant 16 June 2020, ECLI:NL:RBOBR:2020:2984, para 4.2

<sup>892</sup> Asser/Kramer & Verhagen 10-III 2015/1020.

<sup>893</sup> J. den Hartog, 'Hoe leiden de wegen vanuit Rome (II)? De toepassing van de conflictregels van Rome II in de Nederlandse rechtspraak', (2020) *NIPR*, para 6.2.

<sup>894</sup> Asser/Kramer & Verhagen 10-III 2015/1019.

<sup>895</sup> Asser/Kramer & Verhagen 10-III 2015/1020.

<sup>896</sup> District Court Rotterdam 25 November 2015, ECLI:NL:RBROT:2015:8534, para 3.4.3; Rb. Rotterdam 20 July 2016, ECLI:NL:RBROT:2016:6041, para 3.8

<sup>897</sup> L. Strikwerda, 'Een zwakke stee in "Rome II": de conflictregel voor aansprakelijkheid wegens milieuschade', in: M.G. Faure & T. Hartlief (eds.), *De Spier-bundel. De agenda van het aansprakelijkheidsrecht*, Deventer: Wolters Kluwer 2016, para 11.

#### 10. *The specific rule on infringements of intellectual property rights (Arts. 8, 13)*

Most of the cases concerning the infringement of intellectual property rights result in judicial decisions where the court follows the general rule that the law of the country for which protection is claimed applies. There is little discussion about the application of the rule. Often Art 8 is not applied in intellectual property rights cases since there are international conventions on the infringement of intellectual property rights which are applied by the Dutch courts, such as the Paris Convention and the Berne Convention.<sup>898</sup>

In some cases, the demarcation between Article 8 and Article 6 is not clear-cut. In the literature torts like copyfraud are considered to come under the scope of infringement of intellectual property rights as well as unfair competition.<sup>899</sup> An example of this is a case where the Dutch court forbid invoking non-existing intellectual property rights in which the invoker knew the right didn't exist. The court assessed the applicable law not with Article 8 nor Article 6 but the general Article 4.<sup>900</sup> As stated in Section 2.2.3, the application of either to the Articles won't have much influence on the outcome of the applicable law, since Article 6 and 8 are both specifications of Article 4 and thus will almost always lead to the same applicable law.<sup>901</sup> However, this difficulty in demarcation can cause legal uncertainty.

#### 11. *The specific rule on industrial action (Art. 9)*

Art 9 has only been applied in the Dutch courts once. In this case the Dutch court considered the applicable law to be that of the county where the industrial action took place, Sweden.<sup>902</sup> No difficulties arose in this case.

### 2.3 Chapter III - Unjust Enrichment, *Negotiorum Gestio* And *Culpa In Contrahendo*

*Please indicate the general trend in your Member State and if any difficulties have emerged with respect to the implementation of:*

#### 12. *The specific rule on unjust enrichment (Art. 10), including its relationship with the general rule for tort/delict in Art. 4.*

There is little Dutch case law regarding the specific rule on unjust enrichment. Occasionally the relation between Articles 4 and 10 Rome II, or the possible co-existence of claims based on both Articles, is mentioned.<sup>903</sup> There is little discussion of this provision in literature. Difficulties may arise because of the lack of a defined, autonomous concept of 'unjust enrichment'. Possible hardship in distinguishing unjust enrichment from the *negotiorum gestio* has been touched upon in literature.<sup>904</sup> However, as these provisions are similar, this seems to be more a theoretical than a practical problem.

#### 13. *The specific rule on negotiorum gestio (Art. 11)*

Little Dutch case law exists regarding the rule on *negotiorum gestio*. In doctrine the relationship with Article 4 Rome II on 'regular' tort has been pointed out.<sup>905</sup> If Dutch law is applicable, which can be on the basis of a choice of law as well, the gestor gains the right of retention.<sup>906</sup> Potential trouble in distinguishing the *negotiorum gestio* from unjust

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<sup>898</sup> *i.e.* Supreme Court 13 December 2013, ECLI:NL:HR:2013:1881, para 6.3.2; District Court Rotterdam 20 January 2016, ECLI:NL:RBROT:2016:550, para 4.3.

<sup>899</sup> Rosenkranz & Rohde, 'The law applicable to non-contractual obligations arising out of acts of unfair competition and acts restricting free competition under Article 6 Rome II Regulation' (2008) 3, NIPR, p. 437.

<sup>900</sup> District Court Arnhem 30 september 2010, ECLI:NL:RBARN:2010:BN9748, para 4.2.

<sup>901</sup> Asser/Kramer & Verhagen 10-III 2015/1020-1021.

<sup>902</sup> District Court Rotterdam 23 July 2014, ECLI:NL:RBROT:2014:7049, para 4.28

<sup>903</sup> District Court Den Haag, 23 March 2014, ECLI:NL:RBDHA:2014:6909, para 4.8; Court of Appeal Arnhem-Leeuwarden, 24 April 2018, ECLI:NL:GHARL:2018:3878, para 5.7-5.8, 5.27; District Court Rotterdam 13 March 2019, ECLI:NL:RBROT:2019:1954, para 4.2.2.

<sup>904</sup> HLE Verhagen, 'Ongerechtvaardigde verrijking en zaakwaarneming in Rome II' (2008) 6780 WPNR 1003, 1005.

<sup>905</sup> District Court Gelderland, 16 March 2020, ECLI:NL:RBGEL:2020:2264, para 4.45; District Court Rotterdam, 29 July 2016, ECLI:NL:RBROT:2016:4960, 4.11-4.12.

<sup>906</sup> District Court Oost-Brabant, 19 July 2019, ECLI:NL:RBOBR:2019:4349, to be read in combination with Supreme Court 10 December 1948, ECLI:NL:HR:1948:145.

enrichment has been commented on in literature.<sup>907</sup> As these provisions are aligned on content this is unlikely to lead to difficulties.

#### *14. The specific rule on culpa in contrahendo (Art. 12)*

In doctrine the added value of Article 12(2) Rome II has been questioned.<sup>908</sup> Apart from the intrinsic added value of Article 12(2) as a whole, the interpretation of subs a-c of Article 12(2) has been dubbed unclear. Dutch discussion exists as to whether they are to be considered *alternatives* or instead as forming a hierarchical order.<sup>909</sup> The point of discussion has not led to issues in Dutch case law and it has only been applied a few times. In those cases either its first paragraph was applied, or a valid choice of law had been made.<sup>910</sup>

## 2.4 Chapter IV - Freedom of Choice

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

#### *15. The implementation in legal/business practice and by courts of the rule on freedom of choice, any difficulties therein and any discussion that has been carried out in your Member State regarding possible reasons which would justify the need to rethink it (Art. 14)*

Article 14 is regularly applied by Dutch courts. Most of the cases concern a choice of law during the procedure (usually for Dutch law), and the issue evolves around whether it can be considered that an implicit choice of law has been made. Circumstances that are taken into account in deciding that parties had the intention to make a choice of law include the behaviour of parties during the procedure (especially not refuting a claim by the other party that a certain law had been chosen), references to Articles of a specific national code, and the use of legal terminology which is specific for the law of a country. No specific difficulties arise in relation to the freedom choice of Article 14. Some commentators have challenged the exclusion of a choice of law for intellectual property rights under Article 8(3). In addition, the question has been posed whether the prohibition in Article 6(4) only relates to unfair competition that also affects the general public, or to all competition cases including those that only involve a specific competitor.

## 2.5 Chapter V - Common Rules

*Please indicate the general trend in your Member State and if any difficulties have emerged with respect to:*

#### *16. The scope of the exclusion of 'evidence and procedure' in Art 1(3) and any difficulties in relation to that exclusion or to questions of formal validity or the burden of proof (Arts. 21-22)*

There is no published case law on this provision and there is no discussion in doctrine about this provision.

#### *17. The approach in your Member State to questions of pleading, proof and application to individual cases of the substantive rules of the law applicable under the Rome II Regulation governing non-contractual obligations.*

In the Netherlands, conflict of law rules and the applicable substantive law, including foreign law, have to be applied *ex officio*. This is laid down in Article 10:2 of the Dutch Civil Code and generally accepted. Parties thus do not have to plead the application of the conflict of law rules or prove the content of foreign law. In commercial practice in particular parties do play an important role in informing the court about conflict of law rules and the content of foreign law, and often expert opinions are provided on behalf of the parties, but the courts do apply the conflict of law rules on their

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<sup>907</sup> HLE Verhagen, 'Ongerechtvaardigde verrijking en zaakwaarneming in Rome II' (2008) 6780 WPNR 1003, 1005.

<sup>908</sup> F. Ibili, 'Precontractuele aansprakelijkheid en Rome II', *WPNR* 6780/1011.

<sup>909</sup> M.R. Ruygvoorn, 9 July 2009, 'Afgebroken onderhandelingen en gebruik voorbehouden', R&P 2009/173, para 10.3.9; Asser/Kramer & Verhagen 10-III 2015/1192.

<sup>910</sup> District Court Amsterdam, 4 December 2019, ECLI:NL:RBAMS:2019:9089, para 4.2; District Court Rotterdam, 8 May 2019, ECLI:NL:RBROT:2019:3632, para 4.3; Court of Appeal 's-Hertogenbosch, 14 December 2010, ECLI:NL:GHSHE:2010:BO8197, para 4.4.1.

own account and review foreign law. A limitation under Dutch law is that generally the application of foreign law cannot be reviewed in *cassation*.<sup>911</sup>

*18. The delimitation of the scope of the applicable law (Art. 15(a)-(h)), including any difficulties as its relationship to the issues addressed at points 16 17 above)*

There are two published cases that involve Article 15. In both cases Dutch law was applicable based on Article 4 and there were no apparent difficulties.

*19. The application of the rule on overriding mandatory provisions (Art. 16)*

While overriding mandatory law has been a topic of discussion in the Netherlands, there is no published case law in which this provision of Rome II was actually applied. In general, the Dutch courts are reluctant in applying the rules on overriding mandatory law, and hardly ever has this resulted in applying foreign law. Overriding mandatory law has been occasionally applied under the Rome I Regulation on contractual obligations and in family law cases pursuant to a similar provision under domestic private international law.<sup>912</sup>

*20. The application of the specific rule on direct action against the insurer of the person liable (Art. 18)*

There is no published case law on this provision, and this provision has been discussed in doctrine only occasionally.<sup>913</sup>

*21. The application the specific rule on subrogation (Art. 19)*

Article 19 has been referred to twice in case law and did not result in difficulties.<sup>914</sup> There has been discussion on subrogation, but mostly in relation to voluntary assignment under the Rome I Regulation.

*22. The application of the specific rule on multiple liability (Art.20)*

There is not published case law on Article 20, however the specific rule of Article 20 has been applied before Rome II since it was unwritten law. Those rules did not cause difficulties.

## 2.6 Chapter VI - Other Provisions

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

*23. The implementation of the concept of habitual residence in the Rome II Regulation, with reference both to persons covered by Art 23 and natural persons acting otherwise than in the course of business*

There is no case law where this provision was a key issue or appeared to be problematic.

*24. The application of and any difficulties with the specific rules on exclusion of renvoi (Art. 24) and States with more than one legal system (Art. 25)*

There is no case law evolving around these provisions and appeared to be problematic.

*25. The application of and any difficulties with the specific rule on public policy of the forum (Art. 26)*

This provision has not been applied by the courts yet, judging from the published case law. One published judgment concerns a case that was outside the temporal scope of the Regulation. In that case, the District Court considered that that a provision leading to (disproportional) punitive damages under the law of one the States of the US contradicts Dutch public policy.<sup>915</sup>

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<sup>911</sup> Asser/Vonken 10-I 2018/395-407.

<sup>912</sup> Asser/Vonken 10-I 2018/559-652.

<sup>913</sup> F. Blees, De weg naar schadevergoeding in het internationale gemotoriseerde verkeer (Verzekeringsrecht) 2010/7.4; Asser/Kramer & Verhagen 10-III 2015/1134-1137.

<sup>914</sup> District Court Oost-Brabant 03-07-2013, ECLI:NL:RBOBR:2013:4272

<sup>915</sup> Rb Utrecht 8 February 2012, ECLI:NL:RBUTR:2012:BW1631.

26. *Practical interaction between the Rome II Regulation and other EU and international legal instruments, in specific areas such as environmental damages, intellectual property rights or data protection (Arts. 27, 28, 29)*

There are five published cases in which Article 28 has been referred to. In all these cases the other conventions were applied. The application of these other legal instruments has not been challenged in front of the Dutch courts. The cases were not in the areas of environmental damages, intellectual property rights or data protection, but mostly on traffic accidents and product liability.

## 2.7 Comments on other Practical Problems

*These areas are of particular interest for the Commission. Please be as precise as possible regarding any issue that has been reported on:*

27. *The impact of the application of the 1971 Hague Convention on the law applicable to traffic accidents on legal certainty (where relevant for your Member State)*

The 1971 Hague Convention is applicable in the Netherlands. The substantive law of the Convention regarding non-contractual liability flowing from (international) traffic accidents has precedence, according to Articles 28(2) Rome II and 10:158(1)(a) of the Dutch Civil Code.<sup>916</sup> The Convention has a broad substantive and a universal formal scope. It will therefore generally be applied to international traffic accidents brought before a Dutch court, especially as the case law shows willingness to give the convention a broad scope of application.<sup>917</sup> While the main rules of the Convention and the Rome II Regulation coincide, the importance of the law of the registration of the vehicles may lead to different results. The outcome of a case therefore becomes greatly dependent on where the claim is brought. In out of court handling of claims this also raises questions. In the Netherlands this issue has been raised because of the regular (holiday) traffic to and from Germany, which is not a part of the Convention. Especially regarding lease cars, the two instruments may come to point in opposite directions depending on the forum.<sup>918</sup> Coexistence of the different instruments simultaneously diminishes some of the main objectives of the Rome II Regulation: creating foreseeability and *legal certainty* within a uniform system.<sup>919</sup>

28. *Any other practical problems with respect to the application or interpretation of the Rome II Regulation, including but not limited to the suitability of the mosaic approach*

The most important Dutch case regarding the mosaic principle is *Dahabshii*.<sup>920</sup> This was a case concerning defamation to which Article 4 of Rome II became *mutatis mutandis* applicable through Article 10:159 Civil Code. The Dutch Supreme Court (*Hoge Raad*) decided that in the event of violations of privacy or personality rights through internet publications, the law of the country where the victim had its centre of main interests applied as *lex loci damni*. This was done in light of the case law on Article 7 of the Brussel I bis Regulation, specifically *eDate/ Martinez*.<sup>921</sup> Using the 'regular' mosaic response was deemed undesirable for defamation. This has not been confirmed for other categories of non-contractual obligations so far. It shows that the internet and technological advancements might put a strain on the satisfaction about the use of the mosaic principle under Rome II, as well as raise question regarding the transposition of Brussel I bis. For now, the issue seems mostly theoretic. There has been no real issue in Dutch case law regarding the mosaic approach under Article 4. No extensive discussion about the mosaic principle has emerged in Dutch

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<sup>916</sup> Ivo Bach, 'Article 4', in Peter Huber, *Rome II Regulation pocket commentary* (Seller European Law Publishers GmbH 2011) 64, 69; HJ van Harten, *Toepassing van Europees recht. Wat doet de Nederlandse rechter met het Europese recht?* (Kluwer 2012), pp. 88 – 92. Also: Court of Appeal 's-Hertogenbosch 4 April 2017, ECLI:NL:GHSHE:2017:1471, para 3.10.5.

<sup>917</sup> Court of Appeal Arnhem 18 May 2004, ECLI:NL:GHARN:2004:AP0037; District Court Amsterdam 26 July 2012, ECLI:NL:RBAMS:2012:BX4272, par 4.5.

<sup>918</sup> FJ Blees & XE Kramer, 'Internationale verkeersongevallen en verzekering in Europees perspectief' in Rogier Stijnen & Michel Jurgens (eds.), *Toepassing van Europees Recht. Wat doet de Nederlandse rechter met het Europese recht?* (1st edn, Kluwer 2012) 73, 92. See also: District Court Almelo 25 January 2012, ECLI:NL:RBALM:2012:BV2644.

<sup>919</sup> Preamble, recitals 6 and 16. This point of view is also discussed in: AF Collignon-Smit Sibinga, 'Internationale verkeersongevallen. Waarom niet alle wegen naar Rome leiden' (2014) 4 TvP 133, 137.

<sup>920</sup> Supreme Court 3 June 2016, ECLI:NL:HR:2016:1054, para 3.5.1.

<sup>921</sup> ECJ 25 October 2011, ECLI:EU:C:2011:685.

literature either, although it has been pointed out that the principle constitutes a form of *depeçage*, which possibility is not provided for under Rome II.<sup>922</sup>

Other practical issues are the qualification of corporate liability and intellectual property rights, specifically in establishing the border between these special tort categories and others, such as ‘classic’ tort and unfair competition. These issues are discussed more extensively in their own paragraphs.

### 3. Comments on areas of interest

*These areas are of particular interest for the Commission. Please be as precise as possible regarding any issue that emerged in your Member State regarding:*

*29. The exclusion of violations of privacy and rights relating to personality, including defamation, from the scope of the Rome II Regulation and any difficulties arising out from differences among Member States’ rules in cross-border situations*

In the Netherlands, the rights relating to personality and defamation have been brought *mutatis mutandis* under the rules of Rome II through Article 10:159 of the Dutch Civil Code. The aim of this provision was to prevent a gap in conflict law. As there are no conflict rules for personality rights and defamation in Rome II itself because of the general exclusion, the *lex loci damni* will apply. In *Dahabshil*, the Dutch Supreme Court (*Hoge Raad*) ruled that in the event of violations of privacy or personality rights through publications on the internet, the law of the country where the victim had their centre of main interests was to be regarded as *lex loci damni*.<sup>923</sup> In justifying this, the court referred to the case law regarding Article 7(2) of the Brussel I bis Regulation. The interpretation of the CJEU of Article 7(2) has been guiding in the application of Article 4 Rome II, including in cases of defamation as a result of the Dutch reference to Rome II also for cases that are excluded from the scope of Rome II.<sup>924</sup> While this may be generally satisfactorily in outcome the fact that different rules may be used in other Member States, undermines the uniform application of conflict rules on torts. The absence of a dedicated rule for defamation cases creates a void, and the effect of the (indirect) referral to Article 4 Rome II as the rule of conflict has been questioned in Dutch literature.<sup>925</sup> As Rome II has a universal scope, the *lex loci damni* can lead to a Dutch court ‘importing’ a legal regime that is very restrictive regarding the freedom of expression and press freedom. While the public policy exception might form a solution in some cases, it must be used only as ultimum remedium. As of now, no Dutch case law exists on this issue.

*30. Any comment regarding the Interplay of the Rome II Regulation with the treatment of defamation and data protection, and, in these areas, the relevance of Strategic Lawsuits Against Public Participation (SLAPPs)*

As it stands now, Rome II does not contain any special rules on defamation or privacy rights. Member States are therefore free to introduce conflict rules, but also their own substantive laws regarding defamation. In the Netherlands, the rules of Rome II apply *mutatis mutandis* to defamation, through Article 10:159 of the Dutch Civil Code, which brought the Dutch Supreme Court to apply the law of the country where the victim has its centre of main interests (see Section 3.1). The interplay with data protection rules has not been considered in this regard. The existence or amount of protection of free speech however differs between Member States and under the current system claimants are able to pursue cases in states with the most favourable rules. This forum shopping could ultimately lead to limitations of privacy rights and press freedom. Harmonization of the conflict rules on a Union level could make the applicable law less dependent on national law, more predictable, and limit forum shopping. In the Netherlands, SLAPPs are still a rarity. An example regarding the freedom to protest can be found in a number of cases involving Shell and Greenpeace. In 2012, Shell brought Greenpeace before the court of Amsterdam; this case did not come under the

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<sup>922</sup> JA Pontier, *Onrechtmatige daad en andere niet-contractuele verbintenissen* (3rd edn, Maklu 2015), para 251.

<sup>923</sup> Supreme Court 3 June 2016, ECLI:NL:HR:2016:1054, para 3.5.1.

<sup>924</sup> Court of Appeal Amsterdam 25 April 2017, ECLI:NL:GHAMS:2017:1629, no. 3.6, NIPR 2017/470. See also Court of Appeal ‘s-Hertogenbosch 1 May 2012, ECLI:NL:GHSHE:2012:BW5415, no. 4.8 – 4.11.2.

<sup>925</sup> Laura van Bochove, ‘Onlogisch analogisch: de overeenkomstige toepassing van Europese conflictregels in grensoverschrijdende smaadzaken ex artikel 10:159 BW’ in MT Beumers, CC de Kluiver, AM Overheul, FQ van de Pol, LSA Trapman (eds.), *Vijftig weeffouten in het BW377*, 383; AAH van Hoek, ‘De onrechtmatige daad in Boek 10 BW’ (2010) 7/8 MvV 208, 213.

temporal scope of Rome II though.<sup>926</sup> In this case, the court granted Greenpeace the right to peacefully protest. This case does not stand on its own. In 2013, the Court of Appeal ruled that Shell's attempt to have Greenpeace protesters criminally convicted would be to no avail.<sup>927</sup> By bringing Greenpeace to court, Shell may have essentially tried to breach the organization's fundamental right to protests. Shell succeeded in stopping Greenpeace's protests in a similar recent lawsuit in Scotland.<sup>928</sup> According to the Dutch director of Greenpeace: 'Shell is trying to take away their fundamental right to protest'.<sup>929</sup> Generally, however, going to court is seen as an *ultimum remedium* in the Netherlands.<sup>930</sup> Nevertheless, the growing importance of SLAPPs in Europe will also have an effect in the Netherlands, and it is important to address (anti) SLAPPs.

31. *The extent to which Rome II Regulation has been applied to corporate abuses against human rights and lays down an effective set of rules to regulate non-contractual liability;*

If a corporation has its headquarters in a Member State, foreign claimants can bring the case before the court of that Member State based on Article 63 Brussel I bis. This is what happened in the *Nigeria/Shell* case before Dutch courts.<sup>931</sup> Under Dutch conflict rules on tort prior to Rome II, the Conflict of Laws Tort Act (*Wet Conflictenrecht Onrechtmatige Daad*), Nigerian law was applicable. Rome II was not applicable yet at the time of the damage occurring from the oil leak, but as the Regulation does not contain any specific rules on the topic, the *lex loci damni* of Article 4 Rome II would have led to the same result. This negatively affects the chance of claimants succeeding at their *foreign direct liability claim*, as corporations will often choose to 'do the damage' in states where legislation regarding human rights is less strict. Even though claimants do not receive the broader material protection of the *lex fori*, they are bound to its usually stricter procedural rules.<sup>932</sup> Under Rome II, Articles 4(3) or 7 could provide a solution in future cases. It remains to be seen how these options will be dealt with by the Dutch courts. Early 2021, the Court of Appeal judged in this case that Shell is liable for damages that occurred, due to a negligence in their duty of care. The Court ruled that was no violation of human rights by Shell.<sup>933</sup> However the case was outside the temporal scope of Rome II and no noteworthy rulings were given with regard to Rome II.

32. *The impact of the development of artificial intelligence on the Rome II Regulation, and in particular on the suitability of the rules that it contains to regulate non-contractual liability.*

In foreign literature it has been stated that it is 'reasonable' to use Article 4 and that Article 5 Rome II is 'satisfactory' in cases of AI-tort, because they do not necessarily favour the victim.<sup>934</sup> After all, assuming fault of the driver or producer will be harder to prove in cases of imbedded, self-learning artificial intelligence. It simply may not be there. This may lead claimants to forum shop for systems of law in which risk-liability exists. Unforeseeability of the applicable law is increased because of the existence of the 1971 Hague Convention regarding traffic accidents and the 1973 Hague Convention on product liability. Both instruments are likely to be involved in AI torts; both apply in the Netherlands. The subject has not been the topic of any real debate in the Netherlands. Although the application of Rome II to artificial intelligence has also not yet caused any issue in Dutch courts, simplifying the duality of the instruments would lead to more legal certainty and less incentives for forum shopping.

The recently published resolution of the European Parliament on the civil liability of artificial intelligence sheds some new light on suitability of Rome II rules. The resolution addresses the issue of product liability of artificial intelligence, which is under the scope of the 1973 Hague Convention on product liability. The literature discusses possible pitfalls such

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<sup>926</sup> District Court Amsterdam, 5 October 2012, ECLI:NL:RBAMS:2012:BX9310.

<sup>927</sup> Court of Appeal Den Haag, ECLI:NL:RBDHA:2013:10766.

<sup>928</sup> Scottish Court of Session 15 January 2020 [2020] CSOH 7.

<sup>929</sup> 'Shell daagt Greenpeace voor de rechter', *Greenpeace* 25 November 2019, [www.greenpeace.org](http://www.greenpeace.org).

<sup>930</sup> TE van der Linden, 'Strategisch procederen tegen activisten: Over Strategic Lawsuits Against Public Participation (SLAPP's) in Nederland' (2020/9) 3 NTBR 65, 77.

<sup>931</sup> District Court Den Haag, 30 January 2013, ECLI:NL:RBDHA:2013:BY9854.

<sup>932</sup> LFH Enneking, 'The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case' (2014/10) 1 ULR 44, 48; LFH Enneking, 'Foreign Direct Liability and Beyond Exploring the role of tort law in promoting international corporate social responsibility and accountability' (2012). Eleven International Publishing, p. 126-128.

<sup>933</sup> Court of Appeal Den Haag, 29 January 2021, ECLI:NL:GHDHA:2021:132.

<sup>934</sup> Marek Swierczynski & Lukasz Zarnowiec, 'Law applicable to liability for damages due to traffic accidents involving autonomous vehicles' (2020/14) 2 Masaryk University Journal of Law and Technology 177, 200.

as the qualification of 'high risk' AI-intelligence, and the active role that operators should/can have.<sup>935</sup> The intention of the resolution is to offer more legal certainty however the commission will have to deal with great challenges designing these new artificial intelligence regulations.. Based on the published case law, the issue of Rome II and liability in relation to the use of AI has not yet been addressed in Dutch practice. The operation of Rome II and the use of AI has not received specific attention in Dutch literature yet, though the liability of producers, operators and users of AI and the relationship to other areas of law, including privacy law, is a topic of discussion.

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<sup>935</sup> C Prins 'Aansprakelijkheid voor AI-systemen' NJB (2020/41) 2804.



## 4. List of national case law

**Author's note:** This overview covers published case law only. Case law is published on [www.rechtspraak.nl](http://www.rechtspraak.nl). Not all judgments are published, but only those having some significance. Cases involving elaborated private international law aspects will often be considered having significance.

Statistics are included on the last page.

Hoge Raad = Supreme Court

Gerechtshof = Court of Appeal

Rechtbank (Rb) = District Court

<u>Court or tribunal</u>	<u>Case name and reference number</u>  <u>Reference to decision of the Court of Justice if applicable</u>	<u>Date</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings (only for key cases)</u>
Hoge Raad	ECLI:NL:HR:2018:345	16-03-2018	Art 6	Rome II and WCOD	Art 6 not applicable WCOD is applicable
Hoge Raad	ECLI:NL:HR:2017:2269	08-09-2017	Art 17	Rome II and insolvency directive	Preliminary question to CJEU About the relationship between art 17 and art 13 of the insolvency directive
Hoge Raad	ECLI:NL:HR:2016:1054	03-06-2016	Art 4 (1) & (3)	Location of damages with defamation	The court ruled that in the case of defamation websites on the internet which can be access globally, 'the law of the country in which the damage occurs' from art 4 (1), needs to be interpreted in the same way as art. 5 (3) 'the place

					where the harmful event occurred or may occur'. According to the court a judge is free to use the definition and interpretation of EEX to assess where the damages have occurred. Given the ruling of the CJEU in eDate Martinez this is the place where the victim has his centre of interests. The court concluded that this centre of interest is also the place where the damages occur. So the law of the country where the victim has his centre of interest is the applicable law,
Gerechtshof Arnhem-Leeuwarden	ECLI:NL:GHARL:2020:6273	11-08-2020	Art 31 art 32	Application in time	Rome II not applicable since damages happened before 11-01-2009.
Gerechtshof Amsterdam	ECLI:NL:GHAMS:2020:1802	23-06-2020	Art 14 (1)	Choice of law	
Gerechtshof Arnhem-Leeuwarden	ECLI:NL:GHARL:2020:2812	07-04-2020	Art 14 (1)	Choice of law	
Gerechtshof Den Haag	ECLI:NL:GHDHA:2020:795	07-04-2020	art 4 (1) & (3)	Location of damage and close connection to country	Dutch law was applicable, damages were in the Netherlands and close connection with the Netherlands too
Gerechtshof 's-Hertogenbosch	ECLI:NL:GHSHE:2019:4155	12-11-2019	art 4 (1)	Location of damage	Torts on multiple markets in Europe, however Netherlands is considered to be the main market since the sales and production happened in the Netherlands. Thus the court concluded that tort occurred in the Netherlands, so Dutch law was applicable

Gerechtshof Arnhem-Leeuwarden	ECLI:NL:GHARL:2019:6563	13-08-2019	art 4 (1)	Location of damage	
Gerechtshof Den Haag	ECLI:NL:GHDHA:2019:1962				WOCD applicable
Gerechtshof Den Haag	ECLI:NL:GHDHA:2019:1021	30-04-2019	Art 4, art 7 art 10	Location of damages Unjust enrichment	In a long-term contractual relationship Dutch law is appointed to be applicable. The court judged that Dutch law is applicable as well based on art 4, for carelessness and torts resulting from performance of the contract. Art 7 not in the way of Dutch law to be applicable
Gerechtshof Amsterdam	ECLI:NL:GHAMS:2018:4331	27-11-2018	Art 14 (1)	Choice of law	Unjust enrichment. Impoverishment took place in Moldavia and enrichment took place in the Netherlands. Court accepted that parties chose for Dutch law.
Gerechtshof Arnhem-Leeuwarden	ECLI:NL:GHARL:2018:8710	02-10-2018	Art 4 (1) & (3)	Location of damage and close connection to country	Generally, the law of the county where the damages happened is applicable, this is Guyana. In this case the Netherlands is closely related since the contract form which the torts origins has more connection with the Netherlands so Dutch law is applicable.
Gerechtshof 's- Hertogenbosch	ECLI:NL:GHSHE:2018:3452	21-08-2018	Art 4 (1) & (3)	Location of damage and close connection to country.	Plaintiff and respondent have a lease agreement according to Dutch law. Torts and damages all happened in Belgium so Belgium law applicable (art 4 ((1))). Respondent argues that there is a closer connection with the Netherlands, court

				Contract to Dutch law, Torts happened all in Belgium	rejects this, since all activities happened in Belgium. The fact that it was a lease agreement according to Dutch law did not alter the conclusion that Belgian law was applicable.
Gerechtshof Den Haag	ECLI:NL:GHDHA:2018:2894	03-07-2018	Art 10	Location of damages Unjust enrichment	
Gerechtshof Arnhem-Leeuwarden	ECLI:NL:GHARL:2018:3878	24-04-2018	Art 4 art 10	Location of damages Unjust enrichment	All damages and unjust enrichments happened in the Netherlands
Gerechtshof Amsterdam	ECLI:NL:GHAMS:2018:570	20-02-2018	Art 14	Choice of law	
Gerechtshof 's-Hertogenbosch	ECLI:NL:GHSHE:2017:3764	29-08-2017	Art 4 (3)	Location of damage and close connection to country	Close connection to Belgium so Belgian law is applicable.
Gerechtshof Den Haag	ECLI:NL:GHDHA:2017:431	07-03-2017	Art 31 art 32	Application in time	Rome II not applicable since damages happened before 11-01-2009.
Gerechtshof Arnhem-Leeuwarden	ECLI:NL:GHARL:2016:10512	27-12-2016	Art 31 art 32	Application in time	Rome II not applicable since damages happened before 11-01-2009. No temporal expansion of the term through art 10:159 BW since art 31 and 32 explicitly state that it application is limited to torts that happened after 11-01-2009.
Gerechtshof Amsterdam	ECLI:NL:GHAMS:2016:5498	20-12-2016	Art 4 (1)	Location of damages	Dutch law is applicable based on art 4. Art 10:119 BW that states that the law of

						the corporation is applicable. Since the case it based on a non-contractual obligations and thus art 4 is applicable.
Gerechtshof Haag	Den	ECLI:NL:GHDHA:2016:2720	27-09-2016	Art 4 (1)	Location of damages	
Gerechtshof Haag	Den	ECLI:NL:GHDHA:2016:2225	19-07-2016	Art 4 (1)	Location of damages	
Gerechtshof Haag	Den	ECLI:NL:GHDHA:2016:217	02-02-2016	Art 8 (1)	Infringement of intellectual property rights	
Gerechtshof Hertogenbosch	's-	ECLI:NL:GHSHE:2015:3904	06-10-2015	Art 4 (1)	Location of damages	The country where the torts or damages occur can be explained in the same way as the in the CJEU ruling eDate Martinez. The country where the victim of the tort has its centre of interests.
Gerechtshof Arnhem-Leeuwarden		ECLI:NL:GHARL:2015:6649	08-09-2015	Art 4 (1) & art 1(2) sub 1	Directors liability, location of damages	If the claim of a tort is not based on company law then directors liability in not covered by the exclusion of the regulation of Rome II of art 1(2) sub 1 . The general rule of art 4 (1) applies.
Gerechtshof Arnhem-Leeuwarden		ECLI:NL:GHARL:2015:1152	17-02-2015	-	-	Rome II not applicable, mainly noncompliance with contractual obligations.

Gerechtshof 's-Hertogenbosch	ECLI:NL:GHSHE:2014:5184	09-12-2014	Art 4 (1)	Location of damages	
Gerechtshof Den Haag	ECLI:NL:GHDHA:2014:4285	25-11-2014	Art 4 (1) & Art 14 (1)	Location of damages and choice of law	
Gerechtshof Arnhem-Leeuwarden	ECLI:NL:GHARL:2014:8049	21-10-2014	art 4 (1) & (3)	Location of damage and close connection to country	
Gerechtshof Amsterdam	ECLI:NL:GHAMS:2014:3428	19-08-2014	art 4 (1)	Location of damage	
Gerechtshof 's-Hertogenbosch	ECLI:NL:GHSHE:2014:2181	15-07-2014	art 4 (1) & (3)	Location of damage and close connection to country	Even though that a Moroccan judge ruled about a maintenance decision, there is no closer connection with Morocco than the Netherlands where damages occurred. (4.16.2)
Gerechtshof Arnhem-Leeuwarden	ECLI:NL:GHARL:2014:2717	01-04-2014	Art 31 art 32	Application in time	Rome II not applicable since damages happened before 11-01-2009.
Gerechtshof Arnhem-Leeuwarden	ECLI:NL:GHARL:2014:2168	18-03-2014	Art 8(1)	Infringement of intellectual property rights	
Gerechtshof Amsterdam	ECLI:NL:GHAMS:2013:4669	17-12-2013	Art 4 (1) & art 1(2) sub 1	Directors liability, location of damages	Directors liability excluded if it is based on company law.

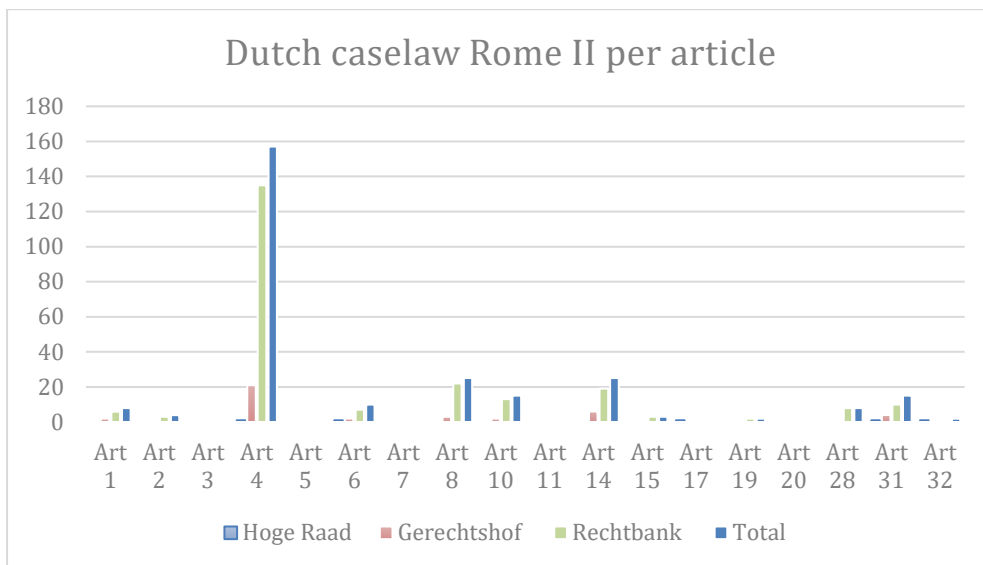
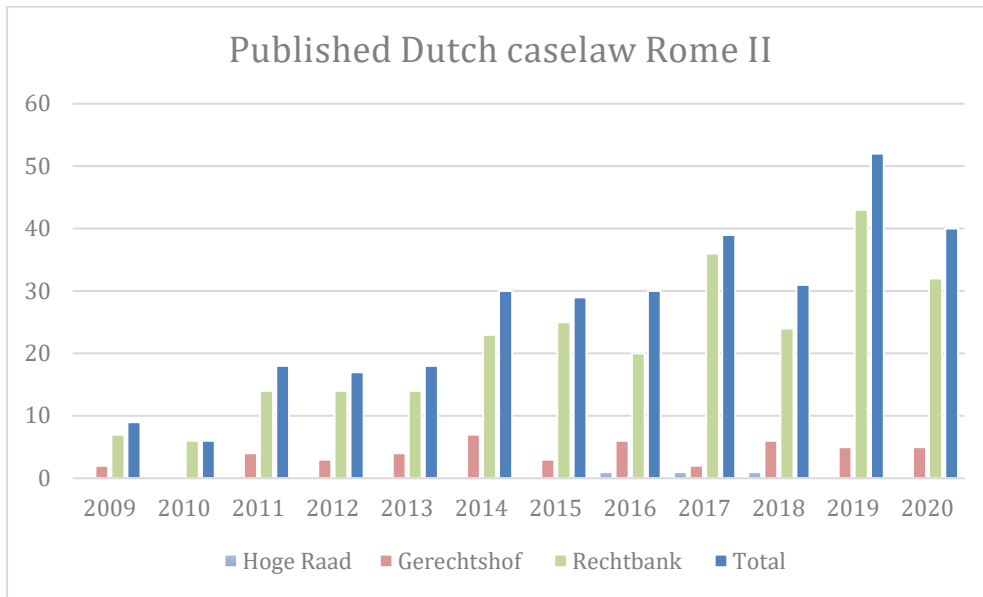
Gerechtshof Hertogenbosch	's-	ECLI:NL:GHSHE:2013:2993	09-07-2013	Art 4(1) art 6 (1)	Location of damage	
Gerechtshof Arnhem-Leeuwarden		ECLI:NL:GHARL:2013:BZ2600	26-02-2013	art 4 (1)	Location of damage	
Gerechtshof Den Haag		ECLI:NL:GHDHA:2013:BZ0458	9-01-2013	Art 6(1)	Location of damage unfair competition	
Gerechtshof Amsterdam		ECLI:NL:GHAMS:2012:BW0096	13-03-2012	Art 4(1) & Art 8 (1)	Location of damages, Infringement of intellectual property rights	
Gerechtshof Gravenhage	's-	ECLI:NL:GHSGR:2012:BV8213	06-03-2012	art 4 (1)	Location of damage	
Gerechtshof Hertogenbosch	's-	ECLI:NL:GHSHE:2012:BV1768	24-01-2012	art 4 (1)	Location of damage of defamation	Defamation and its consequences occurred in the Netherlands.
Gerechtshof Hertogenbosch	's-	ECLI:NL:GHSHE:2011:BU6386	22-11-2011	Art 31 art 32	Application in time	Rome II not applicable since damages happened before 11-01-2009.
Gerechtshof Gravenhage	's-	ECLI:NL:GHSGR:2011:BR1364	12-07-2011	Art 8(1)	Infringement of intellectual property rights	
Gerechtshof Gravenhage	's-	ECLI:NL:GHSGR:2011:BQ4582	19-04-2011	art 4 (1)	Location of damage	

Gerechtshof 's-Gravenhage	ECLI:NL:GHSGR:2011:BP9490	29-03-2011	Art 8 (1)	Infringement of intellectual property rights	
Gerechtshof Arnhem	ECLI:NL:GHARN:2009:BK9704	28-07-2009	Art 31 art 32	Application in time	Rome II not applicable since damages happened before 11-01-2009.
Gerechtshof Arnhem	ECLI:NL:GHARN:2009:BI4766	21-04-2009	Art 31 art 32	Application in time	Rome II not applicable since damages happened before 11-01-2009.
Rb. Amsterdam	ECLI:NL:RBAMS:2020:1565	11-03-2020	Art 4	Location of damages	Damages occurred due to money transactions from a Cypriot bank. The owner of the bank account is a Dutch based company, however the damages occurred in Cyprus so Cypriot law is Applicable.
Rb. Gelderland	ECLI:NL:RBGEL:2020:1082	22-01-2020	Art 1 (1) sub g Art 4	Location of damages with defamation	Based on 10 (159) BW the articles of Rome II are applicable on non-contractual obligations arising from violations of rights related to personality, such as defamation.
Rb. Rotterdam	ECLI:NL:RBROT:2019:110	09-01-2019	Art 1 (1) sub g Art 4	Location of damages with defamation	Based on 10 (159) BW the articles of Rome II are applicable on non-contractual obligations arising from violations of rights related to personality, such as defamation. The damages occurred were the plaintiff has his centre of interest.



Rb. Zeeland-West-Brabant	ECLI:NL:RBZWB:2018:5109	31-08-2018	Art 4	Location of damages with defamation	Based on 10 (159) BW the articles of Rome II are applicable on non-contractual obligations arising from violations of rights related to personality, including defamation. In this case the court judges that the damages occur in Georgia, since the broadcasts were specifically directed to the Georgian public, hence Georgian law is applicable.
Rb. Noord-Holland	ECLI:NL:RBNHO:2017:8248	16-8-2017	Art 4	Location of damages with financial loan	Even though that both parties are not based in the Netherlands, the plaintiff is registered in the British Virgin islands and the respondent is a Russian based and operating company, Dutch law is applicable since it is also applicable to the loan on which the non-contractual violation is based.
Rb Amsterdam	ECLI:NL:RBAMS:2017:5415	9-8-2017	Art 4	Location of damages with defamation	The country where the victim of the tort has its centre of interests, is where the damages occurred, and therefore Dutch law is applicable
Rb. Midden-Nederland	ECLI:NL:RBMNE:2013:7229	18-12-2013	Art 4	Location of damages	The non-contractual violation is due to not paying pension contribution. The place where the damages occurred is where the pension was due to be paid, so the Netherlands
Rb. Midden-Nederland	ECLI:NL:RBMNE:2013:6196	18-12-2013	Art 4	Location of damages	Place where damages occur in the case of non-payment for goods, is the place

					where payment is received and not the place where the goods are fabricated.
Rb. Rotterdam	ECLI:NL:RBROT:2013:BZ2365	23-01-2013,	Art 4	Location of damages	Even though that both the plaintiff and respondent reside in the Netherlands, which is a coincidence, the damages have occurred in Belgium and therefore Belgian law is most closely related, and thus applicable.



# Poland

## Executive Summary

- The Rome II Regulation is well known by Polish doctrine and applied by Polish courts, albeit its correct application was subject to critique by scholars. The doctrinal controversies are often presented in the light of English or German's doctrine on the subject.
- The exclusion of defamation from the Regulation's scope of application was debated in Polish doctrine, however with consensus that such inclusion could be more advantageous in the light of challenges posed by modern technologies.
- Polish doctrine was particularly interested by Art. 14 rule, which was a new addition to Polish private international law. The freedom of choice was considered as of paramount theoretical importance; however, its practical impact was estimated as of lesser magnitude (see Chapter IV). The admissibility of partial choice of law is debated in Polish doctrine (see Chapter IV).
- Other areas of interest include Art. 5 (see Question 7), Art. 6 (see Question 8) and the interplay between the Regulation and the 1971 Hague Convention on the Law Applicable to Traffic Accidents (see Question 27). In the latter case, Polish doctrine criticised that the Convention takes precedence over the Regulation.
- Although some scholars have raised more modern issues, such as accidents involving autonomous vehicles (see Questions 27 and 32), law applicable to electronic torts or artificial intelligence in the private international law (see Question 32), these seem still young and evolving legal matters in Poland.
- Also, the law applicable to financial torts or is to lawsuits against public participation is not yet well explored in Polish literature.

## 1. Introduction

No important data was found as to the citizens' and businesses' awareness of the Rome II Regulation. No significant discussion is led as to the impact of the Regulation's provisions on the question of business and human rights.

The Regulation is known and applied by Polish courts, although the proper knowledge and interpretation of the European legal instruments in general is lesser among lower courts. The courts (also on the appellate level) encountered difficulties not only in determining the scope of application of the Regulation's provision, but also the content of the foreign applicable law.<sup>936</sup> In general, Polish judiciary rarely quotes the decisions of the ECJ and even to the lesser extent refers for a preliminary ruling.<sup>937</sup> Moreover, Polish academia deplores the lack of a methodological justification in court's decision for the application of the specific rule, particularly in the field of private international law.<sup>938</sup> The statistics are hard to provide, as Polish common courts are not obliged to publish their decisions online. Therefore, according to Polish scholars, the extent of matters relating to European private law treated by Polish courts may be greater than it is reflected in the number of cases that in the end are available online.<sup>939</sup>

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<sup>936</sup> A. Frąckowiak-Adamska, A. Guzewicz, Ł. Petelski, „Skuteczność stosowania przez sądy polskie unijnych rozporządzeń: nr 44/2001, nr 2201/2003, nr 864/2007 i nr 4/2009”, *Europejski Przegląd Sądowy*, n° 10/2016, p. 8.

<sup>937</sup> A. Frąckowiak-Adamska, A. Guzewicz, Ł. Petelski, „Skuteczność stosowania przez sądy polskie unijnych rozporządzeń: nr 44/2001, nr 2201/2003, nr 864/2007 i nr 4/2009”, *Europejski Przegląd Sądowy*, n° 10/2016, p. 5.

<sup>938</sup>

<sup>939</sup> A. Frąckowiak-Adamska, A. Guzewicz, Ł. Petelski, „Skuteczność stosowania przez sądy polskie unijnych rozporządzeń: nr 44/2001, nr 2201/2003, nr 864/2007 i nr 4/2009”, *Europejski Przegląd Sądowy*, n° 10/2016, p. 5.

The doctrinal analysis of the Rome II Regulation is often led by the same scholars. It is particularly visible in the legal commentaries, where the same provisions are analysed in different editions still by the same representants of academia. In consequence, there is not much difference in opinions on the same subject. By the same token, Polish doctrine often quotes European scholars for contra or minority opinions. The Rome II Regulation is included in all important commentaries on private international or civil law. The area of particular interest for Polish academia, presented not only in commentaries but also in legal publications and articles, relates to the scope of application of general rule, freedom of choice, unfair competition and product liability, also in the light of autonomous vehicles (with proposals of the Regulation reform). However, no relevant discussion is noted (as of yet) on the interplay between the Regulation and the areas of particular interest, such as SLAPP or human rights abuses by corporations. Also, the question of financial market torts caused no considerable discussions within the legal community. In the frame of privacy rights and traffic accidents, Polish scholars raised the necessity to adapt the Regulation to the challenges of the modern world and regarding the problematic of traffic accidents to give the precedence to the Regulation over the 1971 Hague Convention.

On political level, the Regulation did not generate any relevant debate. Apart inquiries as to the law applicable to mining damages taking place in Poland<sup>940</sup>, the Parliament took into account the Rome Regulations during the reform of Private International Law Act in 2011 by introducing Arts. 28 and 33. According to Polish scholars, this provision cannot be understood as the basis for the application of the Rome II Regulation (because the position of the EU law in the national legal order is the subject of a regulation of a constitutional rank that cannot be changed by a statutory regulation).<sup>941</sup> However, in the literature it was also underlined that Art. 28 and 33 of Polish Private International Law Act could have helped the courts to notice the Rome Regulations.<sup>942</sup>

## 2. Analysis of the Rome II Regulation

### 2.1 Chapter I – Scope and Interpretation

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to :*

1. *The determination of the material scope of application of the Rome II Regulation, including any difficulties in applying the category of “civil and commercial matters” or in defining the exact scope of any excluded matters (Art. 1(1)-(2))*

The distinction provided for in term “civil and commercial matters” is in Polish law superfluous, in the light of the principle of the unity of civil law.<sup>943</sup> Polish doctrine is however consensual that this term must be interpreted autonomously, taking into consideration, at one hand, the purpose, construction and principles of the Regulation and, at the other, the results of comparative analysis of MS legal regimes.<sup>944</sup>

According to one prominent Polish scholar, for the purpose of clarity, the exclusion of the liability of State authority (*acta iure imperii*) should be included in the list of specific exclusions, rather than in Art. 1(1) 2<sup>nd</sup> sentence.<sup>945</sup> In Polish

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<sup>940</sup><http://www.sejm.gov.pl/Sejm7.nsf/interpelacjaTresc.xsp?documentId=7C093FF259A8C15CC1257B6500351335&view=S>

<sup>941</sup> M. Czepelak, „Międzynarodowe prawo zobowiązań Unii Europejskiej”, Warsaw 2012, p. 19 ff.

<sup>942</sup> J. Pazdan *et al.*, „Uwagi o uregulowaniach rozporządzenia Rzym II... i ich stosowaniu na tle doświadczeń polskiej judykatury”, *Problemy Prawa Prywatnego Międzynarodowego*, vol. 16, 2015, p. 69.

<sup>943</sup> J. Pazdan, „Rozdział XII. Zobowiązania pozaumowne”, n° 36, in: M. Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, C.H. Beck, Warsaw 2015.

<sup>944</sup> J. Pazdan, „Rozdział XII. Zobowiązania pozaumowne”, n° 36, in: M. Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, C.H. Beck, Warsaw 2015; M. Pazdan, „Art 1”, n° 4, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe, Duże Komentarze Becka*, Warsaw 2018.

<sup>945</sup> J. Pazdan, „Rozdział XII. Zobowiązania pozaumowne”, n° 36, in: M. Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, C.H. Beck, Warsaw 2015.

law, *acta iure imperii* relate to the responsibility of the State Treasury, local government units and other legal persons that execute public powers such as defined in art. 417 of the civil code.<sup>946</sup>

As for the interpretation of Art. 1, 1<sup>st</sup> sentence, namely "situations involving a conflict-of-laws" (translated into Polish as "conflict-of-laws of different states"), according to doctrine it purports to the application of the Regulation to facts with foreign element (international state of facts).<sup>947</sup>

## 2. *The determination of the temporal scope of application of the Rome II Regulation (Arts 31-32)*

The distinction provided for in the Regulation between its entry into force (including the lack of the specific date in the provision itself) and the date of its application was subject to doctrinal debate and judicial confusion in Poland. Polish scholars leaned towards the application of the choice-of-law rules of the Regulation to non-contractual obligations that have arisen on or after the date of the Regulation application.<sup>948</sup> Therefore, the decision of the CJEU in the *Homawoo* case was welcomed with satisfaction and hope that it would unify the rulings in that matter in the Member States.<sup>949</sup>

The second issue discussed by Polish scholars touches upon the application of the Regulation where a continuous tort gives rise to damages occurring after and before the Regulation's date of application. In that situation one of the recommended solutions is to adopt the principles created to solve the issue of applicable legal provisions change<sup>950</sup>.

Regarding Polish courts, they also faced substantial difficulties in the interpretation of Arts. 31 and 32 of the Regulation, even after the *Homawoo* decision. On 13 January 2014 Provincial Court in Cracow based its decision on Art. 4 for the damage that occurred in 2006 in Austria. The ruling was reversed in appeal, albeit for a different reason.<sup>951</sup> The court of Appeal<sup>952</sup> however referred to the interpretation of the Arts. 31 and 32 presented in the *Homawoo* case.

In the decision from 2013 Polish Supreme Court alluded to the application in time of the Regulation, stating that the latter is applicable to the torts occurring after its date of entering into force which may be interpreted as giving more importance to the solution of the Art. 31.<sup>953</sup>

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<sup>946</sup> J. Pazdan, „Rozdział XII. Zobowiązania pozaumowne”, n° 36, in: M. Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, C.H. Beck, Warsaw 2015.

<sup>947</sup> M. Pazdan, „Prawo Prywatne Międzynarodowe”, Wolters Kluwer Polska, 2016, n° 288.

<sup>948</sup> Ł. Żarnowiec, „Prawo właściwe dla odpowiedzialności za szkodę wyrządzoną przez produkt niebezpieczny w świetle przepisów rozporządzenia Rzym II”, *Problemy Prawa Prywatnego Międzynarodowego*, vol. 5, 2009, p. 87; M. Czepelak, „Międzynarodowe prawo zobowiązań”, p. 84; J. Pazdan, „Zasięg czasowy rozporządzenia Rzym II”, in: A. Tarwacka (ed.), *Iura et negotia. Księga Jubileuszowa z okazji 15-lecia Wydziału Prawa i Administracji Uniwersytetu Kardynała Stefana Wyszyńskiego w Warszawie*, Wolters Kluwer Polska, 2015, p. 255; M. Szpunar, K. Pacuła, „Art. 31”, n° 2, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe, Duże Komentarze Becka*, Warsaw 2018.

<sup>949</sup> Ł. Żarnowiec, „Czasowe ramy zastosowania rozporządzenia (WE) nr 864/2007 Parlamentu Europejskiego i Rady dotyczącego prawa właściwego dla zobowiązań pozaumownych (rozporządzenie „Rzym II”). Uwagi na tle orzeczenia Trybunału Sprawiedliwości Unii Europejskiej w sprawie C-412/10 *Homawoo v GMF Assurances*”, *Rozprawy Ubezpieczeniowe*, n° 12(1/2012), p. 11.

<sup>950</sup> Ł. Żarnowiec, „Skutki zmiany statutu”, in: M. Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20A*, C.H. Beck, Warsaw 2014, p. 403 ff; M. Pazdan, „Prawo prywatne międzynarodowe”, Warsaw 2010, p. 100 ff; M. Szpunar, K. Pacuła, „Art. 31”, n° 2, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe, Duże Komentarze Becka*, Warsaw 2018.

<sup>951</sup> Provincial Court in Cracow, I C 1213/0918, 03.01.2014, the excerpts of this decision were quoted in the reversing decision of Court of Appeal in Cracow I Aca 548/14, 02.07.2014.

<sup>952</sup> Court of Appeal in Cracow, I Aca 548/14, 02.07.2014.

<sup>953</sup> Supreme Court, II CSK 250/1220, 23.05.2013.

3. *The characterization of the concept of "non-contractual obligations", its relationship to the concept of "contractual obligations" and any difficulties in relation to characterisation (Arts. 1(1), 2)*

The term "non-contractual obligations" should be interpreted autonomously, in the light of the international character and purposes of the Rome II Regulation.<sup>954</sup> Its scope of application covering also non-contractual obligations arising out of strict liability, even if mentioned expressly in Recital II, in any case is not controversial in Polish law.<sup>955</sup> The meaning of non-contractual obligations poses the risk that all obligations that are not contractual, hence covered by the Rome I Regulation, fall into scope of application of the Rome II. According to Polish scholars, such broad interpretation is not justified.<sup>956</sup> For instance, obligations arising out of unilateral legal actions are not covered neither by the Rome II nor by the Rome I Regulations.<sup>957</sup>

Art. 2(1), by circumscribing the notion of "damage", prevents many misunderstanding that might have appeared in the lack of thereof, even though this circumscription departs considerably from the Polish legal meaning of this term.<sup>958</sup>

Art. 2(2), in regard to future behaviour or future events, opens way to look for the applicable law in order to assess also the duty relating to damage prevention.<sup>959</sup>

4. *The universal application of the Regulation (Art. 3)*

There is no substantive doctrinal discussion as to the application and interpretation of Art. 3 Rome II Regulation.

5. *The approach to interpretation of the Rome II Regulation, and in particular its relationship to other EU private international law instruments (including the recast Brussels I Regulation and the Rome I Regulation)(Recital (7))*

It is widely accepted in Polish doctrine that the Regulation should be given an autonomous interpretation.<sup>960</sup> This is necessary in order to cover divergent national concepts of various terms and principles used in the Rome II Regulation. However, one author pointed out, although in the frame of a general overview of European private international law, that the qualification is not in fact autonomous, because it does not take sufficiently into account the comparative research in the field of private international law in MS.<sup>961</sup> Another author underlines that the legal culture in which judges acquired their legal knowledge will inevitably influence their understanding of a given legal institution, which

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<sup>954</sup> M. Pazdan, „Art 1”, n° 2, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018; A. Nowicka, „Prawo właściwe wynikające z czynów niedozwolonych w świetle przepisów rozporządzenia nr 864/2007”, in: J. Barta, L. Matlak (ed.), *Prawo własności intelektualnej wczoraj, dziś i jutro*, Cracow 2007, p. 315; J. Pazdan, „Rozdział XII. Zobowiązania pozaumowne”, n° 31, in: M. Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, C.H. Beck, Warsaw 2014.

<sup>955</sup> J. Pazdan, „Rozdział XII. Zobowiązania pozaumowne”, n° 32, in: M. Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, Warsaw, C.H. Beck, 2014.

<sup>956</sup> M. Pazdan, „Art 1”, n° 3, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018; J. Pazdan, „Rozdział XII. Zobowiązania pozaumowne”, n° 32, in: M. Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, Warsaw, C.H. Beck, 2014.

<sup>957</sup> M. Świerczyński, „Prawo właściwe dla zobowiązań deliktowych według rozporządzenia Rzym II”, *Edukacja Prawnicza*, nr 3, 2008, p. 17; J. Pazdan, „Rozdział XII. Zobowiązania pozaumowne”, n° 32, in: M. Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, C.H. Beck, Warsaw 2014; M. Pazdan, „Art 1”, n° 3, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018.

<sup>958</sup> J. Pazdan, „Rozdział XII. Zobowiązania pozaumowne”, n° 33, in: M. Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, C.H. Beck, Warsaw 2014.

<sup>959</sup> J. Pazdan, „Rozdział XII. Zobowiązania pozaumowne”, n° 33, in: M. Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, C.H. Beck, Warsaw 2014.

<sup>960</sup> E. Figura-Góralczyk, „2. Zakres normy kolizyjnej”, in: „Nieuczciwa konkurencja w prawie prywatnym międzynarodowym”, Warsaw 2017.

<sup>961</sup> K. Pacuła, „Kwalifikacja w prawie prywatnym międzynarodowym Unii Europejskiej Od kwalifikacji autonomicznej ku ... kwalifikacji według kolizyjnej legis fori?”, *Problemy Prawa Prywatnego Międzynarodowego*, vol. 25/2019, p. 120.

in turn may lead to erroneous solutions.<sup>962</sup> This phenomena may be further exacerbated in Poland where courts rarely refer for a preliminary ruling to ECJ.<sup>963</sup>

## 2.2 Chapter II - Tort/Delict

Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to the implementation of:

6. The general conflict-of-laws rule for tort/delict, and difficulties that have arisen in your Member State with respect to its application (Art. 4), and in particular:

a. the approach to identifying the place of direct damage in Art 4(1)

The choice made in the Regulation to adopt the rule of the *lex loci damni* is widely accepted in Polish doctrine, even though the Polish Private International Law Act from 1965, that was applicable beforehand, applied a different connector, the one of *lex loci delicti* and this in a very flexible way.<sup>964</sup>

In case of damage occurring in different states, Polish scholars propose to follow the principles established for the interpretation of the former Polish Private International Law Act, i.e.

Range of application within the Art. 4 posed a problem for at least one Polish court. In a decision of District Court in Kłodzko from 2012, the court ruled that Art. 4(1) of the Regulation admits exception to its general rule and as German law has similar provisions relating to financial compensation as Polish one, therefore a court may base its decision exclusively on Polish law.<sup>965</sup> Polish doctrine points out that such motivation is contrary to the Regulation objectives.<sup>966</sup>

b. the approach to the first rule of displacement in Art 4(2) in cases involving multiple parties or claims

Polish Private International Law Act from 1965 was the first one in Europe to adopt the rule of the common law of both parties, therefore the presence of Art. 4(2) in the Regulation is not criticized by Polish doctrine.<sup>967</sup> The only critic that referred to the *lex communis* of the parties in Polish Private International Law Act from 1965 referred to the connector that was of cumulative character.<sup>968</sup> In consequence, the solution of the common habitual residence that was adopted in the Regulation was upvoted by Polish scholars.<sup>969</sup> The term "habitual residence" is understood as referring to the place where the person is physically present and where is the centre of his/her life and interests.<sup>970</sup>

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<sup>962</sup> E. Figura-Góralczyk, „3.3.8. Zasady wykładni”, in: *Nieuczciwa konkurencja w prawie prywatnym międzynarodowym*, Warsaw 2017.

<sup>963</sup> A. Frąckowiak-Adamska, A. Guzewicz, Ł. Petelski, „Skuteczność stosowania przez sądy polskie unijnych rozporządzeń: nr 44/2001, nr 2201/2003, nr 864/2007 i nr 4/2009”, *Europejski Przegląd Sądowy*, n° 10/2016, p. 5.

<sup>964</sup> M. Świerczyński, „Rozdział XII. Zobowiązania pozaumowne”, n° 64, in: M. Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, Warsaw, C.H. Beck, 2014.

<sup>965</sup> District Court in Kłodzko, I C 390/11, 26.11.2012 r.

<sup>966</sup> M. Świerczyński, „Art. 4”, n° 3, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018.

<sup>967</sup> M. Świerczyński, „Rozdział XII. Zobowiązania pozaumowne”, n° 78, in: M. Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, Warsaw, C.H. Beck, 2014.

<sup>968</sup> T. Pajor, „Odpowiedzialność deliktowa w prawie prywatnym międzynarodowym”, Państwowe Wydawnictwo Naukowe, Warsaw 1989, pp. 169-170.

<sup>969</sup> M. Świerczyński, „Rozdział XII. Zobowiązania pozaumowne”, n° 81, in: M. Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, Warsaw, C.H. Beck, 2014.

<sup>970</sup> M. Świerczyński, „Art. 4”, Title III, n° 1, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018.



Polish doctrine agrees that Art. 4(2) in a sufficiently clear way expresses the relevant point in time for its application. Any previous or later factual change in circumstances do not affect the application of Art. 4(2).<sup>971</sup> Companies and other bodies, corporate and unincorporated, usually have their habitual residence at the place of their central administration as per Art. 23.<sup>972</sup> Therefore, Court of Appeal in Katowice correctly applied Art. 4(2) in case of natural person and a company both having their habitual residence in Poland.<sup>973</sup>

*c. the approach to the escape clause in Art 4(3), and*

The escape clause is the important exception for the rules provided for in Arts. 4(1) and 4(2), and even though its formula is more stringent than the first proposals, it helps to bring more flexibility in the application of the Regulation.<sup>974</sup> To evaluate the existence of the closest connecting factor such considerations as the expectations of the parties as to the applicable law can be taken into account.<sup>975</sup> Polish doctrine advocates not to apply the escape clause lightly, which is also underlined by the expression "manifestly more closely connected".<sup>976</sup> Meanwhile, in practice Polish courts encounter difficulties in interpretation of Art. 4(3) and especially confrontation of its two criteria, namely "manifestly more closely connected" and close connection of the pre-existing relationship between the parties with the tort/delict in question. In its decision from 2014, the Court of Appeal in Szczecin confirmed the application of Art. 4(3) to the case ruling that the pre-existing contract between the parties was merely a proof of payment before the German courts and connection between the damage and the Polish territory was manifestly closer.<sup>977</sup>

*d. the suitability of this set of rules to govern cases of prospectus liability or other financial market torts*

No specific problems have been raised as to the suitability of this set of rules to govern cases of prospectus liability or other financial market torts.

*7. The rule on product liability (Art. 5) and, where relevant, the interaction with the application of 1973 Hague Convention on the Law Applicable to Products Liability;*

Polish doctrine regrets that the effort of harmonisation of the law of product liability in the European Union is only partial as alongside the Rome II Regulation, in some MS is also in force the 1973 Hague Convention on the Law Applicable to Products Liability (which is of universal application) and in accordance with recital 40 of the Regulation, Denmark will apply its national law to the matter.<sup>978</sup> It can pose the risk of different judicial solutions within EU and the potential forum shopping.<sup>979</sup> Especially that Art. 5 introduces a rather complex structure of conflict-of-laws rules and poses difficulty in determining its scope of application.<sup>980</sup> The standardization effort of conflict-of-laws rules in that matter was

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<sup>971</sup> M. Świerczyński, „Rozdział XII. Zobowiązania pozaumowne”, n° 82, in: M. Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, Warsaw, C.H. Beck, 2014.

<sup>972</sup> M. Świerczyński, Delikty "elektroniczne" w świetle rozporządzenia Rzym II, *Problemy Prawa Prywatnego Międzynarodowego*, vol. 3/2008, p. 98.

<sup>973</sup> Court of Appeal in Katowice, III APa 32/16, 03.11.2016.

<sup>974</sup> M. Świerczyński, „Delikty "elektroniczne" w świetle rozporządzenia Rzym II”, *Problemy Prawa Prywatnego Międzynarodowego*, vol. 3/2008, p. 99.

<sup>975</sup> M. Świerczyński, „Art. 4”, Title IV, n° 1, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe, Duże Komentarze Becka*, Warsaw 2018.

<sup>976</sup> M. Pazdan, PPM, 2017, p. 246; M. Świerczyński, „Art. 4”, Title IV, n° 1, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe, Duże Komentarze Becka*, Warsaw 2018.

<sup>977</sup> Court of Appeal in Szczecin, I ACa 212/14, 29.05.2014.

<sup>978</sup> M. Pazdan *et al.*, „W odpowiedzi na ankietę skierowaną do państw członkowskich Unii, dotyczącą stosowania Rozporządzenia nr 864”, *Problemy Prawa Prywatnego Międzynarodowego*, vol. 12/2013, p. 177.

<sup>979</sup> M. Pazdan *et al.*, „W odpowiedzi na ankietę skierowaną do państw członkowskich Unii, dotyczącą stosowania Rozporządzenia nr 864”, *Problemy Prawa Prywatnego Międzynarodowego*, vol. 12/2013, p. 176.

<sup>980</sup> P. Machnikowski, „Art. 5”, Title I, n° 2, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe, Duże Komentarze Becka*, Warsaw 2018; Ł. Żarnowiec, „Rozdział XII. Zobowiązania pozaumowne”, n° 95, in: M. Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, C.H. Beck, Warsaw 2015; P. Machnikowski, „Art. 5”, n° 2, in: U. Magnus, P. Mankowski, *European Commentaries on Private International Law ECPII. Commentary. Volume III Rome II Regulation*, Cologne 2019.

however recognised by Polish scholars as to favour the needs for consumers' protection and to allow foreseeing the applicable law with reasonable certainty for commerce.<sup>981</sup> Also, the application of the general rule of Art. 4 could lead in practice to arbitrary solutions.<sup>982</sup>

The difficulties arise as to the several concepts expressed in Art. 5, but not defined herein.<sup>983</sup> This is the case of product, damage and product liability. The first should not give rise to the application of the definition contained in the Directive (EEC) N° 85/734 but receive an autonomous qualification<sup>984</sup>. The Directive does not concern nor include conflict-of-laws rules and the rule concerning the applicable law is construed differently than in the Regulation.

Also, the concepts of 'damage caused by product' and 'product liability' are not defined in the Regulation. They should however be interpreted autonomously, based on what is a meaningful feature of product liability regime. According to one Polish scholar, the fundamental characteristic of the concept of "product liability" is the causing of damage by a product and placing the liability on a person who participates in product marketing, generally the producer.<sup>985</sup>

The term 'marketing of a product' is also interpreted in various ways throughout the literature, with Polish scholars leaning towards application of its broader conception.<sup>986</sup>

Poland is not part to the 1973 Hague Convention on the Law Applicable to Products Liability. For a public policy clause application in the frame of Art. 5, Polish doctrine quoted the example of the *lex causae* provisions that deny any protection to a victim of a damage caused by a defective product.<sup>987</sup>

#### 8. The specific rule on unfair competition (Art. 6)

The introduction of specific rule on unfair competition is deemed by Polish scholars to be beneficial.<sup>988</sup> According to one author, the final text of the conflict-of-laws rule seems to be accepted in the doctrine (quoting however French scholars).<sup>989</sup>

Art. 6(4) excludes the derogation from the applicable law by an agreement between the parties. Albeit, this may be justified to protect the interests of third parties, Polish scholars suggest that the choice should be allowed in cases where a non-contractual obligation arises out of an act of unfair competition that affects solely the interests of a specific

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<sup>981</sup> Ł. Żarnowiec, „Rozdział XII. Zobowiązania pozaumowne”, n° 95, in: M. Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, C.H. Beck, Warsaw 2015.

<sup>982</sup> P. Machnikowski, „Art. 5”, Title IV, n° 1, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018; Ł. Żarnowiec, „Rozdział XII. Zobowiązania pozaumowne”, n° 95, in: M. Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, C.H. Beck, Warsaw 2015.

<sup>983</sup> P. Machnikowski, „Art. 5”, n° 9, in: U. Magnus, P. Mankowski, *European Commentaries on Private International Law ECPIIL. Commentary. Volume III Rome II Regulation*, Cologne 2019.

<sup>984</sup> M. Jagielska, „Prawo właściwe dla odpowiedzialności za produkt: rozważania na tle projektu rozporządzenia WE o prawie właściwym dla zobowiązań pozaumownych”, in: M. Pazdan, L. Ogiełto, W. Popiołek, M. Szpunar (ed.), *Rozprawy prawnicze: księga pamiątkowa profesora Maksymiliana Pazdana*, Zakamycze, Cracow 2005, p. 111.

<sup>985</sup> P. Machnikowski, „Art 5”, no 11 in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018; P. Machnikowski, „Art. 5”, n° 10, in: U. Magnus, P. Mankowski, *European Commentaries on Private International Law ECPIIL. Commentary. Volume III Rome II Regulation*, Cologne 2019.

<sup>986</sup> P. Machnikowski, „Art. 5”, n° 25-26, in: U. Magnus, P. Mankowski, *European Commentaries on Private International Law ECPIIL. Commentary. Volume III Rome II Regulation*, Cologne 2019.

<sup>987</sup> Ł. Żarnowiec, „Prawo właściwe dla odpowiedzialności za szkodę wyrządzoną przez produkt niebezpieczny w świetle przepisów rozporządzenia Rzym II”, *Problemy Prawa Prywatnego Międzynarodowego*, n° 5/2009, p. 112.

<sup>988</sup> E. Figura-Góralczyk, „Zakończenie”, in: *Nieuczciwa konkurencja w prawie prywatnym międzynarodowym*, Warsaw 2017.

<sup>989</sup> M. Świerczyński, „Rozdział XII. Zobowiązania pozaumowne”, n° 119, in: M. Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, C.H. Beck, Warsaw 2015.

competitor (e.g. the unlawful use of a trade secret)<sup>990</sup>. However, as such solution is not widely accepted neither by European nor Polish doctrine, at least one writer suggested that this question should be solved by the ECJ.<sup>991</sup>

For two categories relating to competition, namely unfair competition and restriction of free competition, Art. 6 provides different connecting factors, which is due to their different character. It may however require resorting to interpretation methods in order to define their scope of application<sup>992</sup>.

Polish scholars also raised the issue of choosing the market connector related to acts of unfair competition as posing many practical problems for international private law.<sup>993</sup>

One author moreover suggests that after introducing the Directive no. 2014/104 the provisions of both the Brussels I bis and the Rome II Regulation should be reconsidered, taking into account the specific character of delicts in the field of competition law.<sup>994</sup>

Polish doctrine is of the opinion that the conflict-of-laws rules in Art. 6 (1) and Art. 8 (1) will usually lead to the application of the same law.<sup>995</sup>

### 9. *The specific rule on environmental damage (Art. 7)*

The specific rule on environmental damage is closely related to the environmental protection policy of the EU and particularly the directive 2004/35/EC.<sup>996</sup> In Poland, such solution is justified pursuant to the principle of environmental protection embedded in founding rules of constitutional system.<sup>997</sup> Also, the polluter pays principle is one of the basic principles of Polish environmental policy.<sup>998</sup>

It is generally understood that the scope of Art. 7 covers damages to environment as well as damages sustained by persons or property as a result of such damage.<sup>999</sup>

The claimant's right to choose between the law of the country in which the event giving rise to damage occurred or where the damage occurred is deemed appropriate.<sup>1000</sup> Similar solution was already proposed by Polish scholars in regard to the interpretation of Art. 31 of the former Polish Private International Law Act from 1965, albeit such choice should have been made by a court, not the claimant. It is now considered in Polish doctrine that the claimant may be

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<sup>990</sup> M. Świerczyński, „Art. 6”, n° 6, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018.

<sup>991</sup> E. Figura-Góralczyk, „Wybór prawa dla czynów nieuczciwej konkurencji na tle rozporządzenia rzymskiego II”, in: J. Poczobut (ed.), *Współczesne wyzwania prawa prywatnego międzynarodowego*, Wolters Kluwer Polska, 2013, p. 68.

<sup>992</sup> M. Świerczyński, „Rozdział XII. Zobowiązania pozaumowne”, n° 113 in: Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, C.H. Beck, Warsaw 2015.

<sup>993</sup> P. Fik, „Art. 6”, n° 3, in: P. Fik, P. Staszczuk (ed.), *Prawo właściwe dla zobowiązań pozaumownych. Rozporządzenie (WE) nr 864/2007. Komentarz*, Warsaw 2014.

<sup>994</sup> M. Wąłachowska, „Jurisdiction and applicable law to non – contractual obligations arising out of restriction of competition. A case of the pharmaceutical sector”, *Problemy Prawa Prywatnego Międzynarodowego*, vol. 22/2018, p. 10.

<sup>995</sup> M. Świerczyński, „Naruszenie prawa własności intelektualne w prawie prywatnym międzynarodowym”, Wolters Kluwer Polska 2013, p. 123.

<sup>996</sup> M. Świerczyński, „Art. 7”, Title 1, n° 2, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018.

<sup>997</sup> M. Świerczyński, „Rozdział XII. Zobowiązania pozaumowne”, n° 147, in: M. Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, C.H. Beck, Warsaw 2015.

<sup>998</sup> M. Świerczyński, „Rozdział XII. Zobowiązania pozaumowne”, n° 148, in: M. Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, C.H. Beck, Warsaw 2015.

<sup>999</sup> M. Świerczyński, „Art. 7”, Title 1, n° 2, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018.

<sup>1000</sup> M. Świerczyński, „Rozdział XII. Zobowiązania pozaumowne”, n° 148, in: M. Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, C.H. Beck, Warsaw 2015.

better placed to make the decision. According to one author, claimant's choice of the applicable law is final and it cannot be reversed or amended at a later stage of the proceedings<sup>1001</sup>.

The possibility to conclude the agreement on applicable law that covers all claims between the parties based on Art. 14 of the Regulation was criticized by Polish scholars as going against the principle to protect third party's interests.<sup>1002</sup>

Art. 7 does not cross-refer to Art. 4(2) nor Art. 4(3) thus not allowing for the wider application of the theory of closer connection (*théorie de proximité*). According to Polish doctrine, this solution hardens the process of indication of the applicable law in comparison to general rule of Art. 4.<sup>1003</sup>

It is disputable if an environmental damage caused by a defective product falls into the scope of application of Art. 7 or Art. 5. There is, in consequence, the necessity to determine precisely in those cases the scope of application of each of these articles. According to Polish scholars, the priority should be given to Art. 7, as being more restrictive for the person causing the damage and therefore following the polluters pay principle governing Art. 7<sup>1004</sup>.

#### 10. *The specific rule on infringements of intellectual property rights (Arts. 8, 13)*

Art. 8 adopts the principle of *the lex loci protectionis* which transcends the idea of sovereign character and territorial limits of IPR. According to Polish doctrine, the term of IPR as provided for in Art. 8 should be interpreted broadly, involving not only concepts that EU laws refer to, but also international agreements binding on the EU and other absolute rights in relation to intangible goods that are protected by the domestic law of the Member States.<sup>1005</sup>

The advantage of the solution adopted by Art. 8 (1) is that it allows not to distinguish between its scope of application and the one of others conflict-of-laws rules concerning other aspects of IPR, because they use the same connecting factor of *locus protectionis*.<sup>1006</sup>

The exclusion of party choice provided for in Art. 8(3), even though deemed as appropriate and not pertaining only to infringements of national IPRs, shows the lack of elasticity also in the light of other principles and proposals with regards to IPR (such as ALI, CLIP).<sup>1007</sup> Especially that Art. 8 does not include any escape clause. Such a rigid application of the principle *lex loci protectionis* seems to Polish doctrine as impractical and inappropriate for modern world challenges, especially for cases involving IPR infringements by Internet.<sup>1008</sup> In the literature, it is criticised that the European legislator have chosen the territoriality principle that is applicable also to the cases of multi-states scenarios, pointing out that other solutions could be more suitable in those situations.<sup>1009</sup> Some authors suggest introducing an

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<sup>1001</sup> M. Świerczyński, „Art. 7”, Title III, n° 1, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018.

<sup>1002</sup> M. Świerczyński, „Rozdział XII. Zobowiązania pozaumowne”, n° 148, in: M. Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, C.H. Beck, Warsaw 2015.

<sup>1003</sup> M. Świerczyński, „Rozdział XII. Zobowiązania pozaumowne”, n° 158, in: M. Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, C.H. Beck, Warsaw 2015.

<sup>1004</sup> M. Świerczyński, „Rozdział XII. Zobowiązania pozaumowne”, n° 153 in: Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, C.H. Beck, Warsaw 2015; M. Świerczyński, „Art. 7”, Title II, n° 6, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018.

<sup>1005</sup> P. Fik, „Art. 8”, n° 1, in: P. Fik, P. Staszczuk (ed.), *Prawo właściwe dla zobowiązań pozaumownych. Rozporządzenie (WE) nr 864/2007. Komentarz*, Warsaw 2014.

<sup>1006</sup> M. Świerczyński, „Rozdział XII. Zobowiązania pozaumowne”, n° 178 in: Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, C.H. Beck, Warsaw 2015.

<sup>1007</sup> R. Sikorski, „Prawo właściwe dla naruszeń praw własności intelektualnej w postanowieniach rozporządzenia Rzym II”, in: P. Grzegorzczak, K. Weitz (ed.), *Europejskie prawo procesowe cywilne i kolizyjne*, Lexis Nexis, 2012, pp. 462-463.

<sup>1008</sup> R. Sikorski, „Prawo właściwe dla naruszeń praw własności intelektualnej w postanowieniach rozporządzenia Rzym II”, in: P. Grzegorzczak, K. Weitz (ed.), *Europejskie prawo procesowe cywilne i kolizyjne*, Lexis Nexis, 2012, p. 467; P. Fik, „Art. 8”, n° 1, in: P. Fik, P. Staszczuk (ed.), *Prawo właściwe dla zobowiązań pozaumownych. Rozporządzenie (WE) nr 864/2007. Komentarz*, Warsaw 2014.

<sup>1009</sup> R. Sikorski, „Prawo właściwe dla naruszeń praw własności intelektualnej w postanowieniach rozporządzenia Rzym II”, in: P. Grzegorzczak, K. Weitz (ed.), *Europejskie prawo procesowe cywilne i kolizyjne*, Lexis Nexis, 2012, p. 451.

additional reservation in Art. 8, namely that the infringing party knew or could have foreseen that the infringement would take place in a specific country.<sup>1010</sup>

The solution provided for in Art. 13 is subject to controversies in Polish doctrine, with some authors indicating its practical importance (here, only the point of view of English doctrine is quoted), others considering its irrelevant character and finally, some leaning towards its clarification nature rather than a separate conflict-of-laws rule.<sup>1011</sup>

According to Polish doctrine, Art. 15 does not broaden the scope of application of Art. 8 (1), thus the applicable law will govern only the question of infringement and available remedies.<sup>1012</sup> In relation to Art. 8(2), key importance must be given to letters c and d of Art. 15. Procedure will be governed by *lege fori* in accordance with the EU regulations relating to a given EU intellectual property law.

#### 11. The specific rule on industrial action (Art. 9)

Such regulation was not provided for neither in Polish Private International Law Act from 1965, applicable before the Rome II Regulation<sup>1013</sup>. According to Polish doctrine some aspects of this provision are particularly controversial for academia, namely its scope of application, the connecting factor and the admission of the choice of law by parties.<sup>1014</sup>

The difficulties arise as to the scope of application of Art. 9. Particularly, the concept of 'industrial action' poses difficulties as to its interpretation.<sup>1015</sup> Polish commentators argued in favour of developing an autonomous understanding of that term, as the autonomous qualification of the concepts is rather a rule than the exception in case of the Rome II Regulation (with one author expressly stating that the Regulation did not provide for the autonomous interpretation of the term which raises important interpretative issues<sup>1016</sup>).<sup>1017</sup> Moreover, the application of the *lege fori* for the definition of the concept of the 'industrial action' could result in contradictory interpretations among Member States. Application of *lex causae* to interpret the term of 'industrial action', on the other hand, albeit presenting some advantages (e.g. elimination of negative effects of forum shopping and the risk of contradicting judgments regarding the effects of different damages caused by the same event) would create some tension with the rationale of the rule.<sup>1018</sup>

As for the scope of application with regard to the parties of the claim, the discussion in Polish doctrine revolves around extending it above the sole liability of natural persons<sup>1019</sup> and excluding liability of third parties (such as negotiators, mediators, experts, etc.<sup>1020</sup>). It should be considered as adequate to extend the application of the rule to liability claims lodged by third parties.

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<sup>1010</sup> P. Fik, „Art. 8”, n° 4, in: P. Fik, P. Staszczuk (ed.), *Prawo właściwe dla zobowiązań pozaumownych. Rozporządzenie (WE) nr 864/2007. Komentarz*, Warsaw 2014.

<sup>1011</sup> P. Staszczuk, „Art. 13”, n° 4, in: P. Fik, P. Staszczuk (ed.), *Prawo właściwe dla zobowiązań pozaumownych. Rozporządzenie (WE) nr 864/2007. Komentarz*, Warsaw 2014.

<sup>1012</sup> M. Świerczyński, „Art. 8”, Title V, n° 1, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018.

<sup>1013</sup> Ł. Żarnowiec, „Art. 9”, n° 1, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018.

<sup>1014</sup> Ł. Żarnowiec, „Prawo właściwe dla odpowiedzialności za szkodę wyrządzoną sporem zbiorowym w świetle przepisów rozporządzenia Rzym II”, *Przegląd Sądowy*, April 2011, p. 18.

<sup>1015</sup> Ł. Żarnowiec, „Rozdział XII. Zobowiązania pozaumowne”, n° 194, in: M. Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, C.H. Beck, Warsaw 2015.

<sup>1016</sup> W. Sanetra, „Rozporządzenie dotyczące prawa właściwego dla zobowiązań pozaumownych (Rzym II) a prawo pracy”, *Europejski Przegląd Sądowy*, March 2009, p. 7.

<sup>1017</sup> Ł. Żarnowiec, „Rozdział XII. Zobowiązania pozaumowne”, n° 201, in: M. Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, C.H. Beck, Warsaw 2015.

<sup>1018</sup> Ł. Żarnowiec, „Rozdział XII. Zobowiązania pozaumowne”, n° 199, in: M. Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, C.H. Beck, Warsaw, 2015.

<sup>1019</sup> A.M. Świątkowski, „Międzynarodowe prawo pracy. Tom 2 Międzynarodowe prywatne prawo pracy”, C.H. Beck, Warsaw 2010, p. 582.

<sup>1020</sup> A.M. Świątkowski, „Międzynarodowe prawo pracy. Tom 2 Międzynarodowe prywatne prawo pracy”, C.H. Beck, Warsaw 2010, p. 589.

The reference to Art. 4(2) was criticised by Polish scholars, as the application of the different connecting factors can lead to the application of different governing laws and in the end lead to unsatisfactory results.<sup>1021</sup>

### 2.3 Chapter III - Unjust Enrichment, *Negotiorum Gestio* And *Culpa In Contrahendo*

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to the implementation of:*

#### 12. *The specific rule on unjust enrichment (Art. 10), including its relationship with the general rule for tort/delict in Art. 4.*

The scope of application of the specific rule covers all non-contractual obligations related to unjust enrichment, including undue payments. Polish scholars expressed the opinion that the rule applies as well to settlements arising from expenses incurred in relation to the object of unjust enrichment<sup>1022</sup>.

The difficulties may arise as to the delimitation between Art. 10 Rome II and Art. 12 (1) (e) Rome I.<sup>1023</sup> According to Polish doctrine, the latter would cover solely the existence of the legal basis for the payment, while the former accommodates claims regarding reasons and transfers of value arising from an undue payment.

Unjust enrichment in the sense of the specific rule may also arise from other obligations than torts or contracts, such as family law, property law or inheritance law.

The concept of pre-existing relationship between the parties should be interpreted broadly and therefore covering also the appearance of a relationship and the belief of one party that the payment may be based on it.

In one decision<sup>1024</sup> Polish judges, first applied the Regulation Rome I to assess which law should be applied to parties' relationship (one party claiming that the parties are obligated through loan, and the other that it was a donation) and then stated that the same result, namely the application of Polish law, would be achieved to assess claimant's demand, this time through the application of the Rome II Regulation. After presenting the structure of Art. 10 and its accessory connections, the court directly applied Art. 10(3) as the disputed funds were transferred on the account in Poland.

#### 13. *The specific rule on negotiorum gestio (Art. 11)*

The concept of specific rule for obligations arising out of an act performed without due authority follows the recent trend in national jurisdictions, albeit with number of differences, most importantly relating to the connecting factor. Polish Private International Law Act from 1965 did not provide for a specific rule for *negotiorum gestio* and the connecting factors for claims arising out of such obligations were linked to parties' nationality and habitual residence. According to Polish scholars, as rule of Art. 11 is materially identical to Art. 10, they could be included in one provision covering both of those non-contractual obligations, which would contribute to syntheticism of the Regulation's text.

The rule should be construed autonomously and broadly.

The Polish inadequate translation may cause additional problems with the interpretation of the provision. In particular, the introduction of the term "previously" as pertaining to the relationship existing between the parties, could suggest that the specific rule applies only if such relationship existed before obligation arose.

According to Polish scholars, Art. 11 does not cover claims of third parties against agent or principal<sup>1025</sup>.

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<sup>1021</sup> P. Fik, „Art. 9”, n°3, in: P. Fik, P. Staszczuk (ed.), *Prawo właściwe dla zobowiązań pozaumownych. Rozporządzenie (WE) nr 864/2007. Komentarz*, Warsaw 2014.

<sup>1022</sup> M. Świerczyński, Ł. Żarnowiec, „Art. 10”, Title II, n° 1, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe, Duże Komentarze Becka*, Warsaw 2018.

<sup>1023</sup> M. Świerczyński, Ł. Żarnowiec, „Art. 10”, Title II, n° 3, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe, Duże Komentarze Becka*, Warsaw 2018.

<sup>1024</sup> Provincial Court in Poznań, XII C 983/15, 11.02.2019.

<sup>1025</sup> Ł. Żarnowiec, „Art. 11”, n° 22, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe, Duże Komentarze Becka*, Warsaw 2018.

Wording of Art. 11(2) pertaining to the time when the event giving rise to the damage occurs should be construed narrowly<sup>1026</sup>.

In Polish doctrine, the wording of Art. 11(3) goes against the applicability of the law of the place of effect in case of divergent acts.

#### 14. The specific rule on *culpa in contrahendo* (Art. 12)

*Culpa in contrahendo* is not uniformly apprehended in European jurisdictions. Multitude of concepts in substantive laws is reflected in conflict-of-laws rules that apply different connecting factors to those obligations<sup>1027</sup>. The answer of the European legislature was to introduce a specific rule for non-contractual obligation arising out of dealings prior to the conclusion of a contract. The provision in the Regulation is the autonomous concept that views *culpa in contrahendo* as a non-contractual phenomenon, but also recognizes its non-tortious character. Polish translation of Art. 12 employs the expression of obligations arising out of commercial dealings which could in consequence imply that the provision does not cover civil matters. Polish doctrine is nonetheless unanimous that such conclusion is obviously without foundation and the Polish wording should be construed as describing the character of the dealings and not to the dealings between the professionals. According to Polish scholars, the scope of application of Art. 12 covers also the positive obligation to provide information during negotiations, whereas the breach of duties arising out of conventions relating to parties' behaviour during negotiations does not enter into the scope of application of Art. 12<sup>1028</sup>. The acts of third person, such as a person participating in the negotiations as agent, fall outside the scope of application of Art. 12<sup>1029</sup>.

In Polish literature it is debated whether Art. 12(2) notwithstanding the possible application of Art. 12(1), should prevail for the reasons relating to equity.<sup>1030</sup> Polish scholars disagree on whether Art. 12(2) should have been included in the Regulation<sup>1031</sup>. Another doubt relates to the order of priority of connecting factors from Art. 12(2) paragraphs.<sup>1032</sup>

In absence of a choice-of-law agreement between the parties, Art. 12 provides for the application of the law that would govern the negotiated contract, should it had been concluded. Such solution is positively perceived in Polish doctrine<sup>1033</sup>. The application of the Rome I Regulation, resulting from Art. 12(1), provides for a comprehensive and flexible conflict-of-laws mechanism.

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<sup>1026</sup> Ł. Żarnowiec, „Rozdział XII. Zobowiązania pozaumowne”, n° 231 in: Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, C.H. Beck, Warsaw 2015.

<sup>1027</sup> M.-A. Zachariasiewicz, „Kwalifikacja „culpa in contrahendo” w prawie prywatnym międzynarodowym”, *Problemy Prawa Prywatnego Międzynarodowego*, vol. 3/2008, p. 37 ff.

<sup>1028</sup> M. Świerczyński, „Rozdział XII. Zobowiązania pozaumowne”, n° 239 in: Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, C.H. Beck, Warsaw 2015.

<sup>1029</sup> M.-A. Zachariasiewicz, „Art. 12”, no 18, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018.

<sup>1030</sup> Pro such solution: M.-A. Zachariasiewicz, „Kwalifikacja *culpa in contrahendo* w prawie prywatnym międzynarodowym”, *Problemy Prawa Prywatnego Międzynarodowego*, vol. 3/2008, p. 17; contra: Ł. Żarnowiec, „Rozdział XII. Zobowiązania pozaumowne”, n° 243 in: Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, C.H. Beck, Warsaw 2015.

<sup>1031</sup> Contra: M.-A. Zachariasiewicz, „Art. 12”, n° 28-29, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018; pro: Ł. Żarnowiec, „Rozdział XII. Zobowiązania pozaumowne”, n° 243 in: Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, C.H. Beck, Warsaw 2015.

<sup>1032</sup> M.-A. Zachariasiewicz, „Art. 12”, n° 30, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018; P. Staszczuk, „Art. 12”, n°5, in: P. Fik, P. Staszczuk (ed.), *Prawo właściwe dla zobowiązań pozaumownych. Rozporządzenie (WE) nr 864/2007. Komentarz*, Warsaw 2014.

<sup>1033</sup> M.-A. Zachariasiewicz, „Art. 12”, Title III, n° 3, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018.

## 2.4 Chapter IV - Freedom of Choice

Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:

15. The implementation in legal/business practice and by courts of the rule on **freedom of choice**, any difficulties therein and **any discussion that has been carried out in your Member State regarding possible reasons which would justify the need to rethink it (Art. 14)**

One of the widely accepted principles in private international law is the parties' autonomy of the will in regard to non-contractual obligations.<sup>1034</sup> In Polish law, parties' freedom to choose the law applicable to their non-contractual relationship appeared only with the Regulation Rome II.<sup>1035</sup> A material review of the contents of a choice of law clause must be based exclusively on the Rome II provisions, notwithstanding the standards of the chosen law.<sup>1036</sup>

The fact that the Rome II Regulation does not include the same or similar provision to Art. 3(5) of the Rome I Regulation suggests, according to Polish doctrine, that the latter should not be therefore applied per analogy to the Rome II. The validity of the choice of law agreement should be assessed first through interpretation of the Regulation and only subsidiarily according to the substantive law.<sup>1037</sup>

In Polish doctrine the law applicable to consensus features raises the distortion. The majority of Polish scholars advocates for the assessment according to the chosen law<sup>1038</sup>, while one author stipulates referring to Art. 10(2) of the Rome I Regulation to assess one party's silence in conclusion of the ex-post choice of law agreement<sup>1039</sup>.

After the event giving rise to the damage occurred, Art. 14(I)(a) permits an agreement to submit non-contractual obligation to a chosen law. Accordingly, Polish doctrine admits that this indicates that relevant point in time is the event giving rise to the damage, in opposition to the damage itself, that may appear later on.<sup>1040</sup>

The choice of law does not have to be made expressly. Polish Supreme Court in a decision from 2012 stated that the implicit choice of law should be based on the facts that allow, after taking into consideration all circumstances of the case, to conclude with sufficient certainty that the parties did indeed make corresponding declarations of will regarding

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<sup>1034</sup> K. Pacuła, „Granice swobody wyboru prawa dla zobowiązań pozaumownych na tle rozporządzenia Rzym II”, in: Michał Gajda (ed.), *Autonomia woli w prawie prywatnym międzynarodowym i arbitrażu*, Uniwersytet Śląski, Katowice 2015, p. 26.

<sup>1035</sup> J. Pazdan, „Art. 14”, Title I, n° 1, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018.

<sup>1036</sup> J. Pazdan, „Art. 14”, Title I, n° 3, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018; M. Czepelak, „Wybór prawa właściwego dla zobowiązań pozaumownych w rozporządzeniu rzymskim II”, *Kwartalnik Prawa Prywatnego*, n° 2/2009, p. 534; J. Pazdan, „Rozdział XII. Zobowiązania pozaumowne”, n° 57, in: M. Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, C.H. Beck, Warsaw 2015.

<sup>1037</sup> J. Pazdan, „Art. 14”, Title I, n° 3, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018.

<sup>1038</sup> J. Pazdan, „Art. 14”, Title II, n° 4, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018; J. Pazdan, „Art. 14”, Title II, n° 1, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018; J. Pazdan, „Rozporządzenie Rzym II – nowe wspólnotowe unormowanie właściwości prawa dla zobowiązań pozaumownych”, *Problemy Prawa Prywatnego Międzynarodowego*, vol. 4/2009, p. 29; M. Pazdan *et al.*, „W odpowiedzi na ankietę skierowaną do państw członkowskich Unii, dotyczącą stosowania Rozporządzenia nr 864”, *Problemy Prawa Prywatnego Międzynarodowego*, vol. 12/2013, p. 189.

<sup>1039</sup> M. Pazdan, „Prawo Prywatne Międzynarodowe”, Wolters Kluwer Polska, 2016, n° 295; M. Czepelak, „Wybór prawa właściwego dla zobowiązań pozaumownych w rozporządzeniu rzymskim II”, *Kwartalnik Prawa Prywatnego*, n° 2/2009, p. 551 ff.

<sup>1040</sup> J. Pazdan, „Art. 14”, Title II, n° 1, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018.



the choice of law.<sup>1041</sup> This interpretation was subsequently applied to the case involving the Rome II Regulation.<sup>1042</sup> The doctrine accepts the concept of the implicit choice of law provided that it can be assessed on the factual circumstances. The hypothetical will of the parties should be disregarded.<sup>1043</sup>

Polish scholars lean towards the opinion that the choice of law included in the Standard Terms and Conditions even on the *ex-ante* basis would be invalid as favouring stronger counterparties and therefore lacking the “freely negotiated” element (with one author quoting German doctrine for a contra opinion<sup>1044</sup>).<sup>1045</sup> However, it may be valid if such a choice of law clause is included in a negotiated framework contract covering specific implementing agreements in a dispute about a non-contractual obligation relating to one of those implementing agreements.<sup>1046</sup> Polish scholarship points out that parties may also proceed to the choice of law indirectly, especially through accessory connection of Art. 4(3) Rome II Regulation.<sup>1047</sup> In that case, even parties that are not pursuing a commercial activity may submit in contract their non-contractual obligations to the law of their choice, however the decision would be ultimately assessed by the court.

Parties to the *ex-ante* agreement must pursue commercial activities which in Polish literature means that the term should be interpreted autonomously and there must be sufficient nexus between the factual circumstances of the event giving rise to the damage and the non-contractual liability (pre-tort relationship).<sup>1048</sup>

For the *ex-post* choice of law, the relevant point in time should be the occurring of the event giving rise to the damage, and not the damage itself.<sup>1049</sup> The choice of law can be also made before the court or the tribunal with one author postulating that this point should be strictly determined, preferably before the beginning of the proceedings (these considerations were however developed in regard to other European instruments, namely Art. 7(2) Hague Protocol on the Law Applicable to Maintenance Obligations and Art. 5(2) 1259/2009 Regulation).<sup>1050</sup>

One author analysed the question of the *ex-post* agreements for the cases of possible future events giving rise to damages. Taking into account the strict wording of Art. 2(3)(a), they should be deemed possible on the condition that the probability of the future event is sufficiently proven. If, however, the event occurs in reality, the agreement on the choice of law must be repeated.<sup>1051</sup> To clarify this interpretation, the author proposes to reformulate Art. 14(1)(a) as

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<sup>1041</sup> Polish Supreme Court, IV CSK 48/12, 20.09.2012.

<sup>1042</sup> In a decision of 2019, the Court of Appeal in Warsaw pointed out that the court seeks to verify whether the choice is in fact implied and to that effect it should take into consideration all the factual circumstances of the case, and, in particular, the behaviour of the parties in the course of the proceedings. As the mere reference to the legal provisions of one state was not sufficiently clear, the Court asked the parties to expressly assess if they made the agreement as to the applicable law, Court of Appeal in Warsaw, I ACa 94/18, 27.03.2019.

<sup>1043</sup> J. Pazdan, „Art. 14”, Title II, n° 3, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018.

<sup>1044</sup> A. Dorabialska, „Ograniczenia wyboru prawa w prawie kolizyjnym”, *Przeegląd Sądowy*, n° 7-8/2018, p. 84.

<sup>1045</sup> A. Dorabialska, „Ograniczenia wyboru prawa w prawie kolizyjnym”, *Przeegląd Sądowy*, n° 7-8/2018, p. 84; M. Świerczyński, „Ujednolicenie reguł kolizyjnych dotyczących odpowiedzialności deliktowej (rozporządzenie „Rzym II)”, *Monitor Prawniczy*, vol. 8/2008, p. 401; M. Gabrysiak, „Uprzedni wybór prawa dla deliktów w prawie prywatnym międzynarodowym na tle rozporządzenia Rzym II”, *Europejski Przeegląd Sądowy*, vol. 4/2009, p. 25.

<sup>1046</sup> M. Pazdan, „Prawo Prywatne Międzynarodowe”, Wolters Kluwer Polska, 2016, n° 294.

<sup>1047</sup> A. Dorabialska, „Rozszerzenie możliwości wyboru prawa w rozporządzeniach Rzym I i Rzym II”, *Studia Iuridica*, n° 53/2011, p. 80.

<sup>1048</sup> J. Pazdan, „Art. 14”, Title I, n° 5, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018; M. Czepelak, „Wybór prawa właściwego dla zobowiązań pozaumownych w rozporządzeniu rzymskim II”, *Kwartalnik Prawa Prywatnego*, n° 2/2009, pp. 544-545; Krzysztof Pacuła, „Granice swobody wyboru prawa dla zobowiązań pozaumownych na tle rozporządzenia Rzym II” in Michał Gajda (ed.), *Autonomia woli w prawie prywatnym międzynarodowym i arbitrażu*, Uniwersytet Śląski, Katowice 2015, p. 32.

<sup>1049</sup> J. Pazdan, „Art. 14”, Title I, n° 4 in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018.

<sup>1050</sup> A. Dorabialska, „Ograniczenia wyboru prawa w prawie kolizyjnym”, *Przeegląd Sądowy*, n° 7-8/2018, p. 87.

<sup>1051</sup> A. Dorabialska, „Ograniczenia wyboru prawa w prawie kolizyjnym”, *Przeegląd Sądowy*, n° 7-8/2018, p. 85.

follows: "The parties may agree to submit non-contractual obligations to the law of their choice by an agreement entered into after the event giving rise to the damage occurred or after the justified likelihood of the event giving rise to the damage in case it did not occur."<sup>1052</sup>

According to Art. 14 (l) subparagraph 2, a choice of law shall not prejudice the rights of third parties. Polish doctrine indicates that in such case, the choice of law agreement is not invalid in its entirety but only limits the effects that detrimentally affect third parties (relative ineffectiveness).<sup>1053</sup> The doubts in academia concerning the rights of third parties relate to the circumstances in which those rights are prejudiced and how they are protected.<sup>1054</sup>

In general, Polish doctrine adopts the stance against the admissibility of the *dépeçage* in case of a complex choice of the law applicable to the obligations arising from an illegitimate action.<sup>1055</sup> The partial choice of law is more controversial, with one author leaving this question to be resolved by courts.<sup>1056</sup> The rationale for such opinion is to be found in a rather narrow freedom of choice allowed for in non-contractual obligations and greater difficulties that *dépeçage* would raise in those types of agreements than in case of contractual obligations. Moreover, Polish doctrine is of the opinion that the lack of the solution similar to Art. 3(1) *in fine* of the Rome I Regulation is an *argumentum e contrario* for the admissibility of *dépeçage*.<sup>1057</sup>

Despite the fact that the Rome II Regulation does not clearly address the issue, it is not disputed by Polish doctrine that parties are free to modify or revoke their previous choice of law agreement, provided that the new choice does not violate the right of third parties.<sup>1058</sup>

The introduction of party autonomy into the choice of law for non-contractual obligations may be one of the most innovative part of the Rome II Regulation, however, according to one author, it may have limited impact in practice mainly due to ambiguous and incoherent national legal solutions.<sup>1059</sup>

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<sup>1052</sup> A. Dorabialska, „Ograniczenia wyboru prawa w prawie kolizyjnym”, *Przeгляд Sądowy*, n° 7-8/2018, p. 86.

<sup>1053</sup> J. Pazdan, „Art. 14”, Title II, n° 5 in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe, Duże Komentarze Becka*, Warsaw 2018.

<sup>1054</sup> K. Pacuła, „Wybór prawa a ochrona osób trzecich na tle rozporządzenia o prawie właściwym dla zobowiązań pozaumownych (Rzym II)”, in: A. Koziół, P. Twardoch (ed.), *Ochrona osób trzecich w prawie prywatnym międzynarodowym = Third party protection in private international law*, C.H.Beck, Warsaw 2018, p. 122.

<sup>1055</sup> J. Pazdan, „Art. 14”, Title II, n° 5 in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe, Duże Komentarze Becka*, Warsaw 2018; Krzysztof Pacuła, „Granice swobody wyboru prawa dla zobowiązań pozaumownych na tle rozporządzenia Rzym II”, in: Michał Gajda (ed.), *Autonomia woli w prawie prywatnym międzynarodowym i arbitrażu*, Uniwersytet Śląski, Katowice 2015, p. 40.

<sup>1056</sup> M. Czepelak, „Wybór prawa właściwego dla zobowiązań pozaumownych w rozporządzeniu rzymskim II”, *Kwartalnik Prawa Prywatnego*, n° 2/2009, p. 563.

<sup>1057</sup> Pro. Ł. Żarnowiec, „Prawo właściwe dla odpowiedzialności za szkodę wyrządzoną przez produkt niebezpieczny w świetle przepisów rozporządzenia Rzym II”, *Problemy Prawa Prywatnego Międzynarodowego*, n° 5/2009, p. 106 and P. Staszczuk, „Art. 14”, n° 3, in: P. Fik, P. Staszczuk (ed.), *Prawo właściwe dla zobowiązań pozaumownych. Rozporządzenie (WE) nr 864/2007. Komentarz*, Warsaw 2014; for *contra* opinion: A. Dorabialska, „Rozszerzenie możliwości wyboru prawa w rozporządzeniach Rzym I i Rzym II”, *Studia Iuridica*, n° 53/2011.

<sup>1058</sup> K. Pacuła, „Granice swobody wyboru prawa dla zobowiązań pozaumownych na tle rozporządzenia Rzym II”, in: Michał Gajda (ed.), *Autonomia woli w prawie prywatnym międzynarodowym i arbitrażu*, Uniwersytet Śląski, Katowice 2015, p. 42.

<sup>1059</sup> K. Pacuła, „Granice swobody wyboru prawa dla zobowiązań pozaumownych na tle rozporządzenia Rzym II”, in: Michał Gajda (ed.), *Autonomia woli w prawie prywatnym międzynarodowym i arbitrażu*, Uniwersytet Śląski, Katowice 2015, p. 43.

## 2.5 Chapter V - Common Rules

Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:

16. *The scope of the exclusion of 'evidence and procedure' in Art 1(3) and any difficulties in relation to that exclusion or to questions of formal validity or the burden of proof (Arts. 21-22)*

Polish scholarship raises the difficulties in separating the issues of presumptions of law and burden of proof from the scope of exclusion of Art. 1(3).<sup>1060</sup> It is therefore necessary to analyse procedural provisions of *lex fori* and *lex causae* to determine which of them should be applicable.<sup>1061</sup> According to scholarship, procedural rules that require interpretation of parties' behavior, principles of evaluating the evidence and certain events based on life experience do not fall into scope of application of Art. 22.<sup>1062</sup> Art. 22 also covers only presumptions of law (in opposition to presumptions of facts, that are important in procedures relating to non-contractual obligations, especially in determining the course of events causing damages, as accidents).<sup>1063</sup>

In relation to Art. 22(2), Polish doctrine estimates that it bares the application of the stricter provisions of the *lex causae* (as per Art. 21) than provisions of the law in force at the seat of the court.<sup>1064</sup>

17. *The approach in your Member State to questions of pleading, proof and application to individual cases of the substantive rules of the law applicable under the Rome II Regulation governing non-contractual obligations.*

The provision on applicability of foreign law by Polish courts appear in the Law on the organisation of common courts. The rule allows to resort to various means of evidence in order to determine the content of foreign law, especially, by asking the Ministry of Justice for information on content of foreign law or ordering an expert opinion.

There is no substantial debate as to questions of pleading, proof and application of the substantive rules of the law applicable under the Rome II Regulation. In the broader context of the European regulations it was only pointed out by doctrine that Polish courts sometimes wrongly apply foreign law (see Introduction). In general, Polish courts apply foreign law *ex officio* (according to the Law on the organisation of common courts). However, as pointed out by doctrine, it may pose some difficulties as Polish judges receive education in Polish law, knowledge of foreign law requires mastering a foreign language, and access to information about foreign law is more difficult.<sup>1065</sup> For instance, district court in Kłodzko first correctly identified German law as applicable to the case as per the Rome II Regulation, and then stated that German provisions are similar to Polish statutes and in the rest of its reasoning applied solely Polish law.<sup>1066</sup>

In its decision from 2014, Polish Supreme Court reminded that Polish courts have a duty to determine applicable law (in the case at hand, according to either the Rome I or Rome II Regulation).<sup>1067</sup> In the same decision, the court noted that the conflict-of-laws rule indicates the law most closely related to the facts in question and its application does not imply a choice between different types of liability, but a choice between using one or another connecting factor.

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<sup>1060</sup> K. Sznajder-Peroń, „Art. 22”, Title I, n° 1, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018.

<sup>1061</sup> K. Sznajder-Peroń, „Art. 22”, Title I, n° 1, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018.

<sup>1062</sup> K. Sznajder-Peroń, „Art. 22”, Title I, n° 1, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018, albeit quoting German doctrine.

<sup>1063</sup> K. Sznajder-Peroń, „Art. 22”, Title I, n° 2, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018.

<sup>1064</sup> K. Sznajder-Peroń, „Art. 22”, Title II, n° 1, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018.

<sup>1065</sup> M. Czepelak, „Międzynarodowe prawo zobowiązań Unii Europejskiej”, Warsaw 2012, p. 461 ff.

<sup>1066</sup> District Court in Kłodzko, I C 390/11, 26.11.2012.

<sup>1067</sup> Polish Supreme Court, CSK 274/13, 13.03.2014.

Polish doctrine raised the issue of the interplay between the Rome II Regulation and Art. 10 of Polish Private International Act 2011 that regulates the application of the foreign law (it provides for subsidiary application of Polish provisions in case a foreign law cannot be determined). It was pointed out that this provision cannot be used to resolve the problem of the impossibility of establishing a connecting factor or the content of the applicable law in the case of the Rome Regulations, since they exclude national private international law also in this respect.<sup>1068</sup>

*18. The delimitation of the scope of the applicable law (Art. 15(a)-(h)), including any difficulties as its relationship to the issues addressed at points 16 17 above)*

The general scope of application of the *lex causæ* under the Regulation as provided for in Art. 15 is considered as beneficial in practice. The provision contains a non-exhaustive list of matters covered by the *lex causæ* as opposed to procedural matters which are governed by the *lex fori* (Art. 1(3)). The introduction of Art. 15 is particularly useful in the light of different qualifications in Member States of the scope of application of the procedural law, that may cover extinction, prescription and limitation in time. The main difficulty that may emerge in relation to scope of the applicable law is the lack of compatibility of covered areas with specific provisions of the Regulation. It is apparent e. g. in context of Art. 8 and can lead to the false impression that its scope of application is in reality broader<sup>1069</sup>.

Polish doctrine discusses if Art. 15 covers also the right and conditions of the set-off in case of contractual and non-contractual obligations, as Art. 15 (contrary to the Rome I Regulation) does not expressly cover such possibility.<sup>1070</sup>

Other than that, the list of Art. 15 does not in principle raises any doubts.<sup>1071</sup>

*19. The application of the rule on overriding mandatory provisions (Art. 16)*

The scope of application of Art. 16 overlaps the scope of application of the Rome II Regulation. It encompasses all conflict-of-laws rules for the obligations arising out of non-contractual claims. Traditionally, it is considered as playing the biggest role in case of Art. 14, i.e. parties' freedom to choose the law applicable to their non-contractual relationships<sup>1072</sup>. Even though the European legislator did not provide a definition of the concept of overriding mandatory provisions, in Polish literature it is now clear that they should receive the same meaning as provided in Art. 9 of the Rome I Regulation<sup>1073</sup> (especially after *Arblade* case<sup>1074</sup>). The controversy around Art. 16 relates to the interpretation of the public interest considerations as some rules may aim, at least taken at face value, to protect private interests, but still qualify as overriding mandatory rules (for instance as in case of consumer contracts).<sup>1075</sup> As examples of overriding mandatory rules Polish literature qualifies certain provisions for liability for defective medical and pharmaceutical products, the ones concerning employers' compensation scheme for the acts of their employees or

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<sup>1068</sup> M. Czepelak, „Międzynarodowe prawo zobowiązań Unii Europejskiej”, Warsaw 2012, p. 465 ff.

<sup>1069</sup> M. Świerczyński, „Rozdział XII. Zobowiązania pozaumowne”, n° 246 in: M. Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, C.H. Beck, Warsaw 2015.

<sup>1070</sup> P. Staszczuk, „Art. 15”, n° 15, in: P. Fik, P. Staszczuk (ed.), *Prawo właściwe dla zobowiązań pozaumownych. Rozporządzenie (WE) nr 864/2007. Komentarz*, Warsaw 2014.

<sup>1071</sup> M. Świerczyński, „Rozdział XII. Zobowiązania pozaumowne”, n° 247 in: Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, C.H. Beck, Warsaw 2015.

<sup>1072</sup> M.-A. Zachariasiewicz, „Art. 16”, n° 1, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018.

<sup>1073</sup> Ł. Żarnowiec, „Rozdział XII. Zobowiązania pozaumowne”, n° 264 in: Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, C.H. Beck, Warsaw 2015; Ł. Żarnowiec, „Prawo właściwe dla odpowiedzialności za szkodę wyrządzoną przez produkt niebezpieczny w świetle przepisów rozporządzenia Rzym II”, *Problemy Prawa Prywatnego Międzynarodowego*, n° 5/2009, p. 109; M. Mataczyński, „Przepisy wymuszające swoje zastosowanie – wybrane zagadnienia”, *Problemy Prawa Prywatnego Międzynarodowego*, vol. 18/2016, pp. 61-62.

<sup>1074</sup> CJUE, *Arblade and Leloup* joint cases C-376/96 and C-369/96.

<sup>1075</sup> Ł. Żarnowiec, „Rozdział XII. Zobowiązania pozaumowne”, n° 264 in: Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, C.H. Beck, Warsaw 2015.

pertaining to limit the punitive character of allowed damages<sup>1076</sup>. But not those relating to the liability arising out of the use of a prospectus in financial matters.<sup>1077</sup>

Polish doctrine underlines that the text of Art. 16 is not conclusive as to the application of the overriding mandatory provisions of the law applicable under the Regulation.<sup>1078</sup> It is submitted, albeit not unanimously, that *lex causae*, including its overriding mandatory rules, should be applied if by their scope of application those rules are in connection with the situation that has arisen. The same question arises as to the application of the overriding mandatory rules of a third country, as it is pointed out that the silence of the Regulation on this subject cannot be construed as barring taking them into account.<sup>1079</sup> One scholar points out that such application should be directly possible in case of a strong connection between that law and the circumstances of the case.<sup>1080</sup> Another points out that it remains to be interpreted if the ECJ decision in Republik Griechenland case, where it has approved the indirect approach to foreign mandatory rules under the Rome I Regulation, should be extended to the Rome II Regulation (especially taking into account the different wording of the two provisions).<sup>1081</sup> In any case, it should be underlined that in Polish literature the question of application of the overriding mandatory rules of a third country was always controversial.<sup>1082</sup>

#### 20. The application of the specific rule on *direct action against the insurer of the person liable* (Art. 18)

Before the introduction of the Rome II Regulation, the collision regulations determining the rules applicable for filling claims directly with the insurance company of the perpetrator were not regulated in the Polish Private International Law Act.<sup>1083</sup> Regarding the wording of Art. 18 Rome II Regulation, Polish doctrine is of the opinion that it can raise doubts as to the scope of application of the law it points out to: does it cover only the existence of the right to a direct action against the insurer or also its admissibility, modalities, scope and content? The Polish doctrine follows the latter interpretation.<sup>1084</sup> However, Art. 18 of the Rome II Regulation does not precede the substantive law governing the insurance contract as per the Rome I Regulation. Taking into account differences between MS in determining what falls under the term *actio directa*, some scholars showed the utility of providing directly in the Regulation its definition.<sup>1085</sup> This stance seemed not to be followed by the Provincial Court in Cracow which in 2013 decided that the choice of

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<sup>1076</sup> M.-A. Zachariasiewicz, „Art. 16”, n° 3, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018.

<sup>1077</sup> M.-A. Zachariasiewicz, „Art. 16”, n° 3, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018.

<sup>1078</sup> M.-A. Zachariasiewicz, „Art. 16”, n° 3, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018; see Ł. Żarnowiec who is also calling for the application of *lex causae*, albeit based on adequately broad understanding of the scope of applicable law in the Regulation, Ł. Żarnowiec, „Rozdział XII. Zobowiązania pozaumowne”, n° 268 in: M. Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, C.H. Beck, Warsaw 2015.

<sup>1079</sup> Ł. Żarnowiec, „Wpływ przepisów wymuszających swoje zastosowanie na rozstrzyganie spraw spadkowych pod rządami rozporządzenia Parlamentu Europejskiego i Rady UE Nr 650/2012”, *Problemy Prawa Prywatnego Międzynarodowego*, vol. 25/2019, p. 60.

<sup>1080</sup> Ł. Żarnowiec, „Rozdział XII. Zobowiązania pozaumowne”, n° 270 in: M. Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, C.H. Beck, Warsaw 2015.

<sup>1081</sup> M.-A. Zachariasiewicz, „Art. 16”, n° 8, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018.

<sup>1082</sup> M. Pazdan *et al.*, „W odpowiedzi na ankietę skierowaną do państw członkowskich Unii, dotyczącą stosowania Rozporządzenia nr 864”, *Problemy Prawa Prywatnego Międzynarodowego*, vol. 12/2013, p. 191.

<sup>1083</sup> Ł. Żarnowiec, „Czasowe ramy zastosowania rozporządzenia (WE) nr 864/2007 Parlamentu Europejskiego i Rady dotyczącego prawa właściwego dla zobowiązań pozaumownych (rozporządzenie „Rzym II”). Uwagi na tle orzeczenia Trybunału Sprawiedliwości Unii Europejskiej w sprawie C-412/10 Homawoo v GMF Assurances”, *Rozprawy Ubezpieczeniowe*, n° 12(1/2012), p. 13.

<sup>1084</sup> Ł. Żarnowiec, „Art. 18”, Title II, n° 3, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018.

<sup>1085</sup> K. Pacuła, „Roszczenie bezpośrednio poszkodowanego przeciwko ubezpieczycielowi (*actio directa*) w prawie prywatnym międzynarodowym”, *Zeszyty Naukowe Instytutu Administracji AJD w Częstochowie*, 1(11)/2015, p.118.

law clause contained in the insurance contract is contrary to the Rome II Regulation and therefore applied implicitly Art. 18 of that Regulation to derive from it the law applicable also to the content of the insurance relationship.<sup>1086</sup> This decision was deemed incorrect by Polish doctrine.<sup>1087</sup>

The doubts appear also in respect to the hierarchy of applicable rules in case both legal systems, namely *lex causae* and the law applicable to the insurance contract contain the direct action mechanism. In that case, the choice should be left to the injured party.<sup>1088</sup> The solution that allows to choose the parts of each law that are most favourable to the victim was strongly rejected.<sup>1089</sup>

#### 21. The application the specific rule on *subrogation* (Art. 19)

Art. 19 seems not to apply to debtors *in rem*.<sup>1090</sup> However it is presumed that the law regulating the *action subrogatoire* covers also the question of priority between the new and former creditor in case of partial payments.<sup>1091</sup>

Polish doctrine pointed out to the lack of consensus as to according to which law it should be assessed whether a claim can be subrogated at all.<sup>1092</sup> By the way of analogy with Art. 14(2) Rome I Regulation, Art. 19 should also cover the question of informing the original debtor about the change of the creditor and the effective payment of the debt.<sup>1093</sup> Polish scholars deplore the fact that the European legislator did not introduce in the Rome II Regulation a similar provision to Art. 14(2) Rome I and rule concerning a third party that satisfied the creditor without a duty to do so.<sup>1094</sup>

#### 22. The application of the specific rule on *multiple liability* (Art.20)

As Polish translation has employed the term "regressive claim" in Art. 20, which is not defined in the Regulation, it is understood in the Polish literature that it should benefit from an autonomous and wide interpretation.<sup>1095</sup>

One of the raised questions concerns the applicability of Art. 20, namely if it should also apply in case some of the debtors have the obligation towards the creditor based on a contract. Polish doctrine leans toward granting Art. 20 the broad scope of application.

The other question relates to the applicable law in case when there is a special relationship between the debtors, which regulates also the question of their multiple liability (e.g. associates in a corporation personally liable for a damage caused to a third person by unfair competition in connection with the activities of that corporation).<sup>1096</sup>

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<sup>1086</sup> Provincial Court in Cracow, I C 1694/13, 27.10.2016.

<sup>1087</sup> Ł. Żarnowiec, „Art. 18”, Title II, n° 4, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018.

<sup>1088</sup> Ł. Żarnowiec, „Rozdział XII. Zobowiązania pozaumowne”, n° 278 in: Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, C.H. Beck, Warsaw 2015.

<sup>1089</sup> Ł. Żarnowiec, „Art. 18”, Title II, n° 5, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018.

<sup>1090</sup> Ł. Żarnowiec, „Rozdział XII. Zobowiązania pozaumowne”, n° 282 in: Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, C.H. Beck, Warsaw 2015.

<sup>1091</sup> Ł. Żarnowiec, „Rozdział XII. Zobowiązania pozaumowne”, n° 283 in: Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, C.H. Beck, Warsaw 2015.

<sup>1092</sup> Ł. Żarnowiec, „Rozdział XII. Zobowiązania pozaumowne”, n° 285 in: Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, C.H. Beck, Warsaw 2015; Ł. Żarnowiec, „Prawo właściwe dla subrogacji w przepisach rozporządzenia „Rzym II”, *Europejski Przegląd Sądowy*, July 2014, p. 15.

<sup>1093</sup> Ł. Żarnowiec, „Rozdział XII. Zobowiązania pozaumowne”, n° 285 in: Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, C.H. Beck, Warsaw 2015.

<sup>1094</sup> Ł. Żarnowiec, „Prawo właściwe dla subrogacji w przepisach rozporządzenia „Rzym II”, *Europejski Przegląd Sądowy*, July 2014, pp. 16.

<sup>1095</sup> Ł. Żarnowiec, „Rozdział XII. Zobowiązania pozaumowne”, n° 287 in: Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, C.H. Beck, Warsaw 2015.

<sup>1096</sup> Ł. Żarnowiec, „Rozdział XII. Zobowiązania pozaumowne”, n° 291 in: Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, C.H. Beck, Warsaw 2015.

In case when the liabilities of different debtors are subject to the laws of different States, there may be an issue of qualifying that relation as falling into scope of Art. 20. A leading Polish author is of the opinion that in such case the obligations of debtors toward the creditor should be governed by the law that governs the obligation that gave rise to the main creditor's claim.<sup>1097</sup>

Art. 20 remains silent on the issue if its applicable only to the situation of the liability of different debtors based on the same legal event. In Polish literature the expressed opinion is that of the broad interpretation of that provision, namely that it should apply also to debtors' liabilities arising out of different basis.<sup>1098</sup>

In case of the choice of law between the creditor and one of the debtors, its effect towards others should be limited by the application of Art. 14(1) 2d sentence (for other opinions Polish commentary refers to German and English authors).<sup>1099</sup>

Art. 20 Rome II does not introduce the same solution as Art. 16 Rome I Regulation, i.e. that other debtors may rely on the defences they had against the creditor to the extent allowed by the law governing their obligations towards the creditor. According to Polish doctrine such solution should be allowed as per analogy with Art. 16 (with one commentary expressing a strong *contra* opinion<sup>1100</sup>).<sup>1101</sup>

## 2.6 Chapter VI - Other Provisions

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

*23. The implementation of the concept of habitual residence in the Rome II Regulation, with reference both to persons covered by Art 23 and natural persons acting otherwise than in the course of business*

Polish doctrine is consistent in treating the concept of habitual residence as an autonomous one, that must be interpreted in the light of the Rome II purposes.

In regard to the place of central administration as the place of habitual residence according to Polish doctrine this term seems to be understood as the effective place of central administration.<sup>1102</sup> If a company or other body does not have a central administration, the place of its habitual residence should be the place of its main (preponderant) activity, especially the place from which its business is administered.<sup>1103</sup> In Poland, the term "companies and other bodies, corporate or unincorporated" covers a wide range of entities that are acting as legal entities without necessarily having a legal personality.<sup>1104</sup>

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<sup>1097</sup> Ł. Żarnowiec, „Art. 20”, Title II, n° 2, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018.

<sup>1098</sup> Ł. Żarnowiec, „Art. 20”, Title II, n° 5, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018.

<sup>1099</sup> Ł. Żarnowiec, „Art. 20”, Title III, n° 3, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018.

<sup>1100</sup> P. Staszczuk, „Art. 20”, n° 4, in: P. Fik, P. Staszczuk (ed.), *Prawo właściwe dla zobowiązań pozaumownych. Rozporządzenie (WE) nr 864/2007. Komentarz*, Warsaw 2014.

<sup>1101</sup> Ł. Żarnowiec, „Art. 20”, Title IV, n° 2, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018.

<sup>1102</sup> J. Pazdan, „Rozdział XII. Zobowiązania pozaumowne”, n° 12 in: M. Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, C.H. Beck, Warsaw 2015.

<sup>1103</sup> J. Pazdan, „Rozdział XII. Zobowiązania pozaumowne”, n° 12 in: M. Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, C.H. Beck, Warsaw 2015.

<sup>1104</sup> M. Świerczyński, „Art. 23”, n° 2, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018.

As for natural persons, in case of self-employed persons contracting in the course of their business, the place of their habitual residence is at the place of the main company. The latter is the place of economic interests of that person. Therefore, such considerations as the place of residence or the place of registration of the business are irrelevant.<sup>1105</sup>

Also, for natural person that is not acting in the course of his or her business activity, as the term is not defined by the Regulation, a minority opinion considered that subjective circumstances (namely, the intention to stay in a given place) should be weighed in.<sup>1106</sup>

*24. The application of and any difficulties with the specific rules on exclusion of renvoi (Art.24) and States with more than one legal system (Art.25)*

The general exclusion of *renvoi* is no controversial in Polish doctrine. The one question that may arise is however when parties agree to include in their choice of law the rules of the private international law of the specified legal order. In that situation, the admissibility of a clause to this effect should be rejected<sup>1107</sup>. However, another solution may be to interpret parties' choice as in fact a choice of the law indicated by the conflict-of-laws provisions. The solution in each case should depend on the interpretation of parties' intent.<sup>1108</sup>

In case of Art. 26, the question raised by Polish scholars concerns the situation where the parties refer in their agreement to the law of the State with more than one legal system without designating the specific unit which rules should govern their relationship. In that situation, it seems that it should be resorted to either the conflict-of-laws rules of that State that may be applicable to designate the law of the specific unit or, if such rules do not exist, to the rule with the closest connection to their relation. To present the other solution, namely resorting to the rule of objective connector, Polish scholars cite German doctrine.<sup>1109</sup>

*25. The application of and any difficulties with the specific rule on public policy of the forums (Art. 26)*

The public policy clause of Art. 26 corresponds to the provision of Art. 7 of Polish Private International Law Act, therefore its place in the Regulation does not spark debate within the Polish doctrine. It was pointed out that the courts should apply this provision restrictively, only in situations where the application of *lex causae* provisions clearly could not be reconciled with public order of their state.<sup>1110</sup> The Polish doctrine points out that the provision does not introduce the concept of specific European public order.<sup>1111</sup>

Polish Supreme Court did not exclude the application of the provision on public policy in general for the cases of clear disproportion between the extent of the damage and the compensation.<sup>1112</sup> It also categorically stated that punitive damages are against public policy and therefore cannot be awarded based upon the governing foreign law.<sup>1113</sup>

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<sup>1105</sup> M. Świerczyński, „Art. 23”, n° 5, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018.

<sup>1106</sup> M. Pazdan, „Prawo prywatne międzynarodowe”, Warsaw 2010, p. 56.

<sup>1107</sup> J. Popiołek, „Art. 24”, n° 2, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018.

<sup>1108</sup> J. Popiołek, „Art. 24”, n° 2, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018.

<sup>1109</sup> Ł. Żarnowiec, „Art. 25”, n° 2, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018, quoting *contra* German doctrine.

<sup>1110</sup> Ł. Żarnowiec, „Prawo właściwe dla odpowiedzialności za szkodę wyrządzoną przez produkt niebezpieczny w świetle przepisów rozporządzenia Rzym II”, *Problemy Prawa Prywatnego Międzynarodowego*, n° 5/2009, p. 112; M. Pazdan, M. Szpunar, „Conflict of laws rules in Polish consumer protection laws”, in: M. Kępiński (ed.), *The evaluation of the new Polish legislation in the matter of consumer protection from the European perspective: conference proceedings*, Poznań 2002, p. 111.

<sup>1111</sup> P. Staszczuk, „Art. 26”, n° 10, in: P. Fik, P. Staszczuk (ed.), *Prawo właściwe dla zobowiązań pozaumownych. Rozporządzenie (WE) nr 864/2007. Komentarz*, Warsaw 2014; M. Czepelak, „Międzynarodowe prawo zobowiązań Unii Europejskiej”, Warsaw 2012, p. 470.

<sup>1112</sup> Supreme Court, III CSK 21/16, 8.12.2016.

<sup>1113</sup> Supreme Court, I CSK 697/12, 11.10.2013.



Court of Appeal in Szczecin decided to resort to the public policy provision and not to apply German law for not giving protection to the relationship between the parent and the children. In its opinion, the possibility to demand compensation for the death of a relative is a fundamental principle of Polish legal order.<sup>1114</sup> Polish scholars were hesitant as to the solution adopted by the court.<sup>1115</sup> Provincial Court in Szczecin gave effect to the public policy clause ruling that *culpa in contrahendo* in Swiss law results from case-law and doctrine which are not recognised in Polish constitution as sources of law.<sup>1116</sup>

26. *Practical interaction between the Rome II Regulation and other EU and international legal instruments, in specific areas such as environmental damages, intellectual property rights or data protection (Arts. 27, 28, 29)*

The question of the interplay between the Rome II Regulation and other EU and international legal instruments was debated in Polish doctrine. Especially, the interaction between Art. 7 and the scope of application of directive 2004/35/EC was reported, mainly in respect of the definition of environmental damage.<sup>1117</sup> It is understood however, that the directive may only serve as an auxiliary instrument in defining the scope of application of Art. 7.

In relation to Art. 27, Polish doctrine takes into consideration three European instruments, namely the Council Regulation (EC) N° 2100/94 on Community Plant Variety Rights and the Council Regulation (EC) N° 6/2002 on Community designs, as well as the Regulation 2017/1001 on the European Union trade mark. Regarding first two of those legal acts, the discussion evolves mainly around the question if there is a conflict between their provisions and the Rome II Regulation; as for the latter instrument the main raised problem touches upon the interplay between Arts. 129 par. 2 and 130 par. 2 of the 2017/1001 Regulation and Arts. 8 par. 2, 13 and 27 of the Rome II Regulation.<sup>1118</sup>

## 2.7 Comments on other Practical Problems

*These areas are of particular interest for the Commission. Please be as precise as possible regarding any issue that has been reported on:*

27. *The impact of the application of the 1971 Hague Convention on the law applicable to traffic accidents on legal certainty (where relevant for your Member State)*

It is pointed out by Polish academia that the 1971 Hague Convention on the law applicable to traffic accidents that falls under Art. 28 is detrimental to European uniformity and encourages forum shopping.<sup>1119</sup> The non-unification of the rules in that area can lead to the different applicable substantive laws. This problematic may be further exacerbated by the spread of autonomous vehicles and, on one hand, differences in regulating responsibility in case of accidents among European states and, on the other, the difficulties and costs of gathering the evidence.<sup>1120</sup>

For Polish courts, the existence of different provisions on the same matter caused the difficulties in determining the proper scope of application of each legal instrument.<sup>1121</sup>

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<sup>1114</sup> Court of Appeal in Szczecin, I ACa 91/16, 13.04.2016.

<sup>1115</sup> M. Zachariasiewicz, „Art. 26”, Title II, n° 9, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018.

<sup>1116</sup> Provincial Court in Szczecin, VIII GC 176/17, 10.10.2018.

<sup>1117</sup> M. Świerczyński, „Rozdział XII. Zobowiązania pozaumowne”, n° 154 in: M. Pazdan (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20b*, C.H. Beck, Warsaw 2015.

<sup>1118</sup> M. Szpunar, K. Pacuła, „Art. 27”, Title II, n° 1 and 2, in: M. Pazdan (ed.), *Prawo Prywatne Międzynarodowe*, Duże Komentarze Becka, Warsaw 2018.

<sup>1119</sup> M. Świerczyński, Ł. Żarnowiec, „Prawo właściwe dla odpowiedzialności za szkodę spowodowaną przez wypadki drogowe z udziałem autonomicznych pojazdów”, *Zeszyty Prawnicze*, 19.2/2019, p. 105.

<sup>1120</sup> M. Świerczyński, Ł. Żarnowiec, „Prawo właściwe dla odpowiedzialności za szkodę spowodowaną przez wypadki drogowe z udziałem autonomicznych pojazdów”, *Zeszyty Prawnicze*, 19.2/2019, p. 106.

<sup>1121</sup> M. Świerczyński, Ł. Żarnowiec, „Prawo właściwe dla odpowiedzialności za szkodę spowodowaną przez wypadki drogowe z udziałem autonomicznych pojazdów”, *Zeszyty Prawnicze*, 19.2/2019, p. 122.

In the light of thereof, Polish doctrine proposed either the adoption by the EU of the relevant regulation or introduction of the separate provision on the matter in the Rome II Regulation.<sup>1122</sup> The latter could reflect the provisions of the 1971 Hague Convention, which would result in the assimilation of the Convention in the Provision, leaving however as the main connector the place of the damage<sup>1123</sup>.

*28. Any other practical problems with respect to the application or interpretation of the Rome II Regulation, including but not limited to the suitability of the mosaic approach*

The problems raised in regard to the mosaic approach englobe differences in assessment of the same state of facts and potential risk of incorrect application of the foreign law.<sup>1124</sup> In some areas covered by the Rome II, the application of the mosaic approach was deemed to be the most beneficial one.<sup>1125</sup>

### 3. Comments on areas of interest

*These areas are of particular interest for the Commission. Please be as precise as possible regarding any issue that emerged in your Member State regarding:*

*29. The exclusion of violations of privacy and rights relating to personality, including defamation, from the scope of the Rome II Regulation and any difficulties arising out from differences among Member States' rules in cross-border situations*

Polish doctrine criticized the exclusion of defamation from the scope of application of the Rome II Regulation, pointing out not only the difficulties in construing such conflict-of-laws rule for modern times (especially for cross-border situations), but also the lack of political will in including the violations of privacy in the European regulation.<sup>1126</sup>

*30. Any comment regarding the Interplay of the Rome II Regulation with the treatment of defamation and data protection, and, in these areas, the relevance of Strategic Lawsuits Against Public Participation (SLAPPs)*

No meaningful discussion in academia is led in respect of SLAPP and the Rome II Regulation, even though some media outlets reported that there are victims of approach related to Strategic Lawsuits Against Public Participation.<sup>1127</sup>

*31. The extent to which Rome II Regulation has been applied to corporate abuses against human rights and lays down an effective set of rules to regulate non-contractual liability;*

The question of corporate abuses against human rights is not yet extensively debated in academia and no relevant discussion as to the interaction of the Rome II Regulation and human rights abuses by businesses was found.

*32. The impact of the development of artificial intelligence on the Rome II Regulation, and in particular on the suitability of the rules that it contains to regulate non-contractual liability.*

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<sup>1122</sup> M. Świerczyński, Ł. Żarnowiec, „Prawo właściwe dla odpowiedzialności za szkodę spowodowaną przez wypadki drogowe z udziałem autonomicznych pojazdów”, *Zeszyty Prawnicze*, 19.2/2019, pp. 124-125.

<sup>1123</sup> M. Świerczyński, Ł. Żarnowiec, „Prawo właściwe dla odpowiedzialności za szkodę spowodowaną przez wypadki drogowe z udziałem autonomicznych pojazdów”, *Zeszyty Prawnicze*, 19.2/2019, p. 126.

<sup>1124</sup> E. Figura-Góralczyk, „2. Dystrybucyjne stosowanie prawa”, in: *Nieuczciwa konkurencja w prawie prywatnym międzynarodowym*, Warsaw 2017; A. Frąckowiak-Adamska, A. Guzewicz, Ł. Petelski, „Skuteczność stosowania przez sądy polskie unijnych rozporządzeń: nr 44/2001, nr 2201/2003, nr 864/2007 i nr 4/2009”, *Europejski Przegląd Sądowy*, n° 10/2016, p. 8.

<sup>1125</sup> E. Figura-Góralczyk, „9. Podsumowanie”, in: *Nieuczciwa konkurencja w prawie prywatnym międzynarodowym*, Warsaw 2017 referring to Art. 6.

<sup>1126</sup> J. Balcarczyk, „Prawo właściwe dla zobowiązań wynikających z naruszenia dóbr osobistych w rozporządzeniu o prawie właściwym dla zobowiązań pozaumownych”, *Problemy Prawa Prywatnego Międzynarodowego*, vol. 9/2011, p. 108.

<sup>1127</sup> Oko.press, 4.01.2021, <https://oko.press/nowy-instrument-tlumienia-wolnosc-mediow-oko-press-tez-doswiadcza-slapp/>

In the report prepared by the Ministry of Digital Affairs in 2018, it was stated that for the torts relating to AI Art. 4 of the Rome II will be applicable and its application does not raise particular doubts (quoting however to support this view foreign doctrine)<sup>1128</sup>. It was however pointed out that there are some exceptions to the general rule of Art. 4 which may be more problematic with regard to AI (e.g. is the choice of law included in the algorithm effective or only hypothetical).<sup>1129</sup> The report raised the issue of lack of any connector specific for AI in Art. 5 and raised the issue of possible difficulty in finding the applicable law in case of accidents involving autonomous vehicles (however, in the latter case, the report wrongly states that in most European countries the law applicable to the car accidents would be the “law from 70’s”).<sup>1130</sup>

The issue of AI is not particularly debated in Polish doctrine, as artificial intelligence is still a developing legal area. Some reforms were proposed in the context of autonomous vehicles (see Q. 27), touching upon also a possible new provision introduced in the Rome II Regulation. In regard to the responsibility of the producer (of the whole vehicle or just some of its components), the social interest in supporting the technological development should be taken into consideration, leading to the fair sharing of risks accompanying the implementation of innovative solution. In that respect, Polish scholars propose to provide a minimum level of protection by guaranteeing the applicability of the law of one of the countries in which the vehicle was marketed by reference to Art. 5 of the Regulation.<sup>1131</sup> In Polish literature it was however stipulated that one provision englobing all matters relating to artificial intelligence algorithms is not necessary, nor beneficial, especially in the light of the complex problematics it may pose.<sup>1132</sup> Especially, it was considered that the dynamically developing economy based on artificial intelligence algorithms does not undermine the classic European system of conflict-of-laws rules.<sup>1133</sup> In the case of artificial intelligence, however, the use of those rules cannot be mechanical and should aim at analysing the circumstances of each individual case.<sup>1134</sup>

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<sup>1128</sup> Ministry of Digital Affairs, „Rekomendacje przygotowane pro bono, na zaproszenie i pod kierunkiem Ministerstwa Cyfryzacji, przez środowiska zainteresowane rozwojem AI w Polsce”, Warsaw 2018, p. 181.

<sup>1129</sup> Ministry of Digital Affairs, „Rekomendacje przygotowane pro bono, na zaproszenie i pod kierunkiem Ministerstwa Cyfryzacji, przez środowiska zainteresowane rozwojem AI w Polsce”, Warsaw 2018, p. 181.

<sup>1130</sup> Ministry of Digital Affairs, „Rekomendacje przygotowane pro bono, na zaproszenie i pod kierunkiem Ministerstwa Cyfryzacji, przez środowiska zainteresowane rozwojem AI w Polsce”, Warsaw 2018, p. 181.

<sup>1131</sup> M. Świerczyński, Ł. Żarnowiec, „Prawo właściwe dla odpowiedzialności za szkodę spowodowaną przez wypadki drogowe z udziałem autonomicznych pojazdów”, *Zeszyty Prawnicze*, 19.2/2019, p. 130.

<sup>1132</sup> M. Świerczyński, „Sztuczna inteligencja w prawie prywatnym międzynarodowym – wstępne rozważania”, *Problemy Prawa Prywatnego Międzynarodowego*, vol. 25, 2019, p. 40.

<sup>1133</sup> Ministry of Digital Affairs, „Rekomendacje przygotowane pro bono, na zaproszenie i pod kierunkiem Ministerstwa Cyfryzacji, przez środowiska zainteresowane rozwojem AI w Polsce”, Warsaw 2018, p. 181.

<sup>1134</sup> M. Świerczyński, „Sztuczna inteligencja w prawie prywatnym międzynarodowym – wstępne rozważania”, *Problemy Prawa Prywatnego Międzynarodowego*, vol. 25, 2019, p. 34.

#### 4. List of national case law

<u>Court or tribunal</u>	<u>Case name and reference number</u>  <u>Reference to decision of the Court of Justice if applicable</u>	<u>Date</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings (only for key cases)</u>
District Court in Kłodzko	I C 390/11	26.11.2012	Art. 4	General rule for applicable law	
District Court in Strzelce Opolskie	I C 393/10	12.02.2013	Art. 4	General rule for applicable law	
Provincial Court in Wrocław	II Ca 1367/12	22.02.2013	Art. 4, 19-20	General rule for applicable law	
Provincial Court in Szczecin	VIII GC 134/11	13.11.2013	Art. 4	General rule for applicable law	
The Supreme Court	II CSK 250/12	23.05.2013	Art. 4	General rule for applicable law. Application in time	
The Supreme Court	I CSK 697/12	11.10.2013	Art. 26, recital 32	Public policy	
Provincial Court in Szczecin	VIII GC 134/11	12.11.2013	Art. 10	Unjust enrichment	
Court of Appeal in Szczecin	I Aca 690/13	04.12.2013	Art. 4	Scope of application	

Court of Appeal in Szczecin	I Aca 660/12	7.02.2014	Art. 31	Application in time	
District Court Wrocław Krzyki in Wrocław	I C 388/12	13.02.2014	Art. 4, Art. 15 (a) and (b)	General rule for applicable law	
Provincial Court in Warsaw	II Co 18/14	11.03.2014	Art. 10	Unjust enrichment Decision on Polish jurisdiction based on Art. 10 of the Rome II Regulation	
Court of Appeal in Szczecin	I ACa 212/14	29.05.2014	Art. 4 (1) and (2)	General rule for applicable law	A German seller and Polish buyers concluded a contract for the sale of seeds. The Polish buyer withdrew from the contract and the seller demanded compensation for the damage it incurred in the amount of EUR 27,825. The Polish company refused to pay. The German Court of first instance awarded the requested damages. The second instance court dismissed the claim due to the lack of German jurisdiction. Nevertheless, on February 11, 2011, the German seller initiated an enforcement procedure, which resulted in collecting an amount from the defendant's account. The Polish company requested the return of this amount. The Polish Provincial Court applied Art. 4(1) of the Regulation to the case and in consequence based its decision on Polish law. The Court of Appeal rejected the submission of manifestly closer connection with Germany due to the pre-existing contract between the parties. It recognised, however, such a connection with Poland based on the fact that the damage was

					<p>caused by a Polish enforcement authority on Polish territory and in Polish currency.</p> <p>“Sąd Apelacyjny nie podziela tego poglądu i nie dostrzega – tak jak strona apelująca, aby nienależyte wyegzekwowanie środków w walucie polskiej przez polski organ egzekucyjny pozostawało w znacznie ściślejszym związku z Republiką Federalną Niemiec aniżeli z Rzeczpospolitą Polską. Przeciwnie sposób dokonanej egzekucji, podmioty w niej uczestniczące, kraj w którym ta czynność została dokonana wyraźnie wskazują na związek z Państwem Polskim i jego ustawodawstwem. Nie może tego zmienić sama umowa, która faktycznie stanowiła dowód w sprawie o zapłatę dochodzoną przed Sądem Krajowym w H.”</p>
Provincial Court in Lublin	II Ca 226/14	29.05.2014	Art. 4 (1)	General rule for applicable law	
Court of Appeal in Cracow	I Aca 548/14  C-412/10 Homawoo v. GMF Assurances SA	02.07.2014	Art. 31 and 32	Application in time	
District Court of the city of Warsaw	XV GC 1054/14	11.08.2014	Art. 4(2)	Applicability of the law of the place of Parties' residence	
Provincial Court in Wrocław	I C 1722/13	06.10.2014	Art. 31 and 32	Application in time	

Provincial Court in Szczecin	VIII Ga 227/14	19.12.2014	Art. 18	Applicability of direct action against the insurer of the person liable	
Provincial Court in Łódź	X GC 639/11	02.01.2015	Art. 31 and 32	Application in time	
Supreme Court	V CSK 164/14	05.02.2015	Art. 4(3)	Manifestly closer connection with one country	<p>The Court considered that if an obligation arises from a relationship, where four entities participate, three of which are based or have their habitual residence in Poland and are linked by previous contracts governed by the provisions of Polish law, closely related to the damage, the application of the correcting (escape clause) rule is justified.</p> <p>“Jeżeli się weźmie pod uwagę, że w stosunku zobowiązaniowym uczestniczą cztery podmioty, z których trzy mają siedzibę lub miejsce zwykłego pobytu w Polsce i łączą je podlegające przepisom prawa polskiego wcześniejsze umowy ściśle związane z wyrządzającym szkodę czynem niedozwolonym, to stosowanie reguły korygującej okazuje się uzasadnione”</p>
Provincial Court in Olsztyn	I C 726/13	24.02.2015	Art. 1(2)(g)	Exclusion of defamation from the scope of application of the Regulation (“Polish death camps”) – confirmed by Court of Appeal in Białystok (I Aca 403/15)	
Provincial Court in Warsaw	II C 10/11	05.03.2015	Art. 1(2)(g)	Exclusion of defamation from the scope of application of the Regulation (“Polish death	

				camps") – confirmed by Court of Appeal in Warsaw (I Aca 971/15)	
Court of Appeal in Wrocław	IACa 1748/14	06.03.2015		Application in time (most probably, the court just stated the inapplicability of the Regulation)	
District Court in Szczecin	XI GC 1046/13	23.04.2015	Art. 28(1)	The Convention of 4 May 1971 on the Law Applicable to Traffic Accidents supercedes the Regulation (The Netherlands and Poland)	
Court of Appeal in Białystok	IACa 154/15	21.05.2015		Only a lack of contractual connector may justify the application of the Rome II Regulation	
Court of Appeal in Szczecin	IACz 889/15	30.10.2015		Definition of the place where the harmful event occurred from the Brussels Regulation 44/2001 is based also on the interpretation of the Rome II Regulation (if the place where the harmful event occurred was the place where the victim claims to have suffered consequential damage following the initial one arising in another state, it would also influence the applicable law. Therefore,	



				the change of place of residence of the plaintiff could determine the proper jurisdiction and applicable law, to the detriment of the Defendant).	
Provincial Court in Bydgoszcz	II Ca 266/15	05.11.2015	Art. 31 and 32	Application in time	
Provincial Court in Wrocław	I C 596/11	26.01.2016	Art. 31 and 32	Application in time	
Court of Appeal in Szczecin	I ACa 91/16	13.04.2016	Art. 26 and Art. 28	Public Policy	<p>The Court of Appeal confirmed the judgment of the Provincial Court in Koszalin (first instance) in regard to the application of the Polish law, based on Art. 26 and 28 of the Regulation. The Plaintiffs requested damages for the emotional distress and loss of support they suffered in result of the death of their mother in a car accident. The Court of Appeal confirmed that Polish law should be applied as it grants due protection to legal rights.</p> <p>“Sąd Okręgowy odnosząc się do żądania powodów o zapłatę zadośćuczynienia pieniężnego za krzywdę za zerwanie więzi rodzinnej powodów z matką B. K. w pełni zaakceptował pogląd wyrażony przez Sąd Apelacyjny w Szczecinie, iż przy rozpoznaniu tego roszczenia ma zastosowanie prawo polskie. Powołując się na klauzulę porządku publicznego oraz art. 28 rozporządzenia Rady Europy WE 864/2007 (Rzym II), zgodnie z którym prawem właściwym dla rozpoznania</p>

					tego roszczenia jest prawo polskie jako te, udzielające należytej ochrony prawom chronionym w Rzeczypospolitej Polskiej.”
Provincial Court in Katowice	IX P 10/13	01.06.2016	Art. 4(1) and (2)	Applicability of the Polish law based on habitual residence of the parties	
Court of Appeal in Szczecin	I ACa 344/16	08.06.2016	Art. 10(1)	A contractual relationship existing between the parties	
Supreme Court	IV CSK 609/15	10.06.2016		Court of Appeal wrongly applied Art. 12(1) of the Rome II Regulation instead of applying the Rome I Regulation.	
Supreme Court	V CSK 536/15	23.06.2016		Application of foreign law	<p>The Court did not state the basis of the foreign law application (it just confirmed that the Parties did not question the application of German law). The Court decided that the application of the provisions of the German Civil Code required taking into account not only the content of the Code’s provisions, but also the relevant application and interpretation made in German case law and literature, including current publications in this respect.</p> <p>”stosowanie przepisów kodeksu cywilnego niemieckiego (k.c.n.) wymagało także uwzględnienia nie tylko jego treści (zawartej w tekście kodeksu cywilnego), ale także odpowiedniej praktyki ich stosowania i wykładni dokonywanej w orzecznictwie oraz piśmiennictwie niemieckim (art. 1143 k.p.c.). Oznacza to potrzebę odwołania się przez Sąd</p>

					meriti do aktualnych, międzynarodowych w tym zakresie publikacji, przynajmniej o charakterze podręcznikowym, analizujących rozumienie określonej treści przepisów w praktyce niemieckiej.”
Provincial Court in Świdnica	<i>IC 2019/14</i>	23.06.2016	Art. 32 and 29	Application in time	
Supreme Court	IV CSK 21/16 C-463/07 (on jurisdiction)	21.10.2016	Art. 18 Rome II in conjunction with Art. 11(2) and Art. 9(1)(b) EC 44/2001	The question of jurisdiction for direct claims based not on the law of the court where the claim was brought but on the law applicable according to the conflict-of-law rules	
Provincial Court in Cracow	IC 1694/13	27.10.2016	Art. 4(2), Art. 18 Regulation Rome II	The delimitation of the scope of application of the Rome I and Rome II Regulations, scope of application of the Rome II Regulation, direct action against the insurer	The pilot and the victim concluded a contract on the basis of which the pilot undertook to transport the victim from one point to another by plane. In the event of damage, however, a distinction has to be made between two concepts, namely damage caused by aircraft movement and contractual damage. Obligations that may arise from the movement of the aircraft are non-contractual. The obligation to comply with certain rules of using an aircraft results from legal regulations, not from the contract. Even when the airplane user flies alone, he is obliged to follow them. So they are not part of the contract. Therefore, it should be stated that the liability of the pilot (or in fact the pilot's heirs) towards the victim (or in fact his relatives) resulting from the

					<p>plane crash is a tort, and not an improper performance of the contract.</p> <p>“Zobowiązania, jakie mogą powstać z ruchu samolotu, nie są zobowiązaniami umownymi. Obowiązek przestrzegania określonych zasad postępowania się statkiem powietrznym wynika z przepisów prawnych, a nie z umowy. Nawet jak użytkownik samolotu leci sam to ma je obowiązek przestrzegać. Nie są więc częścią umowy. Dlatego należy stwierdzić, że odpowiedzialność pilota (a w zasadzie spadkobierców pilota), względem poszkodowanego (a w zasadzie jego najbliższymi) wynikająca z katastrofy lotniczej stanowi czyn niedozwolony, a nie, nienależyte wykonanie umowy.</p> <p>W przedmiotowej sprawie mieliśmy do czynienia w wypadkiem samolotowym w którym śmierć poniósł M. K. (1), a zatem wynikające z tego zdarzenia roszczenia stanowią roszczenia wynikające z czynu niedozwolonego (a zatem z zobowiązania pozaumownego) i dlatego do określenia właściwości prawa ma zastosowanie Rozporządzenie „Rzym II”</p>
Court of Appeal in Katowice	III APa 32/16	03.11.2016	Art. 4(2)	Closer connection with Poland (plaintiff and defendant are based in Poland)	

Court of Appeal in Warsaw	VI ACa 826/15	04.11.2016	Art. 4 in conjunction with Art. 19	Application of Art. 19 instead of Art. 4(1)	
Provincial Court in Gliwice	X GC 308/12	29.12.2016	Art. 4	General rule of application	
Court of Appeal in Białystok	I ACa 715/16	25.01.2017	Art. 10(1) Rome II in conjunction with Art. 4(1)(a) Rome I	Unduly received payments fall into scope of application of Art. 10(1) Rome II	
District Court in Olsztyn	X C 1909/15	06.02.2017	Art. 4, Art. 2(1) and Art. 15(a) to (c). Art. 22	Scope of the applicable law	
Provincial Court in Warsaw	I C 1473/15	07.02.2017	Art. 19	Subrogation, applicability of the law governing the relationship between the third party and the creditor to the third party's right to act against the debtor	
Supreme Court	III CSK 60/16	09.02.2017	Application of Art. 10(1) Rome II was excluded by application of Art. 12(1)(e) Rome I Regulation		
District Court in Szczecin	X GC 2309/16	24.03.2017	Art. 4(1)	Applicable law	
District Court of the city of Warsaw	XVI GC 2892/15	29.03.2017		No obligation relationship between the insurers, therefore the obligation to repair damage is a non-contractual one; closer	

				connection with Poland (both insurers based in Poland)	
Provincial Court in Świdnica	IC 1971/16	06.04.2017	Art. 28(1)	Applicability of the Convention of 4 May 1971 on the Law Applicable to Traffic Accidents based on Art. 28(1) Rome II	
District Court in Czulchów	IC 409/15	04.05.2017	Art. 4(1), Art. 18	Applicable law and direct action against insurer	
Court of Appeal in Cracow	IACa 178/17	23.05.2017	Art. 4(1), Art. 28	Provincial Court has wrongly applied only Art. 4(1) of the Regulation without taking Art. 28 into consideration, which should lead to the application of the Convention on 4 May 1971 on the Law Applicable to Traffic Accidents	
Provincial Court in Olsztyn	IX Ca 22/17	20.07.2017		Non applicability of the Rome II Regulation to the case on legal portion in an inheritance	
District Court in Warsaw-Mokotów	IC 1061/12	12.10.2017	Art. 31 and 32	Application in time	
Court of Appeal in Katowice	VACa 41/17	13.10.2017		Non application of Art. 10(1) of the Rome II Regulation as the obligation between the parties should be construed as a contractual one	

Provincial Court in Łódź	X GC 521/17 C-359/14 and C-475/14	22.02.2018	Art. 4(1) Rome II in conjunction with Art. 7 (3) Rome I	The Court applied the Rome II Regulation to determine if the law applicable to an action for indemnity between insurers provided for an apportionment of the obligation to compensate for the damage.	
District Court in Łódź-Widzew	II C 55/16	30.04.2018	Art. 4(1) and (2)	Application of the law of the country where both parties have their habitual residence. Moreover, the damage occurred in the same country.	
Provincial Court in Łódź	XIII Ga 10/18 C-359/14	22.05.2018			
Court of Appeal in Warsaw	IACa 697/17	26.07.2018	Art. 19	Subrogation	According to Art. 19 of the Regulation, the law applicable to the obligation of a third party (contractual provisions of an insurance contract) determines whether and to what extent, a third party who has a duty or has in fact satisfied the creditor in discharge of that duty, is entitled to exercise it against the debtor (subrogation). The conditions and scope of the debtor's liability for damages are still subject to the law applicable to the legal relationship with the original creditor, despite subrogation. The debtor may therefore raise against the subrogated creditor the same allegations that it had against the original creditor under the tort statute, including the limitation period.

					<p>“ Do takiego wniosku prowadzi wykładania językowa art. 19 rozporządzenia „Rzym II”, według którego jeżeli doszło zgodnie z prawem właściwym dla subrogacji do wstąpienia osoby trzeciej w prawa zaspokojonego wierzyciela, to prawa i obowiązki tej osoby kształtowane są przez prawo właściwe dla stosunku zobowiązaniowego wiążącego dłużnika z pierwotnym wierzycielem czyli statut deliktowy (...) prawo właściwe dla obowiązku osoby trzeciej określa, czy i w jakim zakresie osoba trzecia jest uprawniona do dochodzenia od dłużnika uprawnień, które przysługiwały wierzycielowi wobec dłużnika, zgodnie z prawem właściwym dla wiążącego ich stosunku). Takie stanowisko prezentowane jest również w doktrynie i orzecznictwie. Przyjmuje się, że całość zagadnień związanych z sytuacją prawną dłużnika podlega dalej mimo subrogacji prawu właściwemu dla stosunku prawnego łączącego go uprzednio z pierwotnym wierzycielem. Dłużnik może więc podnieść wobec wstępującego w prawa wierzyciela te same zarzuty, które przysługiwały mu względem dotychczasowego wierzyciela. Dłużnikowi należy pozostawić możliwość odwoływania się do tych przepisów prawa właściwego dla subrogowanego roszczenia, które służą ochronie jego praw względem wierzyciela. W grę wchodzi tu zatem wszelkie zarzuty wynikające z prawa materialnego, nie wyłączając przedawnienia* ”</p>
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Court of Appeal in Białystok	IACa 824/17	30.07.2018	Art. 4(1)	Place of damage	<p>The Court of Appeal reversed the judgement of the Provincial Court that found the law applicable to the case in Art. 28(2) Rome II. It pointed out that Art. 4(1) Rome II Regulation has direct application. At the same time, the damage should be understood as a direct result of a prohibited act and the place of damage is the place where such damage produces its direct consequences. The indirect effect of breaking family ties as a result of death of plaintiff's relative does not constitute the place of the damage.</p> <p>"Szkoda jest rozumiana, jako bezpośrednie następstwo czynu niedozwolonego, a miejsce powstania szkody, to miejsce, gdzie ujawnia się bezpośredni skutek. Szkoda na osobie powstaje w państwie, w którym dane dobro zostało naruszone.</p> <p>W okolicznościach tej sprawy zostało naruszone bezpośrednio dobro w postaci życia. Śmierć syna powódki to bezpośredni skutek czynu niedozwolonego. Szkoda ta powstała bezsprzecznie na terenie Niemiec.</p> <p>Pośredni skutek w postaci zerwania więzi rodzinnych na skutek śmierci syna z powódką mieszkającą w Polsce, nie stanowi o miejscu powstania szkody, jako bezpośredniego skutku czynu niedozwolonego."</p>
District Court in Wieluń	IC 1075/17	18.09.2018	Art. 4(1)	General rule of applicable law	

Provincial Court in Szczecin	VIII GC 176/17	10.10.2018	Art. 10, Art. 12, Art. 26	Unjust enrichment, culpa in contrahendo arising out of contract. Public policy clause	<p>If unjust enrichment or culpa in contrahendo arise out of preexisting relationships between the parties, as in this case, the law applicable to that liability is the law of the contract. In Swiss law (that applied in this case) culpa in contrahendo is construed by case-law and doctrine. Meanwhile, in Poland the sources of law are enshrined in Art. 87 of the Polish Constitution that identifies as the only sources of law the constitution, statutes, international treaties, decrees and ordinances. In the light of that and other provisions, the application of Swiss law to the liability resulting from culpa in contrahendo would violate the above-mentioned basic assumptions of the Polish legal order, which is based on statute law. The effect of the application of Swiss law would be a situation in which the applicable law would not have its source in statutory law provisions of law, but would be based on the type of liability resulting from the views of the doctrine and case law. The court therefore applied Polish law to the case at hand.</p> <p>“Na kanwie rozpoznawanej sprawy należało stwierdzić, że w tym zakresie zastosowanie prawa szwajcarskiego stałoby w sprzeczności z podstawowymi założeniami porządku publicznego RP. Należy pamiętać, że w Polsce system źródeł prawa wymieniony jest w art. 87 Konstytucji RP, zgodnie z którym źródłami powszechnie obowiązującego prawa są:</p>
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					<p>Konstytucja, ustawy, ratyfikowane umowy międzynarodowe oraz rozporządzenia, a źródłami powszechnie obowiązującego prawa są – na obszarze działania organów, które je ustanowiły – akty prawa miejscowego. Stosownie do art. 7 Konstytucji RP organy władzy publicznej działają na podstawie i w granicach prawa. Władzę ustawodawczą (prawodawczą) sprawują natomiast, zgodnie z art. 10 ust. 2 Konstytucji RP, Sejm i Senat, a wymiar sprawiedliwości sądy i trybunały. Zgodnie zaś z art. 178 ust. 1 Konstytucji RP sędziowie w sprawowaniu swojego urzędu są niezawisli i podlegają tylko Konstytucji oraz ustawom.</p> <p>W świetle przytoczonych przepisów Konstytucji RP uznanie, że należy zastosować prawo szwajcarskie w zakresie odpowiedzialności za culpa in contrahendo, prowadziłoby do naruszenie ww. podstawowych założeń polskiego porządku publicznego (prawnego), opartego na prawie stanowionym. Skutkiem zastosowania prawa szwajcarskiego byłaby sytuacja, w której stosowane prawo nie miałoby źródła w prawie stanowionym (przepisach prawa), lecz opierałoby się na rodzaju odpowiedzialności wynikającym z poglądów doktryny i orzecznictwa, skoro culpa in contrahendo - jak wyjaśniono – w prawie szwajcarskim nie znajduje regulacji w prawie stanowionym. Mając powyższe na względzie należało uznać, że do rozpoznania roszczenia</p>
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					powódki w oparciu o culpa in contrahendo zastosowanie znajdzie prawo polskie”
District Court in Szczecin Centrum	X GC 1717/17	15.10.2018	Art. 2 and 4	Scope of application and general rule of applicable law	
Court of Appeal in Katowice	I ACa 291/18	26.10.2018	Art. 4(1)	General rule of applicable law	
District Court in Łódź-Widzew	I C 883/15	05.12.2018	Art. 4(1)	General rule of applicable law	
Provincial Court in Poznań	XII C 983/15	11.02.2019	Art. 2(1) and Art. 10(3)	Unjust enrichment	The court interpreted Art. 10(3) as providing for the place where the unjust enrichment occurred, in the case at hand, where the values were transferred.  “ Skoro środki finansowe zostały przekazane przez powoda pozwanym do Polski, to ocena tego świadczenia, z punktu widzenia bezpodstawnego wzbogacenia winna zatem być oceniana według prawa polskiego”.
District Court in Zawiercie	I C 2095/17	20.02.2019	Art. 4	General rule of applicable law, the applicability of the Polish procedural rules.	
Supreme Court	IV CSK 417/17	22.03.2019	Art. 18	Possibility of direct action against the insurer if applicable law allows for it.	
Court of Appeal in Warsaw	I ACa 94/18	27.03.2019	Art. 14 (1)(a), Art. 18 – admissibility of the direct action	Choice of law	Parties do not have to observe any form when making a choice of law, which may be made implicitly. The court referred to a Polish Supreme Court judgment which stated that the implicit choice of law should be based on facts that

					<p>allow, after considering all the circumstances of the case, conclusion with sufficient certainty that the parties did indeed make similar declarations of will regarding the choice of law.</p> <p>The court does not presume such choice of applicable law, but seeks to verify whether it was in fact implied. It assesses all the factual circumstances, and, in particular, the behaviour of the parties in the course of the proceedings. The mere fact that the parties referred only to the same Polish provisions in the course of the proceedings in the first instance is not sufficient to conclude that they made a consciously unanimous choice of law. In view of the above, by order of March 15, 2019, the parties' attorneys were asked to indicate whether the fact that both parties refer to the provisions of Polish law should be interpreted as a choice of Polish law as applicable to the assessment of claims within the meaning of Art. 14 (1)(a) of the Regulation.</p> <p>Należy jednak wskazać na zasadę szczególną, która zawarta jest w art. 14 ust. 1 pkt a) rozporządzenia i stanowi, że strony mogą poddać zobowiązanie pozaumowne wybranemu przez siebie prawu, w drodze porozumienia zawartego po wystąpieniu zdarzenia powodującego szkodę. Wybór prawa musi być wyraźny lub w sposób dostatecznie pewny wynikać z okoliczności sprawy i nie może naruszać praw osób trzecich. Tak sformułowane unormowanie nie wymaga</p>
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					<p>od stron zachowania jakiegokolwiek formy przy dokonaniu wyboru prawa, co prowadzi do konstatacji że wybór prawa w omawianym zakresie może być dokonany w formie dowolnej, w tym w sposób dorozumiany. Zgodnie ze stanowiskiem Sądu Najwyższego zajęтым w wyroku z dnia 20 września 2012 r. IV CSK 48/12 „stwierdzenie dokonania umownego wyboru statutu kontraktowego w sposób dorozumiany powinno być oparte na faktach pozwalających w całości okoliczności sprawy wnioskować w sposób dostatecznie pewny, że strony rzeczywiście złożyły zgodne oświadczenia woli co do tego wyboru”.</p> <p>Powyższe wymaga, aby sąd nie domniemywał wyboru prawa właściwego, lecz dążył do zbadania, czy w istocie doszło do niego w sposób dorozumiany. Wymagało to oceny wszystkich okoliczności faktycznych, w szczególności zachowania stron w toku postępowania. Sam fakt, że strony odwołują się tylko do tego samego prawa polskiego w toku postępowania w I instancji był dla Sądu Apelacyjnego niewystarczający, albowiem nie musi oznaczać, iż strony dokonały świadomie zgodnego wyboru prawa,</p> <p>Mając na uwadze powyższe, zarządzeniem z dnia 15 marca 2019 r. zwrócono się do pełnomocników stron o wskazanie, czy fakt odwoływania się przez obie strony do</p>
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					przepisów prawa polskiego należy odczytywać jako wybór prawa polskiego, jako właściwego dla oceny roszczeń w rozumieniu art. 14 ust. 1 litera a) Rozporządzenia
Supreme Court	II CSK 158/18	15.05.2019	Art. 1(2)(g)	Exclusion of the case from the scope of application of the Regulation	
Court of Appeal in Warsaw	VII AGa 595/18	18.06.2019	Art. 1(2)(d)	Scope of application. The subject matter excluded from the application of the Regulation	
District Court in Nysa	IC 1645/17	26.06.2019	Art. 4(2)	Applicable law based on Parties' place of habitual residence	
Provincial Court in Tarnobrzeg	IC 717/17	27.06.2019	Art. 4(1) and (2), Art. 27	Applicable law based on the general rule of the place of damage and by taking into consideration Art. 27 (which according to the court refers to the Convention of 1971 on the Law Applicable to Traffic Accidents that points out to the same conflict-of-law rule.	
Court of Appeal in Gdańsk	V ACa 145/19	05.07.2019	Applicability of the Rome II Regulation		
Provincial Court in Szczecin	VIII GCo 113/19	24.07.2019	Art. 2(1), Art. 4(3)	Decision on jurisdiction based on the analysis of the place of damage also in the	Place of damage cannot be construed too broadly, especially to include the place where the claimant is domiciled or where his assets are concentrated, just because he suffered financial

	C-220/88, C-364/93, C-168/02			light of the Rome II Regulation	<p>damage there. Art. 4(3) of the Regulation does not allow the application of the law of the place where the costs of a non-delivery of goods to another place were incurred.</p> <p>Norma art. 4 ust. 3 cytowanego rozporządzenia R. II stanowi, że jeżeli ze wszystkich okoliczności sprawy wyraźnie wynika, że czyn niedozwolony pozostaje w znacznie ściślejszym związku z państwem innym, niż państwo wskazane w ust. 1 lub 2, stosuje się prawo tego innego państwa. Znacznie ściślejszy związek z innym państwem może polegać, w szczególności, na istnieniu wcześniejszego stosunku pomiędzy stronami, takiego jak umowa, ściśle związanego z danym czynem niedozwolonym. Twierdzenia faktyczne wniosku nie mogą stanowić podstawy do przyjęcia, że niewydanie rzeczy w Polsce i koszty związane z wydaniem rzeczy i są ściśle związane z prawem szwajcarskim.</p>
District Court in Kalisz	IC 3330/17	03.09.2019	Art. 4(1), (2), (3)	General rule of applicable law with possible corrections	
Court of Appeal in Warsaw	V ACa 896/17	12.12.2019	Art. 31	Application in time	
District Court in Zawiercie	IC 2092/17	19.12.2019	Art. 4	General rule of application. Application of procedural law of the court	
District Court in Szczecin Centrum	XI GC 1135/19	20.01.2020	Art. 4 (1)	General rule of applicable law	



The Court of Appeal in Gdańsk	V ACa 599/19	27.02.2020	Art. 4(1) and Art. 18	General rule of applicable law and the possibility of direct action against the insurer	
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# Portugal

## Executive Summary

- In Portugal, there is a moderate interest in Rome II Regulation amongst practitioners, businesses and citizens.
- It is considered that It makes it possible to guarantee the predictability of the applicable law, which is essential for the proper functioning of the EU internal market, and to prevent *forum shopping*. Its impact on the lives of enterprises and public exercising the fundamental freedoms on which the EU is founded is considered to be evident.
- The relevance of the Rome II Regulation is particularly felt in these areas: traffic accidents; damages caused in the performance of a provision of services (doctors, lawyers, architects, engineers, etc.) and defective product liability.

## 1. Introduction

- Portuguese courts do apply Rome II Regulation
- There are no statistics regarding the application of the Rome II Regulation.
- The doctrinal discussion on the Rome II Regulation in Portugal is moderate. We may find two PhD thesis (both published) that approach the subject. There is another book exclusively dedicated to Rome II Regulation
- There is no evidence of political debate on the Regulation.

## 2. Analysis of the Rome II Regulation

### 2.1 Chapter I – Scope and Interpretation

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to :*

1. *The determination of the material scope of application of the Rome II Regulation, including any difficulties in applying the category of “civil and commercial matters” or in defining the exact scope of any excluded matters (Art. 1(1)-(2))*

Portuguese doctrine emphasizes that the *category “civil and commercial matters”* should be interpreted considering the European jurisprudence and the identical category of Brussels I Regulation.<sup>1135</sup>

Regarding the exclusion of Art. 1(1) (a), authors point out that the Regulation is not applicable to liability in the context of the rupture of engagement before marriage.<sup>1136</sup>

2. *The determination of the temporal scope of application of the Rome II Regulation, Arts 31-32)*

Two decisions of superior courts have addressed the issue.

One decision is from the Portuguese Supreme Court, and it was ruled in 2012, in a case filed in 2010 (Proc. no. 186/10.6TBCBT.S1). The Supreme Court decided that articles 31 and 32 of Rome II Regulation contain a transitional rule that only makes it applicable to the harmful facts that occur after 11/01/2009, therefore the moment of the proposition of the respective action in court is not relevant for the application of the Regulation.

The other decision is from the Court of Appeal of Coimbra (*Tribunal da Relação de Coimbra*). It was also ruled in 2012, in a case filed in 2010 (Proc. no. 1473/10.9T2AVR.C1). The Court decided that articles 31 and 32 establish

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<sup>1135</sup> ALMEIDA, J. C. Moitinho de, *O regulamento Roma II: (lei aplicável às obrigações extracontratuais)*, 1<sup>ª</sup> ed., Princípiã, 2017, p. 29-41.

<sup>1136</sup> Idem.

the temporal scope of the regulation. However, its interpretation raised doubts, which came to be solved by the CJUE in the case C-412/10, connected with a request preliminary ruling. Regarding that case, two positions were being debated: on the one hand, it was argued that article 31 did not establish a date in force, which should be determined under the general terms of article 254/1 of the EC Treaty, that is on the 20th day after its publication; on the other hand, it was argued that article 31 was referred to the date of application established in article 32, that is, 11/01/2009. The Court considered that the CJUE came to an end for discussion, assuming that articles 31 and 32, read in conjunction with article 297<sup>o</sup> of the TFUE must be interpreted as Rome II Regulation applies to the harmful facts that occurred after 11/01/2009. Therefore, *in casu* (1473/10.9T2AVR.C1), the regulation is not applicable, since the harmful facts occurred before its entry into force.

3. *The characterization of the concept of "non-contractual obligations", its relationship to the concept of "contractual obligations" and any difficulties in relation to characterisation (Arts. 1(1), 2)*

There is no case law that evidence discussion or difficulties.

4. *The universal application of the Regulation (Art. 3)*

No evidence of discussion or difficulties.

5. *The approach to interpretation of the Rome II Regulation, and in particular its relationship to other EU private international law instruments (including the recast Brussels I Regulation and the Rome I Regulation)(Recital (7))*

Doctrine emphasizes the need to relate Rome II Regulation, Brussels I Regulation and the Rome I Regulation.<sup>1137</sup>

## 2.2 Chapter II - Tort/Delict

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to the implementation of:*

6. *The general conflict-of-laws rule for tort/delict, and difficulties that have arisen in your Member State with respect to its application (Art. 4), and in particular:*

- a. *the approach to identifying the place of direct damage in Art 4(1)*

Doctrine considers that the solution (*lex loci damni*) has its grounds in an option between the protection of the injured interests, and the responsible, which is in accordance to the normal evolution of tort law (also seen in the enlargement of legal cases of liability with no fault).<sup>1138</sup>

This rule is considered adequate for the protection of the injured and the respective expectations of compensation (namely when choosing an insurer) and also for the administration of justice, since the court enacted will deal with its own legislation.

The Portuguese Supreme Court has decided (in a ruling of 2014, Process no. 1061/12.5TVLSB.L1.S1) that under the terms of article 4/1, the law applicable to non-contractual obligations arising from liability based on lawful or unlawful act or based on risk is the law of the country where the damage occurs, meaning that it is irrelevant that the assessment or quantification of the damage is done in a different place. Evidently, the referred article highlights the connection element relative to the place where the damage occurred, to the detriment of the connection element relative to the place where the harmful behaviour occurred. However, due to the usual spatial coincidence of these two elements, this priority only assumes relevance in cases of delocalized harmful actions, in which the harmful conduct occurs in a state other than that in which the damage occurs.

The Court of Appeal of Lisbon has ruled in 2013 (Process no. 3774/12.2TJLSB-A.L1-7) that, in a case here two vehicles had collided in Spain on September 14, 2009, the Rome II Regulation applies, considering the general rule of *lex loci damni* applicable in cases of non-contractual liability, regardless of the indirect consequences of the offense being produced in another country. One of the damaged vehicles, belonging to a company headquartered in Portugal, suffered damage that made it impossible to drive and forced its repair. The damage resulting from deprivation

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<sup>1137</sup> ALMEIDA, J. C. Moitinho de, *O regulamento Roma II: (lei aplicável às obrigações extracontratuais)*, 1<sup>o</sup> ed., Princípiã, 2017, p. 35 et seq.

<sup>1138</sup> *Idem*, p. 45.

of use is an indirect consequence of the claim, and therefore Spanish law is applicable. Spanish law prescribes a statute limitation in one year to enforce the right, so the lawsuit must be considered prescribed if the defendant was challenged on 11/19/2010 and the action was only filed on 3 September 2012.

In another recent ruling of July 2020 (Process no. 153/19.4T8CBT.G1), the Court of Appeal of Guimarães (*Tribunal da Relação de Guimarães*) stated that concerning the same harmful fact, Rome II Regulation may enforce the law of two different legal systems: on the one hand, under article 4, the obligation to compensate is determined by the law of the country where the damage occurred; on the other hand, regarding the right to subrogation of credits, article 19 establishes that such right is determined based on the law that governs the relationship between the insurer and its insured, that is, the law that governs the contract in which the active part that intends to exercise the subrogation is founded.

The same Court of Appeal has ruled in 2013 (Process no. 225/12.6TBAMR.G1) that for the purposes of applying Rome II Regulation, under the terms of article 4, it is relevant the country where the moral damage or the damage to property occurs, which does not have to coincide with the actual damage. In these terms, it is important to clarify the concept of damage. Following some jurisprudence from the CJUE, in the scope of interpretation of the concept of damage, it is said that the place of damage is the place where the damage is materialized, being this where the generating event produced harmful effects in the patrimonial or moral sphere of the injured party. Therefore, *in casu*, priority is given to the country of residence of the injured party, to the detriment of the country where the injury occurred, since it was in the country of residence that property damage was suffered and sustained.

*b. the approach to the first rule of displacement in Art 4(2) in cases involving multiple parties or claims*

It is frequently referred that there is discussion on the circumstance that all parties responsible and all parties injured must have the same habitual residence. It is considered that the scope of the solution points out to a negative answer, which can result in the considerations of contradictory legislation.

This example is given by MOITINHO DE ALMEIDA (2017): "A car crash occurred in the state of Michigan, with damages for two passengers, one residing in that State, and the other in the State of New York, where the driver also had his/her habitual residence. The law of Michigan demands severe negligence; the other just negligence".

It is also stressed that Art 4(2) should not be applicable by analogy to those residing in different States although with identical legislation.

*c. the approach to the escape clause in Art 4(3)*

Doctrine stresses the exceptional nature of this clause, inspired in the art. 4 of the German EGBGB. Its application should be scarce.

*d. the suitability of this set of rules to govern cases of **prospectus liability or other financial market torts***

No evidence of discussion or difficulties.

*7. The rule on **product liability** (Art. 5) and, where relevant, the interaction with the application of **1973 Hague Convention on the Law Applicable to Products Liability***

It is consensual that this article as to be read in accordance to the scope of Rome II Regulation. It is also stressed that 1973 Hague Convention has a different regime and does not covers subjects covered by Rome II Regulation.

*8. The specific rule on **unfair competition** (Art. 6)*

It is considered that the concept of "unfair competition" should be the one from the Paris Convention of 20<sup>th</sup> of March 1983. On the other side, the concept of "acts restricting free competition" should be constructed from the rules of the EU that protect competition, with the umbrella of articles 101 e 102 of the Treaty.

*9. The specific rule on **environmental damage** (Art. 7)*

There are no particular discussion or difficulties. It is considered that the concept of "environmental damage" is the one from article 24.

*10. The specific rule on **infringements of intellectual property rights** (Arts. 8, 13)*

There are no particular discussions or difficulties.

*11. The specific rule on **industrial action** (Art. 9)*

There are no particular discussions or difficulties.

## 2.3 Chapter III - Unjust Enrichment, *Negotiorum Gestio* And *Culpa In Contrahendo*

Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to the implementation of:

12. The specific rule on **unjust enrichment** (Art. 10), including its relationship with the general rule for tort/delict in Art. 4.

There is no evidence of discussion on the relation with art. 4. Nevertheless, it is analysed the fact that under some legislation, like the Portuguese and German, a claim for the compensation of damage based in unlawful action may be presented as a "unjust enrichment" case.

13. The specific rule on ***negotiorum gestio*** (Art. 11)

It is referred that there is discussion on the circumstance that in some legislation (for example, Portugal, Spain, France and Italy) it is necessary that the *gestio* is objectively useful. Nevertheless, it is also stressed that it is a problem of material law, with the consequence of irrelevance at the level of rules of conflict.

14. The specific rule on ***culpa in contrahendo*** (Art. 12)

There are no particular discussions or difficulties.

## 2.4 Chapter IV - Freedom of Choice

Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:

15. The implementation in legal/business practice and by courts of the rule on **freedom of choice**, any difficulties therein and **any discussion that has been carried out in your Member State regarding possible reasons which would justify the need to rethink it** (Art. 14)

There are no cases that may evidence such practical difficulties.

Regarding "*dépeçage*" (partial choice of the applicable law, meaning that some law may only be applicable to some aspects of a particular case) there is a doctrinal discussion.

LUIS DE LIMA PINHEIRO considers that the partial choice is not possible, on the argument that it is not expressly referred in article 14.<sup>1139</sup>

MOITINHO DE ALMEIDA, otherwise, considers that, since the Regulation is silent about the topic, "*dépeçage*" is admissible in these cases: a) when damages have occurred in different countries and respective laws were chosen; b) when, in "unjust enrichment", several requests are filed (damage compensation, payment of expenses, restitution).<sup>1140</sup>

## 2.5 Chapter V - Common Rules

Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:

16. The scope of the exclusion of 'evidence and procedure' in Art 1(3) and any difficulties in relation to that exclusion or to questions of formal validity or the burden of proof (Arts. 21-22)

Since the number of cases is scarce, there are no evidences of such practical difficulties.

17. The approach in your Member State to questions of pleading, proof and application to individual cases of the substantive rules of the law applicable under the Rome II Regulation governing non-contractual obligations.

No evidence of discussion.

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<sup>1139</sup> PINHEIRO, Luís de Lima, "O direito de conflitos das obrigações extracontratuais entre a comunitarização e a globalização: uma primeira apreciação do Regulamento Comunitário Roma II", in *Estudos em honra do Professor Doutor José de Oliveira Ascensão*, Almedina, 2008, p. 1603.

<sup>1140</sup> ALMEIDA, J. C. Moitinho de, *O regulamento Roma II: (lei aplicável às obrigações extracontratuais)*, 1ª ed., Príncipe, 2017, p. 151-152.

18. *The delimitation of the scope of the applicable law (Art. 15(a)-(h)), including any difficulties as its relationship to the issues addressed at points 16 17 above)*

No evidence of discussion or difficulties.

19. *The application of the rule on **overriding mandatory provisions** (Art. 16)*

It is stressed that the article 16 does not states about overriding mandatory provisions of other States. This solution has the advantage of making dispensable the (always difficult) search for those provisions but has the drawback of allowing *forum shopping*.

20. *The application of the specific rule on **direct action against the insurer of the person liable** (Art. 18)*

No evidence of discussion or difficulties.

21. *The application the specific rule on **subrogation** (Art. 19)*

No evidence of discussion or difficulties.

22. *The application of the specific rule on **multiple liability** (Art.20)*

No evidence of discussion or difficulties.

## 2.6 Chapter VI - Other Provisions

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

23. *The implementation of the concept of habitual residence in the Rome II Regulation, with reference both to persons covered by Art 23 and natural persons acting otherwise than in the course of business*

Doctrine stresses that Rome II Regulation does not defines habitual residence when damages are caused by persons acting otherwise than in the course of business. The solution of Brussels I Regulation and Brussels I *bis* Regulation (in the way it is a matter for the legislation of the State Member) may not be adequate.<sup>1141</sup>

24. *The application of and any difficulties with the specific rules on exclusion of renvoi (Art.24) and States with more than one legal system (Art.25)*

No evidence of discussion or difficulties.

25. *The application of and any difficulties with the specific rule on public policy of the forums (Art. 26)*

It is referred by doctrine that nowadays the "public policy" of a State is a concept that is already influenced by EU legislation and principles.

26. *Practical **interaction between the Rome II Regulation and other EU and international legal instruments**, in specific areas such as **environmental damages, intellectual property rights or data protection** (Arts. 27, 28, 29)*

No evidence of discussion or difficulties.

## 2.7 Comments on other Practical Problems

*These areas are of **particular interest** for the Commission. Please be as precise as possible regarding any issue that has been reported on:*

27. *The impact of the application of the **1971 Hague Convention** on the law applicable to traffic accidents on legal certainty (where relevant for your Member State)*

No evidence of discussion.

28. ***Any other practical problems with respect to the application or interpretation of the Rome II Regulation, including but not limited to the suitability of the mosaic approach***

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<sup>1141</sup> ALMEIDA, J. C. Moitinho de, *O regulamento Roma II: (lei aplicável às obrigações extracontratuais)*, 1<sup>a</sup> ed., Princípiã, 2017, p. 189-190.

No evidence of discussion.

### 3. Comments on areas of interest

*These areas **are of particular interest for the Commission**. Please be as precise as possible regarding any issue that emerged in your Member State regarding:*

*29. The **exclusion of violations of privacy and rights relating to personality, including defamation**, from the scope of the Rome II Regulation and any difficulties arising out from differences among Member States' rules in **cross-border situations***

No evidence of discussion.

*30. Any comment regarding the Interplay of the Rome II Regulation with the treatment of **defamation and data protection**, and, in these areas, the relevance of **Strategic Lawsuits Against Public Participation (SLAPPs)***

No evidence of discussion.

*31. The extent to which Rome II Regulation has been applied to **corporate abuses against human rights** and lays down an effective set of rules to regulate non-contractual liability;*

No evidence of discussion.

*32. The impact of the development of **artificial intelligence** on the Rome II Regulation, and in particular on the suitability of the rules that it contains to regulate non-contractual liability.*

No evidence of discussion.

#### 4. List of national case law

<u>Court or tribunal</u>	<u>Case name and reference number</u>  <u>Reference to decision of the Court of Justice if applicable</u>	<u>Date</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings (only for key cases)</u>
Supremo Tribunal de Justiça	1061/12.5TVLSB.L1.S1	01-04-2014	Articles 4 no1, 31, 32.	Is the place where the damage assessment and quantification take place relevant for the purposes of interpreting article 4 <sup>o</sup> /1?  <i>- Rome II applies.</i>	Under the terms of article 4 <sup>o</sup> /1 of Rome II, the law applicable to non-contractual obligations arising from liability based on lawful or unlawful act or based on risk is the law of the country where the damage occurs, meaning that it is irrelevant that the assessment or quantification of the damage is done in a different place. Evidently, the referred article highlights the connection element relative to the place where the damage occurred, to the detriment of the connection element relative to the place where the harmful behaviour occurred. However, due to the usual spatial coincidence of these two elements, this priority only assumes relevance in cases of delocalized harmful actions, in which the harmful conduct occurs in a state other than that in which the damage occurs ( <i>IV - Do mérito - paragraph 7 and 8</i> ).



Supremo Tribunal de Justiça	186/10.6TBCBT.S1	01-03-2012	Articles 31 and 32	<p>Is Rome II applicable when the action was filed after 2009 but the facts that gave rise to it are prior to 2009?</p> <p>- <i>Rome II does not apply.</i></p>	<p>The articles 31<sup>o</sup> and 32<sup>o</sup> of Rome II contain a transitional rule that only makes it applicable to the harmful facts that occur after its validity (11/01/2009), therefore the adjective moment of the proposition of the respective action in court is not relevant.</p>
Tribunal da Relação de Coimbra	1473/10.9T2AVR.C1	09-01-2012	Articles 4, n 1 and 31	<p>The temporal scope of application of Rome II.</p> <p>- <i>Rome II does not apply.</i></p>	<p>Articles 31<sup>o</sup> and 32<sup>o</sup> of Rome II establish the temporal scope of the regulation. However, its interpretation raised doubts, which came to be solved by the CJUE in the case C-412/10, connected with a request preliminary ruling. Regarding that case, two positions were being debated: on the one hand, it was argued that article 31<sup>o</sup> did not establish a date in force, which should be determined under the general terms of article 254<sup>o</sup>/1 of the EC Treaty, that is on 20th day after its publication; on the other hand, it was argued that article 31<sup>o</sup> was referred to the date of application established in article 32<sup>o</sup>, that is, 11/01/2009. The CJUE came to an end for discussion, assuming that articles 31<sup>o</sup> and 32<sup>o</sup>, read in conjunction with article 297<sup>o</sup> of the TFUE must be interpreted as Rome II applies to the harmful facts that occurred after 11/01/2009. Therefore, <i>in casu</i> (1473/10.9T2AVR.C1), the regulation is not applicable, since the harmful facts occurred before its entry into force.</p>

Tribunal da Relação de Guimarães	225/12.6TBAMR.G1	29-10-2013	Articles 4 no.1	<p>The concept of damage for the purposes of applying article 4º and determining the applicable law.</p> <p>- <i>Rome II applies.</i></p>	<p>For the purposes of applying Rome II, under the terms of article 4º, it is relevant the country where the moral damage or the damage to property occurs, which does not have to coincide with the actual damage. In these terms, it is important to clarify the concept of damage. Following some jurisprudence from the CJUE, in the scope of interpretation of the concept of damage, it is said that the place of damage is the place where the damage is materialized, being this where the generating event produced harmful effects in the patrimonial or moral sphere of the injured party. Therefore, <i>in casu</i>, priority is given to the country of residence of the injured party, to the detriment of the country where the injury occurred, since it was in the country of residence that property damage was suffered and sustained.</p>
Tribunal da Relação de Guimarães	153/19.4T8CBT.G1	09-07-2020	Articles 4 and 19	<p>The enforcement, under Rome II, of the law of two different countries, regarding the same harmful fact.</p> <p>- <i>Rome II applies.</i></p>	<p>This case raises interest to the extent that, concerning the same harmful fact, Rome II enforces the law of two different legal systems. On the one hand, under article 4º, the obligation to compensate is determined by the law of the country where the damage occurred. On the other hand, regarding the right to subrogation of credits, article 19º establishes that such right is determined based on the law that governs the relationship between the insurer and its insured, that is, the law that governs the</p>

					contract in which the active part that intends to exercise the subrogation is founded.
Tribunal da Relação de Lisboa	3774/12.2TJLSB-A.11-7	11-07-2013	Article 4, no.1	- <i>Rome II applies.</i>	Two vehicles collided in Spain on September 14, 2009. The Rome II Regulation applies, considering the general rule of <i>lex loci damni</i> applicable in cases of non-contractual liability, regardless of the indirect consequences of the offense being produced in another country. One of the damaged vehicles, belonging to a company headquartered in Portugal, suffered damage that made it impossible to drive and forced its repair. The damage resulting from deprivation of use is an indirect consequence of the claim, and therefore Spanish law is applicable. Spanish law prescribes a statute limitation in one year to enforce the right, so the lawsuit must be considered prescribed if the defendant was challenged on 11/19/2010 and the action was only filed on 3 September 2012.

# Romania

## Executive Summary

- The entire data base of court cases is available in Romania online on [www.rolii.ro](http://www.rolii.ro). The same data can be found in different legislative software platforms that provide different search engines.
- Romanian courts and scholars are familiar with Regulation Rome II, but they are not enthusiastic in applying its provisions. Most of the cases and discussions are related to the law applicable in car accidents in which a Romanian party is involved.
- There are two authors who conducted more detailed analyses (one who detailed the Rome II Regulation in 2008, before it entered into force – Mme. OPREA Alina, and the other being a reputed university professor – Mr. Alexandru Dragos SITARU – who dedicated a detailed chapter to Rome II in his latest Private International Law Treaty). Nonetheless, the courts of law do not cite the opinions expressed by these authors. The case law is divided over some issues (especially different interpretations of the split liability between the motor head insurer and the trailer insurer in cases like the ones described by ECJ cases C-359/14 and C-475/14) but these are not debated by scholars.
- The concept of "non-contractual obligations" is mainly analyzed based on the Brussels I provisions. Under Rome II sometimes courts have difficulties in differentiating contractual from non-contractual claims. – detailed at point 2.
- Different approach to moral damages. Some apply C-350/14, while others find different ways to connect the damage to Romania, especially when the claimant is a relative of the deceased victim – detailed at point 4.a.
- Court find different arguments to claim applicability of exceptions from 4.2 or 4.3, sometimes without any plausible explanation – detailed at point 4.b.
- In the same way, courts sometime consider that is an implicit choice of law when the parties argue based on Romanian provisions. In point 14, we describe how different courts apply the Romanian Civil Code provisions that allow the applicability of Romanian law in case the parties do not prove the content of the foreign applicable legislation. – detailed at point 13.
- While there is a clear case law stating the limitation, period is covered by the Rome II applicable law, the courts include within the notion of damages different elements varying from surgical treatment in Romania to moral damages suffered by relatives in Romania. Also, the penalties seem to be considered in some cases as being outside the scope of the applicable law, without any other justification then the search of an equitable treatment for the victim and an easier way for the judge. – detailed at point 16.
- The main issue in Romania is the split of liability between motor head and trailer insurers in case of accidents in Germany. The inconsistency of the courts' reasoning is reflected in a significant number of cases, most of them presenting different approaches to the ECJ case-law C-359/14 and C-475/14. In some situations, when the two parties are Romanians (two insurers for example, or a National Bureau and a Romanian debtor), the courts do not even analyze Rome II provisions and apply Romanian law directly. – detailed at point 19.

# 1. Introduction

- *How aware are practitioners and users of the Rome II Regulation?*

Many of the practitioners are aware of the existence of Rome II Regulation, however not all of them have an in-depth knowledge on the Regulation. There is not much public debate about the Regulation, therefore users (i.e., citizens, business environment) are generally not aware of the Rome II Regulation.

- *Is the Regulation generally known and applied by courts in your Member State?*

There is not much case law where courts have applied the Rome II Regulation. In some cases, the parties/ courts only cite the Rome II Regulation without referring to specific provisions. There are some cases where parties cite provisions of Rome II Regulation, however the judges fail to analyze those provisions. There are roughly around 700 cases that contains references to Rome II, 95% of them being related to car accidents in or outside Romania, involving a foreign citizen or entity.

- *Are there any relevant statistics regarding the application of the Regulation in your Member State?*

No, such statistics regarding the application of the Rome II Regulation in Romania could not be identified.

- *How important is the doctrinal discussion on the Rome II Regulation in your Member State?*

There are few doctrinal discussions on the Rome II Regulation in Romania. Most of the legal doctrine on the Regulation is descriptive, without substantial aspects being in-depth analysed. There are two authors who conducted more detailed analyses (one who detailed the Rome II Regulation in 2008, before it entered into force – Mme. OPREA Alina, and the other being a reputed university professor – Mr. Alexandru Dragos SITARU – who dedicated a detailed chapter to Rome II in his latest Private International Law Treaty). Nonetheless, the courts of law do not cite the opinions expressed by these authors.

- *Are there specific issues that have caused debate at a doctrinal or political level?*

No specific issues were debated, but a significant part of the case law covers different interpretations of the split liability between the motor head insurer and the trailer insurer in cases like the ones described by ECJ cases C-359/14 and C-475/14.

## 2. Analysis of the Rome II Regulation

### 2.1 Chapter I – Scope

1. *The determination of the material scope of application of the Rome II Regulation, including any difficulties in applying the category of “civil and commercial matters” or in defining the exact scope of any excluded matters (Art. 1(1)-(2))*

There are not many controversial matters related to the Regulation’s scope of application. In most of the cases, the parties and the courts do not debate the scope of application. The Romanian courts do know the difference between contractual and non-contractual obligations and exclude the first from the scope of the Regulation.<sup>1142</sup>

The Romanian courts generally also apply the distinction between the substantial law applicable to the case and the procedural aspects (such as competence) which is known to be regulated by other European Regulations (Brussels I,

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<sup>1142</sup> Craiova First Instance Court, Sentence no. 1934/2014;

Brussels 1 bis)<sup>1143</sup>. In these cases, the analysis of contractual/ non-contractual issues is made under the Brussels I provision, and it triggers, sometimes, the dismissal of Romanian courts competence. For example, in the cited case, the court explained that the applicable law – German law – does not influence in any way the competence of the courts (Romanian courts) determined by following the provisions of Brussels I.

In other cases, article 1 of Rome II Regulations is cited by the parties or by the courts but its provisions/ impact on the case are not analyzed<sup>1144</sup>.

The Romanian legal doctrine related to the Regulation's scope of application is mainly descriptive. Nonetheless, there are some more particular opinions in this respect. For instance, an author noted that it will not be easy for judges to determine the category of non-contractual obligations arising out of family relationships, providing that, for instance, the explanations issued by the Commission in the draft Regulation (the explicative memorandum) states that an example could be the action for recovery of prejudice caused by late payment of alimentary pension<sup>1145</sup>; nonetheless, the author cites the opinion of other European authors according to which actions of third parties against parents for damages caused by minor children are within the scope of the regulation).

The same author noted that, as regards non-contractual obligations arising out of the law of companies, the direct liability of shareholders or directors for prejudices caused to third parties (based on the general *alterum non laedere* principle), or of the financial or legal consultants of the seller towards the buyer of a company should be included in the scope of the Regulation.

The other authors treated this text only in a descriptive manner.

## 2. *The determination of the temporal scope of application of the Rome II Regulation (Arts. 31-32)*

No case law and legal doctrine have been identified with respect to the application of article 31. The parties and the courts do not refer to the temporal application of the Regulation, thus no difficulties had arisen in relation with the temporal scope of application of Rome II Regulation.

## 3. *The characterization of the concept of "non-contractual obligations", its relationship to the concept of "contractual obligations" and any difficulties in relation to characterisation (Arts. 1(1), 2)*

We have identified in practice few cases tackling this subject. These all relate to the role that different insurers have in relation to the victim and/ or the debtor.

In one case, where the court analysed the applicable law to insurer's regress action when the liability is split between different insurers of the motor head and the trailer due to a car accident occurred in Germany, the court found that the effects of the accident, from the perspective of the obligation to repair the damage, are regulated by the Romanian national law and not by German law as the applicable law is not the one from the place the accident took place, but the law which governs the insurance contract<sup>1146</sup>. Given that both insurers were Romanian entities and their legal relationship, the court held that the applicable law is the Romanian Law<sup>1147</sup>.

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<sup>1143</sup> Mureş Tribunal, Decision no. 1399/2018;

<sup>1144</sup> Bucharest District 2 Court, Sentence no. 12830/2018;

<sup>1145</sup> OPREA Alina - "Noua reglementare europeana a conflictelor de legi in materie delictuala: regulamentul (ce) no 864/2007 (Roma II)" (The new european regulation of conflict of laws in tort matters), published in the Romanian Private Law Magazine no. 3/2008;

<sup>1146</sup> Decision no. 102/2019 issued by Bucharest Tribunal on 10 January 19;

<sup>1147</sup> Although the appeal court confirmed the reasoning of the first court instance, regarding the applicable law, the appeal court changed the ruling, as the plaintiff had paid in the meantime 50% of the damages awarded by the first court, action considered representing an admission of debt;

In another case, however, the courts clearly stated that there is no contractual relation between the CASCO insurer (subrogated for the rights of the victim) and the insurer of the debtor, even if the two are both from Romania<sup>1148</sup>.

Sometimes, Romanian judges have difficulties in differentiating contractual from non-contractual claims. For example, Targu Mures First Instance court determined the applicable law to an insurer regress action against the Romanian driver who caused the damages due to alcohol use on the grounds of art. 4 (3), although their legal relationship was based on the insurance agreement<sup>1149</sup>.

#### 4. *The universal application of the Regulation (Art. 3)*

While some of the judges apply the foreign law based on Rome II Regulation, other judges were inclined to apply the Romanian law based on escape clauses (including by arguing that the foreign law is more closely connected with the Romanian law).

The legal doctrine treats this matter in a descriptive manner.

#### 5. *The approach to interpretation of the Rome II Regulation, and in particular its relationship to other EU private international law instruments (including the recast Brussels I Regulation and the Rome I Regulation) (Recital (7))*

Not applicable

## 2.2 Chapter II - Torts/Delicts

#### 6. *The implementation of the general conflict-of-laws rule, and difficulties that have arisen in your Member State with respect to its application, and in particular the suitability of it for **financial market torts** (Art. 4)*

##### a. *the approach to identifying the place of direct damage in Art 4(1)*

The indirect damages were analyzed from the perspective of relatives of victims from car accidents. The case-law is divided especially when moral damages are claimed for deceased victims that were transiting the countries where the accidents took place:

- i. Some courts considered that indirect damages are to be classified following the ECJ decision in case C-350/14. Therefore, any damage of relatives of victims should not influence the applicable law<sup>1150</sup>. In this category a significant decision is no. 1963/2017 of the Supreme Court, involving a case in which the relatives of a deceased victim of a car accident in Spain, requested damages under Romanian law. The Supreme Court dismissed their claim as time barred considering that the limitation period is to be determined under Spanish law.
- ii. In analyzing this Supreme Court decision, legal scholars observed that the case law is divided and that there are cases where the courts considered that the relatives justify a direct damage<sup>1151</sup>.

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<sup>1148</sup> Bucharest Tribunal, Decision no. 20591/2015;

<sup>1149</sup> Targu Mures First Instance court, Sentence no. 4050/2019.

<sup>1150</sup> Arad Tribunal, decision 354/2017. The decision was maintained by the Court of Appeal of Timisoara – 660/2017 – and by the Supreme Court – decision 2323/2018;

<sup>1151</sup> Laurentiu RADU, Revista Romana de Jurisprudenta no. 3/2018 - Supreme court's decision analysed. - The author agrees that the applicable law is the Spanish law - place of the accident - but mentions that other courts have decided in both ways: i) relatives have an indirect damage (Supreme Court decision no 404/2016) and ii) that Romanian law would apply if the prejudice is connected to the death of the victim - relatives prejudice is a direct prejudice - Supreme Court 1707/2017;

- iii. An interesting case observed that direct damages might occur even after the accident. In decision no. 126/2017, Mures Tribunal decided that Romanian law was applicable since the victim of a car accident in Hungary, needed to follow a surgical treatment in Romania and all the moral damages were suffered in Romania.
- iv. A similar approach with respect to moral damages was adopted by the Dolj Tribunal in decision 206/2015, considering that the moral damage of a son for his father's death in a car accident in Croatia, are present in Romania and, as such, Romanian law should apply. Same approach can be found also with the Bucharest Court of Appeal – Decision no. 604/2019 – in a case where the court considered that irrespective of where the accident took place, since the victim was living in Romania, the direct moral damages are suffered here by the relatives.

As regards legal doctrine, an author analysed in-depth article 4 of the Rome II Regulation before its entering into force<sup>1152</sup>. With respect to article 4.1, the author noted the following aspects:

- With respect to ricochet/ indirect damages, the author noted that the solution included in the Regulation is based on an objective imputation criterion (the geographic localization of indirect damages or ricochet damages is no longer objectively imputable to the responsible party). Further, the author notes that this type of prejudice should be covered according to the law that is applicable to the initial prejudice.
- With respect to the law applicable to the single tort that caused prejudice to more persons having or not the same nationality, located in different states or in the same state, the author noted that the issue in question is whether judges should seek a single law applicable to that tort or whether the law that applies shall be determined separately, considering the situation of each victim. The author cites the opinion of S. Symeonides according to which article 4.1 refers to the law applicable to "*non-contractual obligation arising out of a tort/delict*" and not to the *law applicable to the delict*, therefore judges can assess in an individual manner the multiple obligations that may arise out of the same delict and to determine the several laws that shall apply. The author further notes that, on the other hand, this is another flaw of the text, namely that the Regulation does not regulate the situation when the same delict causes to the same victim damages in different member states. The solution at hand is, according to the author, the distributive application of the different laws in question. Nonetheless, the author notes that one cannot rule out the application of the escape clause if one can prove that the place where the delict occurred is manifestly more closely connected with the respective legal situation.

In another, more recent, opinion, a concern was raised on the very broad and general terminology of recital 17 of the preamble when determining where the damage occurred, providing only two insufficient examples<sup>1153</sup>.

*b. the approach to the first rule of displacement in Art. 4(2) in cases involving multiple parties or claims*

An overwhelming number of court cases in connection to this article analyze car accidents happening within the EU. The courts usually resort to this escape clause whenever both tort parties have their habitual residence in Romania, irrespective of the place where the accident happened. However, not seldom do the courts apply this likewise to insurers that regress one against each other, although they are not initial parties to the legal relationship but subrogated to the rights of the insured.

A tort case solved on the grounds of art. 4 (2) was an industrial accident caused by a Romanian citizen while unloading a truck on German premises<sup>1154</sup>. The court applied the Romanian Law in connection to the transportation agreement governed by the same Law, considering that the accident was connected to the transport agreement, although it was not the freight that was damaged, but a machine of a third party used for the loading process. The judges failed to explain their

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<sup>1152</sup> OPREA Alina, *ibidem*;

<sup>1153</sup> SITARU Dragos Alexandru - *Private International Law*, C.H. Beck, Bucharest 2013 page 497;

<sup>1154</sup> Iași First Instance Court, Decision no. 16704/2013;



reasoning for applying a certain Law since, in this case, art. 4 (3) was also cited and no distinction was made between the two.

To what it concerns this specific article, observations were made in the doctrine in relation to the applicable law when the parties' residence is in two different states where there are identical rules related to tort. The author noticed that the Regulation does not provide a rule for such a case<sup>1155</sup>. The law determined according to art. 4.1 of Rome II Regulation shall govern the respective tort, irrespective that the identical substantial regulations applicable in the states of residence could be more favorable. The author further noted that such a situation is functionally analogue to that when the residences of the parties would be in the same state and it should be treated accordingly.

The article is also analyzed in relation with art. 19 (please see below point 19) since in many cases two Romanian insurers (for motor head and trailer) dispute the split of liability.

*c. the approach to the escape clause in Art. 4 (3)*

The cases follow the same pattern when it comes to the application of this article. Mainly, the courts are vested to solve car accident regress actions between insurers, especially in the event of victims being indemnified by their CASCO insurer who subsequently goes against the debtor's insurer. The courts' recurrent reasoning is that, since the insurance policies are issued under Romanian Law, the regress actions are closely connected to this Law and that regress action also covers the extent of the liability.

In few cases, the courts applied the Romanian Law arguing that otherwise the Romanian victim's right would be severely affected in absence of the possibility to address the Romanian national court, even though this is more a matter of competence and not of applicable law<sup>1156</sup>. In another case involving a Romanian victim, the court found that Romanian Law should apply since the German insurer used his Green Card equivalent to pay the damages and this would be equivalent with accepting Romanian Law<sup>1157</sup>.

An author criticizes that the Regulation does not indicate any criteria for determining the *manifestly more closely* connection with another country, as well as that the Regulation does not allow to apply this clause to a particular aspect of the tort. It is debatable whether cases of pre-existing relationships between the parties (such as contracts) that are closely connected with the tort/delict in question involve that the law that should be applied is (a) the exact law applicable to the contract or (b) the law where the pre-existing relationship is located. Since the text included in the regulation is not explicit, both solutions may be considered. However, the author notes that the explanatory memorandum of the draft regulations indicates the first solution<sup>1158</sup>.

*7. Any difficulties with the rule on product liability (Art. 5) and, where relevant, the interaction with the application of 1973 Hague Convention on the Law Applicable to Products Liability in your Member State;*

No relevant case law has been identified with respect to article 5. Romania is not a party to 1973 Hague Convention on the Law Applicable to Products Liability.

The legal doctrine on article 5 of Rome II Regulation is not significantly relevant. Only an author published a detailed commentary in which article 5 is also analysed<sup>1159</sup>. The author noted that the law applicable must be determined according to the rules set by the 1973 Hague Convention in those member states that ratified the Convention, and not by those set by the Rome II Regulation.

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<sup>1155</sup> OPREA Alina, *ibidem*;

<sup>1156</sup> Bucharest District 1 Court, Sentence no. 8946/2014;

<sup>1157</sup> Medias First Instance Court, Sentence no. 1314/2015;

<sup>1158</sup> OPREA Alina, *ibidem*.

<sup>1159</sup> OPREA Alina, *ibidem*.

With respect to article 5.1, the author notes that it is not clear whether the notion of marketing also includes the publicity related to a product in a member state where the product is not actually available. The author considers that modern business practice such as online publicity should be included in the concept of marketing. An additional difficulty might appear if the product is not marketed in any of the stated referred to under article 5.1 letters a), b) or c) and the rule of habitual residence is also not applicable. In such a case, the author considers that one should resort to the general rules set by article 4.

Also, the author criticises that article 5.2 is not fully clear and the provision according to which “where it is clear from all the circumstances of the case that the tort/delict is more manifestly more closely connected with a country other than that indicated in paragraph 1, the law of that other country shall apply” may trigger two interpretations: (a) that the law applicable must be of another state than of those determined according to article 5.1; or (b) that article 5.2 allows the application of one of the laws determined according to article 5.1 without observing their order of application. The author further considers that, from an economic standpoint, the escape clause provided under article 5.2 is not necessarily justified because it provides the judge with a very large margin of discretion and, therefore, the clause is not of nature to stimulate producers to act more diligently; on the contrary, article 5.2. is susceptible to determine the avoidance of cross-border situations/ litigations, which is not desirable.

The other authors treat this text only in a descriptive manner.

#### *8. Any difficulties with the specific rule on unfair competition (Art. 6)*

No case law has been identified regarding the application of article 6. However, this article was analysed by the legal doctrine.

An author considered that article 6 of Rome II Regulation is partly derogatory from article 4, contrary to point 12 of the recitals<sup>1160</sup>. The author concluded that cross border cartel damages actions fall within the restriction of free competition. The author also considered that article 6.3.b is only applicable when the court’s jurisdiction is determined according to articles 4.1 and 8.1 of Brussels 1 bis Regulation.

Another author noted with respect to article 6.1 that the Regulation does not cover the situation in which the unfair competition affects several markets, as well as that difficulties might appear in connection with illicit behaviours committed through internet<sup>1161</sup>. The distributive application of the existing laws is not satisfying because of the complexity of the situations that it generates: the judges in the states where the unfair competition occurred, authorised to solve claims related to the integral covering of the prejudice will have to apply simultaneously the laws applicable to prejudices caused in different states.

Further, the author noted with respect to article 6.3 that the syntagma “*where the market is, or is likely to be, affected*” might raise difficulties: it is debatable whether it is necessary in order to fulfil the condition for the anticompetitive acts in question to have been committed on the respective market by an undertaking that effectively exercised activity on the respective market or if a wider conception can be admitted to reflect the extremely large territorial scope of certain antitrust legislations worldwide. According to the author, an additional difficulty might appear in connection with the scope of application: if the consequences of the anticompetitive behaviour were produced within the territories of more states (both EU and non-EU), the question is whether *lex fori* will govern only the civil consequences of the said behaviour (while the damages caused to free competition will be assessed according to the laws applicable in the affected markets) or if it will also determine the standard based on which that anticompetitive behaviour should be assessed. This question is for the author

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<sup>1160</sup> Toma-Bianov, Anamaria – “Forum Shopping Revisited: un scenariu încă posibil în acțiunile în despăgubire pentru prejudiciile generate de cartelurile transfrontaliere (Forum Shopping Revisited: a still possible scenario in connection with crossborder cartel damages action), published in the Romanian Business Law Magazine no. 5/2015

<sup>1161</sup> OPREA, Alina, *ibidem*.

of the utmost importance when non-EU countries are involved. The author considers that if *lex fori* is that of the state where the defendant is incorporated, and this state's market was also directly and significantly affected by the anticompetitive behaviour, *lex fori* should also be applicable as regards the standard of behaviour based on the rules regarding the public policy of the forum.

In addition, we note that, at a theoretical level, in the academic literature, an opinion was expressed regarding the indemnification of the victims whenever a delict occurs in multiple states at the same times. The author thinks that, although it seems fair for every illicit act of unfair competition should be sanctioned under the Law its effects occurred, the very same act could be interpreted as licit and illicit simultaneously and restrict the victim's right to claim all damages<sup>1162</sup>.

The same author concludes, after having made an analysis of recital 22 and 23 of the preamble, that the acts prone to be restricting the competition should be qualified according to the autonomous interpretation principle and based on the national law of the state involved, considering the lack of exhaustive definition<sup>1163</sup>.

The other authors treat this text only in a descriptive manner.

9. *Any difficulties with the specific rule on environmental damage (Art. 7)*

No case law has been identified regarding the application of article 7. The legal doctrine is descriptive on this matter, without any detailed/ in-depth analyses. An author deemed that the fact that no exception is regulated within article 7 (i.e., the polluter cannot argue that the occurrence of the prejudice in a particular state could not be foreseen) is not necessary the best solution<sup>1164</sup>. The author argues that a provisions related to the predictability of the prejudice would be of nature to bring a certain dose of equity: if the polluter foresaw or should have foreseen that the consequences of its actions could cause prejudice in a particular state, it should not be allowed to challenge the application of the more severe law of the respective state; on the other hand, if the polluter objectively did not foresee the occurrence of the prejudice in the respective state, the judges should be able to take into consideration this aspect when the assessment is made with respect to the polluter's liability. The other authors treat this text only in a descriptive manner.

10. *Any difficulties with the specific rule on infringements of intellectual property rights (Art. 8)*

No case law has been identified regarding the application of article 8. However, this article was analysed by the legal scholars. An author criticised the correlation between article 8 and article 13. The author considers that although the determination of the legislation applicable to a certain claim related to unjust enrichment/ *negotiorum gestio* based on the provision of article 8 is justified, the justification no longer subsists in case of *culpa in contrahendo*. The author notes that it is difficult to understand the pre-eminence of article 8 over article 12 – the simple circumstance that *culpa in contrahendo* occurs when the potential object of the agreement is a trademark, or a patent is not deemed sufficient for ensuring an adequate basis for the application of article 8. The other authors treat this text only in a descriptive manner.

11. *Any difficulties with the specific rule on industrial action (Art. 9)*

No case law has been identified regarding the application of article 9.

However, a legal scholar analysed the legal nature of the economic liability of employees participating in an illegal strike and interpreted article 9 and recitals 11, 27 and 28, concluding that the damages that employees need to pay as a consequence of their participation in an illegal strike do not fall within the scope of the Regulation<sup>1165</sup>. According to the

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<sup>1162</sup> SITARU Dragos Alexandru, *ibidem.*, pag. 507;

<sup>1163</sup> SITARU Dragos Alexandru, *ibidem.*, pag. 513;

<sup>1164</sup> OPREA Alina, *ibidem.*

<sup>1165</sup> Dr. Șerban Beligrădeanu – "Neincidența art. 9 din Regulamentul (ce) nr. 864/2007 al Parlamentului European și al Consiliului privind legea aplicabilă obligațiilor necontractuale (Roma II) asupra determinării naturii juridice a răspunderii reparatorii a salariaților/angajaților participanți la o grevă nelegală, potrivit Legii nr. 62/2011 a dialogului social" (The

author, the Regulation only regulates a conflict rule and the distinction between contractual and non-contractual liability should be made according to the national law. The other authors treat this text only in a descriptive manner.

## 2.3 Chapter III - Unjust Enrichment, *Negotiorum Gestio* And *Culpa In Contrahendo*

### 12. Any difficulties with the specific rule on *unjust enrichment* (Art. 10)

Only few cases solved by the Romanian courts have been identified with respect to unjust enrichment. In one of the cases, the court deemed that the claim of damages based on unjust enrichment arising out of an undue payment does not fall within the scope of the Regulation, since the liability is actually contractual<sup>1166</sup>.

In another case, the court deemed that, since the alleged unjust enrichment concerns a relationship existing between the parties (in the case at hand, a contractual relationship), that is closely connected with that unjust enrichment, it shall be governed by the law that governs that relationship<sup>1167</sup>. Further, the court deemed that the party had an obligation to prove that the Romanian law was chosen by the parties to govern their contractual relationship. The court argued that the party did not provide proof regarding the law chosen to govern the contractual relationship. The court cited article 3 of Rome I Regulation, nonetheless in lack of proof provided by the party with respect to the law applicable, the court failed to determine it based on the other provisions of Rome I Regulation. Eventually, the court dismissed the claim on procedural grounds.

In other cases, in relation to unjust enrichment arising out of the use with no right of train wagon transportation in Romania, the courts deemed that the Romanian law is applicable, based on article 10.3 of Rome II Regulation<sup>1168</sup>. The cases were related to the use by a company of train wagons without having any contractual relation with the owner the wagons. The courts established that the unjust enrichment was characterised, but the defendant was not the entity who benefited from it, and dismissed the claim based on lack of legal standing.

This text was also analysed by the legal doctrine. An author noted that the reference to the country in which the unjust enrichment took place may raise difficulties because its meaning is not fully clear and because of this lack of clarity it is not possible to determine the law applicable when the enrichment occurred on the territories of more states (e.g., frequently in case of cross-borders financial transactions)<sup>1169</sup>. The other authors treat this text only in a descriptive manner.

As regards payment of amounts wrongly received, it was interpreted in the doctrine that the law governing the legal relationship should that from the place where the payment was received, as an analogy from unjust enrichment<sup>1170</sup>.

### 13. Any difficulties with the specific rule on *negotiorum gestio* (Art. 11)

No case law has been identified regarding the application of article 11.

This text was however analysed by the legal doctrine. An author<sup>1171</sup> noted that resorting, based on the Regulation, to the law where the *negotiorum gestio* took place might raise difficulties if the patrimony at hand is located on the territories of

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*non-application of art. 9 of 864/2007 Regulation to the legal nature of the economic liability of employees participating in an illegal strike, according to Law np. 62/2011 on social dialogue), published I the Romanian Labour Law Magazine no. 3/2012;*

<sup>1166</sup> Alba Court of Appeal, Decision no. 33/2012 dated 4 May 2012;

<sup>1167</sup> Bucharest District 1 Court, Sentence no. 10124/2017 dated 27 december 2017;

<sup>1168</sup> Timiș Tribunal, Sentence no. 829/2018 dated 13 September 2018.

<sup>1169</sup> OPREA Alina, *ibidem*;

<sup>1170</sup> SITARU Dragos Alexandru, *ibidem.*, pag. 522;

<sup>1171</sup> *Idem*

several states and each part of the patrimony is managed separately. The author deems that in this case it is likely to apply the legislation of each state in a distributive manner. The other authors treat this text only in a descriptive manner.

*14. Any difficulties with the specific rule on culpa in contrahendo? (Art. 12)*

Only one case<sup>1172</sup> has been identified concerning the application of article 12 of Rome II Regulation. The case concerned pre-contractual discussions between a Spanish investor and a Romanian developer for development of projects in Bucharest. Damages were claimed for misinformation during these discussions. However, the court did not perform any determination of the applicable law and the claim was dismissed based on lack of proof of the misinformation.

This text was also analysed by the legal doctrine (kindly refer to point 8 above). A concern was raised in connection to the dichotomy between a concluded contract and one that was supposed to be entered. The author signaled that the latter is subject to difficulties whenever put into practice<sup>1173</sup>. Other authors treat this text only in a descriptive manner.

## 2.4 Chapter IV - Freedom of Choice

*15. The implementation of the rule on freedom of choice, any difficulties therein and any discussion that has been carried out in your Member State regarding possible reasons which would justify the need to rethink it (Art. 14)*

There is not much case law on the application of this article. In practice, this article did not raise many issues provided that the parties rarely choose the applicable law to the tort. Nonetheless, there is some case law based on which it could be argued that the court held that the parties chose in an implicit manner the law to govern the tort. For instance, in one case the court ruled that the Romanian law is applicable since the foreign plaintiff claimed the application of the Romanian law and this was not challenged by the defendant<sup>1174</sup>. In another case, the court decided that the parties have implicitly chosen Romanian law since they both have argued their position based on its provisions, although the car accident was in Germany<sup>1175</sup>.

This text was also analysed by the legal doctrine. An author noted that the parties' freedom to choose the law applicable to the tort hides a risk of fraud in case the parties could choose a foreign law to avoid compliance with imperative provisions of the law that would normally be applicable<sup>1176</sup>. The author further notes that this situation is only artificially "international", but this does not prevent the application of the law chosen by the parties (the author deems that a conflict of laws exists). However, this risk is mitigated, according to the author, by the provisions of article 14.2 and 14.3 of Rome II Regulation. Nonetheless, the author cites the opinion of P. de Vareilles-Sommieres according to which imperative provisions are rare in the field of tort and the parties usually can derogate from tort rules by agreement. The other authors treat this matter only in a descriptive manner.

One author interprets art. 14 (1) a) as applicable to mostly consumers and extends the meaning of commercial activity to any professionals, in order to protect the weaker party<sup>1177</sup>.

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<sup>1172</sup> Bucharest court of Appeal, Decision no. 1844/2015 dated 10 November 2015;

<sup>1173</sup> SITARU Dragos Alexandru, *ibidem.*, pag. 527;

<sup>1174</sup> Bucharest District 1 Court, Sentence np. 7797/2020 dated 30 October 2020;

<sup>1175</sup> Targu Mures First Instance Court, Sentence no. 2165/2020;

<sup>1176</sup> OPREA Alina, *ibidem.* ;

<sup>1177</sup> SITARU Dragos Alexandru, *ibidem.*, page 529 ;

## 2.5 Chapter V - Common Rules

*16. The scope of the exclusion of 'evidence and procedure' in Art 1(3) and any difficulties in relation to that exclusion or to questions of formal validity or the burden of proof (Arts. 21-22)*

The Romanian Civil Code regulates under article 2562 that the content of the foreign law is determined by the court by attestations from the authorities of the relevant state, by requesting the opinion of an expert or by other adequate means. Also, the party that refers to a foreign law has the burden of proof as regards its content. If it is not possible to determine the content of the foreign law within a reasonable timeframe, the Romanian law shall be applied.

Based on the previously mentioned legal provision, the burden of proof with respect to the foreign law is shared between the judge (based on the principle of active role) and the parties.

In some cases, the Romanian courts deemed that since the parties failed to prove the foreign law<sup>1178</sup>, respectively since the proof of the foreign law is difficult to obtain<sup>1179</sup>, the Romanian law becomes applicable. Cases where the plaintiff's claims were dismissed based on lack of evidence regarding the foreign law have also been identified.<sup>1180</sup>

*17. The approach in your Member State to questions of pleading, proof and application to individual cases of the substantive rules of the law applicable under the Rome II Regulation governing non-contractual obligations.*

The Romanian legislation and practice of the courts of law treat foreign law as a fact that must be proved, as described at point 14 above.

*18. Any difficulties, if any, arising in connection with the delimitation of the scope of the applicable law (Art. 15) or the relevance of rules of safety and conduct (Art. 17), the burden of proof (Art. 22)*

Most cases where art. 15 was applied by the courts of law concern car accidents lawsuits and the analysis of the applicable law to Insurer's regress action<sup>1181</sup>.

- In one lawsuit, where the car accident took place in Romania, the court analysed the applicable law to Swiss insurer's regress against the Romanian Insurer, deciding that according to art. 4(1) in conjunction with art. 15 lit. a) and h), art. 18 and 19, the law applicable is the Romanian law. However, the court did not make any interpretation of art. 15 besides invoking its applicability.
- In another case where the car accident took place in Germany and the court analysed the applicable law to Insurer's regress action when the liability is split between different insurers of the motor head and the trailer, the court rejected the appeal because the claimant failed to provide enough evidence of the tort happening. In its reasoning, the court based its judgment on cases C359/14 și C475/14 (para. 52 and 53) providing with respect to art. 15 lit. a) and b) from Roma II Regulation that lex loci damni will determine the conditions and extent of liability, as well as the reasons for sharing this liability.

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<sup>1178</sup> *Buftea Court, Sentence no. 9546/2015 dated 23 December 2015; Bucharest District 2 Court, Sentence no. 7312/2013 dated 26 April 2013; Bucharest District 3 Court, Sentence no. 13982/2015 dated 16 October 2015;*

<sup>1179</sup> *Arad Tribunal, Sentence no. 392/2017 dated 1 November 2017;*

<sup>1180</sup> *Bucharest Court of Appeal, Decision no 2378/2017 dated 19 December 2017; Bucharest District 1 Court, Sentence no. 7452/2019 dated 4 November 2019; Bucharest Tribunal, Sentence no. 116/2016 dated 19 January 2016;*

<sup>1181</sup> *Bucharest Tribunal, Decision 3167/2018 issued on 18 October 2018, Decision 102/2019 issued by Bucharest Tribunal on 10 January 2019, Decision 2761/2019 issued by Bucharest Tribunal on 23 July 2019, Decision 630/2020 issued by Bucharest Court of Appeal on 16 September 2020;*

- In another case, the court found that the German law is applicable and covers, based on art. 15 lit. b), the split of liability. The court decided that the Romanian law only covers the right of an insurer to subrogate and pursue claims against the trailer insurer.
- As the German law was not proved with respect to the provision governing the penalties/ interest request, the court decided not to grant them.
- The statute of limitation was considered widely as part of the applicable law. Besides the Supreme Court decision no. 1963/2017, we also have identified a case where the court decided that the claim was belated, as the statute of limitation applicable had to be calculated according to German law, as *lex loci damni*, with the consequence of considering the deadline being two years from the date that the action accrued, instead of three years as the claimant invoked (pursuant to Romanian law)<sup>1182</sup>.

In the academic literature, the term “damages” from letter f) of article 15 was interpreted extensively. One author provides a list of damages that fall within “*damages sustained personally*”, including damages to the human body, mental integrity, and mental state, caused by an illicit act of a natural or legal person, or a state organization<sup>1183</sup>.

*19. The practical application of the rule on **overriding mandatory provisions** (Art. 16) and any difficulties therein*

There are few cases where the Romanian courts made the application of article 16. In two cases, a court applied article 16 and ruled that the principle of full compensation of damage is an overriding mandatory provision of the Romanian law<sup>1184</sup>. Therefore, the courts ruled that, irrespective of the law determined to be applicable according to Rome II Regulation and irrespective of the fact that such law could limit the scope of damage compensation, the full compensation of damage must be complied with based on the mandatory provisions of the Romanian law.

The legal doctrine on this article is mainly descriptive. An author noted that the public order law must not be mistaken for the imperative provisions regulated referred to, for instance, under article 14.2 or 14.3 or under article 3.3. of Rome Convention<sup>1185</sup>. The latter refers to all internal provisions that cannot be derogated from by agreement, while article 16 only pertains to a subcategory of the public order law, namely those rules that are overriding on a particular level. The author further cites ECJ cases C-369/96 and C-376/96 (*Arblade*) to show that public order legislation must be understood as applying to national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the relevant member state.

To what it concerns overriding mandatory provisions, a discussion was made in respect of Rome I Regulation and the differences between its art. 9 (3) and Rome II art. 16. Although recital 7 of the preamble of Rome II Regulation calls on the correlation between the two Regulations, the author thinks there is a good reason the Rome II does not provide such a rule, that being the possibility of the forum to apply the Law of a third state. He puts this restriction on the necessity of predictability and certainty required when determining the applicable law to torts<sup>1186</sup>.

*20. Any difficulties with the specific rule on **direct action against the insurer of the person liable** (Art. 18)*

Even if it does not seem that there are substantial difficulties in applying this article, the Romanian courts usually connect art. 18 to art. 4 (1) and apply the Law that governs the non-contractual obligation, even though there are not few those

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<sup>1182</sup> Cluj Napoca First Instance Court, Decision no. 3918/2015 dated 21 April 2015;

<sup>1183</sup> SITARU Dragos Alexandru, *ibidem.*, page 536 ;

<sup>1184</sup> Timiș Tribunal, Decision no. 1032/2019 dated 31 October 2019 and Decision no. 1034/2019 dated 22 October 2020;

<sup>1185</sup> OPREA Alina, *ibidem.*

<sup>1186</sup> SITARU Dragos Alexandru, *ibidem.*, page 549;

who resort to the escape clause from art. 4 (2) whenever the victims are from Romania and the damages are supposedly suffered here (especially when it comes to indirect damages suffered by the relatives of deceased victims) <sup>1187</sup>.

*21. Any difficulties with the specific rule on subrogation (art. 19)*

The subrogation is quite controversial and has caused non-unitary judicial practice. The courts cannot tell the difference between the third's party right to subrogate into the victim's rights and the extent to which this third party is entitled to compensation.

Most common cases refer to truck accidents, especially happening in Germany, and the main problem the courts are confronted with is the split liability between different insurers of the tractor unit and the trailer. The way how this is solved could really impact insurers whenever they must cover for substantial damages because the Romanian Law holds the trailer insurer responsible only if it is proved that the fault could be linked to the trailer, whereas the German Law admits a split liability (50%) between the insurers, regardless of who or what caused the accident.

In most cases, judges cite and try to relate to joined cases C-359/14 and C-475/14, but get to different conclusions. For example, the Bucharest Court of Appeal based its judgement (no. 1001/2019) on paragraphs 50-52, 58 and 59 of the mentioned ECJ case and resorted to Rome I Regulation to determine the applicable law to the regress action between two different insurers (motor head and trailer), deciding that this specific law only governs the right to subrogate. Nevertheless, one of the judges had a separate opinion, particularly, that the regress implies both the verification of the existence of the right to subrogate and the possibility to regress against other entities. The separate opinion judge did not realise that his interpretation leads to overlapping the two laws the judges considers applicable: the law of the place of accident - German - establishes the parties responsible, but the responsible parties would be also determined by the regress law, if interpreted broadly. This overlapping of the scope of the applicable law would not be consistent with the *ratione* of the provisions.

Further proof of the courts' inconsistency in these types of cases could also lie in the sentence no. 9135/2019 from the Bucharest District 1, where the judge failed to formerly apply Rome II Regulation and simply deemed the German Law as applicable to the regress action in its entirety.

A pertinent reasoning was made in 7452/2019 Bucharest District 1 award, in accordance with ECJ Joined cases C-359/14 and C-475/14. The Court concluded that the persons responsible for the accident and the extent of their liability is determined according to the law of the country where the accident occurred, based on art. 4 of Rome II Regulation. Also, the insurer's obligation to cover the prejudice and its possibility to resort to subrogation is determined according to the law applicable to the insurance contract, based on article 7 of Rome I Regulation. Consequently, the Romanian law is not applicable because it only regulates the right of the insurer who indemnified the victim to subrogate in the victim's rights. Therefore, the Court deemed the German law is applicable and that it regulates the person to which the prejudice is imputable, as well as the extend of liability. Hence, the insurer of the tractor unit is entitled to recover from the other insurer half of the damages paid to the victim.

There is, as well, a rather questionable way of reasoning when applying art. 4 (2) in connection to art. 19. Many Romanian courts apply the Romanian Law to regress actions between two Romanian insurers because they both reside in Romania without analysing the Law that applies to the tort<sup>1188</sup>. Sometimes, they justify this escape clause even when one of the insurers is incorporated in a different state but is represented in Romania<sup>1189</sup>. These variations seem to reflect that some courts would argue anything to bypass the applicability of foreign legislation.

Similar matters refer to BAAR Romania's (Vehicle Insurers' Bureau) actions against Romanian debtors. It often happens that BAAR Romania pays the correspondent agency from another member state whenever the Romanian debtor has no valid

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<sup>1187</sup> *Dolj Tribunal, Decision no. 206/2015;*

<sup>1188</sup> *Bucharest Tribunal Decision no. 102/2019, 3712/2019, 7409/2019, 7415/2019;*

<sup>1189</sup> *Bucharest District 1 Court no. 20591/2015. For a contrary opinion, see Bucharest Tribunal 5247/2017;*



insurance policy or lacks it whatsoever and eventually regresses against the initial debtor<sup>1190</sup>. In these cases, the courts regularly apply the Romanian Law, considering that BAAR is obliged to pay the creditor on the grounds of art. 24 of Directive 2009/103, without any reflection on Rome II. However, other courts apply the law according to art. 4 (1) of Rome II<sup>1191</sup> and some fail to justify their choice of applicable law<sup>1192</sup>.

A frequent issue arising out of these regress actions regards late payment penalties, awarded differently from court to court. For example, Bucharest District 1 Court deemed the German Law applicable to the tort but admitted the claim for penalties based on the Romanian Law, therefore creating *lex tertia*<sup>1193</sup>. The very same court, in case no. 7452/2019, deemed that the German law is applicable and dismissed this claim because the plaintiff did not prove the German law that regulates the legal regime of late payment penalties, similarly happening in cases judged by Satu Mare Tribunal when the plaintiffs based their claims on the Romanian Law (1829/2020, 3330/2020, 4550/2020, 3795/2020 awards).

A fair number of judgements simply dismiss cases after settling on the applicable law because the parties do not prove the content of the foreign law, in spite of the remedies offered by the law<sup>1194</sup>. This could speak to the courts' reluctance to apply another law than the one they are familiar with.

#### *22. Any difficulties with the specific rule on multiple liability (Art.20)*

Only one relevant case<sup>1195</sup> has been identified with respect to the application of article 20 of Rome II Regulation. The case was related to the determination of the law applicable to the insurer's regress action when the liability is split between different insurers of two different parts of a vehicle (e.g., tractor unit and semi-trailer) for a car accident that occurred in Germany. Although the case law on similar facts is very common, the parties and the courts had rarely cited article 20.

In the previously mentioned case, the court deemed based on article 20 of the Regulation that the German law was applicable to the right of the insurer that was firstly noticed and fully covered the damages according to the rules set by the German law to demand compensation from the other insurer (the other debtor), considering that the law applicable to the first insurer's obligation to satisfy the claim of the creditor was the German law. In other cases, the courts ruled in different manners, without resorting to the application of article 20 (kindly refer to points 18 and 19 above).

The legal doctrine on this article is mainly descriptive and no controversies were identified.

## 2.6 Chapter VI - Other Provisions

#### *23. Any difficulties with the specific rule on habitual residence (Art.23)*

There are few cases where the courts examine this applicability of this article regarding habitual residence. Usually in practice the courts consider as relevant the headquarters place of the legal persons and the domicile for the natural persons, without analysing in particularly the habitual residence of the parties.

As an exception, in one case, the appeal court changed the first court's judgement, stating that the Romanian law is applicable in a lawsuit concerning a car accident which took place in Germany and therefore, refused to split liability between insurers, considering that both the insurer's and damaged person have their usual residence in Romania and the close connection of the insurance contracts with Romania (i.e. the driver is Romanian and the insurance was made in

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<sup>1190</sup> Hunedoara Tribunal 752/2016. Similarly, Bucharest District 1 Court 1925/2018, Buftea First Tier Court 7267/2018

<sup>1191</sup> Deva First Instance Court, Sentence no. 1767/2015;

<sup>1192</sup> Dolj Tribunal, Decision no. 218/2019;

<sup>1193</sup> Bucharest District 1 Court, Sentence no. 1114/2019;

<sup>1194</sup> Buftea First Tier Court, Sentence no. 9546/2015, 8514/2016, Ilfov Tribunal Decision no. 4083/2018;

<sup>1195</sup> Bucharest Tribunal, Decision no. 4262/2018 dated 10 October 2020.

Romania<sup>1196</sup>. Lastly, the court also mentioned in its reasoning that the decision cannot be affected by the mere fact the damaged person has other nationality (i.e. German nationality).

*24. Any difficulties with the specific rules on exclusion of renvoi (Art.24) and States with more than one legal system (Art.25)*

No case law or legal doctrine has been identified with respect to articles 24 and 25 of the Regulation.

*25. Any difficulties with the specific rule on public policy of the forums (Art. 26)*

No case law has been identified with respect to article 26. Kindly refer to point 17 above with respect to the application of the rule on overriding mandatory provisions.

*26. Practical interaction between the Rome II Regulation and other EU and international legal instruments, in specific areas such as environmental damages, intellectual property rights or data protection (Arts. 27, 28, 29)*

On a preliminary note, no relevant case law or legal doctrine have been identified with respect to the interaction between the Rome II Regulation and other EU and international legal instruments in the above-mentioned specific fields (environmental damages, intellectual property rights and data protection. Nonetheless, a decision of a national court has been identified with respect to the application of article 28 in the field of collisions in inland navigation, described below. Also, doctrinal commentaries have been identified with respect to articles 27 and 28.

#### *Article 27*

No case law has been identified with respect to the application of article 27 of Rome II Regulation.

Nonetheless, an author noted with respect to the relationship between Rome II Regulation and other provisions of European law according to article 27 that although the text is clear, certain difficulties may appear with respect to those European provisions that regulate “internal market” clauses, potentially together with the proclamation of the principle of the origin country (e.g., Directive 2000/31/EC provides under article 3.1 that each member state shall ensure that the information society services provided by a service provider established on its territory complies with the national provisions applicable in the member state in questions which fall within the coordinated field)<sup>1197</sup>. These “internal market” clauses are contrary to the principle promoted by Rome II Regulation according to which the rule is that the law of the “destination country” (that state where the prejudice is produced) is applicable. Therefore, the coordination of such European instruments is delicate, according to the author. More specifically, the author notes that the issue raised by these “internal market” clauses is that to know whether (a) they are an implicit rule on conflicts determining that the law of the member state is applicable as regards the supplier’s liability; or (b) if these clauses only induce a simple rule of material correction, so that in principle the law determined according to Rome II Regulation shall be applied only if it is shown that its application does not constitute an obstacle to the activities of the service provider (as set for example by recital 23 of the European E-commerce Directive). The author also notes that another possible interpretation would be to consider that these clauses have no influence in conflict of laws, because the principle of the country of origin intervenes only in a legal-public dimension, and not in relationships between private persons. The author further notes that Rome II Regulation does not provide clarification in this regard: the only relevant information is found under recital 35 which states a seemingly obvious idea, that Rome II regulation must not affect the freedom of movement of goods and services governed by other European instruments.

#### *Article 28*

As regards case law, a decision has been identified with respect to the application of article 28 of Rome II Regulation<sup>1198</sup>. The case was related to a prejudice caused by a collision between two ships within the national waters of Romania. In the

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<sup>1196</sup> Bucharest Tribunal, Decision 3544/2019 dated 23 October 2019.

<sup>1197</sup> OPREA Alina, *ibidem*;

<sup>1198</sup> Bucharest Court of Appeal, Decision no. 1051/2015 dated 29 October 2015.

context of the collision, the Romanian ship was damaged by the Bulgarian ship. The debates in this case concerned the duration of the statute of limitation which, according to the Romanian law, consisted in a period of 3 years, while according to the 1960 Geneva Convention relating to the unification of certain rules concerning collisions in inland navigation the statute of limitation consisted in a period of 2 years. Previously, the first court ruled that the 2 years statute of limitation provided by the 1960 Geneva Convention was applicable, and the appeal court annulled the decision of the first court and ruled that the general 3 years statute of limitation provided by the Romanian law was applicable. The final court applied article 28 of Rome II Regulation and ruled that Rome II Regulation did not remove the application of the 1960 Geneva Convention, therefore the 2 years statute of limitation regulated by the Convention shall prevail.

As regards the legal doctrine, an author noted with respect to article 28.1 that the prevalence of the pre-existent international conventions, considering the fact that only some of the member states ratified them, is liable to further maintain the risk of forum shopping at a European level, despite the fact that its removal was one of the main objectives of the text<sup>1199</sup>. According to the same author, it would had been preferable to affirm the priority of the Regulation even in connection with international conventions. On the other hand, the author considered that the European legislator proves inconsistency – for instance, Brussels II bis Regulation provide that it must be applied in preference to 1980 Hague Convention on the civil aspects of international child abduction.

#### *Article 29*

No relevant case law or legal doctrine have been identified with respect to the application of article 29.

## 2.7 Comments on other Practical Problems

*These areas are of particular interest for the Commission. Please be as precise as possible regarding any issue that has been reported:*

*27. Where relevant, any impact of the application of the 1971 Hague Convention on the law applicable to traffic accidents on legal certainty*

Romania is not a party to the 1971 Hague Convention on the law applicable to traffic accidents.

*28. Any other practical problems, including but not limited to the application and treatment of foreign law, the suitability of the mosaic approach supported by the Rome II Regulation*

No other practical problems were identified with respect to the application or interpretation of the Rome II Regulation, besides those already included in this report. No case law or legal doctrine has been identified with respect to the suitability of the mosaic approach of Rome II Regulation.

## 3. Comments on areas of interest

*These areas are of particular interest for the Commission. Please be as precise as possible regarding any issue that emerged in your Member State:*

*29. The exclusion of violations of privacy and rights relating to personality, including defamation, from the scope of the Regulation and any difficulties arising out from differences among Member States' rules in cross-border situations*

No cases have been identified with respect to the exclusion of violations of privacy and rights relating to personality, including defamation, from the scope of the Regulation. Nonetheless, an author, criticised the absence from Rome II

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<sup>1199</sup> OPREA Alina, *ibidem*;

Regulation of uniform rules regarding liability for violations of personality, considering that the national legislations in this area are significantly different<sup>1200</sup>. The author notes that the incertitude related to the law applicable and the costs and risks of abroad litigations have a dissuasive effect on the victims of such violations in what regards the initiation of a litigation. Also, the author notes that forum shopping would be encouraged by the absence of uniform European rules on the law applicable to such cases.

*30. Any comment regarding the Interplay of the Rome II Regulation with the treatment of **defamation and data protection**, and, in these areas, the relevance of **Strategic Lawsuits Against Public Participation**" (SLAPPs)*

No cases and legal doctrine have been identified with respect to the interplay of the Rome II Regulation with the treatment of defamation and data protection, nor with respect to the relevance of SLAPPs.

*31. The extent to which Rome II duly tackles **corporate abuses against human rights**.*

No cases or legal doctrine have been identified with respect to corporate abuses against human rights. At the same time, the Regulations was applied at a reduced scale by the practitioners in Romania to extrapolate the extent to which Rome II Regulations duly tackles such matters.

*32. The impact of the development of **artificial intelligence** on the Rome II Regulation*

No cases or legal doctrine have been identified in this respect.

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<sup>1200</sup> OPREA Alina, "Raspunderea pentru atingerile aduse vietii private si drepturilor personalitatii - aspecte de drept international privat" (Liability for violations of privacy and rights relating to personality - international private law aspects), published in Romanian Private Law Magazine no. 4/2017.

#### 4. List of national case law

<u>Decision Number / Doctrine</u>	<u>Date</u>	<u>Court/ Author name and reference number</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings</u>	<u>Red Flags</u>	<u>ECJ case law cited</u>	<u>Similar Cases</u>
155/2011	21-03-11	Court of Appeal - Bucharest		Concert organised in Bucharest. Exchange of emails between organiser and German artist.	Romanian law applicable according to any ROME Regulation (contractual or tort). However no proof of agreement and no proof of enrichment of the Romanian organiser.			2 more identical cases
3176/2011	18-10-11	Romanian Supreme Court of Justice	Art. 1	Concert organised in Bucharest. Exchange of emails between organiser and German artist.	Romanian law applicable based on a retransmission argument from Romanian former International Private law to German law. No explanation about the incidence of Rome II, although it is referred.			
370/2011	09-12-11	Carei First instance Court	art. 4.1	Car accident in Czech Republic. Romanian debtor. Criminal proceedings	Czech law applicable but Romanian court sends the creditor in Czech Republic for proceedings and refuses to apply (no justification)			

<u>Decision Number / Doctrine</u>	<u>Date</u>	<u>Court/ Author name and reference number</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings</u>	<u>Red Flags</u>	<u>ECJ case law cited</u>	<u>Similar Cases</u>
2155/2019	10-04-12	Buftea First Tier Court	Art. 4.1	Applicable law to Insurer's regress action when the liability is split between different insurers of the motor head and the trailer	Romanian law applicable, as there is a contract between the parties under Romanian law, because the parties did not made an election of the applicable law, and the insurer has its headquarters in Romania			
33/2012	04-05-12	Court of Appeal - Alba Iulia	Art. 10.1	Unjust enrichment caused by an undue payment for quality control services	A contract exists in simplified form. Contractual liability rules applicable.			
1043/2012	09-05-12	Bucharest Tribunal		Car accident in Bulgaria. Romanian victim. Bulgarian debtor.	The appeal court maintained the first court's judgement which stated that the Bulgarian Law was applicable due to the place where the tort happened, but did not refer to the regulation or explain any further. The appeal court also offered late payment penalties.	7/other EU - article 19 of Directive 2000/26/CE		
60/2012	13-09-12	Court of Appeal - Bacau	art. 4.1	Car accident in Italy. Appeal. Romanian victim	Both courts apply Romanian law to damage determination. No justification.			

<u>Decision Number / Doctrine</u>	<u>Date</u>	<u>Court/ Author name and reference number</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings</u>	<u>Red Flags</u>	<u>ECJ case law cited</u>	<u>Similar Cases</u>
525/2012	24-09-12	Targu Lapus First Instance Court	Art. 4.2	Wrong car fuel use. Both parties from Romania	Romanian law applicable			
7312/2013	26-04-13	Bucharest - District 2 - First Instance Court	Art. 4.1	Truck fire in Bulgary. Action against Romanian insurer. Romanian claimant.	Romanian law applicable, only because the claimant did not provide evidence of the Bulgarian law, even though the Court previously decided the applicable law was the Bulgarian law.			
16704/2013	16-12-13	Iasi First Instance Court	Art. 4.2 Art. 4.3	Industrial accident in Germany when loading a truck.	Romanian law applicable since damage was caused by a third party in connection with the execution of a Romanian law transport agreement. However, the damage was not caused to the freight, but to an instrument used for loading			
1934/2014	14-02-14	Craiova First Instance Court	art. 1.1	Scope excludes contracts	Commercial invoices not covered by Rome II			
1247/2014	19-03-14	Bucharest Tribunal	Art. 4.1 Art. 18	Car accident in Bulgaria. Damages claim against the insurer. Action against	Appeal to District 4 - First instance Court Decision no. 4095/2013. Court of appeal considers that Bulgarian law is applicable	7/other EU - article 11 (2), article 9 (1) b) of Regulation		

<u>Decision Number / Doctrine</u>	<u>Date</u>	<u>Court/ Author name and reference number</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings</u>	<u>Red Flags</u>	<u>ECJ case law cited</u>	<u>Similar Cases</u>
				RCA insurer	pursuant to Rome II.	2001/44/CE		
1599/2019	08-04-14	Ilfov Tribunal	art. 4.1 art. 19	Applicable law to Insurer's regress action when the liability is split between different insurers of the motor head and the trailer	Based on article 7 from Rome I and considering that that there has been no evidence that the parties have chosen the applicable law	7/Other EU - article 7 Rome I		
8946/2014	23-05-14	Bucharest - District 1 Court	art. 4.3.	The law applicable to the plaintiff's (Romanian natural person) right to recover from the Austrian RCA insurer the damages caused by the insured vehicle as a consequence of a car accident that occurred in Austria.	The court deemed that the Romanian law applies based on article 4.3 of Rome II Regulation, arguing that otherwise the debtor's right would be severely affected in absence of the possibility to address the Romanian national court.	7/Other EU - articles 19 and 22 of Directive 2009/103/EC	N/A	
281/2014	26-05-14	Bucharest Tribunal	Art. 4 Art. 19	Car accident in France. Applicable law to Insurer's	The court applied the French Law to the right of regress and the Romanian Law to the			



<u>Decision Number / Doctrine</u>	<u>Date</u>	<u>Court/ Author name and reference number</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings</u>	<u>Red Flags</u>	<u>ECJ case law cited</u>	<u>Similar Cases</u>
				regress action when the liability is split between different insurers of the motor head and the trailer	extent of the damages. The court maintained the first court's judgement and obliged the motor head insurer to pay the entire damages.			
3466/2014	07-07-14	Bucharest Tribunal	Art. 4	Damages claim from a Romanian distributor against a German company that terminated the distribution contract in the process of acquisition. Distribution network as part of the goodwill.	The court applied the Romanian Law because the distributor was from Romania and this is where the damage happened. No other justification.			
3838/2014	16-09-14	Arad First Instance Court	art. 4.1	Car accident	locus damni applies			
6873/2014	24-09-14	Bucharest - District 6 - First Instance Court	Art. 4.2	Car accident in Germany. Both drivers from Romania	Romanian law applied - both drivers from Romania			

<u>Decision Number / Doctrine</u>	<u>Date</u>	<u>Court/ Author name and reference number</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings</u>	<u>Red Flags</u>	<u>ECJ case law cited</u>	<u>Similar Cases</u>
19482/2014	11-10-14	Bucharest - District 1 Court	art. 4.1.	The law applicable to the Romanian CASCO insurer's regress action against the debtor's civil auto liability insurer (Romanian company acting as a representative on behalf of a Bulgarian insurer).	The Romanian CASCO insurer suffered itself a prejudice for which claims damages to be covered and did not invoke a prejudice suffered by another person. The CASCO insurer suffered the prejudice in Romania. Consequently, the Romanian law is applicable.	7/Other EU - articles 21 and 22 of Directive 2009/103/CE	C-306/12	
17696/2014	17-10-14	Bucharest - District 1 Court	art. 4.3.	The law applicable to the auto civil liability insurer's (CASCO) regress action against the Hungarian's insurer representative insurance company in Romania (RCA) the expenses borne to cover the damages resulted from an accident caused in Hungary by the vehicle insured by	The Court deemed that, under article 4.3 of the Rome II Regulation, the Romanian law is applicable, arguing that otherwise the right of the victims of car accidents produced in other states would be seriously affected if they were not legally entitled to address the national courts in the state of origin. Further, the Court applied the statute of limitation according to the Romanian law.	N/A	N/A	

<u>Decision Number / Doctrine</u>	<u>Date</u>	<u>Court/ Author name and reference number</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings</u>	<u>Red Flags</u>	<u>ECJ case law cited</u>	<u>Similar Cases</u>
				the latter.				
17237/2014	13-11-14	Bucharest - District 3 - First Instance Court		CASCO insurer regressing against the guilty party's RCA insurer. Conflict of laws and jurisdictions.	The court firstly analyzes the conflict of jurisdiction and states that the matter does not fall within the competence of the Romanian Court. No further analysis on the conflict of laws.	7/Other EU - article 9 of 44/2001 Regulation; article 21 of Directive 2009/103/CE	C-347/08	
335/2014	26-11-14	Giurgiu Tribunal	Art. 4.1	Ship accident in Romania. Bulgarian debtor. Romanian victim	Romanian law applicable according to Rome II. Not the Geneva Convention for ship damage from June 1960			
897/2014	10-12-14	Iasi Tribunal	Art. 4.2 Art. 4.3	Industrial accident in Germany when loading a truck.	Romanian law applied. Appeal in decision no. 16704/2013. Appeal court maintained the solution on the applicable law. Changed the solution on the merits.			

<u>Decision Number / Doctrine</u>	<u>Date</u>	<u>Court/ Author name and reference number</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings</u>	<u>Red Flags</u>	<u>ECJ case law cited</u>	<u>Similar Cases</u>
19689/2014	11-12-14	Bucharest - District 1 Court	Art. 4.1	The law applicable to the right of the Romanian CASCO insurer to regress against the insurer which acts as a representative of the Bulgarian RCA insurer with respect to damages that were initially covered by the first in relation to a car accident that occurred in Bulgaria.	Based on article 4.1 of Rome II Regulation, the Court deemed that the Romanian law is applicable.	N/A	N/A	
113/2017	25-01-15	Cluj Court of Appeal	Art. 4.2	Car accident in Belgium.	The first court applied the Belgium Law, however, the appeal court considered that based on Decision of High Court of Justice 1/2016 Romanian law is applicable.			
60/2015	10-02-15	Dolj Tribunal	Art. 4.1 Art. 18	Car accident in Romania. Bulgarian insurer	Romanian law applicable since victims and damage in Romania			
1908/2015	16-04-15	Bucharest Tribunal	Art. 4 Art. 15	Car accident in Austria. Romanian	Austrian law applicable due to the place of tort and			

<u>Decision Number / Doctrine</u>	<u>Date</u>	<u>Court/ Author name and reference number</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings</u>	<u>Red Flags</u>	<u>ECJ case law cited</u>	<u>Similar Cases</u>
				victim. Applicable Law to CASCO insurer's regress action against RCA insurer.	damages.			
3918/2015	21-04-15	Cluj Napoca First Instance Court	art. 4.1 Art. 19	Car accident in Germany. Regress action.	Statute of limitation applicable according to German law.			
20591/2015	11-05-15	Bucharest - District 1 Court	art. 4 art. 15	The law applicable to the right of the Romanian CASCO insurer to regress against the insurer which acts as a representative of the Hungarian RCA insurer with respect to damages that were initially covered by the first in connection with to a car accident that occurred in Hungary.	The Court deemed that, based on article 4.2. of Rome II Regulation, since both insurers are incorporated in Romania, the Romanian law is applicable. The Court also argued that Rome I Regulation is not applicable considering that the relationship between the two insurers does not arise from a contract. The Court considered, based on an interpretative ruling of the High Court of Justice that interpreted the provisions of the Romanian Commercial Code (in force at the date of the car accident), that subrogation did not occur and the insurer claimed a	7/Other EU-Rome I Regulation	N/A	

<u>Decision Number / Doctrine</u>	<u>Date</u>	<u>Court/ Author name and reference number</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings</u>	<u>Red Flags</u>	<u>ECJ case law cited</u>	<u>Similar Cases</u>
					right of its own. Further, the Court dismissed the claim based on the statute of limitation rules set out by the Romanian law.			
6385/2015	18-05-15	Bucharest - District 4 - First Instance Court	Art. 4.1 Art. 19	Car accident in Italy. Italian debtor. Romanian victim.	Italian law applicable. Limitation applicable according to Italian law - 2 years.			
5971/2015	21-05-15	Constanta First Instance Court	art. 4.1	Car accident in Bulgaria	Bulgarian law applicable in action against insurer. Romanian calculation applicable based on art. 14 of Directive 2009/103	7/Other EU - Directive 2009/103		
7348/2015	23-05-15	Bucharest - District 1 Court	art. 4.1. art. 4.3.	The law applicable to the Romanian CASCO insurer's regress action against the debtor's civil auto liability insurer (Romanian company acting as a representative on	In principle, the applicable law is pursuant to art. 4.1. that of the state where the prejudice occurred, irrespective of the country in which the event giving rise to the damage occurred. Nonetheless, as an exception, art. 4.3. regulates the situation when from all the	N/A	N/A	

<u>Decision Number / Doctrine</u>	<u>Date</u>	<u>Court/ Author name and reference number</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings</u>	<u>Red Flags</u>	<u>ECJ case law cited</u>	<u>Similar Cases</u>
				behalf of a British insurer).	circumstances of the case it is clear that the tort is manifestly more closely connected with another country. The court deemed that the facts are more closely connected with Romania, since the CASCO insurance policy was issued by a Romanian insurer. Therefore, the Romanian law was deemed applicable.			
206/2015	27-05-15	Dolj Tribunal	art. 4.1 Art. 18	Car accident in Croatia. Father deceased. Where the damage is produced.	Romanian law since damage is considered as the material and moral damage of the son (funeral costs and life costs in Romania)	7/Other EU - Directive 2009/103		
6157/2015	05-06-15	Bucharest - District 3 - First Instance Court	Art. 4.1	Applicable law to Insurer's regress action when the liability is split between different insurers of the motor head and the trailer	The law applied to the car accident applies to the split of the insurer's liability. Hence the German 50% split of the liability is applicable and not the Romanian Authority's directive regarding the liability			
331/2015	18-06-	Court of Appeal -	art. 4.1	Car accident in Hungary.	no discussion on applicable			

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	15	Bucharest		Moldavian victims. Romanian debtor (Romanian insurer).	law since settlement reached			
1767/2015	19-06-15	Deva First Instance Court	art. 4.1 Art. 19	Car accident in France. BAAR regress action.	French law applicable to the extent of the damages			
9134/3015	23-06-15	Bucharest - District 3 - First Instance Court		Car accident in Germany. Applicable law to Insurer's regress action when the liability is split between different insurers of the motor head and the trailer	The court applies the Romanian Law without any justification, although the claimant based his statement on art. 4 from the Regulation.			
7542/2015	01-07-15	Bucharest - District 2 - First Instance Court	Art. 2 Art. 4.3	Car accident. CASCO insurer's regress action against the guilty party's insurer.	Romanian law applicable justified on the fact that the insurer is Romanian. No mention of the place where the tort happened.	7/other EU - Directive 2009/103		
1586/2015	03-07-15	Bucharest Tribunal	Preamble 17	Car accident in Germany. Romanian victim. Applicable Law to CASCO insurer's	The court dismissed the claim in connection to the applicable law and stated that it can't be the Romanian Law because of the damages	7/Other EU - art. 9, 11 of 44/2001 Regulation		



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				regress action against RCA insurer.	suffered by the CASCO insurer, but the German Law as the place where the tort happened. The CASCO insurer can not make use of the special provisions of Brussels I Regulation regarding the competence of the Romanian courts, because those are meant for the protection of individuals and not professionals.			
1314/2015	09-07-15	Medias First Instance Court	art. 4.3	Car accident in Italy. German insurer. Romanian victim.	The court found that Romanian law would apply since the German insurer used his Green Card equivalent to pay the damages and this would be equivalent with accepting Romanian law			
10056/2015	21-07-15	Bucharest - District 3 - First Instance Court	Art. 4.1	Applicable law to Insurer's regress action when the liability is split between different insurers of the motor head and the trailer	The law applied to the car accident applies to the split of the insurer's liability. Hence the German 50% split of the liability is applicable and not the Romanian Authority's directive regarding the liability	7/other EU - Directive 2009/103		

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248/2015	18-09-15	Neamt Tribunal	Art. 4.1 Art. 19	Car accident in Italy. Romanian Insurer. Regress action by BAAR against Romanian debtor	Romanian law applicable to action initiated by BAAR against the Romanian debtor although accident in Italy. No justification on art. 18. Art. 4.3 and the insurance agreement are mentioned.			
13982/2015	16-10-15	Bucharest - District 3 - First Instance Court		Car accident in Germany. Applicable law to Insurer's regress action when the liability is split between different insurers of the motor head and the trailer	The court applies the Romanian Law only because the claimant did not provide evidence of the German Law.			
14188/2015	20-10-15	Bucharest - District 3 - First Instance Court	Art. 4.1	Applicable law to Insurer's regress action when the liability is split between different insurers of the motor head and the trailer	The law applied to the car accident applies to the split of the insurers liability. Hence the German 50% split of the liability is applicable and not the Romanian Authority's directive regarding the liability	7/other EU - Directive 2009/103	+1 (11165/2005 din 09/08/2015)	

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1051/2015	29-10-15	Court of Appeal - Bucharest	art. 4.1 art. 28	Ship accident in Romania. Bulgarian debtor. Romanian victim	Appeal to Giurgiu Tribunal decision 335/2014. Court of appeal considers that Romanian law is applicable pursuant to Rome II. However, within the Romanian law, the appeal court decides that the Geneva Convention should prevail over the general limitation rules. Although not fully relevant, the court of appeal claims that art. 28 of Rome II is also an argument for applying the Geneva Convention.			
7355/2015	02-11-15	Buftea First Tier Court	art. 4.1	Applicable law to Insurer's regress action when the liability is split between different insurers of the motor head and the trailer	German law applicable. However, granted penalties according to Romanian law (CSA nr.14/2011 Order).			
13564/2015	04-11-15	Bucharest - District 4 - First Instance Court	art. 4.1	Car accident in Bulgaria. Romanian victim. Bulgarian debtor.	Romanian law applicable since the victim lives in Romania (sic!)			

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864/2015	10-11-15	Court of Appeal - Craiova	art. 4.1 Art. 18	Car accident in Croatia. Father deceased. Where the damage is produced.	maintains decision of Dolt Tribunal no 206/2015	7/Other EU - Directive 2009/103		
1844/2015	10-11-15	Court of Appeal - Bucharest	art. 12	Pre-contractual discussions between Spanish investor and Romanian developer for development in Bucharest. Damage claimed for misinformation during these discussions	No determination of applicable law. Claim dismissed based on lack of proof of breach.			
1149/2015	12-11-15	Dej First Instance Court	Art. 4.1	Car accident in Hungary. Action against foreign insurer. Romanian victim	Romanian law applicable (no justification)			

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21953/2015	19-11-15	Bucharest - District 1 Court	art. 4.1.	The law applicable to the right of the RCA insurer of a tractor unit to recover from the RCA insurer of the semi-trailer a half of the damages which were initially fully covered by the first in relation to a car accident that occurred in Germany.	The court deemed the German law as applicable between the two insurers. The court's reasoning was based on a provision of the national legislation, according to which <i>the insurer grants compensation (...) in accordance with the applicable legislation in the state within the territory of which the car accident occurred.</i> The court admitted the plaintiff's claim and ordered the semi-trailer's insurer to cover half of the damages initially paid by the insurer of the tractor unit.	N/A	N/A	
1414/2015	23-11-15	Bucharest Tribunal		Work accident in Austria. Moral damages claim of the Romanian deceased victim's relatives.	Romanian law applicable with no justification.			
9058/2015	10-12-15	BuŢtea First Tier Court	art. 4.1	Applicable law to Insurer's regress action when the liability is split	Romanian law applicable because of closer connection given the contract.			

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				between different insurers of the motor head and the trailer				
2833/2015	14-12-15	Bucharest Tribunal	Art. 4.1 Art. 4.3	Car accident in England. Romanian victim. CASCO insurer regress action against the RCA insurer.	The appeal court maintained the first court's judgement which stated that the Romanian Law was applicable due to the fact that both insurers were Romanian and the tort is closely connected to Romania.			
2140/2015	15-12-15	Court of Appeal - Bucharest	art. 4.1	Car accident in Hungary. Romanian victim. Austrian victim. CASCO insurer of victim.	Hungarian law applicable.			
25397/2015	21-12-15	Bucharest - District 1 Court	N/A	The law applicable to the Romanian CASCO insurer's regress action against the debtor's civil auto liability insurer (Romanian company acting as a representative on	The court omitted to analyses the applicability of the provisions of Rome II Regulation and deemed the Romanian law as applicable.	N/A	N/A	

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				behalf of a Hungarian insurer).				
9546/2015	23-12-15	Buftea First Tier Court	art. 4.1	Applicable law to Insurer's regress action when the liability is split between different insurers of the motor head and the trailer	locus damni applies. However, the court rejects the claim because of lack of proof of foreign law (art. 2562 Civil Code)			
116/2016	19-01-16	Bucharest Tribunal		Car accident in Bulgaria. Romanian victim. CASCO insurer regress action against the RCA insurer.	The first court applied the Romanian Law because the action was in connection to the CASCO insurer's damage. The appeal court determined the Bulgarian Law as applicable, but dismissed the appeal because the appellant, who was the plaintiff in the first court action, did not provide evidence of the Bulgarian Law. The court stated that the plaintiff had a considerable time to prove it between the response to the claim and the	7/Other EU - article 22 of Directive 2009/103/CE		

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					appeal.			
147/2016	16-02-16	Drobeta Turnu-Severin First Instance Court	art. 4.1	Car accident in Romania. Polish victim. Bulgarian insurer	Romanian law applicable as place of damage			
247/2016	19-02-16	Constanta Tribunal	art. 4.1 Preamble 17	Applicable law to claim against insurer	Locus damni applies irrespective of Directive 2009/103	7/Other EU - Directive 2009/103		
615/2016	24-02-16	Bucharest Tribunal	Art. 4.1. Art. 4.2.	Car accident in Spain. Applicable law to Insurer's regress action when the liability is split between different insurers of the motor head and the trailer	The court applied the Romanian Law based on art. 4.2. and the fact that both parties had their usual residence in Romania.			
127/2016	26-02-16	Court of Appeal - Brasov	art. 4.1	Car accident in Romania. Italian debtor. Italian victims.	Romanian law applicable for moral damages.			



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1741/2016	18-03-16	Bucharest Tribunal	art. 4.1	Car accident in Hungary. Austrian guilty party. Romanian victim. Both deceased. Moral damages claim of the victim's parents against RCA insurer.	Hungarian law applicable to determination of moral damages. The claimants did not provide relevant jurisprudence in connection to the Hungarian Law, although they were given a reasonable time, therefore the court applied the Romania Law.			
1651/2016	22-03-16	Arad First Instance Court	art. 4.1	Car accident in Hungary	Romanian law applicable (no justification)			
882/2016	24-03-16	Deva First Instance Court	Art. 4.1 Art. 19	Car accident in France. Romanian driver. No insurance Action initiated by insurer (BAAR Romania who paid BAAR France)	French law applicable to the extent of the damages	7/Other EU - Directive 2009/103		
3540/2016	08-04-16	Timisoara First Tier Court	art. 4.1	Car accident in Austria	The court considered that there is no foreign element in the case, therefore applied Romanian law.	7/Other EU - article 7 Rome I		

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7346/2016	25-04-16	Bucharest - District 1 Court	art. 4 art. 19	The law applicable to the right of the Romanian natural person to claim compensation from the Romanian representative of an Austrian insurer for the damages suffered as a consequence of a car accident that was caused in Austria by another person	The court omitted to analyse the applicability of the provisions of Rome I Regulation and deemed the Romanian law as applicable.	N/A	N/A	
772/2016	06-05-16	Court of Appeal - Bucharest	Art. 4.1	Car accident in Romania. Bulgarian debtor.	Romanian law applicable			
752/2016	30-05-16	Hunedoara Tribunal	art. 4.1	Car accident in France. BAAR Romania paid BAAR France	Romanian law applicable to statute of limitation since BAAR paid the damages, not as a result of the accident, but as a result of the lack of insurance, based on a legal obligation (Directive 2009/103 art. 24). Only after payment BAAR knows the extent of the damage he			

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					needs to recover. French law applicable to extent of damages.			
3509/2016	08-06-16	Bucharest Tribunal	Art. 4.2 Art. 15 (a) (g)	Car accident in Romania. Swiss victim and Romanian guilty party. Applicable law to Swiss insurer's regress against the Romanian Insurer.	The court applied the Romanian Law considering that both the claimant and the guilty party had their usual residence in Romania. The court also mentioned that the civil action in a criminal trial can be solved by applying a different law than the one applied in the criminal action.			
9012/2016	24-06-16	Craiova First Instance Court	Art. 18	Law applicable to direct claim against insurer	Romanian law applicable since the law from the place of the accident			
9047/2016	30-06-16	Bucharest - District 2 - First Instance Court	Art. 4.1	Car accident in Germany. Insurer's regress action when the liability is split between two different Romanian insurers of the motor head and the trailer	Romanian law applicable (no justification)			

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65/2016	28-09-16	Mures Commercial Tribunal	art. 4.1	Car accident in Hungary. Romanian claimant. Physical injuries. German Insurer	Romanian law applicable (no justification). Second appeal in decision 126/2017 Mures Court of Appeal			
727/2016	05-10-16	Arad Tribunal	Art. 4.2	Car accident in Czech Republic. Romanian debtor. Romanian victim	Romanian law applicable since both Romanians			
275/2016	06-10-16	Arad Tribunal	art. 4.1	Car accident in Hungary. Romanian victim.	Romanian law applicable. Confusion between the rules that apply to representation and the material rules that should apply to the accident			
11103/2016	12-10-16	Bucharest - District 4 - First Instance Court	art. 4.1	Car accident in Bulgaria. Romanian victim. Bulgarian debtor.	Romanian law applicable since the damage was suffered by a Romanian car (sic!).			
604/2016	19-10-16	Suceava Tribunal	Art. 4.1	Car accident in Italy. BAAR Romania paid BAAR Italy. Regress action.	Romanian law applied. No justification.			
1685/2016	20-10-	Court of Appeal -	Art. 4.1	Car accident in Hungary. Austrian	Hungarian law applicable to determination of moral			

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	16	Bucharest		debtor. Romanian victim.	damages			
2158/2016	31-10-16	Cluj Tribunal Court	Art. 4.1	Car accident in Romania. Hungarian claimants	Romanian law applicable, as at least a part of damage took place in Romania.			
1462/2016	08-11-16	Hunedoara Tribunal	Art. 4.1	Car accident	Locus damni applies			
8514/2016	28-11-16	Buftea First Tier Court	Art. 4.1	Applicable law to Insurer's regress action when the liability is split between different insurers of the motor head and the trailer	German law applicable, but rejected the claim because of lack of evidence of foreign law			
362/2016	15-12-16	Bihor Tribunal	Art. 4.1	Car accident in Hungary	Hungarian law applicable for action against insurer			
99/2016	22-12-16	Mures Commercial Tribunal	Art. 4.2 Art. 4.3	Car accident in Bulgaria. Victims are relatives of the debtor. Romanian insurer.	Romanian law applicable since all parties are Romanians and insurance agreement is under Romanian law			
35/2017	14-02-17	Court of Appeal -	art. 4.1	Applicable law insurer.	Rome II applicable even if insurer agent designated	7/Other EU - Directive		

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		Galati			according to Directive 2009/103, based on preamble 35 from this Directive	2009/103		
131/2017	16-02-17	Dolj Tribunal	Art. 4.1 Art. 19	Car accident in Holland. BAAR Romania paid BAAR Holland. Regress against Romanian debtor	Holland law applicable since place of accident and damage.			
126/2017	27-02-17	Court of Appeal - Targu Mures	Art. 4.1	Indirect damages - surgical interventions in different country than the one in which the initial medical treatment happened. Large interpretation of the direct damage, even if the accident happened in Hungary	Romanian law applicable were most of the following surgical treatment was performed and the moral damages happened here			
327/2017	03-03-17	Alba Tribunal	art. 4.1	Car accident in Romania. Spanish debtor. Romanian	Romanian law applicable since damage in Romania			

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				victim.				
50/2017	08-03-17	Bucharest Tribunal		Producing in Germany a good that is defective and learning of this situation in Romania through a physical impact between this good and another object	Appeal to District 4 - First instance Court Decision (the number is censored). The damage occurred in Germany, but its effects were found in Romania. Lack of relevance of Regulation 864/2007 for establishing general competence, since this Regulation regulates the law applicable to the dispute.			
1249/2017	21-03-17	Bucharest Tribunal	Art. 4.1 Art. 19	Car accident in France. Applicable law to Insurer's regress action when the liability is split between different insurers of the motor head and the trailer	The claimant filed an appeal in order to obtain late payment penalties, which the first court did not admit, because they were not grounded on the French Law. The appeal court maintained the judgement and stated that the French Law is applicable to both damages and late payment penalties.			
1263/2017	30-03-17	Cornetu First Instance Court	art. 4.2	car accident outside Romania. Two Romanian involved	Romanian law applicable			

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506/2017	04-04-17	Alba Tribunal	Art. 4.1 Art. 19	Car accident in Poland. Romanian debtor. BAAR Romania claim after payment to BAAR Poland	Romanian law applicable to regress. Defendant not liable (just employee of the owner). Polish law applicable to the extent of damages			
467/2017	21-04-17	Timis Tribunal	Art. 4.1 Art. 19	Car accident in Vienna. BAAR regress action.	The determination of the liable person was not made under any law. Therefore no person could be identified as being liable.			
354/2017	22-05-17	Arad Tribunal	Art. 4.1	Car accident in Slovenia. Deceased	Slovenian law applicable to damage determination (indirect damages of family members).	7/Other EU - Directive 2009/103 Case C-350/14		
4254/2017	24-05-17	Bucharest - District 1 Court		The law applicable to the right of the medical insurer to recover the costs related to medical services attended by the victim from the RCA insurer of the driver of a tractor unit who caused a car	Even though the plaintiff had not cited the Rome II Regulation, the court deemed that the Romanian law was applicable based on its provisions that were cited ex officio by the court. Nonetheless, the court's analysis was limited to referring to article 4 of the Regulation, without	N/A	N/A	



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				accident in Hungary.	developing neither the arguments based on which the Regulation was cited, nor the arguments based on which the Romanian law was deemed applicable.			
2133/2017	31-05-17	Bucharest Tribunal	art. 4.1 art. 19	Car accident in Germany. Applicable law to Insurer's regress action when the liability is split between different insurers of the motor head and the trailer	The law applied to the car accident applies to the split of the insurers liability. Hence the German 50% split of the liability is applicable and not the Romanian Authority's directive regarding the liability	7/Other EU - article 7 of ROME I Regulation	C-359, C-475/14	
2494/2017	30-06-17	Ilfov Tribunal	Art. 4.1 Art. 19	Applicable law to Insurer's regress action when the liability is split between different insurers of the motor head and the trailer	The law applied to the car accident applies to the split of the insurers liability. Hence the German 50% split of the liability is applicable and not the Romanian Authority's directive regarding the liability	7/Other EU - article 7 Rome I	C-359/2014 și C-475/14	
1054/2017	18-09-17	Hunedoara Tribunal	art. 19	Car accident in France	Romanian law applicable to regress action. BAAR Romania cannot request payment from employee since			2 more similar

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					the company had the obligation to have an insurance according to Romanian law.			
163/2017	21-09-17	Bihor Tribunal	Art. 4.1	Car accident in Hungary. German insurer.	Romanian law applicable. NO justification. Action aimed at obtaining only moral damages for death of brother		Decision identical to 1280/2017	
1280/2017	06-10-17	Timis Tribunal	Art. 4.1 Art. 18	Car accident in Hungary. Hungarian insurer. Claimant is sister of Romanian victim	Romanian law applicable based on 4.2 No other argument.			
660/2017	12-10-17	Court of Appeal - Timisoara	art. 4.1, 4.2, 15, 18	Car accident in Slovenia	Locus damni applies.	7/Other EU - art. 10 of 1215/2012 Regulation	C-350/14	

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3701/2017	16-10-17	Ilfov Tribunal	art. 4	car accident outside Romania.	The court applies Romanian law without reasoning			17 more similar
214/2017	17-10-17	Satu Mare Tribunal	Art. 4.1 Art. 19	Car accident in Italy. BAAR Romania paid BAAR Italy. Regress action.	Italian law applicable.			4 more similar cases

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11602/2017	01-11-17	Bucharest - District 2 - First Instance Court	art. 19	Applicable law to Insurer's regress action when the liability is split between different insurers of the motor head and the trailer	The court firstly qualifies whether the liability is contractual or extra-contractual according to the Romanian Law, then concludes that the Romanian Law is applicable and denies the right to split liability between insurers.	7/other EU - article 7 Rome I		
392/2017	01-11-17	Arad Tribunal	art. 4.1	Car accident in Czech Republic	Czech law applicable. Parties failed to prove the content of the law, therefore the law applied Romanian law based on article 2562 Covil Code			
5878/2017	02-11-17	Sibiu First Court Tier	art. 4.1	Applicable law to Insurer's recourse action when the liability is split between different insurers of the motor head and the trailer	The law applied to the car accident applies to the split of the insurers liability. Hence the German 50% split of the liability is applicable and not the Romanian Authority's directive regarding the liability. Regarding the penalties, the court admitted the requested considering applicable a national provision (Norme no. 23/2014)	7/Other EU - article 7 Rome I	C-359/2014 și C-475/14	

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3304/2017	09-11-17	Court of Appeal - Pitesti	art. 4.1	Car accident in Germany	applicable law decided by Supreme Court in Decision no. 404/19.02.2016. German law should have been applied to all aspects, moral damages included. Including the amount of the revenue to which the court should refer to.			
6589/2017	10-11-17	Bucharest - District 1 Court	art. 4.1.	The law applicable to the right of the RCA insurer of a tractor unit to recover from the RCA insurer of the semi-trailer a half of the damages which were initially fully covered by the first in relation to a car accident that occurred in Germany.	The court deemed that the German law is applicable based on the provisions of articles 7.2, 7.4 and 7.4 of Rome I Regulation, as this is the law of the state where the ensured risk occurred. Consequently, the court admitted the plaintiff's claim.	7/Other EU - article 7 of ROME I Regulation	N/A	one more similar
4277/2017	15-11-17	Ifov Tribunal	art. 4.3	Car accident in Germany	Romanian law applicable, having regard to the fact that the circumstances of the case clearly show a closer connection with Romania than			

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					with Germany			
5651/2017	16-11-17	Arad First Instance Court	Art. 4.1	car accident outside Romania.	Slovenian law applicable			4 more similar
1071/2017	28-11-17	Dolj Tribunal	art. 4.1 art. 19	Car accident in Norway. BAAR Romania paid BAAR Norway	Romanian law applicable for regress. NO indication of the law applicable to the damage. Court applies directly the Romanian law for recovery of the amounts from the person who had the obligation to insure the car			
1963/2017	06-12-17	Romanian Supreme Court of Justice	Art. 4.1	Car accident in Spain.	Spanish law applicable to damages requested by relatives. Limitation period determined under Spanish law.			39 more similar decisions
1289/2017	07-12-17	Ialomita Tribunal	Art. 4.1 Art. 19	Car accident in Italy caused by Romanian without insurance. Action initiated by insurer (BAAR Romania who paid	Romanian law applicable for regress. German law applicable for the extent of the damage (NO justification of involvement of Germany)			16 more similar decisions

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				BAAR Italy) against debtor				
4858/2017	15-12-17	Bucharest Tribunal	Art. 4.1	Car accident in Germany. Romanian victim. Moral damages claim of the Romanian deceased victim's relatives against the RCA insurer.	Romanian law applicable because the claimants suffered the moral prejudice in Romania, irrespective where the actual tort happened.			25 more similar decisions
2032/2017	15-12-17	Cluj Tribunal Court	Art. 4.1	Car accident in Belgium.	Romanian law applicable (no reasoning)			5 more similar decisions
2378/2017	19-12-17	Court of Appeal - Bucharest	Art. 4.1	Car accident in Germany. Romanian victim.	German law applicable. Since claimant did not prove its content, the claim was dismissed			9 more similar decisions on penalties

<u>Decision Number / Doctrine</u>	<u>Date</u>	<u>Court/ Author name and reference number</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings</u>	<u>Red Flags</u>	<u>ECJ case law cited</u>	<u>Similar Cases</u>
3833/2018	19-12-17	Sibiu First Court Tier	art. 4.1	Applicable law to Insurer's recourse action when the liability is split between different insurers of the motor head and the trailer	The law applied to the car accident applies to the split of the insurers liability. Hence the German 50% split of the liability is applicable and not the Romanian Authority's directive regarding the liability. Regarding the penalties, the court rejected the request with the reason that such penalties cannot be granted according to Romanian Law. Instead, the court found that the German law is applicable, and therefore considered that it cannot be applicable in conjunction with Order 14/2011 regarding the calculation of penalties.	7/Other EU - article 7 Rome I	N/A	2 more similar decisions
5247/2017	20-12-17	Bucharest Tribunal	Art. 4	Car accident in Austria. Romanian victim. Austrian guilty party. Applicable law to the damages claim.	The appeal court changed the first court's judgement and applied the Austrian Law due to the fact that the tort happened in Austria, regardless of the nationality of the victim and the Romanian representative of the Austrian insurer.			



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10119/2017	22-12-17	Bucharest - District 1 Court	art. 4.1 art. 19	The law applicable to the right of the RCA insurer of a tractor unit to recover from the RCA insurer of the semi-trailer a half of the damages which were initially covered by the first in relation to a car accident that occurred in Germany.	The Romanian law shall govern the regress between insurers since the insurance contract is governed by the Romanian law. The Romanian law entitles the insurer of the tractor unit to claim regress against the insurer of the semi-trailer only if the semi-trailer contributed to the accident because of a technical issue. Therefore, since such a technical issue was not proved, the Romanian law does not recognize the right to regress.	7/Other EU - article 7 of ROME I Regulation	N/A	
7107/2017	22-12-17	Sibiu First Court Tier	art. 4.1	Applicable law to Insurer's recourse action when the liability is split between different insurers of the motor head and the trailer	The law applied to the car accident applies to the split of the insurers liability. Hence the German 50% split of the liability is applicable and not the Romanian Authority's directive regarding the liability	7/Other EU - article 7 Rome I	C-359/2014 și C-475/14	Identical cases: 3614/2019, 346/2018, 2910/2019, 699/2020, 1791/2020, 1790/2020, 3274/2019, 3415/2020, 2264/2020, 4849/2018, 1725/2019,

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								5767/2018, 207/2019, 4189/2018, 376/2020, 1095/2020, 3095/2018 (citata si C-350/14), 3960/2019, 3386/2020, 4309/2018, 1156/2019 (citata si C-350/14), 1156/2019 (citata si C-350/14), 2066/2018, 884/2019
10124/2017	27-12-17	Bucharest - District 1 Court	art. 10.1.	The law applicable to unjust enrichment concerning a relationship existing between the parties, arising out of a contract that is closely connected with that unjust	The defendant has the burden of proof that the Romanian law was chosen by the parties to govern the existing contractual arrangement, in accordance with article 3.1. of Rome I Regulation no. 593/2008.	7/Other EU - article 3.1. of Rome I Regulation	N/A	

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				enrichment.				
328/2018	23-01-18	Bucharest - District 1 Court	art. 4	The law applicable to the right of the RCA co-insurer to recover from another RCA co-insurer half of the damages which were initially covered by the first in relation to the victim of a car accident that occurred in UK.	The Court did not analyse the applicability of the provisions of Rome I Regulation and dismissed the claim based on lack of proof that the policy holder was guilty for the car accident.	N/A	N/A	
402/2018	31-01-18	Bucharest - District 1 Court	art. 4	The law applicable to the right of the RCA insurer of a tractor unit to recover from the RCA insurer of the semi-trailer a half of the damages which were initially	The Court deemed that the German law is applicable, without developing arguments in this respect. Eventually, the RCA insurer of the semi-trailer voluntarily paid half of the damages.	N/A	N/A	

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				fully covered by the first in relation to a car accident that occurred in Germany.				
1925/2018	23-03-18	Bucharest - District 1 Court	art. 4.1	The law applicable in case of split insurers' liability for car accident, when a part of the vehicle (the semi-trailer) is insured by an insurer and another part of the vehicle (the tractor unit) is insured by another insurer.	The German law is applicable, since the accident occurred in Germany. Therefore, the Court ordered the semi-trailer's insurer to cover half of the damages that were initially covered by the insurer of the tractor unit. However, as regards late payment penalties, the Court solved the claim considering the provisions of the Romanian law.	N/A	N/A	
262/2018	23-04-18	Court of Appeal - Timisoara	art. 4.2	Car accident outside Romania	Applicable law does not trigger competence of Romanian courts			No Romanian case law cited.
3035/2018	16-05-18	Bucharest - District 1 Court	art. 4 art. 18 art. 19	The law applicable to the right of the RCA insurer of a tractor unit to fully recover from the RCA insurer of the	The court deemed that the French law is applicable between the two insurers.	N/A	N/A	

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				semi-trailer the damages which were initially fully covered by the first in relation to a car accident that occurred in France.				
448/2018	06-06-18	Suceava Tribunal	art. 4.1 Art. 19	Car accident in Italy. BAAR Romania paid BAAR Italy. Regress action.	Italian law applicable to the damages and Romanian applicable to regress action. German law is referred without any justification			
2520/2018	06-06-18	Ilfov Tribunal	Art. 4.2	Car accident in Germany	German law applicable in the first court, but claim rejected because of lack of proof of foreign law. In the appeal, the court applies Romanian law without reasoning.			
2323/2018	07-06-18	Romanian Supreme Court of Justice	Art. 4.1	Car accident in Slovenia. Deceased. Indirect damages for relatives.	Slovenian law applicable to damage determination (indirect damages of family members). Decision 660/2017 from Timisoara Court of Appeal			

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5225/2018	09-06-18	Bucharest - District 1 Court	N/A	The law applicable to the right of the CASCO insurer of a vehicle to recover from the RCA insurer of the other vehicle the damages which were initially fully covered by the first in relation to a car accident that occurred in Republic of Moldova.	The Court deemed that it is not authorized to solve the case, since the accident occurred in Republic of Moldova and the defendant's domicile is in that country, based on the provisions of a bilateral treaty between Romania and Republic of Moldova in the field of judiciary assistance. Also, the Court argued that the prejudice was produced in Republic of Moldova and, in any case, the Romanian law is not applicable.	N/A	N/A	
735/2018	15-06-18	Court of Appeal - Bucharest	art. 4.1	Labour related accident in Austria. Romanian worker deceased. Claim initiated by wife and children	Romanian law applicable - no justification. Tort law applicable to labour accident in Austria (no contractual connection between the relatives of the victim and the employer)	2/Corporate abuses		
829/2018	13-09-18	Timis Tribunal	Art. 10.3 art. 4.3	Unjust use of train cars in Romania	Romanian law applicable to unjust use of trains cars in Romania by a Romanian entity			identical- 3548/2019, 2600/2019, 2586/2019

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208/2018	19-09-18	Satu Mare Tribunal	Art. 4.1 Art. 19	Car accident in Italy. BAAR Romania paid BAAR Italy. Regress action.	Italian law applicable.			
3769/2018	24-09-18	Bucharest Tribunal		Car accident in Germany. Insurer with terminated contract paid the damages. Regress action against the actual insurers of the motor head and the trailer.	The appeal court applied the Romanian Law without any justification.			Identical 1176/2020, 124/2018, 3879/2019, 4464/2013
9418/2018	01-10-18	Craiova First Instance Court	Preamble 18 art. 4.3	Car accident in Great Britain. Romanian debtor. Italian creditor	Romanian law applicable since no connection of the parties with Great Britain			
4095/2018	08-10-18	Bucharest Tribunal	Art. 4	Car accident in France between two Romanian citizens. Applicable Law to CASCO insurer's regress action against RCA insurer.	The court applied the Romanian Law to the regress action as well as for the tort, considering that both the victim and the guilty party had their usual residence in Romania.	7/Other EU - article 7 of ROME I Regulation		

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4262/2018	10-10-18	Bucharest Tribunal	Art. 4.1 Art. 19 Art. 20	Car accident in Germany. Applicable law to Insurer's regress action when the liability is split between different insurers of the motor head and the trailer	The law applied to the car accident applies to the split of the insurers liability. Hence the German 50% split of the liability is applicable, because the Regulation stipulates that the liability is extra-contractual even when one of the insures who paid goes against the other one.			
4083/2018	15-10-18	Ilfov Tribunal	Art. 4.1 Art. 19	Applicable law to Insurer's regress action when the liability is split between different insurers of the motor head and the trailer	German law applicable, because of the place of accident. The first court rejected the claim because of lack of evidence of foreign law. In the appeal phase, the court applies Romanian law without reasoning.			
5936/2018	18-10-18	Bucharest - District 1 Court	art. 4	The law applicable to the right of the RCA insurer of the tractor unit to recover from the RCA insurer of the semi-trailer a half of the damages which were initially fully covered by	The court omitted to analyse the applicability of the provisions of Rome I Regulation and deemed the Romanian law as applicable.	N/A	N/A	



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				the first in relation to a car accident that occurred in Germany.				
3167/2018	18-10-18	Bucharest Tribunal	Art. 4.1 Art. 15 (a) (h) art. 18 Art. 19	Car accident in Romania. Swiss victim and Romanian guilty party. Applicable law to Swiss insurer's regress against the Romanian Insurer.	The court applied the Romanian Law due to the place where the tort happened.			
5106/2018	29-11-18	Ilfov Tribunal	art. 4.1	Car accident in Germany	German law applicable. However, granted penalties according to Romanian law.	7/Other EU - art. 7.2 from Regulation no. 593/2008		
795/2019	02-12-18	Bucharest - District 1 Court	N/A	The applicable law to the right of the RCA insurer of a tractor unit to recover from the RCA insurer of the semi-trailer half of the damages which were initially fully cover by the	The Court omitted to analyse the applicability of the provisions of Rome II Regulation and noticed that the insurer of the semi-trailer did not challenge the plaintiff's claims and that it had voluntarily reimbursed a part of the claimed damages. The Court ordered the insurer	N/A	N/A	

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				first in relation to a car accident that occurred in Germany.	of the semi-trailer to cover the rest of the damages (the difference between half of the damages paid by the insurer of the tractor unit and the damages reimbursed by the insurer of the semi-trailer). With respect to late payment penalties, the Court solved this claim according to the rules set out by the Romanian law.			
1399/2018	07-12-18	Mures Tribunal	art. 1.1	Confusion with Regulation Brussels	Applicable law does not trigger competence	7/Other EU - Regulation 1215/2012		
2578/2018	11-12-18	Court of Appeal - Bucharest	Art. 4.1	Car accident in Romania. Swiss victim.	Romanian law applicable irrespective of the law that applies to the relation between the insurer and the victim			
79/2018	14-12-18	Maramures Tribunal	art. 4.1	Car accident in Hungary. Romanian victim and debtor	Romanian law applicable			
12830/2018	18-12-18	Bucharest - District 2 - First Instance	Art. 1.1 Art. 4.1	Car accident in Italy. BAAR Romania paid	Italian law applicable.			

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		Court		BAAR Italy. Regress action.				
5944/2018	19-12-18	Bucharest Tribunal		Car accident in Germany. Applicable law to Insurer's regress action when the liability is split between different insurers of the motor head and the trailer	The appeal court used the first court's judgement which stated that the German Law is applicable as res judicata and applied the German Law without further analysing the conflict of laws. (The first court dismissed the claim due to the lack of proof of the German Law.)			
5901/2018	19-12-18	Bucharest Tribunal	Art. 4.1	Car accident in Belgium involving a vehicle normally parked in Belgium and insured with an Austrian insurance company. Applicable law to Insurer's action.	Appeal to District 4 - First instance Court Decision (the number is censored). Belgian law applicable for the damages claim.			
7267/2018	19-12-18	Buftea First Tier Court	Art. 4.1, 19	Car accident in Switzerland	Switzerland law applicable, according to Decision no. 1/2012 of the Joint Committee established by the Agreement between the European Community and its			

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					Member States, of the one part, and the Swiss Confederation, of the other part. However, granted penalties according to Romanian law			
102/2019	10-01-19	Bucharest Tribunal	Art. 2 Art. 4 Art. 15 Art. 19	Car accident in Germany. Applicable law to Insurer's regress action when the liability is split between different insurers of the motor head and the trailer	Although the appeal court was of the same opinion as the first court, that being that the Romanian Law is applicable due to the fact that both insurers were Romanian and their legal relationship is governed by the Romanian Law, the court changed the judgement because the plaintiff had paid 50% of the damages in the meantime and it was considered an admission of debt.	7/Other EU - article 7 of ROME I Regulation		
349/2019	31-01-19	Bucharest Tribunal	Art. 4.1 Art. 19	Car accident in Germany. Applicable law to Insurer's regress action when the liability is split between different insurers of the motor head and	Appeal to District 1 First Instance Court Decision no. 1646/2018. The law applied to the car accident applies to the split of the insurers liability. The German 50% split of the liability is applicable.		C – 359/14, C – 475/14	

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				the trailer and to the management fee				
1114/2019	05-03-19	Bucharest - District 1 Court	art. 4.1 art. 19	The law applicable to the right of the RCA insurer of a tractor unit to recover from the RCA insurer of the semi-trailer a half of the damages which were initially fully covered by the first in relation to a car accident that occurred in Germany.	The law applicable is German law - the law where the accident/prejudice was produced. Romanian law is not applicable in what concern the regress between insurers. Regarding the penalties, the court admitted the requested considering applicable a national provision	7/Other EU - article 7 of ROME I Regulation	Joined cases C-359/14 and C-475/17	
1406/2019	11-03-19	Bucharest - District 1 Court	art. 4.1 art. 19	The law applicable to the right of the RCA insurer of a tractor unit to recover from the RCA insurer of the semi-trailer a half of the damages which were initially fully covered by	The law applicable is German law - the law where the accident/prejudice was produced, Romanian law is not applicable in what concern the regress between insurers. Regarding the penalties, the court admitted the requested considering applicable a national	7/Other EU - article 7 of ROME I Regulation	Joined cases C-359/14 and C-475/17	

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				the first in relation to a car accident that occurred in Germany.	provision			
1722/2019	11-03-19	Bucharest - District 5 - First Instance Court	art. 4.1	Physical assault in Romania. Mobile phone destroyed during visit in Romania by divorced father to child in mother's house. Father is an arab citizen. NO clear connection with other EU country	Romanian law applied. NO justification			
1155/2019	28-03-19	Bucharest Tribunal		Car accident in Germany. Applicable law to Insurer's regress action when the liability is split between different insurers of the motor head and the trailer	The claimant filed an appeal in order to obtain 50% of the management fee which he paid along with the damages. The court applied the German Law considering the place where the tort happened and based on the Internal Regulations of the Council of Bureaux.	7/Other EU - article 7 of ROME I Regulation	C-359, C-475/14	

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604/2019	01-04-19	Court of Appeal - Bucharest	Art. 4.1	Car accident in Germany. Romanian victim deceased.	Relatives request moral damages. C-220/88 reflects that the damage is generated in the country where the accident took place. However, since the victim was living in Romania, the damages were directly generated in Romania. Therefore, Romanian law applicable - Comment - court considers that because the victim lived in Romania, direct damages occurred here.		C-350/14	
1900/2019	01-04-19	BuŢea First Tier Court	Art. 4.1	Applicable law to Insurer's regress action when the liability is split between different insurers of the motor head and the trailer	Locus damni applies			

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7452/2019	11-04-19	Bucharest - District 1 Court	art. 4 art. 19	Th law applicable to the right of the RCA insurer of the tractor unit to recover from the RCA insurer of the trailer a half of the damages which were initially fully covered by the first in relation to a car accident that occurred in Germany.	The Court deemed that article 19 of Regulation Rome II, as it was interpreted by the ECJ, provided that subrogation of the insurer that indemnified the victim, as regards the victim's rights against the person responsible for the car accident is regulated by the law applicable to the third party's obligation, respectively by the law applicable to the insurer that indemnified the victim of the accident. Also, the same provisions regulate that the law applicable for determining the person to which the prejudice is imputable and the way of splitting liability is determined according to article 4 and following of Rome II Regulation, namely the law of the country where the prejudice was produced. Further, the Court concluded that the persons responsible for the accident and the extent of their liability is	7/Other EU - article 7 of ROME I Regulation	Joined cases C-359/14 and C-475/14	



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					<p>determined according to the law of the country where the car accident occurred, based on article 4 of Rome II Regulation. Also, the insurer's obligation to cover the prejudice and its possibility to resort to subrogation is determined according to the law applicable to the insurance contract, based on article 7 of Rome I Regulation.</p> <p>Consequently, the Romanian law is not applicable because it only regulates the right of the insurer who indemnified the victim to subrogate in the victim's rights.</p> <p>Therefore, the Court deemed the German law is applicable with respect to the tort and that it regulates the person to which the prejudice is imputable, as well as the extend of liability. Hence, the RCA insurer of the tractor unit is entitled to recover from the other insurer half of the damages paid to the victim.</p> <p>As regards late payment</p>			

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					penalties, the Court deemed that the German law is also applicable and dismissed this claim because the plaintiff did not prove the German law that regulates the legal regime of late payment penalties.			
7417/2019	11-04-19	Bucharest - District 1 Court	art. 4.1 art. 4.2	The law applicable law to the right of the RCA insurer of a tractor unit to recover from the RCA insurer of the semi-trailer half of the damages	The Court deemed that the Romanian law was applicable because the prejudice was produced in Romania. Irrespective that the car accident occurred in Germany, the payment of the damages by the first insurer	N/A	N/A	

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				which were initially fully cover by the first in relation to a car accident that occurred in Germany.	was made from Romania.			
2336/2019	19-04-19	Bucharest - District 1 Court	art. 4 art. 19	The law applicable to the right of the RCA insurer of the tractor unit to recover from the RCA insurer of the semi-trailer half of the damages which were initially fully covered by the first in relation to a car accident that occurred in Germany.	The law of the place where the car accident occurred, namely Germany, determines both the debtors who must compensate the damages caused to the victim and whether liability can be split in relation to the victim. The Romanian law shall govern the regress between insurers since the insurance contract is governed by the Romanian law. The Romanian law entitles the insurer of the tractor unit to claim regress against the insurer of the semi-trailer only if the semi-trailer contributed to the accident because of a technical issue. Therefore, since such a technical issue was not proved, the Romanian law does not recognize the right	7/Other EU - article 7 of ROME I Regulation	Joined cases C-359/14 and C-475/14	

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					to regress.			
110/2019	23-04-19	Brasov Tribunal	Art. 4.1	Helicopter accident in Romania	Romanian law applicable to German victim			
218/2019	24-04-19	Dolj Tribunal	Art. 4.1 Art. 19	Car accident in Italy. Romanian debtor. BAAR regress action for damages paid to BAAR Italy	Romanian law applicable (no justification)			
131/2019	24-04-19	Court of Appeal - Suceava	Art. 4.1	Car accident in Poland.	The appeal court dismisses the claim because it was grounded wrognfully on Romanian law. The right to opt for claim against insurer is irrevocable: cannot go after the insurer representative in Romania if already asked the prejudice from the Polish insurer			

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132/2019	07-05-19	Dolj Tribunal	Art. 4.1	Car accident in Germany	Romanian law applicable. No justification.			
1383/2019	09-05-19	Ifov Tribunal	Art. 4.2	Car accident in France	Romanian law applicable taking into account also that the person whose liability is invoked and the persons who suffered the damage have the residency in Romania			
491/2017	17-05-19	Court of Appeal - Bucharest	Art. 4.1	Car accident in Germany. Motor head versus trailer insurer.	German law applicable as per C-359/14.			
167/2019	23-05-19	Court of Appeal - Suceava	Art. 4.1	Car accident in Romania. Hungarian debtor	Romanian law applicable to all aspects			
1723/2019	31-05-19	Ifov Tribunal	Art. 4.2	car accident in Germany	Romanian law applicable taking into account also that the person whose liability is invoked and the persons who suffered the damage have the residency in Romania			
216/2019	06-06-19	Court of Appeal - Alba Iulia	Art. 4.1	Applicable law to Insurer's regress action when the liability is split between different	The law applied to the car accident applies to the split of the insurers liability. Hence the German 50% split of the liability is applicable and not	7/Other EU - article 7 Rome I	C-359/2014 și C-475/14	

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				insurers of the motor head and the trailer	the Romanian Authority's directive regarding the liability			
241/2019	18-06-19	Court of Appeal - Alba Iulia	art. 4.1	Applicable law to Insurer's regress action when the liability is split between different insurers of the motor head and the trailer	The law applied to the car accident applies to the split of the insurers liability. Hence the German 50% split of the liability is applicable and not the Romanian Authority's directive regarding the liability	7/Other EU - article 7 Rome I	C-359/2014 și C-475/14	
3688/2019	18-06-19	Bucharest - District 1 Court	art. 4.1.	The law applicable to the right of the RCA insurer of a tractor unit to recover from the RCA insurer of the semi-trailer a half of the damages which were initially fully covered by the first in relation to a car accident that occurred in Germany.	The law applicable is German law - the law where the accident/prejudice was produced. Romanian law is not applicable in what concern the regress between insurers.	N/A	Joined cases C-359/14 and C-475/16	
254/2019	20-06-19	Court of Appeal -	art. 4.1	Applicable law to Insurer's regress action when the	The law applied to the car accident applies to the split of the insurers liability. Hence	7/Other EU - article 7 Rome I	C-359/2014 și C-475/14	

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		Alba Iulia		liability is split between different insurers of the motor head and the trailer	the German 50% split of the liability is applicable and not the Romanian Authority's directive regarding the liability			
2957/2019	20-06-19	Arad First Instance Court	Art. 4.1	Car accident in Czech Republic. Romanian victim. Czech responsible	Czech law applicable according to parties, but court analysis Romanian law			
4039/2019	25-06-19	Galati First Instance Court	Art. 4.1 Art. 19	Car accident in Luxembourg. Request for damages paid by the repair service	Romanian law considered to be applicable (no justification)			
4282/2018	29-06-19	Bucharest - District 1 Court	N/A	The law applicable to the right of the of the CASCO insurer of a vehicle to recover from the RCA insurer of the other vehicle the damages which were initially fully covered by the first in relation to a car accident that occurred in Republic of	Considering the provisions of Regulation (EU) no. 1215/2012, the Court deemed that it is not authorized to solve the case, since the accident occurred in Republic of Moldova.	7/Other EU - articles 10-16 of Regulation (EU) no. 1215/2012, articles 19 and 12 of Directive 103/2009/EC.	N/A	

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				Moldova.				
2061/2019	10-07-19	Bucharest Tribunal	Art. 4	Car accident in England. Romanian victim. Czech guilty party - criminally charged. Damages claim against the insurer.	The court decided that the applicable law is the Czech Law because the tort happened in the Czech Republic.			
743/2019	18-07-19	Maramures Tribunal	art. 4.2	Car accident in Hungary. Two Romanians involved	Romanian law applicable			
2761/2019	23-07-19	Bucharest Tribunal	art. 4.1 art. 15 (a)(b) art. 19	Car accident in Germany. Applicable law to Insurer's regress action when the liability is split between different insurers of the motor head and the trailer	The law applied to the car accident applies to the split of the insurers liability. Hence the German 50% split of the liability should be applicable and not the Romanian Authority's directive regarding the liability, but the Court dismissed the appeal because the claimant did not provide evidence of the tort	7/Other EU - article 7 of ROME I Regulation	C-359, C-475/14	



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					happening.			
2216/2019	23-07-19	Bucharest Tribunal		Car accident in Austria. Romanian victim. Austrian guilty party. Applicable law to the damages claim.	The court applied the Romanian Law considering that the actual damages happened in Romania, where the claimant lived and where he was subject to hospitalization. No other justification related to Rome II Regulation.			
8073/2019	12-09-19	Bucharest - District 1 Court	It does not result from the decision what were the provisions invoked by the plaintiff.	The law applicable to the right of the Romanian RCA insurer of a semi-trailer to recover from the Romanian natural person driving the tractor unit of the vehicle (which was not insured) the damages paid to the German insurance company that acted as a representative of	The court omitted to analyse the applicability of the provisions of Rome I Regulation and deemed the Romanian law as applicable.	N/A	N/A	

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				the Romanian insurer in Germany, for a car accident caused by the said vehicle in Germany.				
5817/2019	18-09-19	Bucharest - District 1 Court	art. 4.1.	The law applicable to the right of the RCA insurer of a tractor unit to recover from the RCA insurer of the semi-trailer a half of the damages which were initially fully covered by the first in relation to a car accident that occurred in Germany.	The court omitted to analyse the applicability of the provisions of Rome I Regulation and solved the case based on the Romanian law, considering the judiciary confession of the defendant.	N/A	N/A	
313/2019	01-10-19	Court of Appeal - Alba Iulia	art. 4.1	Applicable law to Insurer's regress action when the liability is split between different insurers of the	The law applied to the car accident applies to the split of the insurers liability. Hence the German 50% split of the liability is applicable and not the Romanian Authority's	7/Other EU - article 7 Rome I	C-359/2014 și C-475/14	

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				motor head and the trailer	directive regarding the liability			
563/2019	01-10-19	Bacau Tribunal	art. 4 Art. 23.2	Non-contractual dispute in Germany. Both Romanian parties with professional residence in Germany	German law applicable			
563/2019	01-10-19	Ifov Tribunal	art. 4 Art. 23.2	Applicable law to Insurer's regress action when the liability is split between different insurers of the motor head and the trailer	Romanian law applicable, because the insurer has its headquarters in Romania	7/Other EU - art. 7 from Reg. 593/2008	C-359/2014 și C-475/14	
2655/2019	09-10-19	Petrosani First Instance Court	art. 4.1	Car accident in Great Britain. BAAR Romania pays BAAR Great Britain	Romanian law applied. No justification.			

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8174/2019	12-10-19	Bucharest - District 1 Court	art. 4.1	The law applicable to the right of the RCA insurer of the tractor unit to recover from the RCA insurer of the semi-trailer half of the damages which were initially fully covered by the first in relation to a car accident that occurred in Germany.	The Court deemed that based on article 7 of Rome I Regulation the Romanian law is applicable.	7/Other EU - article 7 of ROME I Regulation	N/A	
3770/2019	14-10-19	Ilfov Tribunal	art. 4	car accident in Germany	German law applicable, because of the place of accident. The court reasoned that it has no impact that the payment was made in Romania, the place of accident being relevant	7/Other EU - article 7 Rome I	C-359/2014 și C-475/14	
6208/2019	21-10-19	Bucharest - District 1 Court	N/A	The law applicable to the right of the RCA insurer of a tractor unit to recover from the RCA insurer of the semi-trailer a half	The court omitted to analyse the applicability of the provisions of Rome I Regulation and solved the case based on the Romanian law, considering the judiciary confession of the defendant.	N/A	N/A	

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				of the damages which were initially fully covered by the first in relation to a car accident that occurred in Germany.				
1685/2019	21-10-19	Court of Appeal - Bucharest	art. 4.1	Car accident in Romania. German victim. Romanian debtor.	Court decides that German law is applicable to regress of German Insurer against Romanian insurer. (no details)			
1034/2019	22-10-19	Timis Tribunal	Art. 4.1 Art. 19 Art. 16	Applicable law - car accident Subrogation of car service for the recovery of the insurance Maximum amount that can be recovered by subrogee	Hungarian law applicable. Art. 19 allows another party to claim the damages Art. 16 allows Romanian mandatory provisions that include the obligation to cover all prejudice (art. 10.e Law 132/2017)			
141/2019	22-10-19	Bucharest Tribunal	Art. 4.1 Art. 17 of Preamble	Car accident in France. Damages claim	Appeal to District 4 First Instance Court Decision no. 3108/2019. French law applicable to the accident and for the damages claim.			

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4050/2019	23-10-19	Targu Mures First Instance Court	Art. 4.3 Art. 19	Car accident in Germany. Romanian debtor.	Romanian insurer regress action due to alcohol use by driver. Contractual link - parties have signed an insurance agreement. Actually, it was a contractual claim			
3544/2019	23-10-19	Bucharest Tribunal	art. 4 art. 19	Car accident in Germany. Applicable law to Insurer's regress action when the liability is split between different insurers of the motor head and the trailer	The appeal court changed the first court's judgement, stating that the Romanian Law is applicable and denies the right to split liability between insurers, considering the Romanian insurer's usual residence and the connection to Rome I Regulation.	7/Other EU - article 7 of ROME I Regulation	C-359, C-475/14	
1001/2019	23-10-19	Court of Appeal - Bucharest	art. 4.1 Art. 19	Car accident in Germany. Applicable law to Insurer's regress action when the liability is split between different insurers of the motor head and the trailer	German law applicable for the split of liability based on para 50-52, 58 and 59 of C-359 and C-475/14. Rome I applicable for the determination of the law applicable between the insurer and his contractual partner in order to see if there is a regress action. Separate opinion from one	7/Other EU - article 7 of ROME I Regulation	C-359, C-475/14	

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					<p>judge: he considers that the regress implies not only the verification of whether the insurer subrogates but also if he can go after other entities.</p> <p>Comment: This interpretation in the second opinion leads to overlapping the two laws the judges considers applicable:</p> <ul style="list-style-type: none"> <li>- he says that the delicti law - German - establishes the parties responsables, but also,</li> <li>- the regress law establishes the responsible parties.</li> </ul>			
7046/2019	25-10-19	Bucharest - District 1 Court	art. 4.1.	The law applicable to the right of the RCA insurer of the tractor unit to recover from the insurer of RCA the semi-trailer a half of the damages which were initially fully covered by the first in relation to a car accident that occurred in Germany.	The court omitted to analyse the applicability of the provisions of Rome I Regulation and deemed the German law as applicable.	N/A	N/A	

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13023/2019	25-10-19	Timisoara First Tier Court	art. 4.1	Car accident in Hungary, foreigner insurer	Applicable law does not trigger competence	7/Other EU - art. 11-13 of 1215/2012 Regulation		2 more similar: decizia nr. 7234/2019 din 18 noiembrie 2019, sentinta civila nr. 1051/2018 din 22 februarie 2018
383/2019	29-10-19	Court of Appeal - Alba Iulia	art. 4.1	Applicable law to Insurer's regress action when the liability is split between different insurers of the motor head and the trailer	The law applied to the car accident applies to the split of the insurers liability. Hence the German 50% split of the liability is applicable and not the Romanian Authority's directive regarding the liability	7/Other EU - article 7 Rome I	C-359/2014 și C-475/14	
380/2019	29-10-19	Court of Appeal - Alba Iulia	art. 4.1	Applicable law to Insurer's regress action when the liability is split between different insurers of the motor head and	The law applied to the car accident applies to the split of the insurers liability. Hence the German 50% split of the liability is applicable and not the Romanian Authority's directive regarding the	7/Other EU - article 7 Rome I	C-359/2014 și C-475/14	



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				the trailer	liability			
263/2019	29-10-19	Satu Mare Tribunal	Art. 4.2	Car accident in Hungary. Romanian victims. Romanian debtor.	Romanian law applicable between some parties (Romanian victims).			
386/2019	30-10-19	Court of Appeal - Alba Iulia	art. 4.1	Applicable law to Insurer's regress action when the liability is split between different insurers of the motor head and the trailer	The law applied to the car accident applies to the split of the insurers liability. Hence the German 50% split of the liability is applicable and not the Romanian Authority's directive regarding the liability	7/Other EU - article 7 Rome I	C-359/2014 și C-475/14	
392/2019	31-10-19	Court of Appeal - Alba Iulia	art. 4.1	Applicable law to Insurer's regress action when the liability is split between different insurers of the motor head and the trailer	The law applied to the car accident applies to the split of the insurers liability. Hence the German 50% split of the liability is applicable and not the Romanian Authority's directive regarding the liability	7/Other EU - article 7 Rome I	C-359/2014 și C-475/14	
1032/2019	31-10-19	Timis Tribunal	Art. 4.1 Art. 16	Car accident in Spain. Family Deceased.	Spanish law applicable. Spanish law limits the members of the family who can request damages.	7/Other EU - Directive 2009/103		

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					Romanian principle of full reparation applicable as mandatory provision, therefore other family members (uncles) could obtain damages			
3712/2019	05-11-19	Bucharest Tribunal	art. 4 art. 19	Car accident in Germany. Applicable law to Insurer's regress action when the liability is split between different insurers of the motor head and the trailer	The appeal court maintained the first court's judgement, stating that the Romanian Law is applicable and denies the right to split liability between insurers, considering that both insurers were Romanian and their legal relationship is governed by the Romanian Law.	7/Other EU - article 7 of ROME I Regulation	C-359, C-475/14	2 more similar: decizia nr. 7409/2019 din 4 noiembrie 2019, decizia nr. 7415/2019 din 4 noiembrie 2019
2524/2019	13-11-19	Court of Appeal - Bucharest	Art. 4.1	Car accident in Romania. German victim. Romanian debtor.	Romanian law applicable.			
4198/2019	14-11-19	Ilfov Tribunal	art. 4.1, 4.2, 4.3	Applicable law to Insurer's regress action when the liability is split between different insurers of the	Romanian law applicable as place of damage, given that the person whose liability is invoked and the person who suffered the damage have their residence in the same	7/Other EU - article 7 Rome I		

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				motor head and the trailer	country at the moment of accident, respectively in Romania.			
670/2019	17-11-19	Sibiu Tribunal	art. 4.1	Applicable law to Insurer's recourse action when the liability is split between different insurers of the motor head and the trailer	The law applied to the car accident applies to the split of the insurers liability. Hence the German 50% split of the liability is applicable and not the Romanian Authority's directive regarding the liability	7/Other EU - article 7 Rome I	C-359/2014 și C-475/14	
5156/2019	20-11-19	Arad First Instance Court	Art. 4.1	Car accident in Germany. Defendant claims damage in Romania	German law applicable as place of direct damage			
840/2019	25-11-19	Court of Appeal - Bucharest	art. 4.1	Car accident in Romania. Hungarian victim. Romanian insurer representative	Romanian law applicable. Hungarian victim had the obligation to know the law			
437/2019	26-11-19	Court of Appeal - Alba Iulia	art. 4.1	Applicable law to Insurer's regress action when the liability is split between different insurers of the	The law applied to the car accident applies to the split of the insurers liability. Hence the German 50% split of the liability is applicable and not the Romanian Authority's	7/Other EU - article 7 Rome I	C-359/2014 și C-475/14	

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				motor head and the trailer	directive regarding the liability			
438/2019	26-11-19	Court of Appeal - Alba Iulia	Art. 4.1	Applicable law to Insurer's regress action when the liability is split between different insurers of the motor head and the trailer	The law applied to the car accident applies to the split of the insurers liability. Hence the German 50% split of the liability is applicable and not the Romanian Authority's directive regarding the liability	7/Other EU - article 7 Rome I	C-359/2014 și C-475/14	
1104/2019	26-11-19	Court of Appeal - Bucharest	art. 4.1	Car accident in Germany. Regress action motor head versus trailer insurer	German law applicable as per C-359/14. However, claimant did not prove the content of the applicable law. Therefore, art. 2652 of the Romanian Civil Code applies - Romanian law.			
7652/2019	27-11-19	Bucharest - District 1 Court	art. 4.1	The law applicable to the right of the RCA insurer of a tractor unit to recover from the RCA insurer of the semi-trailer half of the damages which were initially fully covered by	The Court omitted to analyse the applicability of the provisions of Rome II Regulation and noticed that the insurer of the semi-trailer had voluntarily paid the damages initially covered by the first insurer. With respect to the claim regarding late payment penalties, the Court	N/A	N/A	

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				the first in connection with a car accident that occurred in Germany.	solved this claim according to the rules set out by the Romanian law.			
2045/2019	05-12-19	Court of Appeal - Bucharest	art. 4.2	Car accident in France. Romanian debtor. French and Romanian victims.	Romanian law applies since both victim and debtor were Romanians.			
8057/2019	06-12-19	Bucharest - District 1 Court	art. 4.1	The law applicable to the right of the RCA insurer of a tractor unit to recover from the RCA insurer of the semi-trailer a half of the damages which were initially fully covered by the first in relation to a car accident that occurred in Germany.	The Court deemed the law applicable to the case is the law where the accident/prejudice was produced, namely the German law, according to which the liability is split between the insurers of the tractor unit and trailer. The Romanian law shall govern the regress between insurers since the insurance contract is governed by the Romanian law. The Romanian law entitles the insurer of the tractor unit to claim regress against the insurer of the semi-trailer only if the semi-trailer contributed to the accident because of a	7/Other EU - article 7 of ROME I Regulation	Joined cases C-359/14 and C-475/14	

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					technical issue. Therefore, since such a technical issue was not proved, the Romanian law does not recognize the right to regress.			
1261/2019	13-12-19	Maramures Tribunal	Art. 4.1	Car accident in Germany. Romanian and Polish debtors. Romanian victim.	German law applicable and applied to all aspects of the action (damage/ split/ persons liable)			one similar: sentinta civila nr. 773.2018 din 12 februarie 2018
8974/2019	16-12-19	Bucharest - District 1 Court	art. 19	The law applicable to the Romanian public health insurer's regress action against the Romanian debtor's civil auto liability insurer (RCA insurer) to recover from the latter the costs incurred by the first, according to the rules set by the German law, with respect to the	The Court solved the case based on the provisions of the Romanian law related to tort. In its reasoning, the Court cited the provisions of art. 19 of Rome II Regulation, art. 93 of Regulation (CE) no. 1408/1971 and certain provisions of the bilateral treaty in force between Romania and Germany in the field of social security.  Based on these provisions, the Court deemed the plaintiff	7/Other EU - article 93 of Regulation (CE) no. 1408/1971	N/A	

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				medical treatment and other expenses borne in connection with a German citizen who was injured in a car accident caused by a Romanian driver in Romania.	is entitled to recover from the debtor's RCA insurer the costs borne as a consequence of the car accident. The Court did not explain in its reasoning neither the arguments based on which the Romanian law is applicable neither any express mention with respect to the applicable law. However, the Court further analysed the fulfilment of conditions to trigger the debtor's RCA insurer liability as they are regulated under the Romanian law.			
1273/2019	18-12-19	Court of Appeal - Bucharest	art. 4.1 Art. 19	Car accident in Germany. Insurer with terminated contract paid the damages. Regress action against the actual insurers of the motor head and the trailer.	German law applicable for split of liability. Romanian law applied to subrogation. However, the court applies Romanian law to penalties.	7/Other EU - article 7 of ROME I Regulation	C-359, C-475/14	

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9135/2019	18-12-19	Bucharest - District 1 Court	art. 4	The law applicable to the right of the RCA insurer of a semi-trailer to recover from the RCA insurer of the tractor unit half of the damages which were initially fully covered by the first in relation to a car accident that occurred in Germany.	The court omitted to analyse the applicability of the provisions of Rome II Regulation and deemed the Romanian law as applicable.	N/A	N/A	
4806/2019	19-12-19	Ilfov Tribunal	Art. 4.1	Applicable law to Insurer's regress action when the liability is split between different insurers of the motor head and the trailer	Locus damni applies, therefore German law applicable. On the merits, the court found that the claimant did not provided evidence that the defendand is the owner of the trailer	7/Other EU - article 7 Rome I		



<u>Decision Number / Doctrine</u>	<u>Date</u>	<u>Court/ Author name and reference number</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings</u>	<u>Red Flags</u>	<u>ECJ case law cited</u>	<u>Similar Cases</u>
8837/2019	23-12-19	Bucharest - District 1 Court	art. 1 art. 4 art. 18 art. 31 art. 32	The law applicable to the right of the CASCO insurer of a tractor unit to recover, from the correspondent insurance company in Romania of the Spanish RCA insurer of the other vehicle, the damages which were initially fully covered by the the Insurers' Guarantee Fund (on behalf of the CASCO insurer) in relation to a car accident that occurred in Spain.	The Court deemed Rome II Regulation as applicable. The Court deemed that, even though the event giving rise to the damage occurred in Spain, the prejudice was produced in Romania because the damaged vehicle was owned by a company incorporated in Romania. Therefore, the Romanian law is applicable. Further, the Court solved the claims related to statute of limitation and the recovery of damages considering the rules set by the Romanian law and ordered the correspondent Romanian insurance company of the Spanish RCA insurer to cover the damages initially covered by the Insurers' Guarantee Fund on behalf of the Romanian CASCO insurer.	N/A	N/A	
16/2020	15-01-20	Court of Appeal - Bucharest	art. 4.1	Car accident in Czech Republic. Romanian victim. Czech responsible	Czech law applicable. Court applied the foreign legislation and case law.			

<u>Decision Number / Doctrine</u>	<u>Date</u>	<u>Court/ Author name and reference number</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings</u>	<u>Red Flags</u>	<u>ECJ case law cited</u>	<u>Similar Cases</u>
280/2020	23-01-20	Arad Tribunal	Art. 4.1	Car accident in Romania	Romanian law applicable. Foreign insurer			
588/2020	31-01-20	Bucharest - District 2 - First Instance Court	Art. 4.1	Car accident in Germany. Joint liability of principal and agent. BAAR Romania paid BAAR Germany. Regress action	German law applicable as place of direct damage			
53/2020	05-02-20	Court of Appeal - Bucharest	art. 4.1 Artr. 19	Car accident in Germany. Motor head versus trailer insurer	German law applicable. Romanian law sets the right to subrogate			24 more similar
109/2020	06-02-20	Brasov Tribunal	Art. 4.1	Car accident in France. Romanian victim.	Romanian law was applied in frist instance and appeal. Used to determine the person responsible. No justification.			4 more similar
1366/2020	28-02-20	Bucharest - District 1 Court	art. 4.1.	The law applicable to the right of the RCA insurer of a tractor unit to recover from the RCA insurer of the semi-trailer a half of the damages which were initially fully covered by	The law aplicable is Romanian law, given that the damage occurred in Romania because the damage is represented by the payment of full compensation by the plaintiff, a payment that was obviously made from Romania	N/A	N/A	

<u>Decision Number / Doctrine</u>	<u>Date</u>	<u>Court/ Author name and reference number</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings</u>	<u>Red Flags</u>	<u>ECJ case law cited</u>	<u>Similar Cases</u>
				the first in relation to a car accident that occurred in Germany.				
3217/2020	10-03-20	Timisoara First Tier Court	art. 4.1	Car accident in France	The court applied Romanian law without any analysis.			
2293/2020	27-03-20	Bucharest - District 1 Court	art. 4	The law applicable to the right of the RCA insurer of a tractor unit to recover from the RCA insurer of the semi-trailer a half of the damages which were initially fully covered by the first in relation to a car accident that occurred in Germany.	The liability split between the two RCA insurers is determined according to the law governing the tort, namely the law of the state where the accident occurred (i.e., the German law). The German law provides that the liability is split between the two insurers.	7/Other EU - article 7 of ROME I Regulation and article 14.b of Directive 2009/103/EC	Joined cases C-359/14 and C-475/14	
1840/2020	10-06-20	Bucharest - District 2 - First Instance Court	art. 4.1	car accident in Italy caused by Romanian without insurance. Action initiated by insurer (BAAR	Italian law applicable to the regress action considering the place of accident and damage.			

<u>Decision Number / Doctrine</u>	<u>Date</u>	<u>Court/ Author name and reference number</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings</u>	<u>Red Flags</u>	<u>ECJ case law cited</u>	<u>Similar Cases</u>
				Romania who paid BAAR Italy) against debtor				
802/2020	25-06-20	Bucharest Tribunal		Car accident in France. Romanian victim deceased. Relatives asking for indirect damages from the RCA insurer and BAAR Romania.	The court stated that the Romanian Law is applicable without justifying why.			
32/2020	01-07-20	Bucharest - District 1 Court	art. 4	The law applicable to the right of the RCA insurer of the tractor unit to recover from the RCA insurer of the semi-trailer half of the damages which were initially fully covered by the first in relation to a car accident that occurred in Germany.	The split of liability between the two insurers is determined according to the law applicable in the state where the accident occurred (in this case, the German law). The law applicable to the right to regress is the law according to which the national court analyses if a right to regress does or does not exist, and not the specific content of the payment obligation. Therefore, the Court deemed that the Romanian law must be applied only with respect to the existence/inexistence	7/Other EU - article 7 of ROME I Regulation	Joined cases C-359/14 and C-475/14	

<u>Decision Number / Doctrine</u>	<u>Date</u>	<u>Court/ Author name and reference number</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings</u>	<u>Red Flags</u>	<u>ECJ case law cited</u>	<u>Similar Cases</u>
					<p>of a subrogation of the insurer in relation to the victim's rights. The Romanian law regulates this subrogation as a principle under the Civil Code.</p> <p>Contrary to the defendant's claims, as regards the specific content of the payment obligation (i.e., whether the liability of the semi-trailer's insurers exists in relation to the victim and, subsequently, in relation with the insurer of the tractor unit), the Court deemed that the German law was applicable.</p> <p>Consequently, the Court found that the payment obligation existed as regards 50% of the damages.</p> <p>The Court ordered the defendant to pay 50% of the damages to the plaintiff.</p> <p>As regards legal late payment penalties, the Court found that the plaintiff did not prove the German law and dismissed the claim in this respect.</p>			

<u>Decision Number / Doctrine</u>	<u>Date</u>	<u>Court/ Author name and reference number</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings</u>	<u>Red Flags</u>	<u>ECJ case law cited</u>	<u>Similar Cases</u>
185/2020	07-07-20	Court of Appeal - Alba Iulia	art. 4.1	Applicable law to Insurer's regress action when the liability is split between different insurers of the motor head and the trailer	The law applied to the car accident applies to the split of the insurers liability. Hence the German 50% split of the liability is applicable and not the Romanian Authority's directive regarding the liability	7/Other EU - article 7 Rome I	C-359/2014 și C-475/14	
191/2020	08-07-20	Court of Appeal - Alba Iulia	art. 4.1	Applicable law to Insurer's regress action when the liability is split between different insurers of the motor head and the trailer	The law applied to the car accident applies to the split of the insurers liability. Hence the German 50% split of the liability is applicable and not the Romanian Authority's directive regarding the liability	7/Other EU - article 7 Rome I	C-359/2014 și C-475/14	
2165/2020	09-07-20	Targu Mures First Instance Court	Art. 4.1 Art. 14	Car accident in Germany	Romanian law applicable since both parties argued based on its provisions, although no express agreement existed.			
547/2020	13-07-20	Lehliu Gara First Instance Court	art. 4.1	Industrial machine not according to specifications for lavender culture. Tort claim against producer.				

<u>Decision Number / Doctrine</u>	<u>Date</u>	<u>Court/ Author name and reference number</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings</u>	<u>Red Flags</u>	<u>ECJ case law cited</u>	<u>Similar Cases</u>
				Romanian law applicable, according to claimant since producer supplied in Romania. However, action dismissed since liability for goods not applicable for professional use acquisitions (but only for consumers)				
447/2020	14-07-20	Faget First Instance Court	art. 4.1 art. 19	Car accident in Austria. Romanian debtor. BAAR Romania paid BAAR Austria	Romanian law applicable to regress action. BAAR Romania claimed that limitation is applicable from the payment date - citing Decision no 6185/02.11.2001. Accepted by court.			
4129/2020	22-07-20	Bucharest - District 2 - First Instance Court	art. 4.1	car accident in Spain caused by Romanian without insurance. Action initiated by insurer (BAAR Romania who paid	Spanish law applicable to the regress action considering the place of accident and damage.			2 more similar

<u>Decision Number / Doctrine</u>	<u>Date</u>	<u>Court/ Author name and reference number</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings</u>	<u>Red Flags</u>	<u>ECJ case law cited</u>	<u>Similar Cases</u>
				BAAR Spain) against debtor				
8169/2020	11-08-20	Timisoara First Tier Court	art. 4.1	Car accident in Greece	The law applied to the car accident is Greek law based on locus damni	7/Other EU - article 7 Rome I	C-359/2014 și C-475/14	
2109/2020	12-08-20	Bucharest Tribunal	art. 4.1 art. 19	Car accident in Germany. Applicable law to Insurer's regress action when the liability is split between different insurers of the motor head and the trailer	The law applied to the car accident applies to the split of the insurers liability. Hence the German 50% split of the liability is applicable and not the Romanian Authority's directive regarding the liability	7/Other EU - article 7 of ROME I Regulation	C-359, C-475/14, C-350/14	
1717/2020	31-08-20	Campulung First Instance Court	Art. 4.1	Car accident	Locus damni applies in the dispute between the car service (Romania) and the insurer (Hungary)			
4831/2020	06-09-20	Timisoara First Tier Court	art. 4.1 point 17 Preamble	Car accident in France	As the claimant failed to make the proof of foreign law from France, the court rejected the claim	7/Other EU - article 7 Rome I		



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8286/2020	11-09-20	Bucharest - District 1 Court	art. 4	The law applicable to the right of the RCA insurer of the tractor unit to recover from the RCA insurer of the trailer a half of the damages which were initially fully covered by the first in relation to a car accident that occurred in Germany.	The Court deemed the law applicable to the case is the law where the accident/prejudice was produced, namely the German law, according to which the liability is split between the insurers of the tractor unit and trailer. However, with respect to late payment penalties, the Court solved the claim according to the Romanian law.	7/Other EU - article 7 of ROME I Regulation	Joined cases C-359/14 and C-475/14	
517/2020	11-09-20	Court of Appeal - Bucharest	art. 4.1 Art. 19	Car accident in Germany. Insurer with terminated contract paid the damages. Regress action against the actual insurers of the motor head and the trailer.	German law applicable for split of liability. Romanian law applied to subrogation	7/Other EU - article 7 of ROME I Regulation	C-359, C-475/14	
630/2020	16-09-20	Court of Appeal - Bucharest	Art. 4.1 Art. 19 art. 15.b	Car accident in Germany. Insurer with terminated contract paid the damages. Regress	German law applicable to accident and covers (art. 15.b) the split of liability. Romanian law only covers the right of an insurer to	7/Other EU - article 7 of ROME I Regulation	C-359, C-475/14	

<u>Decision Number / Doctrine</u>	<u>Date</u>	<u>Court/ Author name and reference number</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings</u>	<u>Red Flags</u>	<u>ECJ case law cited</u>	<u>Similar Cases</u>
				action against the actual insurers of the motor head and the trailer.	subrogate and to go after the trailer insurer. German law was not proved with respect to the penalties/ interest and therefore, the claimant is not entitled to them			
10500/2020	06-10-20	Timisoara First Tier Court	art. 4.1, point 15, 17 Preamble	Applicable law to Insurer's regress action when the liability is split between different insurers of the motor head and the trailer	The law applied to the car accident applies to the split of the insurers liability. Hence the German 50% split of the liability is applicable and not the Romanian Authority's directive regarding the liability	7/Other EU - article 7 Rome I	C-359/2014 și C-475/14	
392/2020	08-10-20	Arad Tribunal	Art. 4.1	Car accident . Country unknown.	Romanian law applicable. Bulgarian insurer.			
468/2020	08-10-20	Cluj Court of Appeal	Art. 18	Car accident in Hungary	Hungary law applicable based on locus damni. The court rejected the request for penalties, as the Hungarian law did not provided them and applying Romanian law would have determined a lex tertia	7/Other EU - Directive 2009/103		
9039/2020	09-10-20	Bucharest - District 3 - First Instance		Trailer entirely damaged while loading the cargo	The court applies the Romanian Law without any justification.			

<u>Decision Number / Doctrine</u>	<u>Date</u>	<u>Court/ Author name and reference number</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings</u>	<u>Red Flags</u>	<u>ECJ case law cited</u>	<u>Similar Cases</u>
		Court		in Austria. Carrier asking for damages from the Romanian intermediary of the transport.				
7358/2020	22-10-20	Bucharest - District 1 Court	art. 4.1 art. 19	The law applicable to the right of the RCA insurer of a tractor unit to recover from the RCA insurer of the semi-trailer a half of the damages which were initially fully covered by the first in relation to a car accident that occurred in Germany.	The law applicable is German law - the law where the accident/prejudice was produced. Romanian law applicable to the regress between insurers allows the regress	7/Other EU - article 7 of ROME I Regulation	Joined cases C-359/14 and C-475/15	
715/2020	22-10-20	Court of Appeal - Bucharest	Art. 4.1	Car accident in Belgium.	Belgian law applicable for direct damages. Indirect damages are not relevant for the determination of the applicable law			1

<u>Decision Number / Doctrine</u>	<u>Date</u>	<u>Court/ Author name and reference number</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings</u>	<u>Red Flags</u>	<u>ECJ case law cited</u>	<u>Similar Cases</u>
7797/2020	30-10-20	Bucharest - District 1 Court	art. 1.2 art. 18	The law applicable to the Austrian prejudiced natural person right to recover from the Romanian insurer the damages suffered because of a car accident, as well as to the Austrian insurer's regress against the Romanian debtor's civil auto liability Romanian insurer.	The Austrian plaintiff claimed the application of the Romanian law, without this being challenged by the defendant. The defendant's (i.e., the insurance company) headquarters are in Romania. Therefore, the Romanian law is applicable and the plaintiffs are entitled to be compensated for the damages.	7/Other EU - article 7 of ROME I Regulation	N/A	
7794/2020	30-10-20	Bucharest - District 1 Court	art. 4	The law applicable to the right of the RCA insurer of a tractor unit to recover from the RCA insurer of the semi-trailer half of the damages which were initially fully cover by the first in connection with a car accident that occurred in Germany.	The Court deemed that the German law only applies in relation with the right of the victim to request any of the two insurers to cover the damages caused by the car accident. As regards the relationship between the two insurers, the Court deemed that the Romanian law is applicable based on article 7 of Rome I Regulation.	7/Other EU - article 7 of ROME I Regulation	Joined cases C-359/14 and C-475/14	

<u>Decision Number / Doctrine</u>	<u>Date</u>	<u>Court/ Author name and reference number</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings</u>	<u>Red Flags</u>	<u>ECJ case law cited</u>	<u>Similar Cases</u>
849/2020	03-11-20	Court of Appeal - Bucharest	art. 4	Car accident in Germany. Applicable law to Insurer's regress action when the liability is split between different insurers of the motor head and the trailer	The court states that the Romanian Law is applicable considering the Romanian insurer's usual residence and the connection to Rome I Regulation.	7/Other EU - article 7 of ROME I Regulation	C-359, C-475/14	
2498/2020	03-11-20	Ilfov Tribunal	art. 4.2	Applicable law to Insurer's regress action when the liability is split between different insurers of the motor head and the trailer	Romanian law applicable (ASF 23/2014 ). The claimant did not provided evidence that the damage was caused due to technical issues, which could not be seen by the driver	7/Other EU - article 7 Rome I		
7644/2020	30-11-20	Timisoara First Tier Court	art. 4.1 Preamble 17	Car accident in Hungary	Hungary law applicable based on locus damni, but considering that the claimant invoked Romanian law, rejected the claim as groundless			

# Slovakia

## Executive Summary

- Based on the sources available to us, Rome II seems to be generally known to Slovak practitioners, the courts regularly apply and refer to Rome II. Private international law literature focuses mainly on general interpretation of individual provisions of Rome II, we have not identified any specific doctrinal discussion.
- The doctrine suggests that there is certain ambiguity in determining the law applicable to traffic accidents, where Rome II (see 27) is applied instead of the 1971 Hague Convention. The differentiation between contractual and non-contractual obligations also seems problematic in certain cases (see 5), as well as the characterization of some claims as unjust enrichment (see 12).

### Analysis of the Rome II Regulation

- Chapter I - Scope and Interpretation: On a general level, we have not come across any widely spread problems. There seems to be some ambiguity with respect to differentiating between the Rome II and Rome I Regulations (see 5). Some doubts aroused regarding claims on unpaid tolls for motorway in a foreign country, with respect to exclusion of non-contractual obligations in administrative matters (see 1). The characterization of the concept of "non-contractual obligations" seems problematic in some cases of unjust enrichment where the relationship in question relates to a contract within the meaning of Art. 10(1) Rome II. These are cases of assignment of a right to payment for a public transport ticket (deadheads) (see 3). The courts respect the consistency with the recast Brussels I Regulation without difficulties. With regard to the relationship between the Rome II and Rome I Regulations, there appears to be a difficulty regarding claims involving assignment of contracts concerning receivables against passengers arising out of lack of a valid ticket, see 3. Damages claimed in cases of breach of various questionable agreements were sometimes classified as non-contractual (see 5).
- Chapter II – Tort/Delict: According to our information, no difficulties emerged so far.
- Chapter III - Unjust Enrichment, *Negotiorum Gestio* And *Culpa in Contrahendo*: Unjust enrichment represents one of the most frequent subject-matters of the proceedings. First of all, there is a line of case law regarding Slovak citizens who travelled in the Czech Republic by public transport without a valid ticket. It is questionable, whether such cases shall not be subject to Art. 14(2) Rome I Regulation (see 3). In some cases, the unjust enrichment related to purchase, transport or insurance contracts, and therefore the characterization as unjust enrichment was problematic. Nevertheless, it did not have any effect on the determination of applicable law, see 5.
- Chapter IV - Freedom of Choice: No relevant case law is available to the Reporters.
- Chapter V - Common Rules: Mostly, the courts determine Slovak law as applicable. When a foreign law applies, it is in most cases Czech law, easily applicable for Slovak courts. It seems that the courts have no difficulty applying Austrian, German, Polish or Hungarian law (see 17). As to the application of overriding mandatory provisions, without any reasoning or any contextual link, the courts only state that Art. 16 Rome II Regulation applies, see 19.
- Chapter VI - Other Provisions: No relevant case law is available to the Reporters. Art. 28 is mentioned only in one case which relates to the 1971 Hague Convention (see 27). Unfortunately, the courts do not always take into account the application of the 1971 Hague Convention. Some courts correctly gave precedence to the 1971 Hague Convention over Rome II. On the other hand, there are cases where the courts applied Rome II instead of the 1971 Hague Convention. Usually, these decisions do not give any reasoning as to the application of Rome II.

### Comments on areas of interest

- In all cases concerning violations of privacy, the courts did not apply Rome II, but provisions of the Slovak autonomous law, i.e., Sec. 15 of the Slovak PIL Act (see 29). Defamation was concerned only in one case where Slovak law applied.

## 1. Introduction

- *How aware of the Rome II Regulation are practitioners, businesses and citizens in your Member State?*

No commentary on the Rome II Regulation ("Rome II") has been published in Slovakia so far, but Rome II is analysed in all Slovak textbooks on private international law. The most comprehensive analysis of Rome II is to be found in "Introduction to Private International and Procedural Law" (by Csach, Gregová, Širicová and Júdová, in Slovak), which analyses the provisions of Rome II in the form of a brief commentary.<sup>1201</sup> The book also focuses on conflict rules for non-contractual obligations contained in other legal sources than Rome II with special emphasis on the 1971 Hague Convention,<sup>1202</sup> which in Slovakia shall take precedence over Rome II and in practice is often overlooked. Furthermore, the Slovak autonomous regulation of private international law, enshrined in Section 15 of the Slovak Private International Law Act,<sup>1203</sup> is discussed in detail. Succinct commentary on Rome II is included also in a basic textbook "Private International Law" (Štefanková et al., in Slovak),<sup>1204</sup> which also covers in detail the questions of Rome II applicability. The application of the Rome II Regulation in Slovakia is also discussed in the recent Intersentia publication 'Rome I and Rome II Regulations in Practice'.<sup>1205</sup>

Based on the sources available to us, it seems that Rome II is generally known to Slovak practitioners.

- *Is the Rome II Regulation generally known and applied by courts in your Member State?*

In the Slovak case law available to us, the courts regularly apply and refer to Rome II.

- *Are there any relevant statistics regarding the application of the Rome II Regulation in your Member State?*

We have not come across any relevant statistics in the context of our research.

- *How important is the doctrinal discussion on the Rome II Regulation in your Member State?*

Slovak literature on private international law focuses mainly on general interpretation of individual provisions of Rome II, we have not identified any specific doctrinal discussion.

- *Are there specific issues concerning the Rome II Regulation that have caused debate at a doctrinal or political level?*

The doctrine suggests that there is some ambiguity in determining the law applicable to traffic accidents, where the 1971 Hague Convention shall be applied instead of Rome II, otherwise the court would err in its assessment of the case, as pointed out explicitly by Csach with reference to the decision of the Regional Court BA.<sup>1206</sup> We are not aware of any other debate at doctrinal level. Problems may arise in connection with differentiation between contractual and non-contractual obligations partly due to the concept and classification of obligations in the substantive law of the

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<sup>1201</sup> CSACH, Kristián, ŠIRICOVÁ GREGOVÁ, Ľubica, JÚDOVÁ, Elena, Úvod do štúdia medzinárodného práva súkromného a procesného (in Slovak), 2. vydanie. Bratislava: Wolters Kluwer SR, 2018, 314 p., pp. 169-194 (Csach), hereinafter Csach.

<sup>1202</sup> 1971 Hague Convention was published under No. 130/1976 Zb. (Zb. - Collection of laws of former Czechoslovakia, now Collection of Laws of the Slovak Republic).

<sup>1203</sup> Act No. 97/1963 Zb., on Private International Law and International Procedure relating thereto (hereinafter "PIL Act") Sec. 15: "Tort claims shall be governed by the law of the place where the damage or the harmful event occurred."

<sup>1204</sup> ŠTEFANKOVÁ, Natália, LYSINA, Peter et al., Medzinárodné právo súkromné (in Slovak), 1. vydanie, Praha: 2011, C. H. Beck, 600 p., pp. 388-409 (Štefanková), hereinafter Štefanková.

<sup>1205</sup> JÚDOVÁ, Elena, and LEVRINC, Miloš, The Application of the Rome I and Rome II Regulations in Slovakia, in: GUINCHARD, Emmanuel, Rome I and Rome II in Practice, Intersentia, London, November 2020, pp. 485-526, hereinafter Júdová and Levrinc.

<sup>1206</sup> Resolution of the Regional court BA dated 21.9.2016 No. 5 Co 515/2013.

former Czechoslovakia, where non-contractual obligations did not represent a separate category.<sup>1207</sup> Questionable may also be the characterization of certain claims as unjust enrichment.<sup>1208</sup>

## 2. Analysis of the Rome II Regulation

### 2.1 Chapter I – Scope and Interpretation

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

1. *The determination of the material scope of application of the Rome II Regulation, including any difficulties in applying the category of “civil and commercial matters” or in defining the exact scope of any excluded matters (Art. 1(1)-(2))*

On a general level, we have not come across any widely spread problems. The courts, without difficulties, excluded such matters as rights *in rem* or matrimonial property regime or violations of privacy and rights relating to personality. However, there seems to be some ambiguity with respect to differentiating between the Rome II and Rome I Regulations, see 2.1.5.

Doubts may arise regarding claims on unpaid tolls for motorway in a foreign country (Hungary or Czech Republic), with respect to non-contractual obligations in administrative matters which are excluded from the scope of the Rome II Regulation (Art. 1(1)). The courts applied the law of the country in which the damage occurred under Art. 4(1), without further reasoning:

e.g.

- District Court in Čadca 16Cb/26/2012, dated 16. 7. 2014
- District Court in Bratislava I 33Cb/247/2012, dated 19. 1. 2015
- District Court in Trnava 36Cb/142/2012, dated 26. 6. 2013
- District Court in Trenčín 39Cb/274/2012, dated 3. 7. 2014
- District Court in Ružomberok 3C/70/113/2016, dated 19. 8. 2016
- District Court in Galanta 8C/7/2019, dated 28. 3. 2019, and many others.

2. *The determination of the temporal scope of application of the Rome II Regulation, Arts 31-32)*

There are multiple decisions where the courts correctly stated Rome II as inapplicable based on its Art. 31. This case law also serves as further evidence of the fact that Rome II is well known.

e.g.

- District Court in Prievidza 7C/8/2011, dated 2.9.2015
- District Court in Považská Bystrica 10 C110/2009, dated 7.12.2012
- Regional Court in Prešov 14Co/11/2019, 25. 6. 2019
- Regional Court in Žilina 14Cob/29/2014, dated 25. 6. 2015, etc.

3. *The characterization of the **concept of “non-contractual obligations”**, its relationship to the concept of “contractual obligations” and any difficulties in relation to characterisation (Arts. 1(1), 2)*

The characterization seems problematic in some cases of unjust enrichment where the relationship in question relates to a contract within the meaning of Art. 10(1) Rome II. These are cases of assignment of a [receivable representing a]

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<sup>1207</sup> Cf. Sections 415-450 of the former Czechoslovak, now Slovak Civil Code No. 40/1964 Coll., where contractual and non-contractual obligations are not systematically differentiated.

<sup>1208</sup> See also Júdová and Levrinc, at p. 499-505. Most of the decisions cited in this book have been independently commented in our chapter which was drawn up in September 2020.



right to payment for a public transport ticket (deadheads). Such a receivable is usually owed to a transport company with a seat in Czech Republic by a Slovak citizen which is then contractually assigned by the transporting company to a third party which enforces the claim in its position of assignee. It seems that courts shall assess the relationship between the plaintiff and the Slovak debtor as a relationship between assignee and debtor in the sense of Art. 14(2) Rome I Regulation. Nevertheless, the courts classified these cases repeatedly as unjust enrichment and applied either Art. 10(3) Rome II or Art. 4(1) Rome II:

- District Court in Liptovský Mikuláš, 10 C/15/2012, dated 23. 5. 2012
- District Court in Liptovský Mikuláš 10 C/187/2011. dated 3.7.2013
- District Court in Rimavská Sobota 14C/108/2012, dated 10. 12. 2012
- District Court in Rimavská Sobota 14C/13/2012, dated 30. 7. 2012
- District Court in Michalovce 24C/7/2014, dated 9. 2. 2015 (applied Art. 4(1) Rome II)
- District Court in Vranov n/T 5C/429/2011, dated 27. 9. 2012 (applied Art. 4(1) Rome II) etc.

#### 4. *The universal application of the Regulation (Art. 3)*

In one of the analysed decisions the court argued that because one party to the proceedings was from a non-Member State, Rome II shall not apply, and applied Sec. 15 of the PIL Act. instead. However, this reasoning was clearly an isolated case.

#### 5. *The approach to interpretation of the Rome II Regulation, and in particular its relationship to other EU private international law instruments (including the recast Brussels I Regulation and the Rome I Regulation) (Recital 7)*

The consistency with the recast Brussels I Regulation is respected without difficulties. With regard to the relationship between the Rome II and Rome I Regulations, as noted above, there appears to be a difficulty regarding claims involving assignment of contracts concerning receivables against passengers arising out of lack of a valid ticket.

In addition, according to the court, damages claimed in cases where the defendant with a seat in Slovakia failed to deliver goods to the plaintiff with a seat in Germany in breach of an oral agreement between them shall be subject to the provisions of Rome I and Rome II Regulations (CISG was not even mentioned). The court concluded that unjust enrichment occurred (Art. 10 Rome II) as the buyer paid the purchase price but the goods were not delivered:

- District Court in Ružomberok 1Cb/12/2013, dated 26. 6. 2013

Similarly, the characterization seems problematic in a case where an advance was paid but the goods were not delivered. No purchase agreement was concluded, the parties had merely agreed to enter into a purchase agreement in the future and the plaintiff paid the purchase price based solely on this agreement and an issued proforma invoice. The case was classified by the court as a claim for an unjust enrichment and the court applied Art. 10(3) Rome II:

- District Court in Košice II 36C/99/2014, dated 15. 3. 2016

As for a transport contract, the defendant had to pay recurring fees associated with delivering the goods. Surprisingly, the applicable law was determined on the basis of the place where the damage occurred, despite the existence of the transport contract. The court applied Art. 4(1) Rome II without any detailed reasoning:

- Regional Court in Prešov 1Cob/93/2013, dated 12.11.2014

In another case, the existence of an international purchase agreement was questioned in a situation where the defendant received the goods which were not paid for. The defendant accepted the goods without a legal cause, the goods were not ordered. In our view, this case was appropriately classified as a claim for an unjust enrichment, the court applied Art. 10(3) Rome II:

- Regional Court in Trenčín 8Cob/100/2017, dated 20. 12. 2017

The claim for damages caused by an insurable event in the territory of Slovakia concerned the reimbursement of costs which were not directly a result of the traffic accident but occurred in connection with the damage on the courtesy car. The court classified the claim as extra-contractual, referring to the ECJ case C-27/02 Engler, in the absence of a freely assumed obligation:

## 2.2 Chapter II - Tort/Delict

Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to the implementation of:

6. *The general conflict-of-laws rule for tort/delict, and difficulties that have arisen in your Member State with respect to its application (Art. 4), and in particular:*

a. *the approach to identifying the place of direct damage in Art 4(1)*

According to our information, no difficulties have emerged so far.

b. *the approach to the first rule of displacement in Art 4(2) in cases involving multiple parties or claims*

According to our information, no difficulties have emerged so far.

c. *the approach to the escape clause in Art 4(3), and*

According to our information, no difficulties have emerged so far.

d. *the suitability of this set of rules to govern cases of **prospectus liability or other financial market torts***

According to our information, no difficulties have emerged so far.

7. *The rule on **product liability** (Art. 5) and, where relevant, the interaction with the application of **1973 Hague Convention on the Law Applicable to Products Liability**;*

Slovakia is not a contracting state to the 1973 Hague Convention. In the case-law available there was no product liability case (Art. 5 Rome II).

8. *The specific rule on **unfair competition** (Art. 6)*

In the analysed case-law, the provision on unfair competition (Art. 6) was applied once in a case that concerned a preliminary injunction. The plaintiff had an exclusive sales contract for the territory of Slovakia. Slovak law was applicable as a national legal order of the territory where the direct consequence of the non-contractual obligation occurred (referring to Art. 6(2) and Art. 4(1) Rome II), without any detailed reasoning. According to this decision, the defendant was obliged to refrain from distributing and offering goods in Slovakia via the internet:

- District Court in Košice I 27CbPv/3/2015, dated 22. 12. 2015

9. *The specific rule on **environmental damage** (Art. 7)*

No relevant case law is available to the Reporters.

10. *The specific rule on **infringements of intellectual property rights** (Arts. 8, 13)*

Under Art. 8(1) the law of the country for which the protection is claimed shall be applied. Refraining from television broadcasting. Plaintiff had a license agreement granted by the Council of the Czech Republic for Radio and Television Broadcasting. Preliminary injunction:

- District Court in Bratislava I 10Ca/9/2019, dated 22. 3. 2019

The second case concerned the use of photographs on the internet without consent. The law of the country for which the protection is claimed was applied pursuant to Art. 8(1) Rome II:

- District Court in Bratislava I 19Ca/50/2019, dated 17. 10. 2019

11. *The specific rule on **industrial action** (Art. 9)*

No relevant case law is available to the Reporters.

## 2.3 Chapter III - Unjust Enrichment, *Negotiorum Gestio* And *Culpa In Contrahendo*

Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to the implementation of:

12. The specific rule on **unjust enrichment** (Art. 10), including its relationship with the general rule for tort/delict in Art. 4.

Unjust enrichment represents one of the most frequent subject-matters of the proceedings when Rome II is applied in Slovakia. First of all, there is a line of case law regarding Slovak citizens who travelled in the Czech Republic by public transport without a valid ticket. In these cases, the plaintiff is a company to which the Czech transporter assigned its claim against the Slovak passenger. It is questionable, whether such cases shall not be subject to Art. 14(2) Rome I Regulation, according to which the law governing the assigned claim governs the relationship between the assignee and the debtor (see No. 3 above).

Furthermore, in two cases the defendant did not pay for the construction of a house arguing that the contract for work was not concluded and the court applied the law of the country in which the unjust enrichment occurred under Art. 10(3) Rome II:

- District Court in Zvolen 10Cb/31/2013, dated 15. 5. 2019
- District Court in Žilina 20Cb/163/2012, dated 31. 1. 2017 (It follows from all the circumstances of the case that the non-contractual obligation arising out of unjust enrichment was more closely connected with the Czech Republic where the unjust enrichment occurred (construction works), escape clause Art. 10 (3–4)).

Art.10(3) was similarly applied in a case where the unjust enrichment was a result of invalid legal action:

- District Court in Prešov 11C/183/2016, dated 8. 3. 2017

Unjust enrichment was construed in circumstances where one party performed despite the fact that no loan agreement was concluded:

- Regional Court in Prešov 13Co/78/2017, dated 24. 7. 2018
- District Court in Levice 14C/420/2013, dated 2. 9. 2019

Listed above are also cases where the unjust enrichment related to purchase contracts, and therefore the characterization as unjust enrichment was problematic. Nevertheless, it did not have any effect on the determination of applicable law, see No. 5 above.

13. The specific rule on **negotiorum gestio** (Art. 11)

No relevant case law is available to the Reporters.

14. The specific rule on **culpa in contrahendo** (Art. 12)

No relevant case law is available to the Reporters.

## 2.4 Chapter IV - Freedom of Choice

Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:

15. The implementation in legal/business practice and by courts of the rule on **freedom of choice**, any difficulties therein and **any discussion that has been carried out in your Member State regarding possible reasons which would justify the need to rethink it** (Art. 14)

No relevant case law is available to the Reporters.

## 2.5 Chapter V - Common Rules

Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:

16. The scope of the exclusion of 'evidence and procedure' in Art 1(3) and any difficulties in relation to that exclusion or to questions of formal validity or the burden of proof (Arts. 21-22)

No relevant case law is available to the Reporters.

17. *The approach in your Member State to questions of pleading, proof and application to individual cases of the substantive rules of the law applicable under the Rome II Regulation governing non-contractual obligations.*

Mostly, the courts determine Slovak law as applicable. When a foreign law applies, it is in most cases Czech law, which is very similar to Slovak law and thus easily applicable for Slovak courts. It seems, from the analysed case law, that the courts have no difficulty applying Austrian, German, Polish or Hungarian law.

18. *The delimitation of the scope of the applicable law (Art. 15(a)-(h)), including any difficulties as its relationship to the issues addressed at points 16 17 above)*

No such difficulties could be identified in the analysed case law.

19. *The application of the rule on **overriding mandatory provisions** (Art. 16)*

In the following cases that all relate to breach of a contractual obligation (delay in payment), the court repeatedly applied the Slovak PIL Act to determine Slovak law as applicable, ignoring the existence of the Rome I Regulation/the Rome Convention. Without any reasoning or any contextual link, the court only states that Art. 16 Rome II Regulation applies:

- Regional Court in Trnava 10Co/375/2016, dated 13. 9. 2017 (Consumer credit agreement)
- District Court in Trnava 15C/46/2013, dated 18. 8. 2014 (Gas supply agreement. The plaintiff supplied gas to the defendant and the defendant did not pay)
- District Court in Trnava 37C/112/2015, dated 2. 11. 2015 (Gas supply agreement. Delay in payment for the supply)
- District Court in Trnava 37C/222/2015, dated 13. 7. 2015 (Consumer credit agreement)
- District Court in Trnava 37C/328/2013, dated 10. 4. 2017 (Consumer credit agreement)

20. *The application of the specific rule on **direct action against the insurer** of the person liable (Art. 18)*

No reference to Art. 18.

21. *The application the specific rule on **subrogation** (Art. 19)*

No reference to Art. 19.

22. *The application of the specific rule on **multiple liability** (Art.20)*

No reference to Art. 20.

## 2.6 Chapter VI - Other Provisions

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

23. *The implementation of the concept of habitual residence in the Rome II Regulation, with reference both to persons covered by Art 23 and natural persons acting otherwise than in the course of business*

No reference to Art. 23 and based on the case law available, there have been no practical problems with determining the habitual residence so far.

24. *The application of and any difficulties with the specific rules on exclusion of renvoi (Art.24) and States with more than one legal system (Art.25)*

No references to Arts. 24 and 25.

25. *The application of and any difficulties with the specific rule on public policy of the forums (Art. 26)*

No relevant case law is available to the Reporters.

26. *Practical interaction between the Rome II Regulation and other EU and international legal instruments, in specific areas such as environmental damages, intellectual property rights or data protection (Arts. 27, 28, 29)*

In relation to environmental damages, intellectual property rights or data protection, Arts. 27, 28, 29 are not applied in the analysed case law. Art. 28 is mentioned only in one case which relates to 1971 Hague Convention (see No. 27 below).

## 2.7 Comments on other Practical Problems

*These areas are of particular interest for the Commission. Please be as precise as possible regarding any issue that has been reported on:*

27. *The impact of the application of the 1971 Hague Convention on the law applicable to traffic accidents on legal certainty (where relevant for your Member State)*

Slovakia is a contracting state to the 1971 Hague Convention, which takes precedence over other regulations when Slovak courts conduct proceedings concerning claims arising out of traffic accidents with an international aspect. Moreover, the 1971 Hague Convention is *loi uniforme* (Art. 11) and shall therefore be applied regardless of the reciprocity and regardless of the fact that a law of a non-contracting state is applicable. In general, the 1971 Hague Convention comprehensively covers the determination of the governing law with respect to all issues that may arise in connection with traffic accidents, with the exception of recourse actions among persons liable and recourse actions and subrogation in so far as insurance companies are concerned (Art. 2 points 4 and 5). The 1971 Hague Convention also applies to claims against the insurers of the liable person (Art. 9).

Unfortunately, the courts do not always take into account the application of the 1971 Hague Convention. Some courts correctly gave precedence to the 1971 Hague Convention over Rome II (see also footnote No. 5 above with reference to more relevant case law):

- Regional Court Bratislava 5Co/515/2013, dated 21. 09. 2016 (Damage, traffic accident in the Czech Republic)

Other courts also ruled in a similar manner, e.g.:

- District Court in Ružomberok 5C/21/2012, dated 06. 09. 2012 (Damage, traffic accident in the Czech Republic)
- District Court in Lúčenec 14C/162/2013, dated 16. 06. 2016 (Damage, traffic accident in Austria)
- District Court in Liptovský Mikuláš 8C/166/2015, dated 20. 12. 2017 (Damage, traffic accident in Hungary)

On the other hand, there are also cases where the courts applied Rome II instead of the 1971 Hague Convention. Usually, these decisions do not give any reasoning as to the application of Rome II, with the exception of the following decision:

- Regional Court in Banská Bystrica 17Co/54/2019, dated 25. 3. 2020. The traffic accident occurred in 2013. The plaintiff was a Slovak insurance company, and the defendant was a Slovak citizen who had caused a traffic accident in a country "Y" while driving a vehicle without the compulsory motor third party liability insurance. The court stated that even though the plaintiff referred to the 1971 Hague Convention (see Sec. 22), it was not applicable to the case at hand because Rome II takes precedence over conventions concluded exclusively between two or more Member States based on Art. 28(2). Nevertheless, the court further added that under both the 1971 Hague Convention and Rome II the relevant criteria to determine the law governing the rights arising out of non-contractual obligation in connection with a traffic accident as well as the extent of such liability would be approximately the same.

The EU law on motor insurance that is often referred to in judgements may be the reason why the courts apply Rome II instead of the 1971 Hague Convention, without stating their reasons for doing so. These cases usually concern insurance. If a reasoning is given at all, the courts often point to two ECJ cases, C-22/12 (Katarína Haasová) and C-350/14 (Florin Lazar).

The case Haasová concerned the right to compensation of the partner and the child, who was a minor, and non-material damage covered by compulsory insurance which resulted from a traffic accident in the Czech Republic. When deciding on the relevant legal source, the ECJ referred in "legal context" first to the 1971 Hague Convention and second to Art. 28 Rome II. Furthermore, the ECJ stated that, at the outset, it should be noted that the domestic court determined the Czech provisions on civil liability as applicable to the facts in the main proceedings in the light of Arts. 3 and 4 of the 1971 Hague Convention and Art. 28 Rome II, see para 36 of the judgment. Nevertheless, the ECJ did not address in detail the relationship between these two instruments. This judgment was thereafter quoted but only in the context of Rome II application:

- Regional Court in Prešov 6Co/123/2017, dated 25. 9. 2018: damage related to the death of a person in a traffic accident that occurred in the Member State of the court seized, and was suffered by members of that person's family residing in another state, was classified as "indirect consequences", referring to the Haasová case. The applicable law was determined according to Art. 4 Rome II without any reasoning.

The case Florin Lazar was based on a preliminary question from the District Court in Trieste, Italy. Since Italy is not a contracting state to the 1971 Hague Convention, the ECJ was not compelled to address the potential conflict between the two instruments and quickly opted for Rome II in a case where the questions related to the damage and indirect consequences of the tort/delict. The decision focuses on the interpretation of Art. 4(1) Rome II and it cannot be excluded that it may have influenced the Slovak courts when determining the governing law. The decision was quoted, for example by:

- Supreme Court of The Slovak Republic 8Cdo/1361/2015, dated 26. 6. 2017: Damage related to the death of a person in a traffic accident that occurred in the Member State of the court seized and was suffered by members of that person's family residing in another state, was classified as indirect consequences. The applicable law was determined pursuant to Art. 4(1) Rome II, the 1971 Hague Convention was not mentioned).

**28. Any other practical problems with respect to the application or interpretation of the Rome II Regulation, including but not limited to the suitability of the mosaic approach**

We are not aware of any case law which would deal with the mosaic approach.

### 3. Comments on areas of interest

*These areas are of particular interest for the Commission. Please be as precise as possible regarding any issue that emerged in your Member State regarding:*

**29. The exclusion of violations of privacy and rights relating to personality, including defamation, from the scope of the Rome II Regulation and any difficulties arising out from differences among Member States' rules in cross-border situations**

In all cases concerning violations of privacy, the courts did not apply Rome II, but provisions of the Slovak autonomous law, i.e. Sec. 15 of the Slovak PIL Act (cited above, footnote No. 3). For example:

- District Court in Bratislava I 11C/25/2012, dated 28. 2. 2012 (Preliminary injunction - violations of privacy and rights relating to personality. Defendants: 1. Facebook (US), 2. Google (US), 3. Wikidot (Poland). As to defendants 1. and 2., the proceedings were discontinued for lack of jurisdiction. As to defendant 3. (located in Poland), the proceedings were discontinued due to the failure to bear the burden of proof in proving the urgency of the temporary measures. Art. 1(2)(g)).
- District Court in Bratislava I 15C/24/2012, dated 28. 2. 2012 (Preliminary injunction. Violations of privacy and rights relating to personality, untrue and distorting information published on the internet. According to Art. 1(2)(g) the Rome II Regulation does not apply to non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation).
- District Court in Liptovský Mikuláš 6C/69/2011, dated 26. 2. 2013 (Claim for compensation for damage to health due to an accident caused by a snow plough on the ski slope resulting in the death of the injured party (Polish citizen) in Slovakia – the court applied Art. 4(1) Rome II stating that, be the damage occurred in Slovakia, it is not legally relevant whether it was a traffic accident or not, because pursuant to Art. 3 of the

1971 Hague Convention, the law of the state where the accident occurred applies anyway. Second claim for infringement of personality rights (loss of a child) – the court stated that Rome II did not apply according to Art. 1(2)(g) and applied the Slovak PIL Act.

*30. Any comment regarding the Interplay of the Rome II Regulation with the treatment of **defamation and data protection**, and, in these areas, the relevance of **Strategic Lawsuits Against Public Participation (SLAPPs)***

In the analysed case law, no problems were noted in this regard. Defamation was concerned only in one case mentioned above (see No. 29) against Facebook, Google and Wikidot. The court came to the conclusion that Slovak law shall apply. The proceedings were then discontinued for other reasons.

*31. The extent to which Rome II Regulation has been applied to **corporate abuses against human rights** and lays down an effective set of rules to regulate non-contractual liability;*

We have not come across any such case.

*32. The impact of the development of **artificial intelligence** on the Rome II Regulation, and in particular on the suitability of the rules that it contains to regulate non-contractual liability.*

We have not come across any such case.

#### 4. List of national case law

<u>Court or tribunal</u>	<u>Case name and reference number</u>  <u>Reference to decision of the Court of Justice if applicable</u>	<u>Date</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings (only for key cases)</u>
District Court in Považská Bystrica	10 C110/2009	7. 12. 2012	Art. 4 and 31 and art. 32	Damage, traffic accident, insurance.	The accident occurred on 17 August 2006. Rome II was not applied due to restrictions to its temporal applicability.
District Court in Liptovský Mikuláš	10 C/15/2012	23. 5. 2012	Art. 10 (3)	Unjust enrichment - violation of tariff and transport.	Failure to provide a valid transport document (ticket). The claimed amount was considered an unjust enrichment of the defendant. This is the factual basis of unjust enrichment consisting in the material gain acquired by defendant without legal grounds.
District Court in Liptovský Mikuláš	10 C/16/2012	4. 10. 2012	Art.4 (1)	Damage incurred by towing away a vehicle	Without details regarding the applied article of Rome II.
District Court in Čadca	10 C/185/2013	4. 7. 2017	Art.4 (1)	Damage to health Compensation for loss of amenity and loss of earnings.	The dispute dealt with a claim for compensation for a loss of amenity. Plaintiff suffered a work accident in the Czech Republic, therefore, the article 4 (1) of the Rome II Regulation shall apply.



					Without details regarding the applied article of Rome II.
District Court in Liptovský Mikuláš	10 C/187/2011	3. 7. 2013	Art. 10 (3)	Unjust enrichment	Failure to provide a valid transport document (ticket). The claimed amount was considered an unjust enrichment of the defendant.  Without details regarding the applied article of Rome II.
District Court in Liptovský Mikuláš	10 C/313/2012	7. 11. 2013	Art.4 (1)	Damage, traffic accident	Without details regarding the applied article of Rome II.  The Convention on the Law Applicable to Traffic Accidents of 4 May 1971 was not applied.
District Court in Liptovský Mikuláš	10 C/42/2013	31. 7. 2015	Art.4 (1)	Damage, traffic accident, insurance	Without details regarding the applied article of Rome II.  The Convention on the Law Applicable to Traffic Accidents of 4 May 1971 was not applied.
District Court in Čadca	10C/77/2010	11. 4. 2012	Art.4 (1)	Damage, traffic accident	The plaintiff, a citizen of the Czech Republic, and the defendant, a citizen of the Slovak Republic, were involved in a traffic accident that occurred in Austria. All states are members of the European Union; therefore, The Rome II Regulation shall apply.  Without details regarding the applied article of Rome II.
District Court in Lučenec	10 C/63/2013	26. 7. 2013	Art.4 (1)	Damage, traffic accident, insurance	Without details regarding the applied article of Rome II.

					The Convention on the Law Applicable to Traffic Accidents of 4 May 1971 was not applied.
District Court in Bratislava I	10Ca/9/2019	22. 3. 2019	Art. 8 (1)	Intellectual property, preliminary injunction	Plaintiff had a license agreement granted by the Council of the Czech Republic for Radio and Television Broadcasting and requested preliminary injunction restraining certain television broadcasting in Slovakia.  The law applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the country for which protection is claimed.
District Court in Zvolen	10Cb/31/2013	15. 5. 2019	Art. 10 (3)	Unjust enrichment	Defendant did not pay for the construction of a house claiming that a contract for work was not concluded.  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.
Regional Court in Trnava	10Co/375/2016	13. 9. 2017	Art. 16	Overriding mandatory provisions	Loan agreement – consumer credit contract. Without further details regarding the application of article 16 Rome II as an overriding mandatory provision.
Regional Court in Žilina	10Co79/2018	30. 5. 2018	Art.4 (1)	Damage to health	Compensation for a loss of amenity and a loss of earnings.

					Without details regarding the applied article of Rome II.
District Court in Prievidza	11C/147/2008	13. 11. 2014	Art. 4 (3)	Damage, traffic accident	All parties involved in the litigation were members of the European Union, hence, the Rome II Regulation shall apply. The traffic accident occurred in Germany; therefore, the German law shall apply.  Without details regarding the applied article of Rome II .
District Court in Prešov	11C/183/2016	8. 3. 2017	Art. 10 (3)	Unjust enrichment	Invalid legal act.
District Court in Bratislava I	11C/25/2012	28. 2. 2012	Art. 1 (2)(g)	Preliminary injunction - Violations of privacy and rights relating to personality Defendants: 1. Facebook (US), 2. Google (US), 3. Wikidot (Poland)	Proceedings were discontinued for defendants 1 and 2 due to lack of jurisdiction.  With respect to defendant 3 (located in Poland), the proceedings were discontinued due to the failure to bear the burden of proof regarding the urgency of adjustment of relations.  Without details regarding the applied article of Rome II .
Regional Court in Košice	11Co/128/2014	16. 4. 2015	Art. 1 (2)(g)	Damage to health. Compensation for loss of amenity	Damage to health as a result of a traffic accident. Defendant was found guilty for causing a personal injury.  No details regarding the applied article of Rome II .
Regional Court in Trnava	11Co/247/2018	10. 12. 2019	Art. 1	Rome II was not applied, the subject matter was considered a right <i>in rem</i> to a movable thing.	

District Court in Prešov	11Cpr/5/2015	31. 5. 2017	Art. 4 (2)	Work accident	<p>Plaintiff (employee) suffered a work accident while he was working for defendant (employer).</p> <p>Both parties had their habitual residence in the same country at the time of the accident, therefore, article 4 (2) of the Rome II Regulation shall apply.</p> <p>No details regarding the applied article of Rome II .</p>
District Court in Ružomberok	11Csp/43/2018	16. 11. 2018	Art. 4 (1)	Compensation for health care	Provision of medical services – detention centre for intoxicated persons
District Court in Nové Mesto n/V	12C/156/2014	1. 8. 2014	Art. 4	Damage	<p>Compensation for damage from unauthorized consumption of electricity.</p> <p>No details regarding the applied article of Rome II .</p>
Regional Court Prešov	12Co/13/2020	18. 6. 2020	Art. 4	Damage, traffic accident	<p>Involved parties were members of the European Union, the Rome II shall apply. The traffic accident occurred in the European Union; therefore, the Rome II shall apply.</p> <p>No details regarding the applied article of Rome II .</p>
District Court in Rimavská Sobota	13C/15/2019	5. 11. 2019	Art. 4 (1)	Compensation for health care	Provision of medical services – detention centre for intoxicated persons
District Court in Košice I	13C/285/2014	14. 2. 2020	Art. 4 (1)	Delivery of movable and immovable property of a company	The plaintiff demanded the delivery of all commercial and accounting documents, as well as the company's movable and immovable property. The plaintiff derived his

					<p>right to recover things from the defendant in testimony of the defendant as a witness in criminal proceedings in a legal matter of theft.</p> <p>No details regarding the applied article of Rome II .</p>
District Court in Lučenec	13C/79/2015	31. 8. 2017	Art. 4 (1), (2) and art. 10 (2)	Damage, unjust enrichment.	<p>Compensation for damage from unauthorized consumption of electricity and gas.</p> <p>No details regarding the applied article of Rome II .</p>
Regional Court in Prešov	13Co/78/2017	24. 7. 2018	Art. 10 (3)	Unjust enrichment	<p>Loan agreement.</p> <p>No details regarding the applied article of Rome II .</p>
Regional Court in Žilina	13Cob/18/2020	17. 6. 2020	Art. 4 (3)	Damage	<p>The closer connection with the Slovak Republic was established based on the Slovak registered office of the carrier responsible for the damage and also the Slovak registered offices of the parties to the contract of carriage, therefore, article 4 (3) shall apply.</p> <p>No details regarding the applied article of Rome II .</p>
District Court in Rimavská Sobota	14C/108/2012	10. 12. 2012	Art. 10 (3)	Unjust enrichment - violation of tariff and transport conditions.	<p>Failure to submit a valid transport document (ticket).</p>

					The claimed amount for the fare was considered an unjust enrichment of the defendant. This is the factual basis of unjust enrichment consisting in the material gain acquired by defendant without legal grounds.
District Court in Rimavská Sobota	14C/13/2012	30. 7. 2012	Art. 10 (3)	Unjust enrichment - violation of tariff and transport conditions	Defendant was obliged to reimburse both fare and penalty. The claimed amount is an unjust enrichment of the defendant. This is the factual basis of unjust enrichment consisting in the material gain acquired by defendant without legal grounds.
District Court in Prievidza	14C/156/2016	30. 1. 2018	Art. 4 (1)	Compensation for health care	Provision of medical services - detention centre for drunks
District Court in Levice	14C/212/2013	25. 4. 2018	Art. 4 (1)	Damage, traffic accident	<p>Defendant knocked down a cyclist who succumbed to his injuries, thereby interfered with the plaintiffs' personal rights, namely their rights on privacy and family life.</p> <p>Non-contractual obligation resulting from a traffic accident should be interpreted as harm associated with a death of a person occurred in the Member State of the court seized and which has been a person resident in another Member State should be classified as an "indirect consequence" of the accident within the meaning of that provision, since constitutes an interpretation for determining the applicable law and not assessment of the right to compensation for non-pecuniary damage and interpretation of the concept of compensation for non-pecuniary damage within the meaning of insurance event.</p>

District Court in Rimavská Sobota	14C/22/2012	30. 7. 2012	Art. 10 (3)	Unjust enrichment - violation of tariff and transport conditions	Defendant was obliged to reimburse both fare and penalty. Claim for the fare is unjust enrichment of the defendant. This is the factual basis of unjust enrichment consisting in the material gain acquired by defendant without legal grounds.
District Court in Rimavská Sobota	14C/24/2012	24. 5. 2012	Art. 10 (3)	Unjust enrichment - violation of tariff and transport conditions	Defendant was obliged to reimburse both fare and penalty. Claim for the fare is unjust enrichment of the defendant. This is the factual basis of unjust enrichment consisting in the material gain acquired by defendant without legal grounds.
District Court in Žilina	14C/242/2013	15. 1. 2015	Art. 4 (1)	Damage caused by motor vehicle	According to the reasoning of the judgement both The Convention on the Law Applicable to Traffic Accidents of 4 May 1971 and Rome II shall apply. No further details included.
District Court in Rimavská Sobota	14C/286/2013	9. 9. 2013	Art. 10 (3)	Unjust enrichment - violation of tariff and transport conditions	Defendant was obliged to reimburse both fare and penalty. Claimed amount is unjust enrichment of the defendant. This is the factual basis of unjust enrichment consisting in the material gain acquired by defendant without legal grounds
District Court in Levice	14C/420/2013	2. 9. 2019	Art. 10 (3)	Unjust enrichment	The subject of the dispute was unjust enrichment from the pre-contractual negotiations on the loan agreement which was not validly concluded. The plaintiff argued that the defendant unjustly enrich himself by accepting the funds provided by the plaintiff. The funds were received on an account in the Czech Republic.

District Court in Levice	14C/63/2007	28. 11. 2017	Art. 4 (1)	Damage, traffic accident	The effect is the property loss of the injured party, therefore, where is a centre of proprietary interests of the injured party. As the applicable law is Czech law, as the original right to payment of recourse, i.e., proprietary interests of the injured party is located in the Czech Republic.  No further details.
District Court in Rimavská Sobota	14C/66/2012	15. 11. 2012	Art. 10 (3)	Unjust enrichment - violation of tariff and transport conditions	Defendant was obliged to reimburse both fare and penalty. The claimed amount is unjust enrichment of the defendant. This is the factual basis of unjust enrichment consisting in the material gain acquired by defendant.
District Court in Rimavská Sobota	14C/67/2012	18. 10. 2012	Art. 10 (3)	Unjust enrichment - violation of tariff and transport conditions	Defendant was obliged to reimburse both fare and penalty. The claimed amount is unjust enrichment of the defendant. This is the factual basis of unjust enrichment consisting in the material gain acquired by defendant without legal grounds
District Court in Rimavská Sobota	14C/82/2012	20. 9. 2012	Art. 10 (3)	Unjust enrichment - violation of tariff and transport conditions	Defendant was obliged to reimburse both fare and penalty. The claimed amount is unjust enrichment of the defendant. This is the factual basis of unjust enrichment consisting in the material gain acquired by defendant without legal grounds.
Regional Court in Prešov	14Co/11/2019	25. 6. 2019	Art. 31	Damage, traffic accident	The accident occurred in 2005.  Rome II was not applied due to restrictions to its temporal applicability.



Regional Court in Žilina	14Cob/138/2018	30. 5. 2019	Art. 4 (1)	Damage, traffic accident	The Convention on the Law Applicable to Traffic Accidents of 4 May 1971 was not applied.  Traffic accident occurred in Slovakia; therefore, Slovak law shall apply.  No details regarding the applied article of Rome II.
Regional Court in Žilina	14Cob/29/2014	25. 6. 2015	Art. 4 (1) and art. 31	Damage, traffic accident	The accident occurred in 2004.  Rome II was not applied due to restrictions to its temporal applicability.
Regional Court in Žilina	14Cob/46/2019	26. 9. 2019	Art. 4 (1)	Damage, traffic accident, insurance	Traffic accident occurred in Slovakia; therefore, Slovak law shall apply.  No details regarding the applied article of Rome II.  The Convention on the Law Applicable to Traffic Accidents of 4 May 1971 was not applied.
Regional Court in Žilina	14Cob/45/2019	19.9.2019	Art. 4 (1) Rome II	Damage, not directly result of the traffic accident, insurance	Claim for damages caused by an insurable event in the territory of Slovakia concerned the reimbursement of costs which were not directly result of the traffic accident but occurred in connection with the damage on the spare car. The court classified the claim as extra-contractual, referring to the ECJ case C-27/02 Engler, in the absence of a freely assumed obligation.
District Court in Rimavská Sobota	14Csp/108/2016	19. 4. 2015	Art. 10 (1)	Unjust enrichment	Payment of non-existent debt.

					No details regarding the applied article of Rome II.
District Court in Trenčín	14Csp/124/2018	2. 12. 2018	Art. 4 (1)	Damage, traffic accident	Damage occurred in Germany, therefore, article 4 (1) of Rome II shall apply.
District Court in Bratislava I	15C/15/2011	16. 5. 2013	Art. 4 (2)	Traffic accident, damage to health	The accident occurred on 29 August 2008. Rome II was not applied due to restrictions to its temporal applicability.
District Court in Bratislava I	15C/24/2012	28. 2. 2012	Art. 1 (2)(g)	Preliminary injunction. Violations of privacy and rights relating to personality	Untrue and distorting information published on the internet. According to article 1 (2) (g) the Rome II does not apply on-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.
District Court in Trnava	15C/46/2013	18. 8. 2014	Art. 16	Damage Overriding mandatory provisions	Gas supply agreement. Plaintiff supplied gas to the defendant and the defendant fail to pay for the supply. No details regarding the applied article of Rome II .
District Court in Trenčín	16C/10/2011	18. 2. 2013	Art. 4	Damage to health	Plaintiff crashed into an unsecured metal structure intended for an advertising banner and suffered a permanent damage to his health. The accident occurred in Slovakia; therefore, Slovak law shall apply. No details regarding the applied article of Rome II.

District Court in Dunajská Streda	16C/32/2016	16. 9. 2016	Art. 4 (1)	Damage, traffic accident	No details regarding the applied article of Rome II.
District Court in Čadca	16Cb/26/2012	16. 7. 2014	Art. 4 (1)	Damage – toll	Defendant failed to pay a toll for the motorway.  No details regarding the applied article of Rome II .
Regional Court in Trenčín	16CoKR/14/2017	20. 3. 2018	Art. 10 (1 - 3)	Unjust enrichment	Loan agreement.  No details regarding the applied article of Rome II.
District Court in Martin	17Cb/131/2017	27. 9. 2019	Art. 4 (3)	Damage – escape clause	Part of the consignment was stolen. There is a closer connection with the Slovak Republic with regard to the registered office of the carrier in the Slovak Republic that is responsible for the damage and also the contract of carriage was concluded between entities that both have their registered office in the Slovak Republic, therefore, article 4 (3) shall apply.
Regional Court in Banská Bystrica	17Co/54/2019	25. 3. 2020	Art. 4 and art. 15 and art. 28	Damage, traffic accident	Traffic accident occurred in 2013. According to its article 28 (2), Rome II takes precedence over the Convention on the Law Applicable to Traffic Accidents of 4 May 1971.  Criterion concerning applicable law to non-contractual liability for traffic accidents, as well as the scope of applicable law determine in approximately the same way (cf., article 1, articles 4 and 15 of the Rome II with Articles 1, 3 and 8 of the Convention)

District Court in Bratislava II	18C/190/2016	9. 8. 2017	Art. 4 (1)	Compensation for health care	Provision of medical services.
District Court in Prešov, Regional Court In Prešov	18Cb/3/20111, 1Cob/93/2013	12. 11. 2013, 12. 11. 2014	Art. 4 (1)	Damages	Defendant paid recurring fees associated with delivering the goods. The applicable law was determined on the basis of the place where the damage occurred, despite the existing transport contract. Without reasoning.
District Court in Košice I	19C/232/2011	3. 7. 2015	Art. 4 (1)	Unjust enrichment	Using an apartment without a legal title.
District Court in Bratislava I	19Ca/50/2019	17. 10. 2019	Art. 8 (1)	Preliminary injunction. Intellectual property – copyright claims	Use of photographs without consent in a literary publication on the internet portal. Applicable law from an infringement of an intellectual property right shall be the law of the country for which is claimed.
District Court in Žilina	19Cb/45/2012	4. 6. 2019	Art. 4 (1)	Damage, traffic accident	Traffic accident occurred in Slovakia. Decisive is where the damage occurred, therefore, Slovak law shall apply. No details regarding the applied article of Rome II .
District Court in Prešov	19Cb/6/2011	28. 2. 2012	Art. 4 (1)	Damage, insurance	Claim as a result of recourse.
District Court in Žilina	19Cb/69/2018	12. 10. 2018	Art. 4 (1)	Damage, traffic accident	No details regarding the applied article of Rome II .  The Convention on the Law Applicable to Traffic Accidents of 4 May 1971 was not applied.
District Court in Košice I	19Csp/251/2017	24.4. 2018	Art. 4 (1)	Compensation for health care, insurance	Provision of health care. Defendant did not participate in public health insurance.
District Court in Bardejov	1C/109/2015	29.6. 2016	Art. 10 (1)	Unjust enrichment	Non-contractual obligation arising out of an unjust enrichment relates to an existing lease contract between parties.

District Court in Ružomberok	1Cb/12/2013	26. 6. 2013	Art. 10	Unjust enrichment	Defendant did not deliver the goods according to sales contract. No details regarding the applied article of Rome II .
Regional Court in Košice	1Co/424/2017	19. 12. 2018		Rome II does not apply. obligations arising out of matrimonial property regimes are excluded from the scope of Rome II.	Between Slovakia and G. no bilateral agreement has been reached to resolve these issues, therefore, the Act No. 97/1963 Coll. on Private International Law shall apply to determine the applicable law.
Regional Court in Bratislava	1Cob/303/2014	3. 12. 2015	Art. 10 (1)	Unjust enrichment	Failure to provide legal services. No details regarding the applied article of Rome II.
District Court in Žilina	20Cb/163/2012	31. 1. 2017	Art. 1 (1) and art. 10 (3 – 4)	Unjust enrichment, damage	Providing construction works. Based on the circumstances of the case, the non-contractual obligation arising out of unjust enrichment is more closely connected with the Czech Republic where the unjust enrichment occurred (construction works), therefore, Czech law shall apply.
Regional Court in Prešov	21Co/60/2015	31. 3. 2016	Art. 4 (1)	Damage, traffic accident	Damage related to a death of a person in a traffic accident that occurred in a Member State of the court seized and was suffered by members of that person´s family residing in another state, was classified as indirect consequences.
Regional Court in Trnava	21Cob/211/2013	21. 10. 2014	Art. 2 and art. 4 (1)	Unjust enrichment	Gratuitous use of bus stations in the Czech Republic to ensure the operation of the international bus line Ostrava – Bratislava.

					Without further details as to why art. 4 was applied instead of art. 10 related to unjust enrichment.
District Court in Liptovský Mikuláš	22C/1/2017	9. 1. 2018	Art. 4 (1)	Damage, traffic accident	Damage to health, property damage incurred by a traffic accident.  No details regarding the applied article of Rome II.  The Convention on the Law Applicable to Traffic Accidents of 4 May 1971 was not applied.
District Court in Bratislava II	24Cb/46/2013	19. 7. 2013	Art. 4	Damage	Damage due to non-fulfilment of the obligation to provide co-operation for the ordered transport.
District Court in Bratislava III	25Cb/184/2016	12. 6. 2017	Art. 4 (1)	Unjust enrichment	Performance for legal cause which has subsequently lapsed.  Without further s details as to why art. 4 was applied instead of art. 10 related to unjust enrichment.
District Court in Michalovce	24C/7/2014	9. 2. 2015	Art. 4 (1)	Damage - violation of tariff and transport conditions	Defendant was obliged to reimburse both fare and penalty. The plaintiff as a legal entity with registered office in the Czech Republic and defendant is a natural person with abode in Slovakia. Parties did not conclude a contract; therefore, Rome II shall apply, specifically art. 4 due to the fact the damage occurred in the Czech Republic.  Without further specification why was applied art. 4 of Rome II.

District Court in Bratislava III	25Cb/447/2017	10. 10. 2019	Art. 4 (1)	Damage	<p>Defendant was supposed to acquire funds arising from the monetization of the machine; however, he could not validly acquire ownership or even a lien because he was not the owner of the machine.</p> <p>Without further details as to why art. 4 was applied.</p>
District Court in Trenčín	27C/210/2014	22. 12. 2015	Art. 4 (1)	Damage, traffic accident	<p>No details regarding the applied article of Rome II. Just stated that traffic accident occurred in Slovakia, therefore, Slovak law according to art. 4 (1) shall apply.</p> <p>The Convention on the Law Applicable to Traffic Accidents of 4 May 1971 was not applied.</p>
District Court in Košice I	27CbPv/3/2015	22. 12. 2015	Art. 6 (2) and art. 4 (1)	Preliminary injunction - unfair competition, competition (vertical agreements)	<p>Respondent was obliged to refrain from distribution and advertisement of products via internet in Slovakia. Petitioner had an exclusive sales contract which territorial scope included Slovakia.</p> <p>Applicable law is the legal order of the Slovak Republic as a territory where the direct consequence of the non-contractual delict occurred.</p> <p>Without further specification of the direct consequence of the non-contractual delict.</p>
District Court in Bratislava I	32Cb/251/2010	12. 1. 2015	Art. 4 (1)	Damage, traffic accident	<p>The damage arose to the plaintiff in connection with his business activities performed in the Slovak Republic, and therefore, the applicable law shall be Slovak</p>

					law, regardless of the fact that the insured event aroused and occurred in Slovakia.
District Court in Bratislava I	33Cb/247/2012	19. 1. 2015	Art. 4 (1)	Damage - toll	Defendant failed to pay a toll for the motorway.  No details regarding the applied article of Rome II .
District Court in Košice II	36C/99/2014	15. 3. 2016	Art. 10 (1- 3)	Unjust enrichment	Failure to supply the goods. By crediting the funds on the defendant's account unjust enrichment took place, therefore, art. 10 (3) of Rome II shall apply.
District Court in Trnava	36Cb/142/2012	26. 6. 2013	Art. 4 (1)	Damage - toll	Defendant failed to pay a toll for the motorway.  No details regarding the applied article of Rome II.
District Court in Trenčín	36Cb/149/2013	20. 8. 2014	Art. 10 (1- 3)	Unjust enrichment	Defendant received financial proceeds based on a schedule resolution that was later revoked by the court. Due to lack of a legal clause an unjust enrichment occurred.
District Court in Trenčín	36Cb/53/2009	25. 11. 2011	Art. 10 (1- 3)	Unjust enrichment	Loan agreement. Double payment.
District Court in Trenčín	36Cbi/108/2014	5. 5. 2017	Art. 10 (1- 3)	Unjust enrichment	Loan agreement. Non-payment for provided funds.
District Court in Trnava	37C/112/2015	2. 11. 2015	Art. 2 (1) and art. 16	Unjust enrichment  Overriding mandatory provisions.	Gas supply agreement. Non-payment for the supply.  Without further details regarding the applied article 16 of Rome II as an overriding mandatory provision.



District Court in Košice I	37C/204/2012	20. 4. 2017	Art. 4	Damage	Throwing an object on the car.  No details regarding the applied article of Rome II.
District Court in Trnava	37C/222/2015	13. 7. 2015	Art. 2 (1) and art. 16	Overriding mandatory provisions.	Loan agreement.  Without further details regarding the applied article 16 of Rome II as an overriding mandatory provision.
District Court in Trnava	37C/328/2013	10. 4. 2017	Art. 2 (1) and art. 16	Overriding mandatory provisions.	Loan agreement.  Without further details regarding the applied article 16 of Rome II as an overriding mandatory provision.
District Court in Žilina	38Cb/111/2016	16. 2. 2018	Art. 4 (1)	Damage, traffic accident, insurance	No details regarding the applied article of Rome II.
District Court in Žilina	38Cb/294/2016	10. 4. 2018	Art. 4 (1)	Damage, traffic accident, insurance	Plaintiff is a legal entity with registered office in the Czech Republic. Slovak law was determined as applicable law according to article 4 (1) of Rome II.  No details regarding the applied article of Rome II.
District Court in Žilina	38Cb/74/2016	26. 1. 2018	Art. 4 (1)	Damage, traffic accident, insurance	Plaintiff is a legal entity with registered office in the Czech Republic. Slovak law was

					determined the as applicable law according to article 4 (1) of Rome II. No details regarding the applied article of Rome II.
District Court in Košice II	39C/131/2012	21. 2. 2013	Art. 4 (1)	Compensation for health care	Provision of medical services – detention centre for intoxicated persons.
District Court in Trenčín	39Cb/269/2012	3. 7. 2014	Art. 4 (1)	Damage - toll	Non-payment of a toll for the motorway. No details regarding the applied article of Rome II.
District Court in Trenčín	39Cb/272/2012	3. 7. 2014	Art. 4 (1)	Damage - toll	Non-payment of a toll for the motorway. No details regarding the applied article of Rome II.
District Court in Trenčín	39Cb/274/2012	3. 7. 2014	Art. 4 (1)	Damage - toll	Non-payment of a toll for the motorway. No details regarding the applied article of Rome II.
District Court in Ružomberok	3C/70/113/2016	19. 8. 2016	Art. 4 (1)	Damage - toll	Non-payment of a toll for the motorway. No details regarding the applied article of Rome II.
District Court in Nové Mesto n/V	3C/70/2014	12. 5. 2016	Art. 10 (3)	Unjust enrichment	Purchase of a stolen vehicle.
District Court in Bánovce nad Bebravou	3Cb/5/2016	23. 1. 2018	Art. 4	Culpa in contrahendo, damage	As a result of the breach of the general duty of prevention by revocation of the previous resolutions concerning the sale of the land and the construction of the plaintiff's house by a resolution of the city council incurred unlawful action.

Regional Court in Košice	3Co/647/2015	9. 2. 2017	Art. 2 (1) and art. 4 (1)	Unjust enrichment	Unjust enrichment based on use of an apartment without a legal title.
District Court in Liptovský Mikuláš	4C/11/2012	15. 5. 2012	Art. 10 (3)	Unjust enrichment	Failure to submit a valid transport document (ticket). Defendant was obliged to reimburse both fare and penalty. Claim for the fare is unjust enrichment. No details regarding the applied article of Rome II.
District Court in Liptovský Mikuláš	4C/12/2012	20. 3. 2012	Art. 10 (3)	Unjust enrichment	Failure to submit a valid transport document (ticket). Defendant was obliged to reimburse both fare and penalty. Claim for the fare is unjust enrichment. No details regarding the applied article of Rome II.
District Court in Liptovský Mikuláš	4C/125/2012	27. 9. 2012	Art. 10 (3)	Unjust enrichment	Failure to submit a valid transport document (ticket). Defendant was obliged to reimburse both fare and penalty. Claim for the fare is unjust enrichment. No details regarding the applied article of Rome II.
District Court in Vranov nad Toplou	4C/233/2009	28. 2. 2017	Art. 3 – The Convention on the Law Applicable to Traffic Accidents of 4 May 1971	Damage, traffic accident	Traffic accident occurred in 2008. Article 3 of The Convention on the Law Applicable to Traffic Accidents of 4 May 1971 was applied. Damage related to a death of a person in a traffic accident that occurred in the Member

					State of the court seized and was suffered by members of that person's family residing in another state, was classified as "indirect consequences".
District Court in Piešťany	4C/259/2008	8. 9. 2014	Art. 1 (2) (b)	The Rome II Regulation does not apply. From the scope of The Rome II Regulation are excluded obligations arising out of settlement co-ownership between former spouses	For this matter the Act No. 97/1963 Coll. on Private International Law shall apply.
District Court in Liptovský Mikuláš	4C/28/2011	27. 10. 2011	Art. 10 (3)	Unjust enrichment - violation of tariff and transport conditions	Failure to submit a valid transport document (ticket). Defendant was obliged to reimburse both fare and penalty. Claim for the fare is unjust enrichment of the defendant. This is the factual basis of unjust enrichment consisting in the material gain acquired by defendant without legal grounds.
District Court in Liptovský Mikuláš	4C/283/2012	2. 4. 2013	Art. 10 (3)	Unjust enrichment - violation of tariff and transport conditions	Failure to submit a valid transport document (ticket). Defendant was obliged to reimburse both fare and penalty. Claim for the fare is unjust enrichment of the defendant. This is the factual basis of unjust enrichment consisting in the material gain acquired by defendant without legal grounds.
District Court in Liptovský Mikuláš	4C/35/2011	27. 9. 2011	Art. 10 (3)	Unjust enrichment - violation of tariff and transport conditions	Failure to submit a valid transport document (ticket).

					Defendant was obliged to reimburse both fare and penalty. Claim for the fare is unjust enrichment of the defendant. This is the factual basis of unjust enrichment consisting in the material gain acquired by defendant without legal grounds.
District Court in Piešťany	4C/9/2013	2. 9. 2015	Art. 4 (1)	Damage, traffic accident, insurance	No details regarding the applied article of Rome II.  The Convention on the Law Applicable to Traffic Accidents of 4 May 1971 was not even mentioned.
District Court in Liptovský Mikuláš	4C/92/2012	24. 7. 2012	Art. 10 (3)	Unjust enrichment - violation of tariff and transport conditions	Failure to submit a valid transport document (ticket).  Defendant was obliged to reimburse both fare and penalty. Claim for the fare is unjust enrichment of the defendant. This is the factual basis of unjust enrichment consisting in the material gain acquired by defendant without legal grounds.
District Court in Čadca	4Cb/29/2012	5. 2. 2015	Art. 4 (1)	Damage - toll	Non-payment of a toll for the motorway.  No details regarding the applied article of Rome II.
District Court in Bratislava II	58C/1/2014	7. 10. 2015	Art. 4 (1)	Damage  Loss of consignment, refusal of warranty claim, EBAY auction	Plaintiff asserted a claim damages to the carrier but the plaintiff was informed that the consigner had a priority claim. Defendant did not complain about the consignment at the request of the plaintiff.

District Court in Prievidza	5C/149/2011	5. 3. 2012	Art. 4	Damage, traffic accident	No details regarding the applied article of Rome II.
District Court in Vranov n/T	5C/429/2011	27. 9. 2012	Art. 4 (1)	Violation of tariff and transport conditions	Failure to submit a valid transport document (ticket).  Defendant was obliged to reimburse both fare and penalty. Claim for the fare is unjust enrichment of the defendant. This is the factual basis of unjust enrichment consisting in the material gain acquired by defendant without legal grounds.
District Court in Bardejov	5C/43/2009	4. 2. 2013	Art. 31	Unjust enrichment	Rome II was not applied due to restrictions to its temporal applicability. Rome II is effective from 11 January 2009, knowledge of unjust enrichment occurred on 18 December 2008, i.e. on the day of crediting the loan, therefore, the Act No. 97/1963 Coll. on Private International Law shall apply.
District Court in Dunajská Streda	5Cb/12/2013	21. 3. 2014	Art. 4 (1)	Damage - toll	Non-payment of a toll for the motorway.  No details regarding the applied article of Rome II.
District Court in Dunajská Streda	5Cb/13/2013	17. 1. 2014	Art. 4 (1)	Damage - toll	Non-payment of a toll for the motorway.  No details regarding the applied article of Rome II.
District Court in Dunajská Streda	5Cb/2/2013	17. 1. 2014	Art. 4 (1)	Damage - toll	Non-payment of a toll for the motorway.  No details regarding the applied article of Rome II.
District Court in Dunajská Streda	5Cb/4/2013	15. 11. 2013	Art. 4 (1)	Damage - toll	Non-payment of a toll for the motorway.

					No details regarding the applied article of Rome II.
Regional Court in Žilina	5Co/130/2019	29. 10. 2019	Art. 4 (1)	Damage, traffic accident	Mandatory contractual insurance for damage caused by the operation of a vehicle is intended to cover a compensation for non-proprietary damage caused to close persons of victims killed in a traffic accident.
Regional Court in Trenčín	5Co/156/2019	20. 5. 2020	Art. 4 (1)	Damage, traffic accident	Traffic accident that occurred on 1804,2 km of the Danube river, which in this part is on the joint flow of Slovakia and Hungary, which means the state borders on the river are determined by the boundaries of the centre of the flow. From fairway of the damaged ship, it is possible to determine that the collision of the ship occurred on the part from the centre of the river towards the Slovak bank, therefore, Slovak law shall apply.
Regional Court in Bratislava	5Co/314/2017	29. 1. 2019	Art. 4 and art. 31	Damage, traffic accident.	The accident occurred on 29 August 2006. Rome II was not applied due to restrictions to its temporal applicability.
Regional Court in Bratislava	5Co/515/2013	21. 9. 2016	Art. 4 and art. 31	Damage, traffic accident.	The accident occurred on 29 August 2006. Rome II was not applied due to restrictions to its temporal applicability.
District Court in Stará Ľubovňa	6C/14/2017	17. 10. 2018	Art. 4 (1)	Damage	Expenditures related to a traffic accident consisting in preventing groundwater pollution.
District Court in Revúca	6C/34/2012	5. 9. 2012	Art. 4 (1)	Damage. Violation of tariff and transport conditions, damage.	The defendant did not have a valid travel document (ticket).

					The law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs, therefore, Czech law shall apply.
District Court in Brezno	6C/375/2015	10. 5. 2016	Art. 10 (1)	Unjust enrichment	Double payment for work performed.
District Court in Revúca	6C/47/2012	8. 10. 2012	Art. 4 (1)	Violation of tariff and transport conditions.	The defendant did not have a valid travel document (ticket).  The law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs, therefore Czech law shall apply.
District Court in Revúca	6C/48/2012	19. 9. 2012	Art. 4 (1)	Violation of tariff and transport conditions	The defendant did not have a valid travel document (ticket).  The law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs, therefore, Czech law shall apply.
District Court in Prievidza	6C/6/2018	9. 8. 2019	Art. 4 (1)	Damage, traffic accident	Traffic accident that occurred on 1804,2 km of the Danube river, which in this part is on the joint flow of Slovakia and Hungary, which means the state borders on the river are determined by the boundaries of the centre of the flow. From fairway of the damaged ship, it is possible to determine that the collision of the ship occurred on the part from the centre of the river towards the Slovak bank, therefore, Slovak law shall apply.



District Court in Liptovský Mikuláš	6C/69/2011	26. 2. 2013	Art. 1 (2) (g)	Violations of privacy and rights relating to personality.  Compensation for damage. Damage to health.  Accident on the ski slope	The accident incurred by a tracked vehicle operated by defendant – piste modification on 31. 1. 2009.  Damage to health led to death of the injured party in Slovakia, therefore, article 4 (1) EC Regulation no. 764/2007 shall apply. Due to the fact the damage occurred in Slovakia it is not relevant to assess whether it was a traffic accident or not.  Rome II does not apply to the second claim asserted, i.e. the right to protection of personality according to article 1 (2) (g) of Rome II, therefore, to determine the applicable law, the Act No. 97/1967 Coll. on Private International Law shall apply.
District Court in Revúca	6C/70/2012	10. 10. 2012	Art. 4 (1)	Violation of tariff and transport conditions	Defendant did not have a valid travel document (ticket).  The law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs, therefore, Czech law shall apply.  Without further details regarding the applied article 4.
District Court in Partizánske	6Cb/13/2016	20. 12. 2016	Art. 10 (3)	Unjust enrichment	The goods were taken over by the defendant in Slovakia, so that the unjust enrichment occurred in Slovakia and, therefore, Slovak law shall apply.
Regional Court in Prešov	6Co/123/2017	25. 9. 2018	Art. 4 (1)	Damage, traffic accident	Damage related to a death of a person in a traffic accident that occurred in the Member State of the court seized and was suffered by

					<p>members of that person's family residing in another state, was classified as, indirect consequences.</p> <p>The Convention on the Law Applicable to Traffic Accidents of 4 May 1971 was not applied.</p>
Regional Court in Prešov	6Co/56/2018	18. 12. 2018	Art. 4	Damage, traffic accident	<p>Damage related to a death of a person in a traffic accident that occurred in the Member State of the court seized and was suffered by members of that person's family residing in another state, was classified as indirect consequences.</p> <p>The Convention on the Law Applicable to Traffic Accidents of 4 May 1971 was not applied.</p>
Regional Court in Žilina	6Co/609/2015	27. 4. 2016	Art. 4 (1)	Damage, traffic accident	<p>Damage related to a death of a person in a traffic accident that occurred in the Member State of the court seized and was suffered by members of that person's family residing in another state, was classified as indirect consequences.</p>
District Court in Revúca	7C/109/2014	30. 6. 2016	Art. 4 (1)	Violation of tariff and transport conditions	<p>The defendant did not have a valid travel document (ticket).</p> <p>The law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs, therefore, Czech law shall apply.</p>
District Court in Žilina	7C/221/2014	26. 11. 2014	Art. 4	Compensation for health care	<p>Plaintiff was attacked by defendant.</p>

District Court in Liptovský Mikuláš	7C/255/2011	19. 6. 2012	Art. 4 (1)	Damage, traffic accident	Without further details regarding the applied article.  The Convention on the Law Applicable to Traffic Accidents of 4 May 1971 was not applied.
District Court in Revúca	7C/368/2013	11. 9. 2014	Art. 4 (1)	Damage. Violation of tariff and transport conditions	Defendant did not have a valid travel document (ticket).  Without further details regarding the applied article 4.
District Court in Bratislava IV	7C/41/2013	13. 2. 2017	Art. 4 (1)	Damage, traffic accident	Traffic accident that occurred in Slovakia. No details regarding the applied article of Rome II.  The Convention on the Law Applicable to Traffic Accidents of 4 May 1971 was not applied.
District Court in Revúca	7C/63/2014	30. 6. 2015	Art. 4 (1)	Damage, traffic accident	Traffic accident that occurred in the Czech Republic. Law applicable to a non-contractual obligation arising out of a delict shall be the law of the country in which the damage occurs.  No details regarding the applied article of Rome II.
District Court in Prievidza	7C/8/2011	2. 9. 2015	Art. 31	Unjust enrichment	Rome II was not applied due to restrictions to its temporal applicability. Rome II is effective from 11 January 2009, knowledge of unjust enrichment occurred on 18 December 2008, i.e., on the day of crediting the loan, therefore, to determine applicable law, the Act No.

					97/1963 Coll. on Private International Law shall apply.
District Court in Liptovský Mikuláš	7C/93/2011	15. 5. 2012	Art. 4 (1)	Damage, traffic accident, insurance	No details regarding the applied article of Rome II.  The Convention on the Law Applicable to Traffic Accidents of 4 May 1971 was not even mentioned.
District Court in Trnava	8C/110/2016	12. 9. 2019	Art. 4 (1)	Damage to the car, traffic accident, insurance	Traffic accident occurred in Austria.  Compensation for damage as a result of an insured event.  No details regarding the applied article of Rome II.
District Court in Prešov	8C/19/2019	25. 10. 2019	Art. 4 (1)	Compensation for health care	Provision of medical services – detention centre for intoxicated persons
District Court in Pezinok	8C/192/2012	30. 5. 2013	Art. 4	Violation of tariff and transport conditions	Defendant did not have a valid travel document (ticket).
District Court in Lučenec	8C/21/2012	29. 4. 2015	Art. 10 (1 – 3)	Unjust enrichment, compensation for damage	Sale of a real estate. Plaintiff purchased the real estate from defendant. The land area had been reduced and sold to plaintiff. Part of the land was in co-ownership and thus unjust enrichment and damage had taken place, therefore, art. 10 (3) shall apply.
District Court in Liptovský Mikuláš	8C/22/2012	15. 6. 2016	Art. 31	Damage, traffic accident	The accident occurred in 2007.  Rome II was not applied due to restrictions to its temporal applicability.

District Court in Pezinok	8C/244/2011	15. 1. 2013	Art. 4	Unjust enrichment	Loan agreement. Overdrawing funds. Damage shall cover any consequence arising out of tort/delict, unjust enrichment.  Without further details regarding the applied article 4 instead of article 10.
District Court in Liptovský Mikuláš	8C/258/2011	17. 3. 2014	Art. 10 (1 – 3)	Unjust enrichment	Performance based on a legal cause which lapsed
District Court in Liptovský Mikuláš	8C/267/2013	10. 10. 2014	Art. 31 and 32	Unjust enrichment	Rome II was not applied due to restrictions to its temporal applicability. Rome II is effective from 11 January 2009, breach of a legal obligation (sale of real estate) occurred before Rome II entered into force, therefore, the Act No. 97/1963 Coll. on Private International Law shall apply.
District Court in Revúca	8C/34/2017	11. 5. 2018	Art. 10 (1 – 3)	Unjust enrichment	Provision of accommodation without subsequent payment by defendant. Unjust enrichment occurred in the Czech Republic; therefore, Czech law applied according to art. 10 (3) of Rome II.
District Court in Galanta	8C/7/2019	28. 3. 2019	Art. 4	Damage – toll	Non-payment a toll for the motorway.  No details regarding the applied article of Rome II.
District Court in Vranov n/T	8Cb/89/2012	19. 11. 2012	Art. 10 (1 – 3)	Unjust enrichment	Double payment
Supreme Court of The Slovak Republic	8Cdo/1361/2015	26. 6. 2017	Art. 4 (1)	Damage, traffic accident	Damage related to a death of a person in a traffic accident that occurred in the Member State of the court seized and was suffered by

					members of that person's family residing in another state, was classified as indirect consequences.
Regional Court in Trenčín	8Cob/100/2017	20. 12. 2017	Art. 10 (3)	Unjust enrichment	Reception of the goods by the defendant and non-payment for the goods. Reception of the goods occurred in Slovakia, therefore, art. 10 (3) of Rome II shall apply.
Regional Court in Trenčín	8Cob/572/2014	20. 12. 2016	Art. 10 (1 - 3)	Unjust enrichment	Unredeemed receivables from bankruptcy proceedings.
District Court in Prešov	9C/262/2014	7. 1. 2016	Art. 4	Violation of tariff and transport conditions	Defendant did not have a valid travel document.  The law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs, therefore Czech law shall apply.
District Court in Ružomberok	9C/70/2012	26. 11. 2012	Art. 4 (1)	Damage to health	Plaintiff was attacked by defendant. Civil delict occurred in Slovakia; therefore, Slovak law shall apply.
Regional Court in Prešov	12Co/13/2020	18. 6. 2020	Art. 4	Damage, traffic accident	No details regarding the applied article of Rome II.  The Convention on the Law Applicable to Traffic Accidents of 4 May 1971 was not even mentioned.
District Court in Liptovský Mikuláš	8C/166/2015	20. 12. 2017		Damage, traffic accident in Hungary	Hague convention applied
District Court in Lúčenec	14C/162/2013			Damage, traffic accident in Austria	Hague convention applied

		16. 06. 2016			
District Court in Ružomberok	5C/21/2012	06. 09. 2012		Damage, traffic accident in the Czech Republic	Hague convention applied
Regional court Bratislava	5Co/515/2013	21. 09. 2016	Art. 28 Rome II, Hague convention	Damage, traffic accident in the Czech Republic	Hague convention applied

# Slovenia

## Executive Summary

- Slovenia is a small EU Member State with a population of approx. 2 million people; therefore, there is less case law (a smaller pool of disputes) and less doctrine (a smaller number of researchers) than in the larger EU Member States. Accordingly, several specific issues in the field of conflict of laws in non-contractual obligations have not yet been tackled neither in case law, nor in the doctrine.
- Only case law of the four appellate and of the Supreme Court are available for analysis; the prevalence of articles of the Regulation applied in this case law might not reflect the ambit of the application of a specific article in the case law of first instance courts. The courts do not hold a specific register regarding cross-border disputes.
- The analysed case law shows that the courts are aware of the Rome II Regulation and apply it when it is applicable.
- The doctrine analysing the Rome II Regulation is relatively scarce. Martina Repas wrote a presentation of the Regulation and of all its articles in a monograph on EU Private International Law in 2018, and Aleš Galič and Jerca Kramberger Škerl have analysed the Slovenian case-law regarding the Regulation in an article of 2020. Other scientific contribution tackle specific issues, such as the exclusion of party autonomy in certain disputes, the law applicable to traffic accidents etc. The doctrine and the practitioners also rely on literature in other EU languages, especially English, and quotes from foreign doctrine are not unusual in the judgments.
- The analysis of the case law shows that several more 'advanced' issues pose problems to the courts:
  - Direct actions of victims against the insurers (in two available judgments, the courts did not even examine the admissibility of the direct action as a separate PIL issue);
  - Escape clause from Art. 4(3) is overused; the result of the application of this rule is, in all analysed cases, the application of Slovenian law.
  - Courts tend to cite different rules as a basis for their decision (most notably Art. 4(2) and Art. 4(3)); it seems that this is more the result of uncertainty than a way of making a stronger argument.
  - In all analysed cases relating to product liability, the courts overlooked the application of the Hague Product Liability Convention; Courts sometimes overlook the application of the Hague Traffic Accidents Convention.
  - The PIL treatment of direct actions against the insurance company in Slovenian case law is insufficient; in the two available cases, the courts did not identify the separate questions of the admissibility of the direct action and of the substance of the liability of the insurance company.
  - In one case regarding subrogation, the court applied the law applicable to subrogation also to the question of whether the liability of the tortfeasor was prescribed, instead of applying the law applicable to that liability; this again shows the difficulty of treating multi-party relationships in PIL;
- Additionally, several interesting decisions and trends should be reported in the application of the Regulation in Slovenia
  - In interpreting the place of the direct damage, the courts refer to CJEU case law regarding the Brussels I (bis) Regulation; this shows awareness of the need of a common interpretation of notions in EU Private International Law;
  - The Hague Conventions on Traffic Accidents and Product Liability supersede the Rome II Regulation in Slovenia (which is often overlooked by the courts);
  - Slovenian doctrine draws attention to the lacuna in Art. 5 (product liability), consisting of the fact that there is "no explicit rule for a situation where the product was marketed neither in the country where the person who sustained damage was habitually resident, nor in the country where the product was purchased, nor in the country where the damage occurred".
  - Slovenian doctrine criticizes the rule of Art. 6 (unfair competition) in that it seems to totally forbid party autonomy in all cases, and that it is unclear whether this prohibition also applies when Art. 6 refers to Art. 4.



- Slovenian doctrine points out that it is not clear whether the protection of geographical indication falls under the scope of the rule on intellectual property or not (Art. 8);
- Regarding industrial action (Art. 9), Slovenian doctrine draws attention to, first, the fact that only non-contractual obligations are covered by the said article, while the Rome I Regulation is applicable to any contractual damages, which can lead to the application of law other than that of the state where the industrial action was taken (which is a risk for the workers and unions), and second, the fact that it is unclear which law is applicable in case of an international industrial action – here, Galič supports the ‘mosaic approach’.
- No case law was found where parties would choose the applicable law. This might also be the consequence of the courts’ extensive use of the escape clause as a way to apply Slovenian law, which the parties might otherwise choose in order to avoid costs of obtaining the information on foreign law.
- Slovenian courts are used of treating the evidentiary procedure as a part of procedural law and thus applying the *lex fori*. The burden of proof is traditionally a substantive law issue, and so is the statute of limitations;
- Foreign law is deemed as ‘law’ and not ‘fact’, thus the rule *iura novit curia* applies. The courts have to apply the Regulation and the law the Regulation refers to, on their own motion (ie. there is no prerequisite of a party’s assertion); they cannot appoint experts on foreign law, but can (and do) use the procedure under the Council of Europe Convention on Information on Foreign Law; parties can provide evidence of the foreign law, but are not obliged to; courts can use any appropriate means to establish the content of the applicable foreign law.
- The notion of overriding mandatory provisions only exist in Slovenian doctrine, but not in the legislation, therefore, the judges are not used to apply this tool; given that such rules are difficult to determine also in the European context, Slovenian courts might struggle with their application, when such opportunity arrives;
- In Slovenia, the term ‘habitual residence’ is only applied in EU or international Private International Law; national law does not use this category, but rather those of ‘permanent’ and ‘temporary residence’ which both differ from habitual residence; the courts nevertheless seem aware of the specificity of the term.
- Renvoi exists in Slovenian national PIL, but the courts are aware that it is excluded in the Regulation, which is also welcomed in the doctrine in view of providing predictability;
- Public policy exception from the Regulation was discussed only in regard to the statute of limitations and the court refused the application of the exception. Traditionally, Slovenian courts pursue a restrictive use of the public policy exception, especially in conflict of laws; exemplary and punitive damages would probably be sanctioned by the exception, but there is no case law in this regard yet;
- Slovenian case law shows that the relationship between the Rome II Regulation and the Hague Conventions on Traffic Accidents and Product Liability need rethinking; at least a more prominent mention of the conventions would be needed in order to enhance the application of the correct legal text in Member States like Slovenia, where both conventions supersede the Regulation;
- There is no case law regarding the **mosaic approach** yet; the mosaic approach could prove problematic in certain cases (typically as a consequence of the use of Internet); legislative action would be welcome to meet the demands of the Internet era; as Repas points out, nuclear accidents as another potential origin of dispersed damage are excluded from the scope of application of the Regulation; Galič proposes to use the mosaic approach also in cases of an international industrial action.
- There is a need for legislative action to include **defamation and privacy violations** into the Rome II Regulation: solutions were already proposed by ALI and CLIP Principles;
- The issue of SLAPPs and a possibility of anti-SLAPP regulation, has not yet been tackled by Slovenian doctrine in the frame of private international law. There is, however, a recurrent debate on the chilling effect of lawsuits directed against journalists, and the insufficient protection both in relation to the plaintiff, as in relation between journalists and their employers; the issue of SLAPPs should undoubtedly be tackled in the debate regarding a possible common rule on defamation and violations of privacy. Even better, substantive regulation of this field could be adopted on the EU level.

- Corporate abuse of human rights abroad has not yet been handled in Slovenian courts, at least not if we have in mind the violations of human rights other than the right to property. There is, however, a debate in the doctrine, in the NGO sector and the corporate sector.
- Artificial intelligence has so far not been tackled by Slovenian conflict of laws doctrine, nor have any related cases come up in Slovenian courts; the development of AI undoubtedly is an issue which will have to be addressed in private international law, but first (or at least at the same time) substantive rules will have to be set on national and, hopefully, EU level.

## 1. Introduction

- *How aware of the Rome II Regulation are practitioners, businesses and citizens in your Member State?*

Since no empirical studies are available, it is difficult to assess to which extent the Rome II Regulation is known by the mentioned stakeholders.

- *Is the Rome II Regulation generally known and applied by courts in your Member State?*

It is impossible to give a precise answer to this question, since first, only case law of appellate courts and the Supreme court is available online and one cannot systematically analyse the proceedings where there was no appeal, and second, it is practically impossible to trace all cases where the Rome II Regulation should have been applied, but (incorrectly) was not. As to the second, we searched the case law for cases where the courts applied the provision of the national Private International Law and Procedure Act relating to non-contractual damage, in order to see whether the court should have in fact applied the Rome II Regulation, and we did not find such cases, which could point to the conclusion that the courts (at least the appellate courts and the Supreme Court) are aware of the Rome II Regulation and apply it when the case falls into the scope of its application.

- *Are there any relevant statistics regarding the application of the Rome II Regulation in your Member State?*

There are no official statistics. The case law of the appellate courts and of the Supreme Court is freely available online and therefore it is possible to analyse it and provide the number of cases and other information about the application of the Regulation (please see the Case Summary which is annexed to this report).

The information about the application of the Rome II Regulation before the first instance courts is available physically at the court houses, however, there is no specific record of cross-border cases or even cases where the Rome II Regulation was applied, so it is not possible in practice to gather a statistically relevant group of such cases for scientific analysis.

- *How important is the doctrinal discussion on the Rome II Regulation in your Member State?*

Since the accession of Slovenia to the EU in 2004, the Slovenian doctrine has been more strongly focused on the procedural part of the EU Private International Law (the Brussels Regulations, the Enforcement Order Regulation). The Rome II Regulation is generally dealt with in a 2018 manual on EU Private International Law,<sup>1209</sup> while several specific issues are tackled in few academic articles.<sup>1210</sup> An analysis of the application of both Rome I and Rome II Regulations

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<sup>1209</sup> M. Repas, V. Rijavec (eds.), *Mednarodno zasebno pravo Evropske unije* [Private International Law of the European Union], Uradni list Republike Slovenije, Ljubljana 2018, pp. 468–514.

<sup>1210</sup> See e.g. N. Bezjak, *Uredba Rim II in (ne)sloboda strank glede izbire merodajnega prava* [The Rome II Regulation and the (Lack of) Party Autonomy in Choice of Law], *praksa*, No. 18, 2018, p. 15-16; K. Primožič, *Odgovornost za škodo na stvareh v varstvu - pasivna legitimacija* [Liability for Damage on Things in Custody – the Passive Legal Standing], *Odvetnik*, No. 81, 2017, p. 35; Z. Skubic, *Insolventnost zavarovatelja avtomobilske odgovornosti in odgovornost držav članic* [The Insolvency of the Insurer of Automobile Responsibility and the Responsibility of the Member States], *Pravna praksa*, No. 34, 2013, p. 26; N. Smerdu, *Reševanje patentnih sporov v Evropi – de lege lata in predvidene reforme* [Resolving of Patent Disputes in Europe – de lege lata and the Planned Reforms], *Pravna praksa*, No. 21, 2009, p. 16-18; M. Krisper Kramberger, *Varstvo žrtev prometnih nesreč v čezmejnih sporih po pravu Evropske unije in Haaški konvenciji* [Protection of Victims of Traffic Accidents in Cross-Border Disputes under the EU

was recently published in English.<sup>1211</sup> A general presentation of Slovenian Private International Law in English, providing context of the application of Rome II Regulation, was published in 2018.<sup>1212</sup> The availability of doctrinal research from other EU Member States is very important and useful (at least English is understood by most Slovenians), however, more Slovenian language publications would be necessary in order to enhance the correct application of the Regulation in practice, as well as in order to contribute to the European development of the conflict of laws in non-contractual relationships.

- *Are there specific issues concerning the Rome II Regulation that have caused debate at a doctrinal or political level?*

The Rome II Regulation has not been discussed at the political level, outside of the state authorities involved in the adoption of the Regulation. No national legal acts or provisions have been adopted in view of a smoother application of the Regulation (e.g. regarding the delimitation of the scopes of application of national law and the Regulation).

As explained above, the doctrine remains mostly, at the time being, on a more general level of presenting the rules of the Regulation. When dealing with specific matters, authors have pointed out possible problems concerning traffic accidents (the interplay between EU insurance directives, the Rome II Regulation and the Hague Traffic Accidents Convention), the need to adopt an EU rule on conflict of laws in defamation and violations of privacy<sup>1213</sup> and other issues, which will be mentioned in the analysis of specific articles below.

## 2. Analysis of the Rome II Regulation

### 2.1 Chapter I – Scope and Interpretation

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

1. *The determination of the **material scope of application** of the Rome II Regulation, including any difficulties in applying the category of “civil and commercial matters” or in defining the exact scope of any excluded matters (Art. 1(1)-(2))*

Regarding the material scope of application of the Rome II Regulation, several examples of case-law can be mentioned, which tackled the delimitation between contractual and non-contractual obligations.

In one case the Appellate Court in Ljubljana (No. III Cp 942/2016 of 15 June 2016) struggled with the qualification as contractual or non-contractual obligation of the responsibility for damages of the administrators of a company with limited responsibility. Instead of applying an existing autonomous interpretation of Article 1/1/d) or, if there is no such interpretation, referring a preliminary question to the CJEU, the appellate court criticized the first-instance court for

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law and the Hague Convention], in: *Razsežnosti zasebnega prava: liber amicorum Ada Polajnar Pavčnik* [Dimensions of Private Law: Liber Amicorum Ada Polajnar Pavčnik], pp. 281-296 (abstract in English: pp. 374-375); A. Galič: *Kolizijskoppravna pravila v delovnih sporih* [Applicable Law in Labour Disputes], *Delavci in delodajalci*, No. 2/3, Year 13 (2013), pp. 301-323; A. Polajnar-Pavčnik: *Novejši razvoj evropskega kolizijskega prava* [Recent Developments in European Choice of Law Rules], *Podjetje in delo*, No. 6-7, 2008, pp. 1368-1376; Š. Mežnar: *Predlog uredbe o kolizijskih pravilih za nepogodbene obligacijske obveznosti (t. i. Rimska II uredba)* [Proposal for a Regulation on Choice of Law in Non-Contractual Obligations (the so-called Rome II Regulation)], *Evro Pravna praksa*, No. 2004, pp. 23-28.

<sup>1211</sup> J. Kramberger Škerl, A. Galič, in: E. Guinchard (ed.), *Rome I and Rome II in Practice*, Intersentia, 2020, pp. 527–550.

<sup>1212</sup> J. Kramberger Škerl: *Slovenia*, in: J. Basedow et al. (eds.), *Encyclopedia of Private International Law*, Edward Elgar, 2017, pp. 2638-2649.

<sup>1213</sup> J. Kramberger Škerl, *Jurisdiction in on-line defamation and violations of privacy: in search of a right balance*, *Lexonomica*, Dec. 2017, vol. 9, no. 2, pp. 87-107 (<http://journals.um.si/index.php/lexonomica/article/view/79>).

resolving this question under Slovenian law, whereas, in the opinion of the appellate court, the qualification should have been made under Austrian law since the damage occurred there.<sup>1214</sup>

In another case of the Appellate Court in Ljubljana (No. I Cpg 1084/2016 of 25 October 2017), the question arose whether a claim for damages because of a failed assignment of claim (the defendant asserted, in view of a set-off, their claim for damages against the plaintiff, based on the latter's non-acceptance of the payment by the third party of a claim the defendant assigned to the plaintiff) was of contractual or non-contractual nature. The court decided that the claim asserted for set-off was, in substance, the defendant's defence against the original claim, in that the defendant asserted that the fulfilment of their obligation to the plaintiff failed because of the plaintiff's (in)action. This defence was therefore to be governed by the same law (*in casu* the CISG) as the claimant's claim for the payment of purchase money, and it was of a contractual nature.

Furthermore, in two cases judged by the Appellate Social and Labour Court (judgments No. Pdp 634/2019 of 12 December 2019 and No. Pdp 599/2012 of 16 August 2012), the court applied the Rome II Regulation regarding the damage resulting from a work accident, which occurred abroad, while the Slovenian employee was sent to work there by their Slovenian employer. In one case, the defendant was the employer's insurer (it was a direct action against the insurer), and in the second case, the defendants were the employer and the employer's client for which the employee was performing work at the time of the accident. The court characterised the liability for the damages suffered because of the work accident as non-contractual (although the work was performed on the basis of an employment contract (see Art. 4/III of the Rome II Regulation)).

2. *The determination of the temporal scope of application of the Rome II Regulation, Arts 31-32)*

The rule on the temporal scope of application of the Rome II Regulation does not appear to raise any difficulties in Slovenian case law or doctrine. In one case, the Appellate Labour and Social Court decided on a work accident which occurred abroad in July 2008 and correctly applied the Slovenian Private International Law and Procedure Act, however, without any special notice on the temporal (in)applicability of the Rome II Regulation (No. Pdp 247/2011 of 19 May 2011).

In one case (No. I Cp 338/2016 of 5 April 2016), however, the Appellate Court in Ljubljana wrongly stated that the regulation was applicable to the cases of unjust enrichment, which came to existence after 11 July 2007 (instead of only to cases, which arose after 11 January 2009), however, it further established that the unjust enrichment could only have occurred in 2009 (without giving the precise date), so the application of the Rome II Regulation was possibly correct.

3. *The characterization of the concept of "non-contractual obligations", its relationship to the concept of "contractual obligations" and any difficulties in relation to characterisation (Arts. 1(1), 2)*

See answer to Q1.

4. *The universal application of the Regulation (Art. 3)*

The accessible case law (i.e. the case law of appellate and supreme courts) does not reveal any issues as to the universal application of the Regulation.

5. *The approach to interpretation of the Rome II Regulation, and in particular its relationship to other EU private international law instruments (including the recast Brussels I Regulation and the Rome I Regulation)(Recital (7))*

Regarding the interpretation of the same notions in different instruments of the EU Private International Law, we can mention case law of the Appellate Court in Maribor regarding the damage, which occurred in Slovenia as a consequence of a harmful act committed in Austria (Appellate Court in Maribor, No. I Cp 615/2016 of 23 August 2016, and many cases that followed and concerned the same mass harm event; see Case Summary Form) where the

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<sup>1214</sup> Cf. A. Galič in: J. Kramberger, A. Galič: The Application of the Rome I and Rome II Regulations in Slovenia, in: E. Guinchard (ed.): Rome I and Rome II in Practice, Intersentia, 2020, p. 545.

court applied the CJEU interpretation of the place where damage occurred under the Rome II Regulation to the question of jurisdiction under the Brussels I bis Regulation.

In the doctrine, Repas draws attention to the fact that the notion of non-contractual obligations should not be interpreted in an exactly same way in the both mentioned instruments, since Article 7/2 of the Brussels I bis Regulation is an exception to the general rule in Article 4 of that regulation, which is not the case regarding the application of the Rome II Regulation.<sup>1215</sup> This view is certainly relevant, but could prove problematic in light of Recital No. 7 to the Rome II Regulation which advocates the same interpretation of notions in both regulations.

## 2.2 Chapter II - Tort/Delict

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to the implementation of:*

6. *The general conflict-of-laws rule for tort/delict, and difficulties that have arisen in your Member State with respect to its application (Art. 4), and in particular:*

a. *the approach to identifying the place of direct damage in Art 4(1)*

In a series of cases concerning a mass harm event of flooding of the river Drava, the question arose whether the damage sustained by different parties in Slovenia was a direct, but distant damage, or else it was indirect damage (the latter was claimed by the defendant) for the purposes of the Brussels I bis Regulation. The defendant referred to CJEU case No. C-350/14 (*Lazar*), but the court explained that the case at hand was different and that the damage sustained by Slovenian parties was indeed a direct (although) distant damage.

In the Appellate Court of Ljubljana judgment No. I Cp 2219/2017 of 18 April 2018 regarding a skiing accident in Italy, the court explained that the country where the damage occurred was Italy, since only primary damages are relevant for the determination of the place where damage occurred, with no regard to the place where indirect consequences of the accident are suffered by the victim.

b. *the approach to the first rule of displacement in Art 4(2) in cases involving multiple parties or claims*

The Appellate Labour and Social Court issued two judgments (Nos. No. Pdp 634/2019 of 12 December 2019 and Pdp 599/2012 of 16 August 2012) concerning work accidents which occurred abroad. It applied the Rome II Regulation and concluded that since the employer and the employee were domiciled in Slovenia, Slovenian law had to be applied. In the first case, the employer's client was also sued beside the employer, thus the question could arise about the applicability of Article 4(2) regarding such "additional" defendants. However, the court also determined the existence of a closer link of the case with Slovenia (the escape clause of Art 4(3)) and thus somehow dodged the necessity of tackling the above mentioned dilemma. The same "tactic" was used by the Appellate Court in Ljubljana in the judgment No. III Cp 764/2014 of 12 June 2014, where the employee who suffered damage in a work accident abroad, sued "only" the employer's insurer and not also the employer. The court applied both Art 4(2) and Art 4(3) to determine that Slovenian law was applicable.

Both cases nevertheless point out that the first rule of displacement in Art 4(2) can also be applied outside of the relationship between the victim and the tortfeasor.

c. *the approach to the escape clause in Art 4(3), and*

In the above mentioned judgment by the Appellate Social and Labour Court (No. Pdp 634/2019 of 12 December 2019) the work accident and the direct damage occurred in Belgium. The case is interesting because of the reasoning of the court regarding Article 4/III. The court judged that the closest connection existed with Slovenian law, because the basis of the plaintiff's work was an employment contract between him and the employer, who were both domiciled in Slovenia. The second defendant (a Belgian company) argued that the closest connection existed with Belgium, because the accident happened there and the basis for the work was a contract between the Belgian client and the

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<sup>1215</sup> Repas, in: Repas, Rijavec (eds.), *Mednarodno zasebno pravo Evropske unije*, Uradni list, 2018, p. 473.

Slovenian employer, under which the client was responsible for the safety of the working conditions. The court disagreed.

In a similar case (Pdp 599/2012 of 16 August 2012), the same appellate court decided on the claim of a Slovenian employee against the Slovenian employer. The case was about a work accident which occurred while the employee was sent to work in Italy. The court again applied the Rome II Regulation and decided that the case was more closely connected with Slovenia and thus Slovenian law had to be applied.

A closest connection with Slovenia was also found by the Appellate Court in Ljubljana in a case where a work accident occurred in Italy, but the employee (as plaintiff) and the employer were domiciled or established in Slovenia. The sole defendant was the employer's insurance company. The plaintiff demanded the application of Italian law, which would presumably provide a higher amount of damages, whereas the court determined that the connection with Italy was such that the escape clause in favour of Slovenian law had to be applied (No. III Cp 764/2014).

The doctrine criticizes the application of the escape clause in Slovenian case-law as being too broad: the courts seem to depart too quickly from the basic rule of *lex loci damni* and apply the escape clause which is an exception and should be interpreted narrowly. Galič proposes two possible reasons for such approach: first, the influence of the interpretation of Slovenian choice of law rule for torts, which promotes a primary use of the closest connection criterion (even though the wording of Article 30 of the Slovenian Private International Law Act poses a combined rule of *lex loci delicti commissi* and *lex loci damni* as the primary connecting factor),<sup>1216</sup> and second, the fact that in all accessible case, the application of the closest connection criterion led to the application of the *lex fori*.<sup>1217</sup> In her presentation of the escape clause in Art. 4(3) Repas also explains that a narrow interpretation is necessary, also in light of the foreseeability of the applicable law.<sup>1218</sup>

*d. the suitability of this set of rules to govern cases of prospectus liability or other financial market torts*

For the time being, there is no Slovenian case-law or doctrinal discussion on the appropriateness of Art. 4 in relation to financial market torts.

*7. The rule on product liability (Art. 5) and, where relevant, the interaction with the application of 1973 Hague Convention on the Law Applicable to Products Liability;*

Slovenia has duly notified the Commission on the continued application of the Hague Convention on the Law Applicable to Product Liability of which Slovenia was a party at the time of the adoption of the Rome II Regulation. The case-law analysis shows that Slovenian courts are not always aware of the prevalence of the Convention over the Regulation. In fact, no case-law of appellate courts or of the Supreme Court was found applying the Hague Convention.

Thus, in a Supreme Court case (No. III Ips 32/2015 of 20 September 2016) the court applied the Rome II Regulation (without mentioning the Convention). It examined the possibility of application of Article 5 of the Rome II Regulation. The court deemed that since it was not possible to either establish that the product was marketed in Slovenia (where the damage occurred), or that the case was closely connected to any specific country, Article 5 as *lex specialis* could not be applied and Article 4 was applicable as *lex generalis*.

The case was returned for retrial and the Appellate Court in Ljubljana (No. I Cpg 664/2017 of 20 July 2017) then repeated the interpretation of the Supreme Court and applied Slovenian law on the basis of Article 4 of the Rome II Regulation.

Galič criticizes (beside the incorrect application of the Regulation instead of the Convention) such interpretation of the relationship between Articles 4 and 5 of the Rome II Regulation and draws attention to the lacuna, consisting of the fact that there is "no explicit rule for a situation where the product was marketed neither in the country where the person

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<sup>1216</sup> Judgment of the Supreme Court, No. II Ips 1001/2007 of 16 December 2010.

<sup>1217</sup> A. Galič in J. Kramberger Škerl & A. Galič, The Application of the Rome I and Rome II Regulations in Slovenia, in: E. Guinchard (ed.), Rome I and Rome II in Practice, Intersentia, 2020, p. 538, 539.

<sup>1218</sup> Repas in: M. Repas, V. Rijavec (eds.), Mednarodno zasebno pravo Evropske unije [Private International Law of the European Union], Uradni list Republike Slovenije, Ljubljana 2018, pp. 483, 484.

who sustained damage was habitually resident, nor in the country where the product was purchased, nor in the country where the damage occurred". The author deems that the interpretation that in a situation where *lex loci damni* cannot be applied on the basis of Article 5 because the product was not marketed in that state, it would be inconsistent to apply such law anyway, on the basis of Article 4.<sup>1219</sup>

#### 8. *The specific rule on unfair competition (Art. 6)*

Article 6 regarding unfair competition was applied once by the Appellate Court in Ljubljana (No. V Cpg 164/2018 of 5 April 2018). The court stated: "The defendant has an international chain of fast-food restaurants, however, not yet in Slovenia. This chain is not as well-known as some other chains, but it is active in a large number of EU Member States, among them in the majority of the bigger EU Member States. For this reason, it is in a different position as if it was only active in one, maybe also territorially limited market. Thus, it is also present in the Slovenian market where it can offer a franchise, or it can, on its own, via a daughter company, provide goods and services. This is, however, not the only reason. An average Slovenian consumer, as well as an average tourist can know the chain of restaurants of the plaintiff from other states. This is not disputed in the appeal. In this way, the plaintiff is present in Ljubljana market of restaurant services already at this moment. The plaintiff is thus present in the market also in this way and not only as a provider of a franchise. The first instance court rejected a part of the plaintiff's claims because the defendant did not infringe copyrights of the plaintiff. However, the protection of copyright and the protection from unfair competition have different legal bases. Therefore, it is possible to protect against unfair competition also signs and data which are used by the plaintiff, even though they are not protected under copyright. Regarding the claims in relation with unfair competition, the Slovenian court has jurisdiction pursuant to Article 5/III of the Regulation No. 44/2001. Slovenian law is applicable (Article 6/1 of the Rome II Regulation)."

Repas draws attention to several issues regarding Art. 6. First, regarding the unclear scope of application of Art. 6(3), ie. whether it applies to all acts of restricting the free competition or does Recital 23 restrict its application to acts prohibited in the TFEU. Repas deems that such narrowing of the scope of application would not be appropriate.<sup>1220</sup> Second, Art. 6(2) provides for the application of the general rule of Art. 4 in cases where an act of unfair competition affects exclusively the interests of a specific competitor. It is unclear whether consequently also party autonomy is allowed, ie. that also Art. 6(4) is excluded.<sup>1221</sup>

Furthermore, Bezjak criticizes the strict rule on the prohibition of party autonomy in Art. 6(4) and deems it should have been (at least) nuanced.<sup>1222</sup>

#### 9. *The specific rule on environmental damage (Art. 7)*

The specific rule on environmental damage (Art. 7) was not yet applied in the accessible Slovenian case-law of appellate courts and the Supreme Court. We know, however, that there were multiple proceedings instituted by Slovenian victims of the flooding of the river Drava in 2012, which was allegedly the result of a mismanagement of the river in Austria by the Austrian electricity provider Verbund. The Appellate Court in Maribor namely examined numerous appeals against first instance courts' decisions that Slovenian courts have jurisdiction, because the damage occurred in Slovenia. The appellate court rejected all such appeals, stating that the damage, which occurred in Slovenia, was indeed a direct damage, as also required by the CJEU for the purposes of interpretation of Article 4 of the Rome II Regulation.

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<sup>1219</sup> A. Galič in J. Kramberger Škerl & A. Galič, *The Application of the Rome I and Rome II Regulations in Slovenia*, in: E. Guinchard (ed.), *Rome I and Rome II in Practice*, Intersentia, 2020, p. 541, 542.

<sup>1220</sup> Repas in: M. Repas, V. Rijavec (eds.), *Mednarodno zasebno pravo Evropske unije [Private International Law of the European Union]*, Uradni list Republike Slovenije, Ljubljana 2018, p. 495.

<sup>1221</sup> Repas explains the two possible solutions, but does not take a stand. Repas in: M. Repas, V. Rijavec (eds.), *Mednarodno zasebno pravo Evropske unije [Private International Law of the European Union]*, Uradni list Republike Slovenije, Ljubljana 2018, p. 498.

<sup>1222</sup> N. Bezjak, *Uredba Rim II in (ne)svoboda strank glede izbire merodajnega prava [The Rome II Regulation and the (Lack of) Party Autonomy in Choice of Law]*, praksa, No. 18, 2018, pp. 15-16.

It will be interesting to see whether first instance courts interpret this damage as environmental damage and apply Article 7 of the Regulation, or else as 'classic' damage and apply Article 4. In the event of the application of Article 7, the victims would be able to choose the application of Austrian law, which is improbable.

No controversies or problems were pointed out in the doctrine regarding the rule on environmental damage.

10. *The specific rule on infringements of intellectual property rights (Arts. 8, 13)*

Article 8 was applied in several judgments of the Appellate Court in Ljubljana (Nos. II Cp 1356/2012 of 24 October 2012, II Cp 1356/2012 of 29 May 2013 and II Cp 1909/2014 of 1 October 2014). All cases concerned the management of small author's rights by a collective organization in Slovenia regarding works of non-Slovenian authors. The court applied the rule of *lex loci protectionis* of Article 8/1 of the Rome II Regulation. In these cases, the defendant asserted that the plaintiff (a Slovenian collective organization) could only manage small rights on foreign authors' work for which the plaintiff's foreign "sister" organization mandated the plaintiff. The court deemed that such view was wrong and incompatible with the principle of equal treatment of foreign and domestic authors from Article 176/II of the Slovenian Copyright and Related Rights Act.<sup>1223</sup>

Another case by the same Appellate Court (No. II Cp 2009/2009 of 30 September 2015) concerned a lawsuit between a Croatian company, which demanded payment for use of a copyrighted work, as well as damages because of such use, from a Slovenian company, which reproduced the work. The court applied Slovenian Private International Law and Procedure Act to the examination of the legal relationship between the plaintiff and the author and, by applying Croatian substantive law, established that there was no transfer of author's rights, but only a mandate under which the plaintiff had the power of representation of the author. The reasoning of the court is somewhat unclear, but it seems that the court applied Slovenian law on the basis of Article 8 of the Rome II Regulation and rejected the claim, because there was no transfer of author's rights to the plaintiff who therefore had no right to demand payment because of infringed copyright (i.e. only the holder of the corresponding right could have demanded such payment).

In examining the rule on intellectual property, Repas points out that it is unclear whether the geographical indication, which falls into the scope of intellectual property under Slovenian and several other national laws, is encompassed by Art. 8 of the Regulation (or else by Art. 6 within the protection of competition).<sup>1224</sup>

11. *The specific rule on industrial action (Art. 9)*

The specific rule on industrial action (Art. 9) was not yet applied in the accessible Slovenian case-law. This provision has, however, gained attention in the doctrine. Galič deems that the rule of Article 9 is appropriate, but points to two issues that can still prove problematic.<sup>1225</sup> First, only non-contractual obligations are covered by the said article, while the Rome I Regulation is applicable to any contractual damages, which can lead to the application of law other than that of the state where the industrial action was taken (which is a risk for the workers and unions). Second, it is unclear which law is applicable in case of an international industrial action – here, Galič supports the 'mosaic approach'.<sup>1226</sup>

## 2.3 Chapter III - Unjust Enrichment, *Negotiorum Gestio* And *Culpa In Contrahendo*

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to the implementation of:*

12. *The specific rule on unjust enrichment (Art. 10), including its relationship with the general rule for tort/delict in Art. 4.*

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<sup>1223</sup> Zakon o avtorski in sorodnih pravicah, Official Gazette of the Republic of Slovenia, No. 21/1995, with further amendments.

<sup>1224</sup> Repas in: M. Repas, V. Rijavec (eds.), *Mednarodno zasebno pravo Evropske unije [Private International Law of the European Union]*, Uradni list Republike Slovenije, Ljubljana 2018, p. 504.

<sup>1225</sup> A. Galič, *Kolizijskoppravna pravila v delovnih sporih [Conflict of Law Rules in Labour Disputes]*, *Delavci in delodajalci*, No. 2-3, 2013, p. 317–320.

<sup>1226</sup> *Ibidem*.



Slovenian national law treats unjust enrichment and *negotiorum gestio* as two different quasi-contracts. Nevertheless (or precisely because of this) the judges must be attentive to the fact that the two notions must be interpreted euroautonomously and therefore have to refer any potential doubtful situations to the CJEU for interpretation.

Repas welcomes the rule of Art. 10(1), because it mitigates the difficulties of combining different legal systems, but points out a possibly problematic situation where the enrichment is connected to multiple existing legal relationships.<sup>1227</sup>

One decision could be found where the Appellate Court in Ljubljana applied Article 10 of the Rome II Regulation (No. I Cp 338/2016 of 5 April 2016). The court referred the case back to the first instance court for retrial, because the nature of the relationship between the parties was not sufficiently clarified. The plaintiff namely asserted that they issued invoices for wellness equipment, which was ordered by the defendant and provided by a third person (the plaintiff allegedly acted as intermediary). The plaintiff allegedly paid the provider but did not receive payment from the buyer, which was therefore unjustly enriched. If the first instance court found that there was unjust enrichment, it should apply Article 10 of the Rome II Regulation. The appellate court wrongly stated that the regulation is applicable to the cases of unjust enrichment, which came to existence after 11 July 2007 (instead of only to cases, which arose after 11 January 2009),<sup>1228</sup> however, it further establishes that the unjust enrichment could only have occurred in 2009 (without giving the precise date), so the application of the Rome II Regulation was possibly correct.

13. *The specific rule on negotiorum gestio (Art. 11)*

14. *The specific rule on culpa in contrahendo (Art. 12)*

13. + 14. The rules on *negotiorum gestio* and *culpa in contrahendo* were not yet applied in the accessible Slovenian case law.

## 2.4 Chapter IV - Freedom of Choice

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

15. *The implementation in legal/business practice and by courts of the rule on freedom of choice, any difficulties therein and any discussion that has been carried out in your Member State regarding possible reasons which would justify the need to rethink it (Art. 14)*

We have not found any example of application of Article 14 (Freedom of choice) in the accessible Slovenian case law.

Given that Slovenian courts are very quick to establish an implicit choice of law in contractual obligations, it could be surprising that this is not the case in non-contractual obligations. However, traditionally, party autonomy has been the main connecting factor for contractual obligations in Slovenian private international law, whereas the closest connection was the main connecting factor for non-contractual obligations in the previously applicable legislation (as per interpretation of the Supreme Court). One can guess that this traditional mind-set is one of the reasons why the courts, in the accessible case law, seemed not to examine whether there was (at least implicit) choice of law.

In one academic article, the autonomy in non-contractual obligations was specifically addressed and the author criticized the total exclusion of autonomy in Articles 6/IV and 8/III of the Rome II Regulation.<sup>1229</sup> In the author's opinion, such regulation is appropriate only when public interest is endangered, while party autonomy could be permitted in cases where the damage is only sustained by the parties in the proceedings.

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<sup>1227</sup> Repas in: M. Repas, V. Rijavec (eds.), *Mednarodno zasebno pravo Evropske unije [Private International Law of the European Union]*, Uradni list Republike Slovenije, Ljubljana 2018, p. 508.

<sup>1228</sup> The interpretation of the application *ratione temporis* of the Rome II Regulation was given by CJEU in *Deo Antoine Homawoo*, C-412/10 of 17 November 2011.

<sup>1229</sup> N. Bezjak, *Uredba Rim II in (ne)svojodnja strank glede izbire merodajnega prava [The Rome II Regulation and the (Lack of) Party Autonomy in Choice of Law]*, *Pravna praksa*, No. 18, 2018, p. 15-16.

Regarding the time when the parties must pursue a commercial activity, in order to be able to conclude a choice of law agreement, Repas aligns with several foreign authors in that such activity must be exercised at the time of the conclusion of the agreement and not necessarily at the time when the dispute arises.<sup>1230</sup>

## 2.5 Chapter V - Common Rules

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

*16. The scope of the exclusion of 'evidence and procedure' in Art 1(3) and any difficulties in relation to that exclusion or to questions of formal validity or the burden of proof (Arts. 21-22)*

We did not detect any difficulties with the exclusion of evidence and procedure from the scope of applicability of the Rome II Regulation. The traditional rule of '*lex fori regit processum*' is well known and followed. On the practical level, problems can arise from the sometimes insufficient knowledge of the judges and other practitioners of the EU procedural regulations, such as the Evidence Regulation, the Service Regulation, or else the Brussels I bis and other regulations.

Different than in some other countries, rules on evidence (admissible evidence, procedure with proposing, producing and taking the evidence, evaluation of evidence etc.) are contained in the Slovenian Civil Procedure Act and there is no confusion about them being of procedural nature. In Slovenian procedural law, all types of evidence are admissible as proofs of any disputable facts (i.e. there is no 'evidentiary rule', except from the (rebuttable) presumption of the veracity of the content of a public document).

Likewise, there is no confusion about the burden of proof being a question of substantive law (cf. Art. 22 of the Rome II Regulation). Slovenian lawyers are also used to distributive conflict of laws rules regarding formal validity of legal acts, such as Art. 21 of the Rome II Regulation, as well as to the fact that the questions of formal validity are questions of substantive law and not procedural questions.

*17. The approach in your Member State to questions of pleading, proof and application to individual cases of the substantive rules of the law applicable under the Rome II Regulation governing non-contractual obligations.*

If a dispute has a cross-border character, the Slovenian court of its own motion has to apply choice-of-law rules to determine the applicable substantive law. If the applicable law is a foreign law, the court has to determine its content *ex officio*, since foreign law has the same status as domestic law and the *iura novit curia* rule applies. There is thus no requirement for the parties to request the application of foreign law or an obligation to adduce evidence regarding the content of such law.

According to Article 12(3) of the Slovenian Private International Law and Procedure Act (PILPA), however, the parties may contribute to establishing the content of the applicable foreign law in that they may submit to the court a public document or other document issued by a competent foreign authority providing this content. If the court has any difficulty in determining the content of the applicable foreign law, it can request relevant information from the Ministry of Justice or, as provided by Article 12(2) PILPA, 'establish its content in another suitable manner'. If the court deems it necessary, the Ministry will carry out the procedure under the 1968 European Convention on Information on Foreign Law. Thus, the Ministry, as the transmitting authority under the Convention, will contact the receiving authority of the state the law of which is applicable to the case before the Slovenian court in order to receive information on the content of that law.

The Yugoslav Act on Private International Law of 1982, the predecessor of the PILPA, provided that foreign law had to be applied according to its sense and its terms. This provision was omitted in the PILPA, since it is self-evident – albeit difficult in practice – that foreign law must be applied as in its country of origin, including its interpretation in the case

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<sup>1230</sup> Repas in: M. Repas, V. Rijavec (eds.), *Mednarodno zasebno pravo Evropske unije* [Private International Law of the European Union], Uradni list Republike Slovenije, Ljubljana 2018, pp. 478, 479.

law and theory. The non-application or erroneous application of foreign law may be corrected by the appellate court via an appeal or the Supreme Court through a legal remedy called revision.<sup>1231</sup>

When applying foreign law, the court will only apply the substantive provisions and will normally apply Slovenian domestic procedural rules (*lex fori regit processum*). Regarding the distinction between procedural and substantive issues, it has been ruled (under the PILPA) that the standard of proof constitutes a procedural issue, meaning that, according to the Civil Procedure Act, the court has to be 'convinced' of the veracity of the fact that is being proven. Thus the Slovenian Civil Procedure Act must be applied.<sup>1232</sup> On the other hand, it is a generally accepted view that the rules governing the burden of proof are based in substantive and not in procedural law.<sup>1233</sup> Equally, under Slovenian law, prescription (statute of limitations) is a substantive issue, meaning that the *lex causae* applies (Article 8 PILPA).

Currently, foreign law cannot be ascertained by experts as a means of evidence. The doctrinal explanation for this is that the expert evidence as means of evidence can only be provided on matters of fact, whereas foreign law is considered a question of law, like for domestic law. We believe that this should change, following the examples of Austria and Germany, for instance. Without questioning the status of foreign law as the law and not as a fact, there are strong practical reasons for allowing the court to appoint experts for the applicable foreign law. When establishing the contents of a foreign law, the *iura novit curia* principle can only mean that the court must ascertain the foreign law *ex officio*, it does not impose restrictions on how it is ascertained. It is extremely difficult to apply foreign law correctly without knowing the foreign system – as well as the foreign language – very well, which cannot be expected from judges. The option to appoint a lawyer practising in the foreign legal system would be of great help in terms of saving time and improving the accuracy of the final decision.

In practice, the courts' approach to determining the foreign law has been quite flexible. Information provided online has been deemed sufficient, as have (official) translations of foreign judgments (*in casu*, an Austrian judgment applying Greek law, which was the applicable law in a case before a Slovenian court).<sup>1234</sup> In another case, the appellate court even accepted (although describing it as 'awkward') the approach of a first instance court, which determined the content of the applicable German law by relying on its (assumed) similarity with Slovenian law. The first instance court reasoned that the relevant Slovenian legislation had been adopted following the German model, and that it could thus be concluded with a sufficient degree of probability that the German law was identical.<sup>1235</sup> In any case, the Slovenian courts reject the view that the content of foreign law can only be established via the Ministry of Justice.<sup>1236</sup> If the content of the applicable foreign law cannot be established, the court applies Slovenian law.<sup>1237</sup>

*18. The delimitation of the scope of the applicable law (Art. 15(a)-(h)), including any difficulties as its relationship to the issues addressed at points 16 17 above)*

We found two cases of the Appellate Court in Ljubljana where the court explicitly referred to Article 15 of the Rome II Regulation. In the first case (No. I Cpg 1084/2016 of 25 October 2017), the court just generally referred to Article 15 as an argument that the law determined by Article 4 was indeed applicable to the claim for damages in question. In the second case (No. II Cp 2314/2018 of 12 June 2019, the court explained that the applicable law was indeed applicable also to the statute of limitations. The court, however, made an error in defining the applicable law in the first place (see Q 21 of this National Report).

We could not find any doctrine raising issues regarding Art. 15 of the Rome II Regulation.

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<sup>1231</sup> It must, however, be noted that the application of a wrong conflict-of-law rule leading to the application of the same substantial law as the correct conflict-of-law rule does not constitute an erroneous application of law as one of the reasons for appeal or revision. See e.g. Appellate Court in Koper, No. Cpg 172/2016 of 14 September 2016.

<sup>1232</sup> See e.g. Supreme Court of the Republic of Slovenia, No. III Ips 125/2007 of 22 September 2009.

<sup>1233</sup> Supreme Court of Slovenia, No. II Ips 405/2000 of 29 March 2001.

<sup>1234</sup> Appellate Court in Ljubljana, No. I Cpg 23/2016 of 5 April 2016.

<sup>1235</sup> Appellate Court in Ljubljana, No. I Cpg 563/2010 of 20 May 2010.

<sup>1236</sup> *Ibid.*

<sup>1237</sup> The whole text of the answer to question No. 17 is copied from the national reporter's writing in J. Kramberger, A. Galič: The Application of the Rome I and Rome II Regulations in Slovenia, in: E. Guinchard (ed.): Rome I and Rome II in Practice, Intersentia, 2020, p. 545–547.

19. *The application of the rule on overriding mandatory provisions (Art. 16)*

There is no accessible case law in which court would deal with overriding mandatory provisions in non-contractual obligations.

The doctrine tackled the issue of overriding mandatory rules of third states and the need to find a common solution for Rome I and Rome II Regulations.<sup>1238</sup>

20. *The application of the specific rule on direct action against the insurer of the person liable (Art. 18)*

In one available judgment (No. I Cpg 23/2016 of 5 April 2016) the Appellate Court in Ljubljana struggled with the question of applicable law concerning direct actions against the insurer. The court overlooked the need to (also) examine the admissibility of such action under the law applicable to non-contractual obligation.<sup>1239</sup> It should have namely applied the Hague Traffic Accidents Convention (in case the convention was not applicable, Article 18 of the Rome II Regulation would have to be applied). The court thus did not examine the possibility of a direct claim under the law applicable to the non-contractual obligation, i.e. *lex loci damni*,<sup>1240</sup> but only regarding to the law applicable to the insurance contract (determined pursuant to the Rome I Regulation) and (wrongly) concluded that such action was not admissible.

In an earlier case (No. III Cp 764/2014 of 12 June 2014), the same court did not even examine the separate conflict of law question of the admissibility of the direct action.

We did not find other case-law regarding direct actions, however, we deem it is safe to assume that this issue needs more attention in the doctrine and judicial training, with additional focus on the possible application of the Hague Traffic Accidents Convention.

21. *The application the specific rule on subrogation (Art. 19)*

In the judgment No. II Cp 2314/2018 of 12 June 2019, the Appellate Court in Ljubljana dealt with the question of subrogation under Article 19 of the Rome II Regulation. The plaintiff was an Austrian social security institution, which claimed to have been subrogated into the rights of the victim of a traffic accident, to which the plaintiff had paid compensation for their injuries out of the social security scheme. The defendant was the insurer of the person who caused the accident. Pursuant to Article 19 of the Rome II Regulation, the court applied Austrian law to the question of the existence of the subrogation. There was, however, another question to be solved – that of the statute of limitations of the claim for the compensation. The court deemed that this question was inseparately linked to the question of the subrogation, that Austrian law had to be applied as well. As Galič points out, the reasoning regarding the statute of limitations was erroneous. Since the statute of limitations concerned the (possibly) subrogated claim, which was the claim of the victim against the tortfeasor, it should be examined under the law applicable to that claim.<sup>1241</sup> The court also overlooked the applicability of the Hague Traffic Accidents Convention, which it should have applied to find the applicable law to the 'original' claim between the victim and the tortfeasor (Article 3 of the Hague Convention) and which also applies to the statute of limitations (Article 8/1(8) of the Hague Convention).

22. *The application of the specific rule on multiple liability (Art.20)*

We found no case law or doctrine on the question of multiple liability (Art. 20).

## 2.6 Chapter VI - Other Provisions

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<sup>1238</sup> J. Kramberger, A. Galič: The Application of the Rome I and Rome II Regulations in Slovenia, in: E. Guinchard (ed.): Rome I and Rome II in Practice, Intersentia, 2020, p. 533.

<sup>1239</sup> Cf. Repas in: M. Repas, V. Rijavec (eds.), Mednarodno zasebno pravo Evropske unije [Private International Law of the European Union], Uradni list Republike Slovenije, Ljubljana 2018, p. 513.

<sup>1240</sup> Cf. A. Galič in: J. Kramberger, A. Galič: The Application of the Rome I and Rome II Regulations in Slovenia, in: E. Guinchard (ed.): Rome I and Rome II in Practice, Intersentia, 2020, p. 539, 548.

<sup>1241</sup> A. Galič in: J. Kramberger, A. Galič: The Application of the Rome I and Rome II Regulations in Slovenia, in: E. Guinchard (ed.): Rome I and Rome II in Practice, Intersentia, 2020, p. 539, 540.

Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:

23. The implementation of the concept of **habitual residence** in the Rome II Regulation, with reference both to persons covered by Art 23 and natural persons acting otherwise than in the course of business

We found two judgments where the courts had to determine the habitual residence of the parties. There did not appear to be any difficulty. We would, nevertheless, like to point out that the term 'habitual residence' does not exist in Slovenian national law, where only two categories of residence exist: permanent and temporary, which are defined by Slovenian administrative law and depend on individual's registration, rather than on the individual's actual whereabouts. 'Habitual residence' in the sense of the Regulation thus sometimes does not correspond neither to permanent nor to temporary residence of a person (but nevertheless usually does at least to one of them).

The first case where habitual residence was important, was the Appellate Labour and Social Court case No. Pdp 599/2012 of 16 August 2012 about an accident at work, which occurred in Italy. The court opted for an exception from *lex loci delicti commissi* on the basis of Article 4/II, since the habitual residence of the injured party and of the employer was in Slovenia. The court then additionally stated that the case was also more closely connected to Slovenia (Article 4/III). In this case, there was no doubt about the residence of both parties and therefore no need to interpret the notion of habitual residence.

The second case was more interesting from the point of view of habitual residence. It was also about a work accident, this time in Belgium. The Appellate Labour and Social Court (No. Pdp 634/2019 of 12 December 2019) applied Slovenian law pursuant to Article 4/II, because both parties were habitually resident in Slovenia and because the case was more closely connected to Slovenia (Article 4/III). It must however be mentioned that the defendant was working for a Slovenian employer and also had his social insurance in Slovenia, however, he originally came from Bosnia. After the accident, he went to live with his family in Bosnia and returned to Slovenia only for medical treatment. He told the court that he could not have lived in Slovenia with the low income he was receiving during the convalescence and that he needed his family's help in everyday life. It can thus be concluded that the defendant had his habitual residence in Slovenia at the time of the accident, but (arguably) changed it after the accident. We deem that the court's decision to take into account the habitual residence at the time of the accident was correct.

Regarding the habitual residence of natural persons who do not pursue a business activity, Repas advocates for a euroautonomous interpretation.<sup>1242</sup>

24. The application of and any difficulties with the specific rules on **exclusion of renvoi** (Art.24) and **States with more than one legal system** (Art.25)

There is no case-law where the courts would mention the exclusion of *renvoi* under Article 24 or where a law of a state with more than one legal system had to be applied under Article 25 of the Regulation.

The exclusion of *renvoi* is welcomed by the doctrine,<sup>1243</sup> since it enhances legal certainty in the EU. We can, however, report that Article 6 of the Slovenian Private International Law and Procedure Act provides for *renvoi* in all cases, with the exception of cases where parties chose the applicable law. The practitioners must therefore be attentive to the different type of referral in the Rome II Regulation.

Also the rule of the PILPA regarding states with more than one legal system is different than that in the Rome II Regulation. Article 9 namely provides for the application of the national conflict of law rules for finding the applicable law.

25. The application of and any difficulties with the specific rule on **public policy of the forums** (Art. 26)

There is no accessible case-law where the court would apply the public policy exception from the Rome II Regulation. In general, cases where public policy is invoked in the conflict of law rules, are very rare (and, in the accessible case-

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<sup>1242</sup> Repas in: M. Repas, V. Rijavec (eds.), *Mednarodno zasebno pravo Evropske unije* [Private International Law of the European Union], Uradni list Republike Slovenije, Ljubljana 2018, p. 413.

<sup>1243</sup> See eg. Repas, who underlines the need for the predictability of the result of the conflict of law operation. In: M. Repas, V. Rijavec (eds.), *Mednarodno zasebno pravo Evropske unije* [Private International Law of the European Union], Uradni list Republike Slovenije, Ljubljana 2018, p. 469.

law, the courts never actually rejected the application of a foreign law on that basis), contrary to those regarding the recognition and enforcement of judgments.

One case can nevertheless be mentioned, even though the court applied the Slovenian national legislation. The Appellate Court in Maribor namely addressed the question whether foreign rules on the statute of limitations of civil claims can be contrary to Slovenian public policy. The court stated: 'Each mandatory (imperative) rule is not a part of the public policy, but only those, of which a violation would endanger the legal and moral integrity of the domestic legal order. That said, it is completely clear that rules on the statute of limitations regarding civil claims do not fall into the scope of public policy.'<sup>1244</sup>

Slovenian courts did not yet face a foreign law prescribing punitive damages. We deem that such law would currently be considered contrary to Slovenian public policy (as permitted by Recital 32 of the Rome II Regulation), where compensation in civil matters is still considered to bring 'satisfaction' to the victim and not to penalize the tortfeasor.

We can mention a partly surprising doctrinal opinion that the public policy, protected by the Regulation, is not 'some supranational public policy, but public policy of a particular Member State of the EU'.<sup>1245</sup> The general view in Slovenia is, however, that supranational sources of fundamental rights and values (most notably the European Convention of Human Rights) equally enter into the scope of the 'national' public policy protected in Private International Law.<sup>1246</sup>

*26. Practical interaction between the Rome II Regulation and other EU and international legal instruments, in specific areas such as environmental damages, intellectual property rights or data protection (Arts. 27, 28, 29)*

Slovenia is a party to the **Hague Traffic Accidents Convention** and to the **Hague Product Liability Convention** and has notified the Commission that those conventions, when applicable, prevail over the Rome II Regulation. The relationship between the two conventions, the Regulation, and sometimes even the national PIL rules has sometimes proven difficult for the courts to decipher. Since the mentioned conventions are the most prominent legal instruments to which Article 28 applies, it could be useful to include in the Regulation an explicit referral to them, as a guidance to the stakeholders.

The doctrine has identified several difficulties in the interpretation of the relationship between **the Rome II Convention, the Hague Traffic Accidents Convention and the Directive 2009/103/EC relating to insurance against civil liability in respect of the use of motor vehicles**, and the enforcement of the obligation to insure against such liability.<sup>1247</sup>

In the case No. I Cpg 292/2018 of 21 April 2020, the Appellate Court in Ljubljana had to resolve the dispute between an Austrian social security institution which paid compensation to the victim of a traffic accident in Slovenia (plaintiff) and a Slovenian insurer of the person who caused the accident (defendant). The court explained that that the **Regulation (EC) No. 883/2004 of the coordination of social security systems** did not provide for a conflict of law rule, but for the obligation of all Member States recognize the subrogation, where the institution responsible for providing benefits is, under the legislation it applies, subrogated to the rights which the beneficiary has against the third party. It then went on to apply Article 19 of the Rome II Regulation regarding the existence of subrogation and applied Austrian law.

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<sup>1244</sup> No. I Cpg 10/2016 of 12 April 2016.

<sup>1245</sup> Repas in: M. Repas, V. Rijavec (eds.), *Mednarodno zasebno pravo Evropske unije* [Private International Law of the European Union], Uradni list Republike Slovenije, Ljubljana 2018, p. 480.

<sup>1246</sup> See e.g. J. Kramberger Škerl, *Evropeizacija javnega reda v mednarodnem zasebnem pravu* [Europeanisation of Public Policy in Private International Law], *Pravni letopis*, 2008, pp. 355-375.

<sup>1247</sup> See e.g. Z. Skubic, *Insolventnost zavarovatelja avtomobilske odgovornosti in odgovornost držav članic* [The Insolvency of the Insurer of Automobile Responsibility and the Responsibility of the Member States], *Pravna praksa*, No. 34, 2013, p. 26 (the author analyses the CJEU case Csonka No. C-409/11 of 11 July 2013), and M. Krisper Kramberger, *Varstvo žrtev prometnih nesreč v čezmejnih sporih po pravu Evropske unije in Haaški konvenciji* [Protection of Victims of Traffic Accidents in Cross-Border Disputes under the EU law and the Hague Convention], in: *Razsežnosti zasebnega prava: liber amicorum Ada Polajnar Pavčnik*, pp. 281-296 (abstract in English: pp. 374-375).

## 2.7 Comments on other Practical Problems

These areas are **of particular interest** for the Commission. Please be as precise as possible regarding any issue that has been reported on:

27. *The impact of the application of the 1971 Hague Convention on the law applicable to traffic accidents on legal certainty (where relevant for your Member State)*

Slovenia is a party to the 1971 Hague Convention and we found 21 judgments of appellate courts and the Supreme Court where it was applied. A recurrent issue in this case law is the question of the amount of compensation for non-pecuniary damages, specifically when the “living standard” in the state whose law is applicable, is lower than that in Slovenia where the victim lives, and the typically determined amounts (or even non-binding scale of compensation, adopted by the Supreme Court of the relevant country) 1248 are thus lower than in similar cases in Slovenia. Mostly, the courts explain that in applying foreign law, they are also bound by the criteria of that law regarding the compensation for non-pecuniary damages. That said, the applicable criteria mostly left some place for taking into account all circumstances of the case, which then gave the Slovenian court the possibility to at least partly adjust the amount of compensation to the living environment of the victim.

Even the Slovenian Constitutional court issued a decision regarding this convention (No. Up-1802/08 of 16 December 2009).<sup>1249</sup> The Constitutional court was seized by an individual who claimed a violation of the principle of equal treatment from Article 14 of the Slovenian Constitution, because, to resume, the Slovenian courts did not apply Slovenian law with which the case was closely connected, but Croatian law as the law of the state where the accident occurred. The court examined the question whether it could interpret the possible exception from *lex loci delicti commissi*, enacted in Article 4 of the Convention (under certain circumstances, the law of the state of the registration of the vehicle of the victim is applied) as enabling the application of Slovenian law. The decision against such interpretation was adopted with 5 votes against 3. One of the dissenting judges wrote a dissenting opinion in which she advocated for a broader interpretation of the exception, which would enable the application of a closely connected law, in line with the recent development of the tort statute in EU private international law, namely the Rome II Regulation.<sup>1250</sup>

Nevertheless, we deem that the parallel system of application of the Rome II Regulation in the states which are not parties to the 1971 Hague Convention and the application of the Convention in the contracting states, with only one mention of the Convention in the Regulation (Art. 30 – Review clause) does not contribute to legal certainty. In a situation where lawyers and parties already have to navigate in the dispersed EU private international law legislation and its diverging relations with national laws, the application of the Hague Convention can be easily overlooked by parties, attorneys and judges alike. One such case is a very recent judgment of the Appellate Court in Ljubljana (No. I Cpg 292/2018 of 21 April 2020) where the court applied the Rome II Regulation to the claim for damages arising from a traffic accident, without even mentioning the Hague Convention.

28. *Any other practical problems with respect to the application or interpretation of the Rome II Regulation, including but not limited to the suitability of the mosaic approach*

We can mention two problems exposed in the doctrine. First, the need for addressing the lacuna in the relationship between Articles 4 and 5, i.e. the application of *lex loci damni* in cases of **product liability**, where the product was not

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<sup>1248</sup> Such scales exist in numerous countries and are adopted by different bodies. For example, in Italy, such scale is found in the so-called 'Court of Milano Tables'.

<sup>1249</sup> ECLI:SI:USRS:2009:Up.1802.08. For an analysis of this judgment and the general analysis of the victims' protection in cross-border traffic accidents, see: M. Krisper Kramberger: Varstvo žrtev prometnih nesreč v čezmejnih sporih po pravu Evropske unije in Haški konvenciji [Protection of Victims of Traffic Accidents in Cross-Border Disputes under the EU law and the Hague Convention], in: Razsežnosti zasebnega prava: liber amicorum Ada Polajnar Pavčnik, pp. 281-296 (abstract in English: pp. 374-375).

<sup>1250</sup> Dissenting opinion of Judge Marija Krisper Kramberger, attached to the decision.

marketed in the state where damage occurred (see point 7 of this report for further precisions).<sup>1251</sup> And second, the need for an explicit referral to Product Liability Convention and the Traffic Accidents Convention in the Rome II Regulation, in order to “remind” judges and practitioners in the contracting states of the existence and prevalence of these conventions over the rules of the Regulation.

Regarding the **mosaic approach**, we could not find any case law where it could be applied (i.e. where damage would occur in different states). Repas advocates for the use of this approach in cases of ‘dispersed’ damage.<sup>1252</sup> However, Repas points out and we agree that the mosaic approach could prove problematic in certain cases (typically as a consequence of the use of Internet). In the field of jurisdiction, the CJEU already found a satisfactory solution in the cases E-Date and Martinez, however, there was more place to manoeuvre since the wording of Article 7/2 of the Brussels I bis is broader than that of Article 4 of the Rome II Regulation. In choice of law, the ‘solution’ to defamation and violations of privacy via the internet was the exclusion of these fields from the scope of application of the Rome II Regulation, which can only be a temporary state of affairs. Solutions for a choice of law rule were also already proposed by ALI and CLIP Principles. Legislative action would therefore be welcome to meet the demands of the Internet era. Repas points out that another potential origin of dispersed damage is excluded from the scope of application of the Regulation, namely nuclear accidents, whereas there is a special rule concerning environmental damages.<sup>1253</sup> On the other hand, Galič proposes to use the mosaic approach also in cases of an international industrial action.<sup>1254</sup>

### 3. Comments on areas of interest

*These areas are of particular interest for the Commission. Please be as precise as possible regarding any issue that emerged in your Member State regarding:*

29. *The exclusion of violations of privacy and rights relating to personality, including defamation, from the scope of the Rome II Regulation and any difficulties arising out from differences among Member States’ rules in cross-border situations*

Based on the exclusion of the scope of application of the Rome II Regulation of violations of privacy and right relating to personality, Article 30 of the Slovenian Private International Law and Procedure Act is applicable to determine the applicable law. This is the general article of the PILPA concerning non-contractual obligations, which is applicable for all such obligations which fall outside of the scope of application of EU acts and international treaties.

We found only one judgment concerning cross-border defamation (Appellate Court in Ljubljana, No. I Cp 1024/2012 of 28 November 2012). It was about a television documentary about high ranked Slovenian politicians and other persons presumably involved in corruption when Slovenia bought military tank from a Finnish company. The documentary was first aired in Finland and then in Slovenia. Pursuant to Article 30 of the PILPA, the court applied Slovenian law, since the lawsuit only concerned the airing of the documentary in Slovenia and the damage resulting from that airing, which was the violation of the plaintiff’s personal sphere and could thus only occur in Slovenia.

Problems, relating to the lack of a common conflict of law rule for defamation and violations of privacy as well as regarding the relationship between national conflict of law rule and the Directive on Electronic Commerce, were addressed in Slovenian doctrine.<sup>1255</sup> Further problems could arise, in the opinion of the author of this National Report,

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<sup>1251</sup> A. Galič in J. Kramberger Škerl & A. Galič, The Application of the Rome I and Rome II Regulations in Slovenia, in: E. Guinchard (ed.), Rome I and Rome II in Practice, Intersentia, 2020, p. 541, 542.

<sup>1252</sup> Repas in: M. Repas, V. Rijavec (eds.), Mednarodno zasebno pravo Evropske unije [Private International Law of the European Union], Uradni list Republike Slovenije, Ljubljana 2018, pp. 481, 482.

<sup>1253</sup> Repas in: M. Repas, V. Rijavec (eds.), Mednarodno zasebno pravo Evropske unije [Private International Law of the European Union], Uradni list Republike Slovenije, Ljubljana 2018, p. 482.

<sup>1254</sup> A. Galič, Kolizijskoppravna pravila v delovnih sporih [Conflict of Law Rules in Labour Disputes], Delavci in delodajalci, No. 2-3, 2013, p. 317–320.

<sup>1255</sup> J. Kramberger Škerl: Mednarodna pristojnost in kolizijsko pravo EU za internetne kršitve zasebnosti in osebnostnih pravic [International Jurisdiction and Conflict of Law Rules in the EU Regarding the Violations of Privacy and Personality



regarding the GDPR. We support the solution proposed by the European Parliament in the European Parliament resolution of 10 May 2012 with recommendations to the Commission on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) as a well-balanced rule. In the meantime, we deem that the case-law of the European Court of Human Rights regarding Article 8 can provide some guidance for the national courts in applying substantial law of any country, or else, rejecting the application on the basis of public policy exception from their national legislations.

*30. Any comment regarding the Interplay of the Rome II Regulation with the treatment of **defamation and data protection**, and, in these areas, the relevance of **Strategic Lawsuits Against Public Participation (SLAPPs)***

Regarding the treatment of defamation and data protection, the concerns arise mainly from the exclusion from the Rome II Regulation (see Q 29 of this National Report).

The issue of SLAPPs and a possibility of anti-SLAPP regulation, has not yet, to our knowledge, been tackled by Slovenian doctrine in the frame of private international law. There is, however, a recurrent debate on the chilling effect of lawsuits directed against journalists (both in front of the courts as in front of the Honour Tribunal of the Association of Journalists), and the insufficient protection both in relation to the plaintiff, as in relation between journalists and their employers.

The issue of SLAPPs should undoubtedly be tackled in the debate regarding a possible common rule on defamation and violations of privacy. Even better, substantive regulation of this field could be adopted on the EU level.

One case that could also be analysed from the point of view of SLAPPs was the above-mentioned case (Q 28 of this National Report) about the defamation lawsuit by a high-ranking politician against the authors of a documentary supposedly revealing corruption.

*31. The extent to which Rome II Regulation has been applied to **corporate abuses against human rights** and lays down an effective set of rules to regulate non-contractual liability;*

Corporate abuse of human rights abroad has not yet been handled in Slovenian courts, at least not if we have in mind the violations of human rights other than the right to property. There is, however, a debate in the doctrine, in the NGO sector and the corporate sector.<sup>1256</sup>

A famous cross-border case in which Slovenia lost in front of the European Court of Human Rights, is *Alisic et al. v Slovenia et al.* (ECHR, Grand Chamber, 16 July 2014) was about the violation of the right to property (Article 1 of the 1<sup>st</sup> Protocol to the ECHR) concerning the savings of several citizens of ex-Yugoslavia by a Slovenian state-owned bank. Slovenian courts previously rejected the plaintiffs' claims.

*32. The impact of the development of **artificial intelligence** on the Rome II Regulation, and in particular on the suitability of the rules that it contains to regulate non-contractual liability.*

Artificial intelligence has so far not been tackled by Slovenian conflict of laws doctrine, nor have any related cases come up in Slovenian courts.

We deem that the development of AI undoubtedly is an issue which will have to be addressed in private international law, but first (or at least at the same time) substantive rules will have to be set on national and, hopefully, EU level. In light of the universal application of the Rome II Regulation, even an EU legislative action, which would at least bring a common definition of AI, will not suffice to prevent problems arising from different understanding of the notion in different legal areas, as well as the different speed of the development of national legislations in this regard. This field should thus be closely monitored and specific rules added to the Rome II Regulation, if necessary.

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Rights via the Internet], in: M. Damjan, M. Ahtik (eds), *Pravo v informacijski družbi*, Ljubljana: IUS Software, GV založba, 2014, p. 191-215.

<sup>1256</sup> For an overview, see e.g. Jernej Letnar Čerňič, *Človekove pravice v gospodarstvu* [Human Rights in Business], column on Ius Info webpage: <https://www.iusinfo.si/medijsko-sredisce/kolumne/256211> (accessed on 7 December 2020).

#### 4. List of national case law

<u>Court or tribunal</u>	<u>Case name and reference number</u>  <u>Reference to decision of the Court of Justice if applicable</u>	<u>Date</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings (only for key cases)</u>
Appellate Labour and Social Court <i>(Sl. Višje delovno in socialno sodišče)</i> <sup>1257</sup>	No. Pdp 599/2012 <sup>1258</sup> (ECLI:SI:VDSS:2012:PDP.599.2012)	16 August 2012	Arts. 4/II and 4/III  (the Court (wrongly) based its decision on the Slovenian national conflict of laws rules, but also explained that the application of the Rome II Regulation would bring the same result)	Applicable law for damage sustained in a work accident, which occurred in Italy; the defendant is the insurer of the employer (direct claim).  Exception from " <i>lex loci delicti commissi</i> ": habitual residence of the injured party and the employer is in Slovenia; additionally, the case is more closely connected to Slovenia.	The court stated: "[T]he connecting factors refer to Slovenian law: the employer has their seat in Slovenia; the employee was sent to work from Slovenia; with the exception of the time directly after the accident the plaintiff received medical treatment in Slovenia, where he also registered his temporary residence. These circumstances are not altered by the fact that the defendant is the employer's insurer."

<sup>1257</sup> In Slovenia, there are four appellate courts with general jurisdiction in civil and commercial matters: in Koper, Ljubljana, Maribor and Celje. The Appellate Labour and Social Court (located in Ljubljana) is a specialized court with jurisdiction in labour and social security disputes.

<sup>1258</sup> In Slovenia, cases are referred to by numbers only. Cases accessible online are anonymised.

<p>Appellate Court in Ljubljana <i>(Sl. Višje sodišče v Ljubljani)</i></p>	<p>No. II Cp 1356/2012 (ECLI:SI:VSLJ:2012:II.CP.1356.2012)</p>	<p>24 October 2012</p>	<p>Art. 8/1</p>	<p>Infringement of intellectual property rights</p>	<p>The court stated: "The [Slovenian] Copyright and Related Rights Act, referring to international treaties, protect also foreign musical works; for questions related to the foreign element, this Act is applicable before national courts on the basis of <i>lex loci protectionis</i> (Article 8/1 of the Regulation No. 864/2007 [...]). The appellants view that the plaintiff (a Slovenian collective organization) is entitled to manage small rights on works of foreign authors only regarding issues for which its sister organizations mandated it – i.e. only regarding works of foreign authors who are members of sister organizations, is erroneous and such view is not compatible with the principle of equal treatment of foreign and domestic authors from Article 176/II of the Act (if the defendant's view was valid that the foreign author should assert their economic author's rights individually, which is incompatible with the legally imposed collective protection of rights)."</p>
<p>Appellate Court in Ljubljana</p>	<p>No. II Cp 2926/2012 (ECLI:SI:VSLJ:2013:II.CP.2926.2012)</p>	<p>29 May 2013</p>	<p>Art. 8/1</p>	<p>Infringement of intellectual property rights</p>	<p>The court stated: "The repertoire of the plaintiff sustains of all already published musical non-stage works, whether the author is domestic or foreign.  The view that the plaintiff is only entitled to manage small rights on works of</p>

					foreign authors insofar as the sister organizations mandated them – i.e. only with the works of foreign authors who are members of sister organizations, is contrary to the current legislation and erroneous.”
Appellate Court in Ljubljana	No. III Cp 764/2014 (ECLI:SI:VSLJ:2014:III.CP.764.2014)	12 June 2014	Art. 4/II, III	Direct action of an employee against the employer’s insurer	<p>The court did not examine the admissibility of the direct claim under Art. 18 of the Rome II Regulation and simply found that it was admissible under Slovenian law.</p> <p>As to the substance of the insurance company’s liability, the court examined the liability of the insured person, ie the employer (no mention of the scope of liability under the insurance contract).</p> <p>Even though the accident and thus the damage occurred in Italy, the court applied Slovenian law, since both the employer and the employee were domiciled in Slovenia and because the case was more closely connected with Slovenia.</p>
Appellate Court in Ljubljana	No. II Cp 1909/2014 (ECLI:SI:VSLJ:2014:II.CP.1909.2014)	1 October 2014	Art. 8	Infringement of intellectual property rights	The court stated: “The first instance court correctly applied the Slovenian law, namely on the basis of the Regulation EC No. 864/2007. According to Article 8 of that regulation the law of the state for which protection is claimed, or, if there is infringement of a unitary Community

					<p>intellectual property right, the law of the state in which the act of infringement was committed, applies to non-contractual obligations arising from the infringement of intellectual property rights.</p> <p>The reference to Article 182 of the Copyright and Related Rights Act does not alter the applicable law, because the authors' works were not distributed to the public directly via satellite."</p>
Appellate Court in Ljubljana	No. I Cp 1591/2015 (ECLI:SI:VSLJ:2015:I.CP.1591.2015)	23 September 2015	Art. 4/1 → the prevalence of the Hague Convention on Traffic Accidents	Relationship between the Hague Convention and the Rome II Regulation in Slovenian law;  Lex loci actus	<p>Facts: Traffic accident in Austria</p> <p>The court stated: "The Hague Convention (Convention on the Law Applicable to Traffic Accidents) prevails over the [Slovenian] Private International Law and Procedure Act, since the latter provides in Article 4 that it is not applicable to relations regulated in another act or international treaty. Also the Regulation (EC) No. 864/2007 [...] is not an obstacle to the application of the Hague Convention, since Article 28 of the Regulation provides that the Regulation does not affect the application of international treaties to which one or more Member States are parties at the time of the adoption of the Regulation and which determine conflict of laws rules regarding non-contractual obligations."</p>

Appellate Court in Ljubljana	No. II Cp 2009/2009 (ECLI:SI:VSLJ:2015:II.CP.2009.2009)	30 September 2015	Art. 8	Infringement of intellectual property rights	The court stated: "on the basis of Article 8 of the Rome II Regulation, the first instance court correctly applied the Copyright and Related Rights Act, since the plaintiff demands protection of the author's right in the Republic of Slovenia. As far as the claim concerns a demand for payment for the use of small author's rights, the view of the first instance court that the Copyright and Related Rights Act determines the obligatory collective management of such rights is thus correct. However, insofar as the claim concerns the damages because of the infringement of the moral author's right (Article 169 of the Copyright and Related Rights Act), the Appellate Court adds that moral author's rights cannot be transferred, and the claim for damages relating to non-pecuniary damage following the infringement of such right, can only be transferred if it was determined in a final judgment or in a written agreement (Article 197/1 in connection with Article 197/II of the [formerly applicable] Obligations Act).
Appellate Court in Ljubljana	No. I Cpg 23/2016 (ECLI:SI:VSLJ:2016:I.CPG.23.2016)	5 April 2016	Art. 18 (the court considers the application of Rome II	Direct claim of the victim against the insurer	The court stated: "The plaintiff and the second defendant did not conclude any contract, which would, at a first glance, justify the application of the Rome II Regulation. However, it is important to emphasize that the obligation of the

			Regulation, but wrongly decides to apply only Rome I to the existence of a direct claim)		second defendant to pay compensation for damage sustained by the plaintiff, originates from the contractual relationship between the first and the second defendant, namely if the first defendant had not insured their liability at the second defendant, the latter would not have any obligations resulting from the asserted harmful event (because the second defendant did not cause the damage). The obligation of the second defendant to cover civil liability of the first defendant against the plaintiff thus results from the insurance contract concluded with the first defendant, therefore the law applicable to such obligation has to be determined pursuant to the Rome I Regulation.
Appellate Court in Ljubljana	No. I Cp 338/2016 (ECLI:SI:VSLJ:2016:I.CP.338.2016)	5 April 2016	Art. 10 Art. 31	Unjust enrichment Application <i>ratione temporis</i>	The case concerned unpaid invoices issued by the plaintiff, who was an intermediary between the defendant as the buyer and a third person as the provider of ordered equipment. The plaintiff alleged that she paid the provider for this equipment and thus replied them in the legal relationship with the defendant, which the latter denied. <i>(summary in English provided by Aleš Galič)</i>  The court referred the case back to the first instance court for retrial, because the nature of the relationship between the

					<p>parties was not sufficiently clarified. If the first instance court found that there was unjust enrichment, it should apply Article 10 of the Rome II Regulation. The appellate court wrongly states that the regulation is applicable to the cases of unjust enrichment, which came to existence after 11 July 2007 (instead of only to cases, which arose after 11 January 2009), however, it further establishes that the unjust enrichment could only have occurred in 2009 (without giving the precise date), so the application of the Rome II Regulation was possibly correct.</p>
Appellate Court in Ljubljana	No. III Cp 942/2016 (ECLI:SI:VSLJ:2016:III.CP.942.2016)	15 June 2016	Art. 4/1	<p>Qualification of non-contractual damage</p> <p>(first instance court applies Slovenian law to such qualification and, consequently, to the question whether Rome II is applicable;</p> <p>Appellate court deems that, under Rome II, qualification must be made under Austrian law)</p> <p><i>* Author's note: the court ignored that there should be euroautonomous interpretation of whether</i></p>	<p>The court stated: "The first instance court applied the wrong substantial law, because it did not apply Austrian law to the contentious relation in view of the basis of the claim, as is determined in Article 4/1 of the Rome II Regulation.</p> <p>The first instance court correctly cites Article 4/1 of the Regulation [...] according to which the law of the state where the damage occurred is applicable to the non-contractual obligation for damages; however, the court then finds itself in a logical trap, by verifying whether there is in fact non-contractual obligation for damages and by applying Slovenian law to that question. The court namely decides that</p>



				<p><i>the obligation at stake is a non-contractual obligation and whether the application of Rome II is not excluded in Art. 1/1/d).</i></p>	<p>pursuant to Article 148 of the [Slovenian] Obligations act, which regulates the responsibility of the legal entity for damages caused by its organ, there is no passive standing of the defendant; it then refuses to apply Article 131 of the Obligations Act and concludes that also the provisions of the [Slovenian] Companies Act which regulate the responsibility for damages of the administration of the limited responsibility company, there is no basis for such responsibility of the defendant according to the plaintiff's claim. One can therefore see that the court evaluated the conditions for the existence or inexistence of the defendant's (non-contractual) responsibility for damages asserted by the plaintiff, only according to Slovenian legislation, which is contrary to the cited provision of the Regulation. It took the wrong path of evaluating under Slovenian law whether there is defendant's non-contractual responsibility, instead of, pursuant to Rome II Regulation, assessing also this question under Austrian law.</p>
Supreme Court of the Republic of Slovenia	No. III Ips 32/2015 (ECLI:SI:VSRS:2016:III:IPS.32.2015)	20 September 2016	Articles 4, 5	Applicability of Article 5 – question whether the product was marketed in Slovenia	The court stated: "Article 5 of the Rome II Regulation is <i>lex specialis</i> in comparison to its Article 4, since it determines the law applicable to non-contractual

<p>(Sl. Vrhovno sodišče Republike Slovenije)</p>				<p><i>* Not all facts of the case are known, but the court probably forgot about the application of the Hague Convention on Law Applicable to Products Liability</i></p>	<p>obligations arising from damage caused by defective products, while Article 4 of the Rome II Regulation generally concerns non-contractual obligations arising from a harmful act.</p> <p>In the case at hand, the question must first be resolved whether the product was marketed in the Republic of Slovenia where the plaintiff as victim has their habitual residence (point a) of Article 5/1 of Rome II Regulation). If the answer to this question is negative then it must be verified whether other connecting factors from Article 5 of the Rome II Regulation exist.</p> <p>However, since it is not possible to determine, based on the content of the claim, where the product was marketed or a close connection with the law of any of the countries, Article 5 of the Rome II Regulation is not applicable. Article 4 of the Rome II Regulation is thus applicable, since the claim contains all the facts needed for such application."</p>
<p>Appellate Court in Ljubljana</p>	<p>No. II Cp 3249/2016 (ECLI:SI:VSLJ:2017:II.CP.3249.2016)</p>	<p>20 March 2017</p>	<p>Art. 28</p>	<p>Relationship between the Rome II Regulation and the Hague Convention on the Law Applicable to Traffic Accidents:</p>	<p>The court stated: "The appellate court first establishes that the case at hand is a case with a foreign element, since the traffic accident occurred in the Federation of Bosnia and Herzegovina. The first instance court correctly established that on the basis of Article 3</p>

				The Hague Convention prevails in relation to third states.	of the Convention on the Law Applicable to Traffic Accidents, of which both countries are signatories, Bosnian law has to be applied. Article 3 of the convention namely determines the applicability of the law of the country where the traffic accident occurred. The first instance court correctly explained that Bosnian law would also be applicable pursuant to the Rome II Regulation, which provides in Article 4 for a general rule that the law applicable to non-contractual responsibility for damage is the law of the country where the damage occurred ( <i>lex loci damni</i> ). However, this Regulation only prevails over the concluded convention among the Member States, and does not prejudice the application of international conventions to which one or more Member States are parties at the time of the adoption of the Regulation and which lay down conflict-of-law rules relating to non-contractual obligations (Article 28 of the Regulation).
Appellate Court in Ljubljana	No. I Cpg 664/2017 (between the same parties as in the case III Ips 32/2015) (ECLI:SI:VSLJ:2017:I.CPG.664.2017)	20 July 2017	Articles 4, 5  The Court should have applied the Hague	Product liability, application of Art. 4, since no basis for the application of Art. 5	The court stated: "The plaintiff asserted that the damage resulted from the delivery of a defective product. The second defendant supposedly caused the damage with their actions. The damage occurred in the Republic of Slovenia. Since neither the plaintiff nor

			Convention on the Law Applicable to Product Liability		the defendant asserted any circumstances, which would exclude the application of Slovenian law, this law is thus applicable (Article 4/1 of the Rome II Regulation.”
Appellate Court in Ljubljana	No. I Cpg 1084/2016 (ECLI:SI:VLSJ:2017:I.CPG.1084.2016)	25 October 2017	Articles 4/I, 4/III, 15	<p>Claim for payment of price under a contract of sale; defendant demands set-off with a claim based on the plaintiff's alleged responsibility for damages because of a failed assignation;</p> <p>Court finds that Rome II is not applicable for the claim asserted for set-off, but the same law would have been applicable even if Rome II was applicable.</p>	<p>The court stated: “The assertion in the appeal that the first instance court should have applied Italian or, respectively, Austrian substantive law for the decision on the existence of the claim for damages which was asserted for set-off, is incorrect. In the procedure at hand, the defendant (the Slovenian company) asserted for set-off a claim for damages against the plaintiff (the Italian company F. S.p.A., Italy) resulting from an unsigned assignment, because of which the person who placed the order and who is at the same time the assignee (the Austrian company W., Austria) retained the payments to the defendant in the amount of 50,000,00 EUR. In substance, this is a reproach of a violation of the obligation of the plaintiff regarding the acceptance of the fulfilment (the payment) of the defendant, which originates in the same contractual relationship (the contract of sale) between the plaintiff and the defendant, as does the asserted claim of the plaintiff (the payment of the price), and concerning which the first instance court</p>

					correctly assumed that the plaintiff and the defendant implicitly agreed on the application of Slovenian substantial law. The application of Slovenian law (and the UN Convention on International Sale of Goods, the CISG) was not disputed in the appeal. On the mentioned grounds, also the existence of the claim for damages, which is asserted for set-off, thus has to be established under the Slovenian substantial law. For the claim asserted for sett-off, this law would have been applicable even if the court considered that it was a non-contractual claim for damages, since Slovenian law would have been applicable under Article 4/1 and 4/III in connection with Article 15 of the Rome II Regulation.”
Appellate Court in Ljubljana	No. V Cpg 164/2018 (ECLI:SI:VSLJ:2018:V.CPG.164.2018)	5 April 2018	Art. 6/1	Unfair competition	<p>The court stated: “Regarding the claims in relation with unfair competition, the Slovenian court has jurisdiction pursuant to Article 5/III of the Regulation No. 44/2001. Slovenian law is applicable (Article 6/1 of the Rome II Regulation).”</p> <p>The case concerned the dispute over the use of a distinctive sign which the defendant used in Slovenia, but which is already in use by the plaintiff for the same activity in numerous other Member States, so that it could come to a confusion. The court explained that the disputed sign was not protected by</p>

					copyright, however, it was protected under the distinct rules on unfair competition.
Appellate Court in Ljubljana	No. I Cp 2219/2017 (ECLI:SI:VSLJ:2018:I.CP.2219.2017)	18 April 2018	Art. 4/1	<p>Definition of place where the damage occurred = only the place where primary/direct damage occurs</p> <p>(the jurisdiction of Slovenian courts is rejected regarding the insurer of the ski slope manager)</p>	<p>The court stated: "Taking into account the cited provision of Article 13/II [of the Brussels I bis Regulation], the first instance court correctly went to establish which law was applicable, pursuant to the Rome II Regulation, in the case at hand. It ensues from Article 4/1 that the law applicable for a non-contractual obligation arising from a harmful action, is the law of the state where the damage occurs, with no regard to the state where the harmful event causing the damage occurred, and with no regard to the state where indirect consequences occurred. In the case at hand, that state is Italy, where the physical injuries of the plaintiff occurred because of a fall on the ski slope, as the court of first instance correctly determined, therefore Italian law is applicable on the basis of the mentioned provision. In view of the reproaches in the appeal, it is necessary to additionally explain that such solution is in conformity with the European case law, pursuant to which only primary damages are decisive for the identification of the place where the damage occurred. This is only the place where there was direct influence on the</p>

					protected legal good (body, patrimony) and it is not essential if the victim suffers the damage also later in another place or where further or indirect damages of the victim occurred, all reproaches in the appeal which go in the opposite sense, are not founded."
Appellate Court in Ljubljana	No. I Cp 522/2019 (the same event as in the case I Cp 2219/2017) (ECLI:SI:VSLJ:2019:I.CP.522.2019)	3 April 2019	Art. 4/1	Definition of place where the damage occurred = only the place where primary/direct damage occurs  (the jurisdiction of Slovenian courts is rejected also in relation to the ski slope manager)	The court stated: „Concerning the Rome II Regulation and the CJEU judgment No. C-350/14 of 10 December 2015, where the court refers to the place of the direct damage as the connecting factor to be taken into account for the determination of the applicable law, Italian law is applicable to the case at hand."
Appellate Court in Maribor	No. I Cp 295/2019 (ECLI:SI:VSMB:2019:I.CP.295.2019)	11 June 2019	Article 28/1	Relation between Rome II Regulation and the Hague Convention on Law Applicable to Traffic Accidents  (the Convention prevails)	The court stated: "In the case at hand it is not possible to apply the Rome II Regulation which is applicable to the conflict of laws in non-contractual obligations in civil and commercial matters (Article 1), because the Regulation, according to Article 28/1 does not prejudice the application of international conventions to which one or more Member States are parties at the time of the adoption of the Regulation and which provide for conflict of law rules for non-contractual obligations. The Member States of the EU in which the parties have their domicile or seat

					(Republic of Slovenia and Czech Republic) were namely already parties, at the time of the adoption of the Rome II Regulation, of the Convention, which is also a more specific act than the Rome II Regulation which applies generally to non-contractual obligations in civil and commercial matters, whereas the Convention regulates exclusively non-contractual liability for damage in relation to traffic accidents with a foreign element ( <i>lex specialis derogate legi generali</i> ). [...] Notwithstanding, the second instance court, in view of the plaintiff's assertion in the appeal, adds that, in the case at hand, Croatian law would have also been applicable under Article 4/1 of the Rome II Regulation, as the law of the country where the damage occurred."
Appellate Court in Ljubljana	No. II Cp 2314/2018 (ECLI:SI:VSLJ:2019:II.CP.2314.2018)	12 June 2019	Articles 15/1 (h) and 19	Subrogation of rights from social security and statute of limitations	The court applies Article 19 to the question of subrogation of rights of the victim of a traffic accident against the person who caused the accident and determines the applicability of Austrian law.  When the defendant (the tortfeasor) invokes the statute of limitations regarding the claim for compensation, the court decides to equally apply Austrian law, on the basis of Article 15. This is, however, wrong, since it should



					have applied Slovenian law as the law of the place where the accident occurred, pursuant to the Hague Traffic Accidents Convention.
Appellate Labour and Social Court	No. Pdp 634/2019 (ECLI:SI:VDSS:2019:PDP:634.2019)	12 December 2019	Articles 4/II and 4/III	Victim and perpetrator habitually resident in the same Member State;  Closest connection with Member State other than the state where damage occurred.	The court stated: "The assessment of the first instance court that Slovenian substantial law is applicable to the resolution of this dispute is correct. The first instance court correctly established that the plaintiff was injured while he performed work abroad (in Belgium) and that he performed the work on the construction site of a Belgian client, with his working instruments, following his orders and under his control. Taking into account further findings that, by concluding the employment contract of 9 September 2011, the plaintiff and the second defendant established an employment relationship in Slovenia for the performance of carpentry work abroad and that the plaintiff was, on the basis of this contract, sent to work for the client in Belgium, the first instance court correctly concluded that the harmful event is more closely connected with Slovenia than with the state where the damage occurred (Article 4/III of the Rome II Regulation), therefore domestic law has to be applied in the case at hand. The second defendant incorrectly states in her appeal that the closest

					connection with the harmful event is demonstrated by the contract on business and technical cooperation, because pursuant to the provisions of this contract the client was obliged to take care of the security of workers on the construction site. However, as the appellate court already emphasised in its decision No. 16/2018, the contract on business and technical cooperation or any other contract by which the employer and the client agree on the obligations regarding the safety measures or regarding the liability for possible damage, can only be binding in their mutual relationship and not regarding the victim – the worker. The basis for the application of Slovenian law is, furthermore, also Article 4/II of the Rome II Regulation which provides that in the case where the person claimed to be liable (first and second defendant) and the person sustaining damage (the plaintiff) both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply (Slovenian law)."
Appellate Court in Ljubljana	No. I Cpg 292/2018 (ECLI:SI:VSLJ:2020:I.CPG.292.2018)	21 April 2020	Art. 4/1 (in relation to Art. 85 of the Regulation (EC))	Law applicable to the claim for damages of a victim of a traffic accident against the perpetrator	The court stated: "The defendant correctly points out in the appeal that the first instance court, when deciding on the case at hand, will have to take into account that the law applicable to the

			No. 883/2004)		question of the existence and the amount of the assigned claim for damages is the law of the state where the traffic accident occurred (pursuant to the Rome II Regulation, the law applicable in the case where the damage results from a traffic accident is the law of the state where the traffic accident occurred), namely the Slovenian law. As results already from the cited reasons of the CJEU judgment No. C-397/96, the rights of the victim against the liable person are assessed under the law of the state where the traffic accident occurred, and only such rights can then be transferred to the bearer responsible for the attribution of a public payment.”
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In the following case law, the Rome II Regulation was referred to for purposes of argumentation only and was not applied to determine the applicable law in the case at hand.

	Court	Case Number	Date	Article of the Rome II Regulation		
1.	Supreme Court of the Republic of Slovenia	No. Cpg 3/2019-3 (ECLI:SI:VSRS:2019:CPG.3.2019.3)	15 July 2019	Recital 32	Comparison of punitive damages in non-contractual relations with contractually agreed penalties for non-execution of contract	In proceedings for recognition and enforcement of an arbitral award, the defendant invoked that the contractually agreed penalties for non-execution of contract were contrary to public

						<p>policy, in analogy with punitive damages from the Recital 32 of the Rome II Regulation.</p> <p>The court stated that the Rome II Regulation was applicable to non-contractual obligations and its content could not simply be copied to contractual legal field.</p>
2.	<p>Appellate Court in Maribor</p> <p>(further case-law based on the same mass-harm event of the Drava river flooding and regarding the interpretation of the place where the damage occurred:</p> <ul style="list-style-type: none"> <li>- Appellate Court in Maribor, No. I Cp 615/2016 of 23 August 2016,</li> <li>- Appellate Court in Maribor, No. I Cpg 297/2016 of 30 August 2016,</li> <li>- Appellate Court in Maribor, No. I Cpg</li> </ul>	<p>No. I Cp 8/2017 (ECLI:SI:VSMB:2017:I.CP.8.2017)</p>	<p>7 February 2017</p>	<p>Art. 4</p>	<p>Interpretation of the place where damage occurred under the Rome II Regulation for the purposes of the (same) interpretation of Article 7/2 of the Brussels I bis Regulation</p>	<p>A plaintiff domiciled in Slovenia sued a defendant domiciled in Austria for damages resulting from the flooding of the river Drava, arguably caused by the (in)action of the defendant concerning the retention of the water in the Austrian part of the river.</p> <p>The dispute revolved around the jurisdiction of Slovenian courts pursuant to Art. 7/2 of the Brussels I bis Regulation.</p>

	<p>294/2016 of 30 August 2016,</p> <ul style="list-style-type: none"> <li>- Appellate Court in Maribor, No. I Cp 1270/2016 of 20 December 2016,</li> <li>- Appellate Court in Maribor, No. I Cpg 527/2016 of 19 January 2017,</li> <li>- Appellate Court in Maribor, No. I Cp 30/2017 of 7 February 2017,</li> <li>- Appellate Court in Maribor, No. I Cp 261/2017 of 14 March 2017,</li> <li>- Appellate Court in Maribor, No. I Cp 165/2017 of 14 March 2017,</li> <li>- Appellate Court in Maribor, No. I Cp 615/2016 of 13 April 2016.</li> </ul>					<p>The defendant asserted that Austrian courts had jurisdiction, because the damage sustained in Slovenia was indirect (consequential) damage, which, under the CJEU case-law regarding the Rome II Regulation (case No. C-350/14 of 10 December 2015), was not relevant for the determination of the place where damage occurred.</p> <p>The court accepted jurisdiction, stating that the damage in the case at hand was in fact a direct distant damage and thus Slovenia was the place where damage occurred for the purposes of the application of the Brussels I bis Regulation.</p>
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# Spain

## Executive Summary

- The application of the specific (general and special) rules of the Rome II Regulation by the courts in Spain does not in general reveal any serious problems in their understanding, although case law shows an often too brief analysis of the issues of applicable law. Moreover, many of the Regulation's rules have not been applied in practice.
- The problems in applying the Rome II Regulation in Spain seem to be of general origin, not linked to the specific content of the provisions, with its application facing two main difficulties: (i) the Spanish system of application of foreign law requiring proof of the law by the parties, in the absence of which the question is settled under Spanish substantive law; and (ii) the often inadequate understanding by legal operators of the relationships between legal provisions emanating from different sources (in particular between the Rome II Regulation and the 1971 and 1973 Hague Conventions on the Law Applicable to Traffic Accidents and on the Law Applicable to Products Liability, respectively). In addition, the *erga omnes* scope of the text is not always properly understood.
- The Regulation has been the subject of considerable academic attention. The issue that has aroused the most academic interest has been the absence in the Rome II Regulation of a conflicts rule about damage to rights relating to violations of privacy and rights relating to personality. As regards defamation, the need for a common rule, based on the victim's habitual residence, is emphasised; although there are still differing opinions advocating the application of the law of the alleged tortfeasor's habitual residence.

## 1. Introduction

Spanish practitioners and businesses' legal advisors are generally aware of the existence of the Rome II Regulation and its main rules, although in many cases it is only a superficial knowledge extending to the general rule and some of the special ones, but not to its interaction with other rules (such as the The Hague Conventions) or the correct interpretation of some articles (such as Art. 3 on universal scope). Most citizens are not familiar with the Rome II Regulation or any other Private International Law rules.

The Rome II Regulation is generally known and applied by Courts in Spain. Nonetheless, some cases show a rather "automatic" application, without complex reasoning of the international aspects of the case and the effect on application of the rules, or their interaction with other private international law rules. In other cases, a more accurate approach and understanding of the rules is shown, as explained in the answers to some of the questions below.

On the other hand, there are several court cases where the Regulation is applied, but not the foreign law to which it leads, since the foreign law is not proven to the court, as explained in section 2.5 of this report.

To the best of my knowledge, there are no relevant statistics regarding the application of the Rome II Regulation in Spain. There is, however, a study conducted as part of an EU project on the application of several EU law instruments, the Spanish results of which were published in C. OTERO GARCÍA-CASTRILLÓN/S. BENAÏSSA PEDRIZA, "Informe sobre la aplicación en España de los instrumentos comunitarios de derecho internacional privado: reglamentos 44/2001 y 1215/2003 (Bruselas I/I bis), 2201/2003 (Bruselas II bis), 4/2009 (Bruselas III), 593/2008 (Roma I) y 864/2007 (Roma II)", in C. OTERO GARCÍA CASTRILLÓN (dir.), *Justicia civil en la Unión Europea: evaluación de la experiencia española y perspectivas de futuro*, Dykinson, Madrid, 2017, pgs.15-52.

In contrast with the situation described above, academic discussion of the Rome II Regulation in Spain is significant. The areas where scholars have shown special interest are mainly defamation and the absence of a rule regarding personality rights in the Regulation; torts in financial markets; torts resulting from a violation of anti-trust rules; and, to a lesser extent, torts resulting from pollution and traffic accidents. Even if those questions,

mainly that of defamation, have caused a debate at an academic level, there is not, to the best of my knowledge, debate at a political level regarding them.

## 2. Analysis of the Rome II Regulation

### 2.1 Chapter I – Scope and Interpretation

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

1. *The determination of the material scope of application of the Rome II Regulation, including any difficulties in applying the category of “civil and commercial matters” or in defining the exact scope of any excluded matters (Art. 1(1)-(2))*

In general, the scope and Interpretation of the Regulation has not raised relevant problems in Spain. Perhaps the aspect in relation to which Spanish courts may have the most difficulty - not only in relation to the Rome II Regulation, but also in relation to other applicable law texts - is that of their universal scope.

No special difficulties have emerged in relation to Rome’s II material scope as concerns the concept of “civil and commercial matters” or in the definition of the exact scope of excluded matters (Art. 1(1)-(2)).

2. *The determination of the temporal scope of application of the Rome II Regulation (Arts. 31-32)*

The same may be said, in general, as regards the determination of the **temporal scope** of application of the Rome II Regulation (Arts 31-32). The only court case where the application of the Regulation was excluded on this ground correctly understood that the damage occurred before it was applicable, since it concerned damages resulting from the violation of industrial property rights in Spain between 1993 and 2005 (ECLI: ES: SJMM :2014 :5). There is, however, one case where it was considered that the Regulation applied even if the damages could be considered to occur in 1999. It is, notwithstanding a case where very reduced attention was paid to applicable law, since the internal rule in Spain (Art. 19.9 of the Spanish Civil Code) was considered to lead to the same conclusion that Rome II Regulation (ECLI: ES:APGI:2014:1614. This case is further explained in section 2.3 below).

3. *The characterization of the concept of “non-contractual obligations”, its relationship to the concept of “contractual obligations” and any difficulties in relation to characterisation (Arts. 1(1), 2)*

The characterization of the concept of **“non-contractual obligations”** and its relationship to the concept of “contractual obligations” has also not presented difficulties in Spain in general. In case ECLI:ES:APM:2018:13812, that concerned damages resulting from the violation of intellectual property rights, the question was discussed, but adequately decided by the court. This case is explained in section 2.2 below. In some cases concerning internal situations (not implying conflicts of laws and, thus, being cases where the Regulation does not apply) where it is discussed if the case is contractual or related to torts, the Regulation is used to clarify the concept, so there is a certain influence of European Union’s law in internal law even in cases where the former does not necessarily apply. The following cases may be cited as examples: ECLI:ES:JMBI:2019:1107; ECLI: ES:APBI:2019:2254; ECLI:ES:APL:2018:804; ECLI:ES: APM:2018:2844; ECLI:ES:JMBI:2016:4321; ECLI:ES:APCC:2015:911; ECLI:ES:JMIB:2015:2174; ECLI:ES:APBA:2015:42; ECLI:ES:APBI:2013:1881; ECLI:ES:APA:2013:1362; ECLI:ES:APBI:2012:2694; ECLI:ES:APPO:2009: 2891; ECLI:ES:TS:2008:7354. These cases have not been included in the case law list, since they concern situations where the Regulation has not been applied to decide about applicable law, that was not an issue, but just as a tool of interpretation of internal material rules. As an example, in case ECLI:ES:APPO:2009: 2891 the claimant had commissioned certain refurbishment works on a house of her property which resulted in its collapse. The defendant, the insurance company of the person in charge of the works, argued that the damage was not covered by the insurance policy, since it only covered non-contractual liability and the damage resulted from a contractual relationship. The court, while admitting the existence of grey areas in the delimitation of this qualification, concluded that the action that caused the damage exceeded the contractual sphere because it could not be considered, in strict terms, a breach of the obligations of the lessee of the work, but rather a breach of the general duty not to cause damage to the property of others. The regime of non-contractual liability was applicable, even if there was a prior obligatory relationship, because the damage had not been caused within

the strict scope of the agreement, since it was unrelated to the nature of the business, even if it occurred in its execution. In support of this contractual classification, the court uses arguments that are peculiar to Spanish civil law and, furthermore, refers to the distinction between contractual and non-contractual liability that the EUCJ makes in application of the Rome I and Rome II Regulations (depending on the existence of a situation in which there is an obligation freely assumed by one party towards another) citing for this purpose the judgments in the cases C-189/87, C-261/90, C-51/97, C-96/00; C-334/00; C-167/00 (which relate to that distinction in application of the Brussels Regulations).

#### 4. *The universal application of the Regulation (Art. 3)*

As regards the **universal scope** of the Regulation, the question has generally not arisen, since in most cases decided by Spanish Courts, the application of Regulation Rome II lead to the application of the law of a member State of the European Union or to Spanish law. There is, however, a case where the court of Appeal of Lleida deciding on the question did not apply Rome II Regulation, since it misunderstood its universal scope (ECLI:ES:APL:2015:955). The case concerned damages caused in a ski accident occurred in Andorra. Both the person who caused the damage and the victim had their habitual residence in Lleida (Cataluña, Spain). The victim alleged the application of Rome II Regulation and argued that Art. 4.2 together with Art. 25 lead to Catalan law, according to which the statute of limitation for this action was three years. The court decided that the Regulation did not apply since it only applies to conflicts of laws and jurisdiction (sic.) among member States of the European Union, and Andorra is not one of them. As a consequence, the applicable law was decided in accordance with Art. 10.9 of the Spanish civil code, that lead to the law of Andorra, according to which the action had prescribed.

#### 5. *The approach to interpretation of the Rome II Regulation, and in particular its relationship to other EU private international law instruments (including the recast Brussels I Regulation and the Rome I Regulation) (Recital (7))*

The **relationship of Rome II Regulation to other European Union private international law instruments** and the consequences on the interpretation thereof seem to be quite clear for Spanish courts. Such relation is mentioned in one case (ECLI:ES:APM:2011:13407A) where Rome II Regulation is used to interpret and apply the concept of non-contractual liability, as regards a claim concerning unfair competition and its inclusion in art. 5.3 of Regulation 44/2001 (the case only concerned the jurisdiction of Spanish courts and no question of applicable law was decided, so this case is also not included in the list of Spanish case law) and also in some of the cases where reference to Regulations Rome I and II is made in order to decide the qualification in internal cases, mentioned in section 2.1 of this report. Such reference shows the understanding of the inter-relation of texts since the point of departure is the mutual exclusion of cases included in each of them.

## 2.2 Chapter II - Tort/Delict

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to the implementation of:*

6. *The general conflict-of-laws rule for tort/delict, and difficulties that have arisen in your Member State with respect to its application (Art. 4), and in particular:*
  - a. *the approach to identifying the place of direct damage in Art. 4(1)*

The **general conflict-of-laws rule** for tort/delict contained in Art. 4 regarding the approach to identifying the place of direct damage (Art 4(1)) does not seem to pose relevant problems of understanding in Spanish case law, although some court decisions pay insufficient attention to that issue, as in some of the cases presented below in this section.

- b. *the approach to the first rule of displacement in Art. 4(2) in cases involving multiple parties or claims*

There are no cases decided by Spanish courts in which the **first rule of displacement in Art 4(2) in cases involving multiple parties or claims** was applied.



c. *the approach to the escape clause in Art. 4(3)*

The **escape clause of Art. 4(3)** has been considered in several cases in Spain, but does not seem to be controversial. Only in one of them was it considered that Spanish (and not German) law should be applied because it was manifestly more closely connected to the case (ECLI:ES:APT:2015:1638). A claim was brought for damages suffered by a person with habitual residence in Germany due to acts that had been declared a criminal offence in that country. Civil liability was claimed in Spain. The court considered that, even if the tort could be considered to have occurred in Germany, where the victim suffered an economic loss, the situation was more closely connected with Spain, because the economic loss suffered had its origin in the delivery by the victim of certain amounts to the author of the damage, who managed his rights in an open succession (“sucesión abierta”) in Spain, and in relation to assets also located there, for the payment of taxes allegedly due in the country, which were never paid.

The other two cases concerned damages resulting from traffic accidents (also referred in section 2.7 below). In the first (ECLI:ES:APB:2020:491), the question is presented as one concerning Art. 4(3), but what is really elucidated in it is what the relevant damage is and the exclusion of indirect damages. The case was decided under the Rome II Regulation, without any reference to the 1971 Hague Convention. The accident had taken place in England, but the plaintiffs understood Spanish law to be applicable because it was more closely connected to the tort, since they underwent most (and many) medical treatments and follow-ups in Spain. The court did not accept this argument: it understood that the law of the ‘country in which the damage occurs’ must be applied, as it appears from Art. 4.1 and Recitals 17 and 18 of the Rome II Regulation, regardless of the country or countries where there could be indirect consequences, so that in cases of personal injury or property damage, the country where the damage occurs must be the country where the injury was suffered or the property was damaged, respectively (Recital 18). Art. 4(2) is an exception to this general principle, creating a special connection where the parties are habitually resident in the same country, and Article 4(3) is to be understood as an ‘escape clause’ from Article 4(1) and (2) where it is clear from all the circumstances of the case that the damage is manifestly more closely connected with another country. After citing the cases of the ECJ C-350/14 (*Lazar*) and joined cases C-359/14 and C-475/14 (*ERGO Insurance*), the Spanish court concluded that the law of the place of the accident (England) applied and also determined the conditions and extent of liability, as well as the grounds for apportionment of such liability (Art. 15 a) and b)).

The second case concerned damages resulting from a traffic accident that occurred in Portugal and involved two cars registered in Spain and Portugal respectively. No reference to the 1971 Hague Convention was made. The Spanish driver and passenger of the Spanish car claimed against the insurer of the Portuguese car. Liability was not discussed, but only the law that applied to quantification of the damage (and the application of the scales provided by each law). The court of first instance applied Portuguese law since it was the place where the damage occurred, but the claimants appealed alleging that Spanish law was more closely connected to the case, given that both injured persons were Spanish nationals, so Spanish law should be applied in accordance with Art. 4(3) of the Rome II Regulation. The Court of Appeal of Pontevedra rejected this argument and considered that, even if the case presents an obvious link with Spain, it is not closer than the one that it presents with Portugal, which is the country of one of the vehicles involved and of the nationality of the defendant (ECLI:ES:APPO:2012:2888).

d. *the suitability of this set of rules to govern cases of prospectus liability or other financial market torts*

There is no case law in Spain concerning Rome II and **prospectus liability or other financial market torts**, but this question has been the object of some academic interest. The damage caused by the violation of information obligations in this sector is classified as non-contractual and the authors agree that the place of the damage is the affected market (S. SÁNCHEZ FERNÁNDEZ, *El folleto en las ofertas públicas de venta de valores negociables (OPV) y responsabilidad civil. Ley aplicable*, La Ley, Las Rozas, Madrid, 2015; F.J. GARCIMARTÍN ALFÉREZ, “The law applicable to the prospectus liability in the European Union”, in C. PELLISÉ DE URQUIZA (Coord.), *La unificación convencional y regional del Derecho internacional privado*, Marcial Pons, Madrid, 2014, pgs. 120-144; S. CORNELOUP, “Roma II y el derecho de los mercados financieros: el ejemplo de los daños causados por la violación de las obligaciones de información”, *Anuario español de Derecho internacional privado*, 11, 2011, pgs. 63-87). On the basis of this criterion, S. SÁNCHEZ points out that the affected market is the one where the offeror has marketed the securities and that whenever there is more than one affected market, the place of acquisition of the securities should be used as an auxiliary criterion. The

system should be closed with the closer connection clause, limited to the affected markets: when a claim is brought before the courts of any of the defendants' domicile or the Member State of origin, as place of the event giving rise to the damage, and that State is one of those in which securities have been marketed, it must be possible to apply the *lex fori* to all investors, irrespective of the market where they acquired the securities. This author also excludes the possibility of applying the rule for *culpa in contrahendo*. S. CORNELOUP agrees on the criterion of the affected market completed by the exception clause that provides the required flexibility. This author adds that where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country, the victim should have the possibility to choose between the law of the marketplace and the law of the common habitual residence, whereas a choice of law according to art. 14 should be excluded.

7. *The rule on product liability (Art. 5) and, where relevant, the interaction with the application of 1973 Hague Convention on the Law Applicable to Products Liability;*

As regards **product liability**, Spain is party to the 1973 Hague Convention on the Law Applicable to Products Liability, but this fact is sometimes ignored by the Courts.

In a recent case (ECLI:ES:APM:2020:3518), the Court of Appeal of Madrid decided that Spanish law applied to a case where a claimant lost vision in one eye from using a medical product manufactured by a German company. The defendant was the German insurer of the company, and discussion concerned the possibility of a direct action against it, permissible under Spanish law but only allowed by German law in some instances. The Court decided that Spanish law applied, according to Arts. 4, 5.1 and 18 of the Rome II Regulation, and no reference was made to the Hague Convention.

In a case concerning the same defendant and also regarding product liability damage and the availability of a direct action against the manufacturer's insurer (ECLI:ES:APM:2019:16074), the Court of Appeal of Madrid applied Spanish law under Art. 5.1 of the Rome II Regulation, without mentioning the Hague Convention on the Law Applicable to Products Liability.

By contrast, in case ECLI:ES:TS:2015:181, the Supreme Court (and before, the Barcelona Provincial Court-ECLI:ES:APB:2012:6351- and a Barcelona Court of First Instance-ECLI:ES:JPI:2010:100) used the 1973 Hague Convention, without any reference to Rome II Regulation, to determine the law that should be applied to a claim concerning the damages caused by a defective flight instrument installed on an aircraft which caused it to crash, leading to the application of the laws of New Jersey and Arizona.

8. *The specific rule on unfair competition (Art. 6)*

The specific rule on **unfair competition** (Art. 6) has been applied in several cases by Spanish Courts but no relevant problems seem to have arisen.

In case ECLI:ES:APM:2017:17979, the claimant, a German company, alleged that the Spanish defendant produced and sold a roulette slot machine that was a copy of ones produced by the claimant, and that had "Germany" written on the front, creating confusion in the market. The slot machines were produced and sold in Spain to distributors that sold them in Namibia, where they were used, and where the claimant also sold its products, competing in that market. The Spanish company claimed that Namibian law applied, since the unfair competition affected the Namibian market; but the court rejected this argument, considering that Art. 6 of the Rome II Regulation should be interpreted as Spain being the relevant market, since it was in Spain that the slot machines were produced and sold by the defendants and it was a third party who sold them in Namibia.

In the ruling of the Provincial Court of Cordoba (ECLI:ES:APCO:2017:666), Spanish law was applied under Arts. 6 and 4 of the Rome II Regulation because the case concerned an act of unfair competition that exclusively affected the interests of a specific competitor, and Spain was the country where the damage occurred, which was not disputed by the parties.

Similarly, the Supreme Court's ruling (ECLI:ES:TS:2017:1910) states that Spanish unfair competition law does not apply to conduct in Serbia, since an action for unfair competition under Spanish law cannot be brought against conduct in another State, directed at the citizens of that State, and having effect in that State. Arts. 6 and 4 of the Rome II Regulation lead to Serbian law. The court emphasized that the fact that the criteria for determining the applicable law designated the law of a non-Member State is not an obstacle to their

applicability, as Article 3 of the Rome II Regulation provides. The appellant's arguments concerning online accessibility, through the Serbian company's website offering the product alleged to be a copy, were not accepted, since there were no circumstances from which it could be deduced that this website offered products or services to Spanish consumers, as it did not even have a version in Spanish or any other language spoken in Spain.

*9. The specific rule on environmental damage (Art. 7)*

To the best of my knowledge, there is no Spanish case law concerning article 7 on **environmental damage**.

*10. The specific rule on infringements of intellectual property rights (Arts. 8, 13)*

Article 8 on the infringement of **intellectual property rights** has been applied in some case law that does not show any specific problems in the understanding of the rule and its consequences.

In one of the cases (ECLI:ES:APM:2019:4801), the claimant Japanese company sued two Spanish companies for commercializing an audiovisual work property of the claimant, in Spain, without its consent. The application of Spanish law under Article 8 of the Rome II Regulation was not discussed, since Spain was the territory for which protection was sought (*lex loci protectionis*).

The same lack of difficulty ascertaining the *lex loci protectionis* is evidenced in ECLI:ES: APM:2018:13812, concerning a claim for unauthorised use of a musical work, to which Spanish law was applied. The interesting thing about this case is that it had been presented by the claimant as a contractual claim, and it was the Appeal Court of Madrid which decided that it was a non-contractual one, so the applicable law should be decided according to the Rome II Regulation. The claimant, a Spanish company, had acquired the rights to a song from its English parent company, which had, in turn, acquired them from the author. The defendants, two Spanish companies, used a modified version of the song in an advertising campaign. The contract transferring the rights from the author to the parent of the claimant was subject to English law, which it was alleged by the defendants should also apply to this claim. The Court of Appeal of Madrid considered that English law should not apply, since the claim was not a contractual one, but a claim in tort, since even if the claimant obtained its rights from a contract, the claim did not concern the contract and was not against the counterparty, but a third party who had infringed the rights. Since protection was sought for the violations in Spain, that country was the *locus protectionis* and Spanish law applied. The court added that Spanish law could not be avoided by an agreement between the parties, and that it did not extend to matters such as the transfer and acquisition of property rights, which should be decided according to Art. 10.4 of the Spanish Civil Code, which also contains the *lex loci protectionis* principle.

*11. The specific rule on industrial action (Art. 9)*

There is no case law on the specific rule on **industrial action**, nor, as far as I know, much academic interest in this rule.

## 2.3 Chapter III - Unjust Enrichment, Negotiorum Gestio And Culpa In Contrahendo

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to the implementation of:*

*12. The specific rule on unjust enrichment (Art. 10), including its relationship with the general rule for tort/delict in Art. 4.*

The specific rule on **unjust enrichment** has been addressed by Spanish courts in a case where it was decided that the enrichment did not derive from a contract and thus, according to Art. 10 of the Rome II Regulation, should be governed by Spanish law, as the law of the country of habitual residence of both parties (ECLI:ES:APO:2016:2820).

In case ECLI:ES:APGI:2014:1614, the plaintiff, a British national residing in England, like the defendant, brought an action for unjust enrichment as a consequence of breaking the promise of marriage. The alleged enrichment concerned the acquisition of real estate both in England and in Spain, allegedly in view of the celebration of the marriage. The court considered that the action must be regarded as a non-contractual obligation, so that, in order to determine the applicable law, one must resort to the provisions of both the Rome

II Regulation (without investigating the possible exclusion of the case from its material scope) and Article 10.9 of the Civil Code, which establishes that '[i]n the case of unjust enrichment, the law by virtue of which the transfer of the patrimonial value in favor of the enriched party took place shall be applied.' It was considered that both rules led to English law because, at the time the contract of sale giving rise to the damage was entered into, both parties were residing in England (even where both the contract and the break-up of the relationship between the couple occurred long before the entry into force of the Rome II Regulation). This is a case in which the court resolved the question of applicable law in a quasi-automatic way, concluding it was insufficiently proven.

13. *The specific rule on negotiorum gestio (Art. 11)*

14. *The specific rule on culpa in contrahendo (Art. 12)*

There is no case law on the specific rules on **negotiorum gestio** (Art. 11) or **culpa in contrahendo** (Art. 12).

## 2.4 Chapter IV - Freedom of Choice

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

15. *The implementation in legal/business practice and by courts of the rule on freedom of choice, any difficulties therein and any discussion that has been carried out in your Member State regarding possible reasons which would justify the need to rethink it (Art. 14)*

Case law does not contain cases where the rule on **freedom of choice** (Art. 14) has been applied.

Academics have paid limited attention to this rule. Those who deal with it stress its limited practical usefulness, given the way in which cases of non-contractual liability are presented; and point to its effectiveness in overcoming problems of classification as contractual or extracontractual, in cases where the choice of law has been included in a contract, and the parties want to apply it to issues related to the contract which, nevertheless, in some States could be classified as non-contractual.

The literature has sometimes criticized certain aspects of the Regulation. In particular, A. ESPINIELLA "La autonomía de la voluntad en el Reglamento (CE) n1 863/2007 ("Roma II") sobre la ley aplicable a las obligaciones extracontractuales", *Noticias de la Unión Europea*, 299, 2009, pp. 95-109) argues that (i) the limits to freedom of choice in the cases covered by Articles 6 and 8 are not adequate because the underlying justification of these rules suggests that those limits should not extend beyond what is strictly necessary. Choice of law should be allowed, even in those cases, for issues such as the amount or assessment of damages or the transmissibility of the right to claim. The same applies to acts of unfair competition that exclusively affect the interests of a competitor; (ii) in relation to Article 14.3, this author criticizes that only the mandatory rules of the forum State are taken into account, and not those of a State that might be more closely connected, such as the State whose law would be applicable in the absence of a choice; (iii) he also contests the advisability of allowing *depeçage* in certain cases as a result of the choice, (iv) he affirms that there is a need to clarify whether different choice of law agreements would be possible in the case of a plurality of parties. The author understands that it can be argued against this admission that it would lead to a splitting up of the applicable law, with the risk of inconsistent results (i.e: the same person to the same facts may be declared liable for a victim and exonerated in relation to another; the existence, nature and damage assessment, as well as prescription, could be ruled by different laws even if the cases concerned the same facts), but he stresses in favour of these multiple agreements that such unequal solutions would be accepted by each of the parties and that they are not against the wording of the Regulation; (v) he also considers that some uncertainty arises from the lack of regulation of matters such as the form of the agreement and consent. Most of this reflexions are shared by S. LEIBLE ("El alcance de la autonomía de la voluntad en la determinación de la ley aplicable a las obligaciones no contractuales en el Reglamento Roma II /The scope of autonomy in determining the law applicable to non contractual obligations in the Rome II Regulation)", *Anuario Español de Derecho internacional privado*, VII, 2007, pgs. 219-240). As regards the relationship between choice of law and other sector-specific rules on non-contractual matters, such as the 1971 and 1973 Hague Conventions, A. ESPINIELLA considers that the former takes precedence and that only in the absence of a choice of law by the parties, should the Conventions be applied (pp. 99-100).

## 2.5 Chapter V – Common Rules

Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:

16. *The scope of the exclusion of ‘evidence and procedure’ in Art. 1(3) and any difficulties in relation to that exclusion or to questions of formal validity or the burden of proof (Arts. 21-22)*

No difficulties have emerged in Spanish case law with respect to the scope of the **exclusion of ‘evidence and procedure’** in Art 1(3) or to questions of formal validity or the burden of proof (Arts. 21-22).

17. *The approach in your Member State to questions of pleading, proof and application to individual cases of the substantive rules of the law applicable under the Rome II Regulation governing non-contractual obligations.*

Regarding proof and application to individual cases of the substantive rules of the law applicable under the Rome II Regulation, Spanish law (articles 281.2 of the Spanish Act on Civil Procedure and 33.2 of the International Juridical Cooperation Act) requires, for foreign law to be applied, that it be proven by the parties, with only limited exceptions. Case law shows that sometimes the applicability of foreign law is adequately ascertained, but the court refuses its application because the parties have not proven its being in force or contents, leading to the merits of the case being decided according to Spanish law (see, for example ECLI: ES:APB:2020:5205; ECLI: ES:APM:2019:773; ECLI: ES:APB:2018:6940; ECLI: ES:APPO:2014:1255).

18. *The delimitation of the scope of the applicable law (Art. 15(a)-(h)), including any difficulties as its relationship to the issues addressed at points 16 17 above)*

Case law does not show any problems relating to the **delimitation of the scope of the applicable law**, since that question does not seem to have been addressed (Art. 15(a)-(h)).

19. *The application of the rule on overriding mandatory provisions (Art. 16)*

There are no cases applying the rule on **overriding mandatory provisions** (Art. 16).

20. *The application of the specific rule on direct action against the insurer of the person liable (Art. 18)*

On the other hand, the application of the specific rule on **direct action against the insurer** of the person liable (Art. 18) has been addressed by several cases.

In ECLI: ES:APM:2020:3518, the damage, caused by a defective product, had occurred in Spain, but the insurance contract was subject to German law. As mentioned in section 2.2 of this report, the Appeal Court of Madrid did not apply The Hague Convention of 1973, but the Regulation, and considered that the exercise of the direct action, permitted by Spanish law, was appropriate, even if the German law applicable to the contract did not permit it in the circumstances of the case. Art. 18 was applied in a similar case as well (ECLI: ES:APM:2019:16074).

A court of first instance of Bilbao correctly understood the aforementioned precept in case ES:JMBI:2018:3950, in which it considered Czech law to be applicable (which was both the law governing the insurance contract and the law of the place where the damage occurred), although lack of proof of this led to resolution of the dispute in accordance with Spanish law.

In case ECLI:ES:APB:2020:8359, the Court of Appeal of Barcelona unduly applied Art. 18 of the Regulation because it incorrectly qualified as direct and action that was brought by the insurer of a transport company, who had compensated the recipient of goods for their loss during transport, against the insurer of the company that had actually carried out the transport because it had been subcontracted by the first carrier.

21. *The application the specific rule on subrogation (Art. 19)*

There are no cases applying the rule on **subrogation** (Art. 19).

22. *The application of the specific rule on multiple liability (Art. 20)*

The specific rule on **multiple liability** (Art.20) does not seem to have been applied by courts and academic work is also scarce on this issue (see the paper by I. HEREDIA, “Las deficiencias de la regla de responsabilidad múltiple del Reglamento Roma II”, *Anuario español de Derecho internacional privado*, VII, 2007, pgs. 277-

285, which points out the problems posed by this Article in cases where the obligations of the different co-responsible parties are subject to different legal systems, as a result of the provisions of the Regulations, which sometimes point to laws different from those of the place of the damage).

## 2.6 Chapter VI - Other Provisions

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

*23. The implementation of the concept of habitual residence in the Rome II Regulation, with reference both to persons covered by Art. 23 and natural persons acting otherwise than in the course of business*

The implementation of the concept of **habitual residence** in the Rome II Regulation, with reference both to persons covered by Art 23 and natural persons acting otherwise than in the course of business, does not seem to have posed any specific problems in Spain, since it has not been addressed by case law and the academic interest raised by it is very low.

*24. The application of and any difficulties with the specific rules on exclusion of renvoi (Art. 24) and States with more than one legal system (Art. 25)*

*25. The application of and any difficulties with the specific rule on public policy of the forums (Art. 26)*

The same may be said as regards the rules on **exclusion of renvoi** (Art.24), **public policy of the forum** (Art. 26) and **States with more than one legal system** (Art.25). Spain is a country where different legal systems co-exist, but only in case ECLI:ES:APL:2015:955 (see section 2.1 of this Report) was an application of Article 25, and Catalan law as a consequence, claimed. Since the Court incorrectly decided that the Rome II Regulation did not apply to the case, no analysis of the rule was developed. There is limited scholarly interest on the subject (see J.M. FONTANELLAS MORELL, "Remisión a un sistema no unificado en el Reglamento Roma II: la plurilegislación española en la materia a examen", *Anuario español de Derecho internacional privado*, 16, 2016, pgs. 1220-1229).

*26. Practical interaction between the Rome II Regulation and other EU and international legal instruments, in specific areas such as environmental damages, intellectual property rights or data protection (Arts. 27, 28, 29)*

No difficulties seem to have emerged as regards the **interaction between the Rome II Regulation and other EU and international legal instruments**, in specific areas such as **environmental damages, intellectual property rights or data protection** (Arts. 27, 28, 29), having regard to case law.

## 2.7 Comments on other Practical Problems

*27. The impact of the application of the 1971 Hague Convention on the law applicable to traffic accidents on legal certainty (where relevant for your Member State)*

An analysis of Spanish case law in the application of the Rome II Regulation shows that the most common cases are those relating to road traffic accidents. Spain is a party to the **1971 Hague Convention on the Law Applicable to Traffic Accidents**, but this text is often ignored by our courts, which resort to Art. 4 of the Rome II Regulation to decide the issue.

This is the case in the ruling of the Provincial Court of Barcelona (ECLI:ES:APB:2020:5205), in which the parties to the proceedings agreed that the legal text to decide the applicable law was the Hague Convention of 1971, but this was rejected by the court, which affirmed the application of Article 4 of the Rome II Regulation. The court's argument was that the Spanish model of Private International Law combines rules of institutional origin (i), rules of conventional origin (ii), and rules of State origin (iii); that the rules of institutional origin prevail over the rules of conventional and State origin; and that, in turn, the rules of conventional origin prevail over those of State origin. Thus, an European Union Regulation will always prevail over a Convention since, otherwise, many situations would arise in which the Member States would not comply with European Union Regulations by invoking a particular Convention, or even their domestic law. This would cause legal uncertainty and violate the community of law that makes up the European Union. The court decided that the principle of specificity which had been invoked by the parties could not be applied to the situation, since a Convention, no matter how

specific and particular it may be, can never derogate from or contradict a Regulation. Moreover, added the court, the 1971 Hague Convention would not apply in any event because it had not been ratified by Portugal.

Along the same lines, the judgment of the Barcelona Provincial Court (ECLI:ES:APB:2020:491) considered English law to be applicable to the case (the running over of two Spaniards, residing in Spain, in England), in accordance with Art. 4 of the Rome II Regulation, without even considering the possibility that the 1971 Hague Convention might be applicable. The same is true of the rulings of the Provincial Court of Madrid (ECLI:ES:APM:2019:773), concerning an accident that occurred in Portugal; the Provincial Court of Barcelona (ECLI:ES:APB: 2016:9245), relating to an accident that occurred in England, to which it was understood that English law applied, in accordance with Art. 4 of the Rome II Regulation (in this case, reference was made to the fact that the Regulation could cease to apply if there were a bilateral agreement); the Provincial Court of Pontevedra (ECLI:ES:APPO:2014:1255), which considered Portuguese law to be applicable under Article 4.1 of the Rome II Regulation, although it resolved the case in accordance with Spanish law due to the lack of proof Portuguese law; and the Provincial Court of Pontevedra (ECLI:ES:APPO:2012:2888) which applied the Portuguese law of the place of the accident, in accordance with Art. 4.1 of the Rome II Regulation, not considering that the case had closer links with Spain (Art. 4.3). The latter issue is detailed in section 2.2 of this report.

In contrast, other judgments correctly identify the 1971 Hague Convention as the instrument that applies to determine the law applicable to damages caused by traffic accidents. This is the case with the judgments of the Provincial Court of Madrid (ECLI:ES:APM:2019:11054) and the Provincial Court of Barcelona (ECLI:ES:APB:2018:6940) or the Provincial Court of Tarragona (ECLI:ES:APT:2020:1277A), although in the latter case French law is not applied due to lack of prove.

*28. Any other practical problems with respect to the application or interpretation of the Rome II Regulation, including but not limited to the suitability of the mosaic approach*

Spanish case law does not show problems with respect to the **mosaic approach**, since situations where it would be applied do not seem to have been brought before Spanish courts.

### 3. Comments on areas of interest

*29. The exclusion of violations of privacy and rights relating to personality, including defamation, from the scope of the Rome II Regulation and any difficulties arising out from differences among Member States' rules in cross-border situations*

The exclusion of **violations of privacy and rights relating to personality**, including defamation, from the scope of the Rome II Regulation has aroused much academic interest in Spain, but there is no case law on the subject. The majority of academics consider that the best solution is to amend the Rome II Regulation to include a rule on the matter based on the application of the law of the victim's habitual residence, without prejudice to the possibility of the parties choosing the applicable law in accordance with Art. 14, and possible application of an escape clause based on closest connection (see, for example, M. AMORES CONRADI/E.TORRALBA MENDIOLA, "Difamación y Roma II", *Anuario español de Derecho internacional privado*, VII, 2007, pgs. 251-265; E. TORRALBA MENDIOLA, "La difamación en la era de las comunicaciones: ¿Nuevas? perspectivas de Derecho Internacional Privado Europeo", *Indret: Revista para el Análisis del Derecho*, 1, 2012, pgs. 1-35), although there are some dissenting opinions (L. GARCÍA GUTIÉRREZ, "Reglamento «Roma II» y derechos de la personalidad: reflexiones para formular una norma de conflicto que preserve adecuadamente el ejercicio del derecho a la información y de la libertad de expresión", *Revista de Derecho Comunitario Europeo*, 43, 2012, pgs. 851-874. This author proposes, as a general rule, the application of the law of the habitual residence of the alleged tortfeasor).

*30. Any comment regarding the Interplay of the Rome II Regulation with the treatment of defamation and data protection, and, in these areas, the relevance of Strategic Lawsuits Against Public Participation (SLAPPs)*

There seem to be no relevant interest on the matter of **Strategic Lawsuits Against Public Participation (SLAPPs)** in Spain. It has not, to my knowledge, received academic attention, although some journalistic publications have



echoed the existence of this type of claims and the problem they represent. Similarly, Greenpeace has denounced at least one case which has occurred in Spain: it concerns a lawsuit brought by a meat production company located in the north of Spain (Galicia), which had been accused on television by a local farmer of producing meat without taking into account the effects on the environment, and of filtering chemicals and antibiotics into groundwater, also contaminating surface water. Apparently, this information was corroborated by official data and various scientific reports. Five months later, the farmer received a burofax from the legal services of the company claiming 1 million euros in damages. It is, however, a purely domestic case, that does not raise the application of Rome II Regulation (<https://es.greenpeace.org/es/en-profundidad/coren-contra-manuel/>).

31. *The extent to which Rome II Regulation has been applied to corporate abuses against human rights and lays down an effective set of rules to regulate non-contractual liability*

The Rome II Regulation has not been applied to **corporate abuses against human rights** by **Spanish courts**, but the matter has raised some academic interest as is shown by the works by M. REQUEJO ISIDRO (*Violaciones graves de derechos humanos y responsabilidad civil (Transnational Human Rights Claims)*, Thomson/Aranzadi, Pamplona, 2009) and M. ÁLVAREZ TORNÉ ("El Derecho internacional privado ante las vulneraciones de derechos humanos cometidas por empresas y respuestas en la UE", *REDI*, 2013, 65(2), pgs. 157-190).

M. REQUEJO ISIDRO considers that the rules on torts do not adequately respond to the needs linked to the protection of human rights but admit that, in the face of difficulties in finding adequate solutions, they can be a useful, even if not ideal, tool. In this regard, and for international cases, the author notes the limited usefulness of the rules laid down in the Rome II Regulation for dealing with corporate abuses against human rights and proposes certain solutions, some of them *de lege ferenda*, to approach them. In particular (i) allowing victims a choice of law, similar to that in Article 7 of the Rome II Regulation; (ii) reconsidering an application of Article 4, only for these cases, which would not only take into account the place of the damage, but also the place where the event giving rise to the damage occurred and that could be useful when the "intellectual perpetrators" of the damage are in a State other than that in which the damage occurred; (iii) establishing a special "European Union public policy" clause integrating the defence of human rights. In addition, this author also stresses the need to work on procedural mechanisms, regulating class actions and ensuring systems of legal aid. M. ALVAREZ TORNÉ refers to the usefulness in this field of Articles 16 (overriding mandatory provisions), 17 (rules of safety and conduct) and 26 (public policy of the forum) of the Rome II Regulation to enforce higher standards of conduct (providing that they exist in the forum).

32. *The impact of the development of artificial intelligence on the Rome II Regulation, and in particular on the suitability of the rules that it contains to regulate non-contractual liability.*

There seem to be no relevant interest on the impact of the development of **artificial intelligence** on the Rome II Regulation, and in particular on the suitability of the rules that it contains to regulate non-contractual liability.

As regards the impact of the development of artificial intelligence on the Rome II Regulation or on Private international law, in general, to the best of my knowledge there are no relevant doctrinal works in Spain. The question has indeed aroused interest in the sphere of substantive law and there are, therefore, works that analyse its implications in the labour sector or in patent law, for example. Regarding this late field of law, the possibility of considering an artificial intelligence system to be an inventor has been analyzed (see M. MAROÑO GARGALLO, "El concepto de inventor en el Derecho de patentes y los sistemas de inteligencia artificial", *Cuadernos de Derecho Trasnacional*, 2020, 12, 2, 510-526, who reaches a negative conclusion at least as long as such systems need to be assisted or require human activity of sufficient intellectual stature, it being considered that only if the human contribution was ancillary could the answer be different). In relation to labour law, the need to guarantee workers that decisions affecting them (promotions, dismissals, bonuses, etc.) are not taken only on the basis of computerised processing or on the basis of automatically created profiles and the right of workers' representatives to have access to the algorithm used in the processing of data concerning workers affected by a business decision is also stressed (F. BERNAL SANTAMARÍA, "Big data: gestión de recursos humanos y el derecho de información de los representantes de los trabajadores", *Cuadernos de Derecho Trasnacional*, 2020, 12, 2, 136-159). In my view, since that substantive interest exists, it is only a matter of time before it is transferred to the field of conflict of laws.



#### 4. List of national case law<sup>1259</sup>

<u>Court or tribunal</u>	<u>Case name and reference number</u>  <u>Reference to decision of the Court of Justice if applicable</u>	<u>Date</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings (only for key cases)</u>
Court of Appeal Barcelona	Roj: SAP B 8359/2020 ECLI:ES:APB:2020:8359	23/09/2020	18	The action was incorrectly qualified as a direct action	
Court of Appeal Tarragona	Roj: AAPT 1277/2020 ECLI: ES:APT:2020:1277A	9/09/2020	28	Traffic accident. The Hague Convention (1971) is applied, but not French law due to lack of prove.	
Court of appeal Barcelona	Roj: SAP B 5205/2020 ECLI: ES:APB:2020:5205	19/06/2020	4	Traffic accident. The Hague Convention (1971) was not applied, even though it was plead by the parties. Portuguese law of the place of the accident was not	

<sup>1259</sup>References to the cases correspond to the number (Roj) used in the open database [www.poderjudicial.es](http://www.poderjudicial.es) and to the ECLI.

				proven to the Court, which decided on the merits according to Spanish Law.	
Court of Appeal-Madrid	Roj: SAP M 3518/2020 ECLI: ES:APM:2020:3518	07/05/2020	1, 4, 5 and 18	Product liability. The Hague Convention (1973) was not mentioned. Direct action against insurer.	
Court of Appeal-Barcelona	Roj: SAP B 491/2020 ECLI: ES:APB:2020:491 Case C-350/14 and joined cases C-359/14 and C-475/14 of the EUCJ are mentioned.	31/01/2020	4	Traffic accident. No reference to The Hague Convention (1971). Application of Rome II Regulation- Lex locus damni. Direct damage. Closer connections	
Court of Appeal-Madrid	Roj: SAP M 16074/2019 ECLI: ES:APM:2019:16074	10/12/2019	5 and 18	Product liability. No reference to The Hague Convention (1973). Direct action against insurer	
Court of Appeal-Madrid	Roj: SAP M 11054/2019 ECLI: ES:APM:2019:11054	30/09/2019	28- The Hague Convention (1971)	Traffic accident. Correctly applies The Hague Convention (1971).	
Court of Appeal-Zaragoza	Roj: SAP Z 680/2019 ECLI: ES:APZ:2019:680	17/04/2019	4.1	Damage caused by the negligent conduct of a bank	
Court of Appeal Madrid	Roj: SAP M 4801/2019 ECLI: ES:APM:2019:4801	05/04/2019	8	Intellectual property Lex loci protectionis	

Court of Appeal-Madrid	Roj: SAP M 773/2019 ECLI:ES:APM:2019:773	17/01/2019	1 and 4.1	Traffic accident. No reference to The Hague Convention (1971).  Portuguese law was not proven to the courts. Spanish law was applied. Attention was paid to the Portuguese rules of safety and conduct (circulation code).	
Court of appeal-Palma de Mallorca	Roj: SAP IB 2410/2018 ECLI: ES:APIB:2018:2410	13/12/2018	4.1 and 15	Accident caused by a ship that broke a fiber-optic cable between Ibiza and Formentera causing lack of data in both islands	
Commercial Court (Sec. 2)- Bilbao	Roj: SJM BI 3950/2018 ECLI: ES:JMBI:2018:3950	15/10/2018	4.1, 15, 18 and 19	Direct action  Damage to products during transport	
Court of appeal-Madrid	Roj: SAP M 13812/2018 ECLI: ES:APM:2018:13812	15/10/2018	8	Intellectual property  Lex loci protectionis	The case had been presented by the claimant as a contractual claim. The Appeal Court of Madrid decided that it was a non-contractual one, so the applicable law should be decided according to the Rome II Regulation. The claimant, a Spanish company, had acquired the rights to a song from its English parent company, which had, in turn, acquired them from the author. The defendants, two Spanish companies, used a modified version of the song in an advertising campaign. The contract

					transferring the rights from the author to the parent of the claimant was subject to English law, which it was alleged by the defendants should also apply to this claim. The court considered that English law should not apply, since the claim was not a contractual one, but a claim in tort, since even if the claimant obtained its rights from a contract, the claim did not concern the contract and was not against the counterparty, but a third party who had infringed the rights. Since protection was sought for the violations in Spain, that country was the <i>locus protectionis</i> and Spanish law applied. The court added that Spanish law could not be avoided by an agreement between the parties, and that it did not extend to matters such as the transfer and acquisition of property rights, which should be decided according to Art. 10.4 of the Spanish Civil Code, which also contains the <i>lex loci protectionis</i> principle.
Court of appeal- Barcelona	Roj: SAP B 6940/2018 ECLI:ES:APB:2018:6940	13/07/2018	4 and 28- The Hague Convention (1971)	Traffic accident. Parties had alleged Rome II, but the court applied The Hague Convention (1971) that led to French law.  French Law was not proven and Spanish law was applied.	

Court of Appeal-Oviedo	Roj: SAP O 293/2018 ECLI:ES:APO:2018:293	7/02/2018	4	Lex loci damni French law was not applied because it was not proved.	
Court of appeal-Madrid	Roj: SAP M 17979/2017 ECLI: ES:APM:2017:17979	15/12/2017	6.1	Unfair competition. Damage-relevant market.	The claimant, a German company, alleged that the Spanish defendant produced and sold a roulette slot machine that was a copy of ones produced by the claimant, and that had "Germany" written on the front, creating confusion in the market. The slot machines were produced and sold in Spain to distributors that sold them in Namibia, where they were used, and where the claimant also sold its products, competing in that market. The Spanish company claimed that Namibian law applied, since the unfair competition affected the Namibian market; but the court rejected this argument, considering that Art. 6 of the Rome II Regulation should be interpreted as Spain being the relevant market, since it was in Spain that the slot machines were produced and sold by the defendants and it was a third party who sold them in Namibia.
Court of appeal-Córdoba	Roj: SAP CO 666/2017 ECLI: ES:APCO:2017:666	14/07/2017	4 and 6	Unfair competition. Damage-relevant market.	
Supreme Court	Roj: STS 1910/2017 ECLI:ES:TS:2017:1910	17/05/2017	6 and 3	Unfair competition Damage-relevant market	Spanish unfair competition law does not apply to conduct in Serbia, since an action for unfair competition under Spanish law cannot be brought against conduct in another State,

				Universal scope of Rome II Regulation	directed at the citizens of that State, and having effect in that State. Arts. 6 and 4 of the Rome II Regulation lead to Serbian law. The court emphasized that the fact that the criteria for determining the applicable law designated the law of a non-Member State is not an obstacle to their applicability, as Article 3 of the Rome II Regulation provides. The appellant's arguments concerning online accessibility, through the Serbian company's website offering the product alleged to be a copy, were not accepted, since there were no circumstances from which it could be deduced that this website offered products or services to Spanish consumers, as it did not even have a version in Spanish or any other language spoken in Spain.
Court of appeal-Oviedo	Roj: SAP O 2820/2016 ECLI: ES:APO:2016:2820	03/11/2016	10	Unjust enrichment Habitual residence of the parties	
Court of appeal-Barcelona	Roj: SAP B 9245/2016 ECLI:ES:APB:2016:9245	01/09/2016	4 and 15	Traffic accident. No mention to The Hague Convention (1971). Attention was paid to the English rules of safety and conduct (circulation code).	

Court of appeal- Lleida	Roj: SAP L 955/2015 ECLI:ES:APL:2015:955	27/11/2015	4.2 and 25.1	No application of Rome II Regulation because of an incorrect understanding of the universal scope of the Regulation.	
Court of appeal- Tarragona	Roj: SAP T 1638/2015 ECLI:ES:APT:2015:1638	14/07/2015	4.3	Civil liability arising from a criminal offense.	A claim was brought for damages suffered by a person with habitual residence in Germany due to acts that had been declared a criminal offence in that country. Civil liability was claimed in Spain. The court considered that, even if the tort could be considered to have occurred in Germany, where the victim suffered an economic loss, the situation was more closely connected with Spain, because the economic loss suffered had its origin in the delivery by the victim of certain amounts to the author of the damage, who managed his rights in an open succession ("sucesión abierta") in Spain, and in relation to assets also located there, for the payment of taxes allegedly due in the country, which were never paid.
Supreme Court	Roj:STS 181/2015 ECLI:ES:TS:2015:181	13/01/2015		Product liability. The Hague Convention (1973) was applied without any reference to the Rome II Regulation, ratifying the decisions of the Court of Appeal of Barcelona (Roj: SAP B/6351/2012; ECLI:ES:APB:2012/6351)	

				and of the Court of First Instance (Roj: SJPI 100/2010, ECLI:ES:JPI:2010:100).	
Court of appeal-Girona	Roj: SAP GI 1614/2014 ECLI: ES:APGI:2014:1614	27/11/2014	10	Unjust enrichment derived from breaking a promise of marriage.	
Court of appeal-Vigo	Roj: SAP PO 1255/2014 ECLI: ES:SAPPO:2014:1255	16/05/2014	4.1	Traffic accident. No mention of The Hague Convention (1971). Foreign law was not proven to the court. Spanish law applied.	
Superior Court of Madrid	Roj: SJM M 5/2014 ECLI:ES:SJMM:2014:5	09/01/2014	31	No application of Rome II Regulation because the facts occurred before it entered into force.	
Court of appeal-Pontevedra	Roj: SAP PO 2888/2012 ECLI: ES:APPO:2012:2888	06/11/2012	4. 1 and 4.3	Traffic accident. No reference to The Hague Convention (1971). The Court does not accept application of 4.3 on closer connections.	



# Sweden

## Executive Summary

- Section 1: the Rome II Regulation is completely unknown outside the legal community and not so well known within it. It is not a widely used instrument.
- Paras. 1–5: Questions of scope and interpretation have given rise to little practical problems.
- Paras. 6–11: The only one of the questions concerning the chapter on torts/delicts that has given rise to any difficulties concerns the interpretation of Art. 9.
- Paras. 12–14: Cases concerning unjust enrichment, negotiorum getio or culpa in contrahendo are highly unusual in national substantive law and no cases on choice of law are to be found in the available databases.
- Para. 15: In practice the application of Art. 14 on freedom of choice has not given rise to any problems.
- Paras. 16–22: The question of the application of foreign law has been discussed on a general level and there is case-law from the Supreme Court. However, that case-law did not specifically concern the Rome II Regulation.
- Paras. 23–26: No known problems.
- Paras. 27–28: There has been some criticism of the mosaic approach leading to higher cost and extended duration of proceedings.
- Paras. 29–32: No change in the Swedish position concerning the exclusion of defamation etc. from scope is to be expected.

## 1. Introduction

- *How aware of the Rome II Regulation are practitioners, businesses and citizens in your Member State?*

Outside the legal community it is highly unlikely that businesses and citizens in general are aware of the Rome II Regulation or even private international law. Most practicing lawyers, perhaps excluding those that work for insurance companies, would not be familiar with the Regulation as it is seldom used in practice. However, the Regulation is covered in the most widely used textbook in private international law and there is a monograph in the Swedish language so most practitioners could easily find out what they need to know should the need arise.

- *Is the Rome II Regulation generally known and applied by courts in your Member State?*

No, it is very rarely used. International tort cases are not frequent with the exception of traffic accidents that are generally dealt with by insurance companies.

- *Are there any relevant statistics regarding the application of the Rome II Regulation in your Member State?*

The case summary for Sweden most probably includes all the cases in which Swedish courts have ever applied the Rome II Regulation. Databases have improved and now generally include cases from courts of first instance and appellate courts. However, it cannot be excluded that there are cases from lower courts that have not been included in the commercially available databases.

- *How important is the doctrinal discussion on the Rome II Regulation in your Member State?*

It has petered out. There were a few articles in law journals when the Regulation was adopted and legal doctrine dealing with matters for which the Rome II Regulation is of relevance will of course include it in the discussion, see the dissertations by Lundstedt and Sinander referred to in the list of doctrine. The only monograph on the Regulation was published in 2014 and it is unlikely that anyone would write another in the foreseeable future.

Should there be a new decision from the CJEU or a Swedish court of last instance it would probably lead to doctrinal discussion.

- *Are there specific issues concerning the Rome II Regulation that have caused debate at a doctrinal or political level?*

When the Regulation was negotiated the question of choice of law for defamation and the protection of privacy was discussed in the press, which adopted a very negative attitude towards harmonisation of the choice of law rules concerning this matter. What is more, trade unions were quite active in pushing for what became Art. 9 of the Regulation.

## 2. Analysis of the Rome II Regulation

### 2.1 Chapter I – Scope and Interpretation

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to :*

1. *The determination of the material scope of application of the Rome II Regulation, including any difficulties in applying the category of “civil and commercial matters” or in defining the exact scope of any excluded matters (Art. 1(1)-(2))*

There is one case concerning the material scope of the Regulation and it dealt with the question of whether a case was international or not, see case # 12 in the list of cases.

2. *The determination of the temporal scope of application of the Rome II Regulation, Arts 31-32).*

Several of the cases have involved the temporal scope of the Regulation (cases # 2, 3, 4, 5, 8, 9, 10 in the list of cases). However, they have not involved difficulties of interpretation. The court has simply noted that for reasons of temporal scope the Rome II Regulation is not applicable to the case at hand.

3. *The characterization of the **concept of “non-contractual obligations”**, its relationship to the concept of “contractual obligations” and any difficulties in relation to characterisation (Arts. 1(1), 2)*

There are no cases in which this has been an issue.

4. *The universal application of the Regulation (Art. 3)*

There are no cases in which this has been an issue.

5. *The approach to interpretation of the Rome II Regulation, and in particular **its relationship to other EU private international law instruments (including the recast Brussels I Regulation and the Rome I Regulation)**(Recital (7))*

There are no cases involving the relation to other EU PIL instruments and one cannot, based on Swedish case-law, draw any general conclusions about the methods of interpretation of the Rome II Regulation.

### 2.2 Chapter II - Tort/Delict

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to the implementation of:*

6. *The general conflict-of-laws rule for tort/delict, and difficulties that have arisen in your Member State with respect to its application (Art. 4), and in particular:*
  - a. *the **approach to identifying the place of direct damage** in Art 4(1)*
  - b. *the approach to the first rule of displacement in Art 4(2) in cases involving multiple parties or claims*
  - c. *the approach to the escape clause in Art 4(3), and*
  - d. *the suitability of this set of rules to govern cases of **prospectus liability or other financial market torts***

There are no cases in which this has been an issue.

7. *The rule on **product liability** (Art. 5) and, where relevant, the interaction with the application of **1973 Hague Convention on the Law Applicable to Products Liability**;*

There are no cases in which this has been an issue. Sweden is not a party to the 1973 Hague Convention.

8. *The specific rule on **unfair competition** (Art. 6)*

Generally speaking the Swedish Courts have completely failed to observe that there is something as the Rome II Regulation in cases concerning the Swedish Marketing Act. When an injunction against particular market has been sought by a competitor they see the application of Swedish rules on marketing (which is a question of unfair competition) as a public law matter and apply the 'country of effect principle' developed earlier in Swedish case-law and do not understand that the *first* question is whether Swedish law is applicable at all according to Art. 6 Rome II Regulation and the *second* question is to ask whether it is applicable according to its own rules on territorial applicability. However, it should be noted that in most cases this makes no practical difference as Art. 6 Rome II and the effects principle established in earlier Swedish case-law lead to the same result. A recent case from *Marknadsdomstolen* (after 2016 replaced by *Patent- och marknadsöverdomstolen*) confirming this practice is MD 2015:7 (se para. 110). I have not listed any cases in the case-list since strictly speaking they are not cases on the application of the Rome II Regulation; they are cases in which the Rome II Regulation *should* have been applied.

9. *The specific rule on **environmental damage** (Art. 7)*

There are no cases concerning the application of Art. 7.

10. *The specific rule on **infringements of intellectual property rights** (Arts. 8, 13)*

See case # 10 in the case-list. Since Swedish law was invoked as the *lex protectionis*, it was declared applicable according to Art. 8 Rome II. The case was an interim judgment on the applicable law. The question of whether Swedish intellectual property law was applicable according to its own rules on applicability was not tried in this case.

11. *The specific rule on **industrial action** (Art. 9)*

The only one of the questions above that has given rise to any difficulties is the interpretation of Art. 9. The Swedish Labour Court (case # 1 on the case-list) was faced with the question of whether that rule included the question of the legality as such of the industrial action or whether the question was left to national law. In the end the court did not decide the matter since it would not affect the outcome whether the Regulation or national PIL was applied.

## 2.3 Chapter III - Unjust Enrichment, Negotiorum Gestio And Culpa In Contrahendo

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to the implementation of:*

12. *The specific rule on **unjust enrichment** (Art. 10), including its relationship with the general rule for tort/delict in Art. 4.*

There have been no cases on choice of law for unjust enrichment.

13. *The specific rule on **negotiorum gestio** (Art. 11)*

There have been no cases on choice of law for *negotiorum gestio*.

14. *The specific rule on **culpa in contrahendo** (Art. 12)*

There have been no cases on choice of law for *culpa in contrahendo*.

## 2.4 Chapter IV - Freedom of Choice

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

15. *The implementation in legal/business practice and by courts of the rule on **freedom of choice**, any difficulties therein and **any discussion that has been carried out in your Member State regarding possible reasons which would justify the need to rethink it** (Art. 14)*

In the only case to be found concerning Art. 14 (case # 7 in the case-list) the parties agreed on the applicable law during proceedings and that posed no legal difficulty. No suggestions concerning a revision of Art. 14 have been brought forward.

## 2.5 Chapter V - Common Rules

Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:

16. *The scope of the exclusion of 'evidence and procedure' in Art 1(3) and any difficulties in relation to that exclusion or to questions of formal validity or the burden of proof (Arts. 21-22).*

There is no case-law concerning this question.

17. *The approach in your Member State to questions of pleading, proof and application to individual cases of the substantive rules of the law applicable under the Rome II Regulation governing non-contractual obligations.*

There is no case-law concerning this question. The questions of the pleading, proof and application of foreign law has been the subject of both academic discussion and case-law from the Supreme Court. However, that discussion has been general and not restricted to cases of non-contractual obligations and the case-law did not pertain to the application of the Rome II Regulation.

In legal writing the application of foreign law is discussed in i.a.:

- Jänterä-Jareborg, M. Svensk domstol och utländsk rätt, Uppsala 1997 (monograph on the application of foreign law).
- Sinander, E. & Lindqvist, G., Ska svensk domstol utreda innehållet i utländsk rätt, SvJT 2015 p. 749-758.
- Hellner, M., Rom II-förordningen: tillämplig lag för utomobligatoriska förpliktelser, Stockholm 2014 (specifically for Rome II on pp. 286-289)
- Bogdan, M. & Hellner, M., Svensk internationell privat- och processrätt, 9:e uppl., Stockholm 2020 (textbook on PIL, matter dealt with on pp. 49-58)

Recently, the Supreme Court has decided on issues concerning the application of foreign law twice:

- NJA 2017 p. 168 (Mahr): foreign law is to be applied ex officio.
- NJA 2016 p. 288 (Betalingserklæringen): if the content of foreign law cannot be ascertained it is presumed to be identical with the lex fori (however, the level of proof required is not high, cf. NJA 1987 p. 885)

18. *The delimitation of the scope of the applicable law (Art. 15(a)-(h)), including any difficulties as its relationship to the issues addressed at points 16 17 above)*

There is no case-law concerning this question.

19. *The application of the rule on **overriding mandatory provisions** (Art. 16)*

There is no case-law concerning this question.

20. *The application of the specific rule on **direct action against the insurer** of the person liable (Art. 18)*

There is no case-law concerning this question.

21. *The application the specific rule on **subrogation** (Art. 19)*

There is no case-law concerning this question.

22. *The application of the specific rule on **multiple liability** (Art.20)*

There is no case-law concerning this question.

## 2.6 Chapter VI - Other Provisions

Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:

23. *The implementation of the concept of habitual residence in the Rome II Regulation, with reference both to persons covered by Art 23 and natural persons acting otherwise than in the course of business.*

There are no known problems relating specifically to the Rome II Regulation and no case-law. Almost all cases concerning habitual residence are from the area of international family law.

24. *The application of and any difficulties with the specific rules on exclusion of renvoi (Art.24) and States with more than one legal system (Art.25).*

*There are no known cases concerning States with more than one legal system. It is also difficult to imagine cases where the rejection of renvoi would cause difficulty in application.*

25. *The application of and any difficulties with the specific rule on public policy of the forums (Art. 26)*

There are no known problems relating specifically to the Rome II Regulation and no case-law.

26. *Practical **interaction between the Rome II Regulation and other EU and international legal instruments**, in specific areas such as **environmental damages, intellectual property rights or data protection** (Arts. 27, 28, 29)*

There are no known problems relating specifically to the Rome II Regulation and no case-law.

## 2.7 Comments on other Practical Problems

*These areas are **of particular interest** for the Commission. Please be as precise as possible regarding any issue that has been reported on:*

27. *The impact of the application of the **1971 Hague Convention** on the law applicable to traffic accidents on legal certainty (where relevant for your Member State).*

Sweden is not a party to the 1971 Hague Convention.

28. ***Any other practical problems with respect to the application or interpretation of the Rome II Regulation, including but not limited to the suitability of the mosaic approach***

The author of this report has anecdotal evidence that the mosaic approach has been considered problematic by tort victims who would have liked a general possibility to apply the law of the place where the event leading to the damage occurred, just like in Art. 7. The mosaic principle increases the costs and duration of proceedings. As much as it would be desirable, the sources of this information cannot be revealed since it has been given whilst consulting and is subject to non-disclosure agreements.

## 3. Comments on areas of interest

*These areas **are of particular interest for the Commission**. Please be as precise as possible regarding any issue that emerged in your Member State regarding:*

29. *The **exclusion of violations of privacy and rights relating to personality, including defamation**, from the scope of the Rome II Regulation and any difficulties arising out from differences among Member States' rules in **cross-border situations***
30. *Any comment regarding the Interplay of the Rome II Regulation with the treatment of **defamation and data protection**, and, in these areas, the relevance of **Strategic Lawsuits Against Public Participation (SLAPPs)***
31. *The extent to which Rome II Regulation has been applied to **corporate abuses against human rights** and lays down an effective set of rules to regulate non-contractual liability;*
32. *The impact of the development of **artificial intelligence** on the Rome II Regulation, and in particular on the suitability of the rules that it contains to regulate non-contractual liability.*

Sweden was opposed to the inclusion of violations of privacy and rights relating to personality, including defamation when the Rome II Regulation was negotiated in the Council. The reasons for this position are mainly two: (1) When balancing the interests of freedom of expression and protection against defamation, Swedish law is very much balanced in favour of freedom of expression and application of foreign law would be seen as a step in the wrong direction. (2) Maintaining the chosen balance is a strong national interest and the rules are laid down in detail in

constitutional acts. Hence, the room for application of foreign law is extremely limited, if not non-existent. The situation has not changed and it is unlikely that the Swedish position would change in the foreseeable future.

Regarding SLAPPs for defamation, it is so difficult under Swedish domestic law to obtain damages for defamation that that in itself works as anti-SLAPP legislation. The risk of legal action with the purpose of intimidating free speech has been put forward as one of the reasons not to include defamation in the scope of the Rome II Regulation.

#### 4. List of national case law

	<u>Court or tribunal</u>	<u>Case name and reference number</u>  <u>Reference to decision of the Court of Justice if applicable</u>	<u>Date</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings (only for key cases)</u>
1	Arbetsdomstolen (Labour Court)	A 176/11; reported as AD 2011 nr 95	22.11.2011	9	Legality of industrial action within scope of Art. 9?	Does not matter since Swedish autonomous PIL and Art. 9 Rome II both lead to the application of Swedish law.
2	Svea hovrätt (Svea Court of Appeal)	B 6659-13; reported as RH 2014:34	19.6.2014	31	Law applicable to damages for genocide committed before entry into force of Rome II.	Rome II not applicable, older rule in autonomous Swedish law not influenced by Rome II (Rome II not applicable by way of analogy).
3	Svea hovrätt	B 9296-10	28.10.2011	31	Law applicable to damages for actions carried out before entry into force of Rome II	Rome II not applicable, older rule in autonomous Swedish law not influenced by Rome II (Rome II not applicable by way of analogy).
4	Svea hovrätt	T 3412-11	4.9.2012	31	Law applicable to damages for non-release of bonds before entry into force of Rome II.	Rome II not applicable, older rule in autonomous Swedish law not influenced by Rome II (Rome II not applicable by way of analogy).

5	Svea hovrätt	T 11011-14	16.12.2015	31	Law applicable to damages for actions carried out before entry into force of Rome II	Rome II not applicable, older rule in autonomous Swedish law not influenced by Rome II (Rome II not applicable by way of analogy).
6	Svea hovrätt	PMT 3491-16	16.3.2020	8.1	Law applicable to copyright infringement	Swedish law applied as lex loci protectionis (infringement of Swedish copyright).
7	Göta hovrätt (Göta Court of Appeal)	T 3598-12	7.4.2014	4.2; 14	Law applicable when both parties have same habitual residence. Law applicable to set-off.	Law of country of common habitual residence applied to claim. Swedish law applicable to right to set-off since both parties had so agreed during proceedings.
8	Hovrätten för Nedre Norrland (Court of Appeal for Southern Norrland)	B 560-10	10.6.2011	31	Law applicable to damages for physical assault committed before entry into force of Rome II.	Rome II not applicable, older rule in autonomous Swedish law not influenced by Rome II (Rome II not applicable by way of analogy).
9	Hovrätten över Skåne och Blekinge (Court of Appeal for Skåne and Blekinge)	T-1170	30.5.2012	31	Law applicable to product liability incurring before entry into force of Rome II.	Rome II not applicable, older rule in autonomous Swedish law not influenced by Rome II (Rome II not applicable by way of analogy).
10	Stockholms tingsrätt (Stockholm District Court)	T 2409-12	13.5.2013	8; 31	Law applicable to infringement of copyright Law applicable to infringements of copyright committed	Swedish law applicable to permissibility and damages concerning linking by Google to materials copyrighted under Swedish law (lex loci protectionis).



					before entry into force of Rome II	Rome II not applicable to older infringement, older rule – lex loci delicti commissi – in autonomous Swedish law not influenced by Rome II (Rome II not applicable by way of analogy). Infringement acts considered to have been carried out in country of protection (Sweden).
11	Stockholms tingsrätt	B 1636-14	9.5.2016	8; 15	Law applicable to infringement of copyright	Law applicable to infringement (Swedish law) applied to question of whether sole owner of a British limited company was personally liable to pay a penalty payment for infringement of Swedish copyright law.
12	Stockholms tingsrätt	T 14416-17	22.10.2019	1	International situation involving a conflict of laws or not?	The fact that a Swedish party sold his rights in previous proceedings to an Estonian company entirely owned by himself in order to escape responsibility for costs of proceedings does not by itself make the dispute international. Hence Rome II is not applicable, there is no question of applicable law and the court applied lex fori to the question of his personal responsibility for costs.

# United Kingdom and Ireland

## Executive Summary

- The principal focus of this report is the judgments of the Courts of England and Wales which have decided the large majority of the cases on Rome II. Reference is also included to the judgments of the Courts in Scotland and Ireland.
- Practitioners dealing with cross border litigation are familiar with Rome II.
- The experience and knowledge of judges varies but there is a considerable degree of specialist expertise, including in the Commercial Court.
- There is significant high level, doctrinal discussion on Rome II.
- The central concept of ‘non-contractual’ obligations has been considered.
- Issues concerning the temporal scope have been determined by the Courts.
- **Article 4(1)** has been applied regularly (and correctly) in the context of straightforward personal injury cases. An initial difficulty in its application to fatal accident claims has been resolved. The application of 4(1) in claims for financial loss has proved to be more difficult. The judgments demonstrate that the courts are seeking to develop a principled approach.
- **Article 4(2)** has given rise to a number of technical issues, including the identification of the person claimed to be liable. There has been limited consideration of the concept of habitual residence and, as yet, no consideration of the identification of the person sustaining damage in the context of secondary victim claims.
- **Article 4(3)** has been raised frequently. In personal injury cases it has, so far, only been deployed to enable the Court to apply the law of the place of the damage – in cases where Article 4(2) has operated to displace that law. In financial loss claims the Courts have found more scope for the exception to apply.
- Articles 5, 8, 9 and 13 have not been considered and Articles 6 and 7 only in passing.
- Article 11 has not been considered.
- There is currently an issue as to whether a claim for knowing receipt falls within Article 10 or Article 4. Article 10(1) has been held not to apply where no relationship existed between the parties prior to the facts giving rise to the claim.
- The doctrinal debate as to whether Article 12 applies to a misrepresentation by a non-contracting party has been referred to by the Court in passing.
- There has been limited consideration of Article 14. The Courts are aware of the potential issues concerning the scope of choice of law agreements and, in particular, whether non-contractual obligations are covered.
- The Courts have grappled with a number of difficult issues concerning the scope of the applicable law under Article 15. The Court of Appeal has given guidance on the meaning of “law applicable” in Rome II: it includes not only hard rules but also practices, conventions and guidelines routinely applied.
- It has been decided that the rules of the forum relating to expert evidence are to be applied.
- The English court has considered the potential overriding status of a number of rules of English law on two occasions: in neither did the court conclude that Article 16 applied.
- Article 18 has not been controversial in the courts.
- The operation of Article 19 has been considered briefly in one case.
- Article 20 has been considered briefly in a claim for equitable contribution between insurers.
- Article 26 has been raised once, but the Court held that it did not apply.

- Pleading and proof of foreign law. The English court's traditional approach to foreign law – which is treated as a matter of fact – has been questioned in the context of Rome II. In 2021, guidance may be given by the Supreme Court on the question of whether the presumption that English law is the same as foreign law (in the absence of evidence to the contrary) is consistent with the mandatory choice of law rules in Rome II.
- Assessment of personal injury damages under foreign law. Issues have arisen in practice concerning the application of foreign law in this context.
- There are a significant number of decisions in claims arising out of financial torts. These are mainly addressed in the context of Article 4.
- In a number of claims concerning environmental damage/corporate abuse of human rights, claimants have relied on Article 7 but this has not been controversial to-date.

#### Acknowledgements

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## 1. Introduction

There have been a significant number of cases on Rome II decided by the Courts of England and Wales and judgments are handed down on a very regular basis.<sup>1260</sup> Many of the issues concerning Rome II first arose in the context of cross-border personal injury claims. In that context the law applicable can be particularly significant due to the differences between national laws on liability, limitation and the assessment of damages which may, in part, explain why so many Rome II issues have been litigated in personal injury claims. More recently the Courts have had to focus increasingly on Rome II issues in the context of financial claims. A number of judgments have considered the difficult issue of locating damage in cases of financial loss. Issues of characterisation are starting to become evident in practice, particularly relating to the scope of the general rule in Article 4 and of the specific rules in other Articles, including 10 and 12.

Practitioners dealing with cross border litigation are generally familiar with Rome II. The experience of judges varies but there is a high level of expertise amongst many. Both practitioners and judges have been assisted by the extensive academic commentary on Rome II and judgments frequently refer to such commentary. Professor Andrew Dickinson's monograph "The Rome II Regulation" (2008 OUP) is regularly cited by the Courts and has been particularly influential in the development of the law. There have been a number of seminars and meetings to discuss the issues arising under Rome II, including an event held by the British Institute of International and Comparative Law in 2019 to mark the 10<sup>th</sup> anniversary of the Regulation, at which leading academics, judges and practitioners from the United Kingdom and other Member States presented papers and participated.

## 2. Analysis of the Rome II Regulation

### 2.1 Chapter I – Scope and Interpretation

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

1. *The determination of the material scope of application of the Rome II Regulation, including any difficulties in applying the category of "civil and commercial matters" or in defining the exact scope of any excluded matters (Art. 1(1)-(2))*

The Courts have not yet given detailed consideration to the concept of "civil and commercial matters" in the context of Rome II<sup>1261</sup>; nor have the exclusions in Article 1(2) been examined. Perhaps unsurprisingly, there has been no more

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<sup>1260</sup> This Report refers to a further 5 judgments handed down since the Interim Report (October 2020).

<sup>1261</sup> In *Jacobs v MIB* [2010] EWHC 231 (QB) (Owen J), at first instance, the Claimant raised the possibility that the claim was not a "civil and commercial matter" within the scope of Rome II, but this was not pursued.

than passing consideration of the phrase “*in situations involving a conflict of laws*”, which defines the *raison d’être* of the Regulation.<sup>1262</sup>

The scope of *acta iure imperii* was examined in the context of a personal injury claim brought against the Ministry of Defence by a British soldier engaged on an army training exercise in Canada. The parties agreed that the scope of *acta iure imperii* should be consistent with the Brussel I Regulation. The Judge concluded that, as the soldier was on a training exercise at the time and not carrying out a “military operation”, there was no positive exercise of the defendant’s public powers and, consequently, the matter was not *acta iura imperii*<sup>1263</sup>.

## 2. *The determination of the temporal scope of application of the Rome II Regulation (Arts. 31-32)*

The first cases on Rome II in the English courts raised the issue of its temporal scope. The reason this became an issue was that Rome II was generally accepted to have effected a very significant change in English law in relation to the law applicable to the assessment of damages. Pre-Rome II, English courts applied English law to the assessment of damages, regardless of the law applicable to the claim. This was on the basis that the assessment of damages was “procedural” and thus, for the law of the forum.<sup>1264</sup> Article 15(c) of Rome II reversed this long-established position in English law and required the assessment of damages to be governed by the applicable law. As the difference in value of compensation assessed under English law and other laws was frequently significant, the issue of whether Rome II applied became significant. There were conflicting decisions of the High Court<sup>1265</sup> and a reference to the CJEU was made. This determined that Rome II applied where the events giving rise to damage occurred after 11 January 2009.<sup>1266</sup> The result of the ruling was that in a straightforward personal injury case arising out of accident, Rome II applies if the accident occurred after 11 January 2009.

Further issues as to the temporal scope have arisen in more complex cases, where the event giving rise to the damage and the damage are separated in time. In such cases, the focus has been on identifying the event giving rise to damage. For example, in a product liability context concerning metal hip implants, the Court has considered whether the event giving rise to damage is the manufacture, distribution or implant of the defective product. The Court held that the appropriate event was the date of manufacture/ circulation of the defective product.<sup>1267</sup> The issue has also arisen – but not yet been determined – in the context of long-tail personal injury claims arising out of exposure to asbestos.

## 3. *The characterization of the concept of “non-contractual obligations”, its relationship to the concept of “contractual obligations” and any difficulties in relation to characterisation (Arts. 1(1), 2)*

The ambit of the central concept of “*non-contractual obligations*” was considered by the Court of Appeal in *Committeri v Club Med* [2018] EWCA Civ 379. The claim arose out of an accident in France, which occurred in the course of a team building trip organised by the Claimant’s employers, BNP Paribas Bank in London. The issue arose because there was a choice of law clause in favour of English law in the contract pursuant to which the trip took place. If the claim was characterised as contractual, the choice of law clause applied, resulting in English law. If the claim was properly characterised as non-contractual, the choice of law clause had no application and French law governed the claim. French law was favourable as it provided for strict liability whereas English law required proof of fault. The Court of Appeal considered the CJEU authorities (and two English cases applying the CJEU cases) and concluded that, whilst there was no direct contractual relationship between the claimant and Club Med, the claim was contractual. The Court held that the claim was, in essence, for breach of the obligations under the contract and the existence of the contract was “indispensable” to the claim. Although the claim was based on the strict liability obligation imposed by the French *Code de Tourisme*, that obligation was not independent of the obligation under the contract: the correct analysis was that the contract was the source of the relevant obligations and the *Code* merely enhanced the claimant’s pre-existing rights under the contract.

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<sup>1262</sup> See *Jacobs v MIB* [2010] EWHC 231 (QB); *Jacobs v MIB* [2010] EWCA Civ 1208.

<sup>1263</sup> *Rai v MOD* [2016] 5 WLUK 135.

<sup>1264</sup> See *Harding v Wealands* [2006] UKHL 32.

<sup>1265</sup> *Homawoo v GMF Assurance SA* [2010] EWHC 1941 (QB) per Slade J, *Bacon v Nacional Suiza* [2010] EWHC 2017 (QB).

<sup>1266</sup> *Homawoo v GMF Assurances* C-412/10.

<sup>1267</sup> *Allen v Dupuy International* [2014] EWHC 753 (QB).

#### 4. *The universal application of the Regulation (Art. 3)*

There has been no consideration of Article 3. The Courts have had no issue with applying Rome II to cross-border claims - even where there is no EU connection other than forum.

#### 5. *The approach to interpretation of the Rome II Regulation, and in particular its relationship to other EU private international law instruments (including the recast Brussels I Regulation and the Rome I Regulation) (Recital (7))*

Courts have had no difficulty in accepting that, as an EU Regulation, Rome II requires to be interpreted consistently with the CJEU jurisprudence and that key concepts are to be construed “autonomously”.

The approach of the Courts evidences the need for consistency with the other EU instruments on private international law, in particular, Brussels I Regulation and Rome I, as required by Recital 7. Moreover, there is some evidence that Courts are sensitive to the distinction between jurisdiction rules and choice of law rules – and particularly that the choice of law rules in Rome II are designed to identify a single law, whereas this constraint is often absent in the context of Brussels I.<sup>1268</sup> This approach is in line with the views of Professor Andrew Dickinson, who notes that as the character and objective of rules on applicable law differ to that of jurisdiction, “consistency [in the interpretation of the two regulations] does not demand complete fidelity”.<sup>1269</sup>

## 2.2 Chapter II - Tort/Delict

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to the implementation of:*

#### 6. *The general conflict-of-laws rule for tort/delict, and difficulties that have arisen in your Member State with respect to its application (Art. 4), and in particular:*

##### a. *the approach to identifying the place of direct damage in Art. 4(1)*

In straightforward personal injury cases arising out of an accident, the Courts have had little difficulty in applying Article 4(1) in line with Recital 17: the law of the country in which the damage occurs is applied regardless of the location of the indirect consequences of the accident.<sup>1270</sup> So, where a road traffic accident occurs in France causing personal injury but with financial consequences felt in other countries, the place in which damage occurs under Article 4(1) is France and the law applicable is French law.<sup>1271</sup>

Fatal accidents proved to be slightly more challenging for the courts. In *Brownlie v Four Seasons Holdings Inc* [2015] EWCA Civ 665, the Court of Appeal (incorrectly) held that English law applied to a claim by a dependant arising out of a fatal accident in Egypt. The Court of Appeal’s approach was not strictly followed in subsequent cases<sup>1272</sup> and, by the time the appeal in *Brownlie* was heard by the Supreme Court, the CJEU had given judgment in C-350/14 *Lazar* (EU:C:2015:802) and it was common ground between the parties that Egyptian law, as the law of the place of the accident, applied.<sup>1273</sup>

Identifying the place of damage in cases of financial loss is, unsurprisingly, proving to be challenging: it is notoriously difficult to pinpoint the location of damage in the absence of a physical manifestation of it. The Courts have started to explore the issues and are seeking to develop a principled approach to locating financial damage for the purposes of Article 4(1) but the proper approach to the issue is still open to question.

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<sup>1268</sup> *Erste Group Bank AG v JSC* [2015] EWCA Civ 379 at [89]-[91]; *Pan Oceanic Chartering Inc v Unipec* [2016] EWHC 2774 (Comm).

<sup>1269</sup> See Fatal Accidents – the law applicable to claims by family members, Andrew Dickinson, LQR 2016, 132 at 212.

<sup>1270</sup> An early example is *Jacobs v MIB* [2010] EWHC 231 (QB).

<sup>1271</sup> *Pickard v Marshall* [2015] EWHC 3421 (QB), [2017] EWCA Civ 17.

<sup>1272</sup> *Marshall v MIB* [2015] EWHC (QB) Dingemans J.

<sup>1273</sup> See *Four Seasons Holdings Inc v Brownlie* [2017] UKSC 80.

Cases where the Courts have been required to apply Article 4(1) to financial damage often arise in the context of fraud claims and concern the torts of conspiracy or dishonest assistance. The variation in the factual scenarios underlying the disputes undoubtedly contributes to the difficulty in developing a clear approach.

One common factual scenario is where the claim is based on non-receipt of money. For example, a claim for commissions due to be paid to a specific party in a certain country, but because of the fraud they were received by another party in a different country. The Courts have considered whether the direct damage in such a case is the non-receipt of commissions due, or the fact that those commission were received by another party elsewhere. Cockerill J has recently endorsed the analysis that the direct damage is the place where the commission should have been received by the victim. In reaching that conclusion, Cockerill J indicated that her analysis was not restricted to cases where there is an express positive contractual obligation to pay in a particular country, but rather was of more general application focused on the nature of the harm where the money was not, but should have been, received.<sup>1274</sup>

Another not infrequent factual scenario is where a victim pays out money to purchase goods which, by reason of a fraud, do not in fact exist. In such circumstances the Courts have considered whether the place of direct damage is the place where the goods should have been handed over, had the fraud not occurred, or the place from where the money was paid out to purchase the goods. In *ED&F Man Capital Markets* [2019] EWHC 166 (Comm), the issue arose in the context of a fraud which had at its heart the production of forged warehouse receipts to evidence that non-existent goods were in existence in warehouses in Malaysia, Singapore and South Korea. The Judge held that England was the place of direct damage because England was place from which payment was made and payment had been made on the basis of the forged receipts which had been received by the victim of the fraud in England. The place of direct damage was not the place the goods would have been handed over but for the fraud.<sup>1275</sup>

In *MX1 v Fardad Farahzad* [2018] EWHC 1041 (Ch), Marcus Smith J, relying on Professor Andrew Dickinson's analysis, considered whether a principled answer lies in identifying the place at which the victim performs or fails to perform an act which results in irreversible loss. Applying that approach, in that case the Judge held that the relevant financial damage – being irreversible or concrete loss - occurred at the place where the Claimants entered into agreements, in England.<sup>1276</sup> The Judge rejected the Defendant's argument that, in cases where damage occurs in multiple jurisdictions, the location of the relevant damage for Article 4(1) should be where the predominant loss occurs. The Judge held that Article 4(1) had to be applied purposively and, properly applied, the claim in respect of the loss in each country was to be governed by the law of that country. The Judge noted that the consequent fragmentation of applicable laws was anticipated in the Explanatory Memorandum.

*b. the approach to the first rule of displacement in Art. 4(2) in cases involving multiple parties or claims*

A number of issues have arisen under Article 4(2). These include identifying the "person claimed to be liable", the operation of the rule where there are more than two parties to proceedings, and the proper approach to identifying habitual residence.

Where a claim is brought against a body which is obliged to satisfy the liability of an underlying tortfeasor, the Courts have considered whether the person claimed to be liable is the underlying tortfeasor or the body that would in fact be satisfying a judgment. The most common scenario arises in the context of liability insurance. In that context, it has been held that the relevant habitual residence is that of the underlying insured tortfeasor and not that of the insurer.<sup>1277</sup>

There are yet unanswered questions in relation to the meaning and application of the "person sustaining damage" in the context of secondary claimants, or "ricochet" claimants. Examples of such claims, which are increasingly common, include where a dependant of an injured or deceased victim seeks to recover in respect of their loss of dependency. It is not yet clear whose habitual residence is relevant in such a context.

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<sup>1274</sup> *FM Capital Partners v Marino* [2018] EWHC 1768 (Comm). A similar analysis was adopted by Carr J in *Pan Oceanic Chartering Inc v UNIPPEC* [2016] EWHC 2274 (Comm).

<sup>1275</sup> *ED&F Man Capital Markets Limited* [2019] EWHC 1661 (Comm).

<sup>1276</sup> See Andrew Dickinson "The Rome II Regulation" at paragraph 4.67 in the context of fraudulent misrepresentation. And see *Hillside (New Media) Ltd v Baasland* [2010] EWHC 3336 (Comm). See also *Shenzen Senior Technology v Celgard* [2020] EWCA Civ 1293.

<sup>1277</sup> *Winrow v Hemphill* [2014] EWHC 3164 (QB).

The Courts have concluded that Article 4(2) applies even in cases where there are claims between more than two parties.<sup>1278</sup> Academic commentary had suggested that there was scope to argue that the use of the singular “person” in the text of Article 4(2) excluded the possibility of Article 4(2) operating in multiparty cases. This argument was rejected by Dingemans J in *Marshall v MIB* [2015] EWHC 3421 (QB) who, by his approach to Article 4(3), resolved the practical problems caused by Article 4(1) and Article 4(2) resulting in different laws applying to different defendants in the same proceedings.

There has been limited consideration of the key concept of habitual residence. Slade J’s review in *Winrow v Hemphill* [2014] EWHC 3164 (QB) considers the caselaw and some commentary and provides pointers for other cases. Other cases in which this issue has arisen have, so far, been settled before being resolved by Court decision. Further guidance on the proper approach to habitual residence for individuals is required and will be helpful in practice.

*c. the approach to the escape clause in Art. 4(3)*

The Courts are well versed in the operation of Article 4(3) and its role as an escape clause. The Courts have accepted that the burden is on the party seeking to rely on Article 4(3) and that it applies only in exceptional cases: the requirement that a country be “manifestly” more closely connected imposes a high hurdle.<sup>1279</sup> The Courts have emphasised the need to take into account “all the circumstances” and have suggested that for a law to apply pursuant to Article 4(3), the ‘centre of gravity’ of the tort must point towards that law.<sup>1280</sup> The authorities support an argument that, in certain cases, the law applicable to related claims may be relevant in applying Article 4(3).<sup>1281</sup>

There was an issue at an earlier stage as to whether Article 4(3) could be used to apply the law which would otherwise have been designated by Article 4(1) or Article 4(2). This issue arose as a result of the wording of Article 4(3) “other than that indicated in paragraphs 1 or 2”. However, in *Marshall v MIB* the Court accepted that a law designated by Article 4(1) but excluded by the operation of Article 4(2), can nonetheless apply pursuant to Article 4(3).<sup>1282</sup>

There may be evidence of a variation in approach emerging in the operation of Article 4(3) in different types of case. In personal injury cases, Article 4(3) has only been used to enable the Court to apply the law of the place of the accident, which had been displaced pursuant to Article 4(2).<sup>1283</sup> In this context there have been no cases where Article 4(3) has applied to designate a law other than that applicable pursuant to Article 4(1).

In cases of financial damage, often by their nature centred around claims of fraud and/or conspiracy, Article 4(3) has been applied by the Courts to designate a different law. For example, where as a result of a conspiracy money had not been repaid under a loan agreement, the place where all the conspirators were based - which was also where the conspiracy was hatched and where the conspirators sought to gain a commercial advantage - was held to be manifestly more closely connected to the tort.<sup>1284</sup>

*7. The rule on product liability (Art. 5) and, where relevant, the interaction with the application of 1973 Hague Convention on the Law Applicable to Products Liability;*

Article 5 has not yet been considered in the Courts.

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<sup>1278</sup> *Pickard v Marshall* [2015] EWHC 3421 (QB), [2017] EWCA Civ 17, see also *Owen v Galgey and others* [2020] EWHC 3546 (QB).

<sup>1279</sup> See *Owen v Galgey and others* [2020] EWHC 3546 (QB), *FM Capital Partners v Marino* [2018] EWHC 1768 (Comm); *Fortress Value Recovery Fund LLC v Blue Sky Special Opportunities Fund LP* [2013] 2 BCLC 351; *Winrow v Hemphill*; *Pickard v Marshall* [2015] EWHC 3421 (QB), [2017] EWCA Civ 17 and *Stylianou v Suncorp* [2013] EWHC 2188 (QB).

<sup>1280</sup> *Fortress Value Recovery Fund LLC v Blue Sky Special Opportunities Fund LP* [2013] 2 BCLC 351.

<sup>1281</sup> See *Marshall v MIB and Avonwick Holdings Ltd v Azitio Holdings* [2020] EWHC 1844.

<sup>1282</sup> *Pickard v Marshall* [2015] EWHC 3421 (QB), [2017] EWCA Civ 17.

<sup>1283</sup> See *Marshall v MIB* and *Owen v Galgey and others*.

<sup>1284</sup> See *Erste Group Bank AG v JSC ‘VMZ Red October’* [2015] EWCA Civ 379 [88]-[98]. See also *Avonwick Holdings* [154]-[159].

8. *The specific rule on unfair competition (Art. 6)*

Article 6 has been mentioned in passing by the Courts, but no substantive issue has yet required determination. In a claim by numerous retailers against MasterCard (alleging that merchant service charges paid to banks in respect of transactions using the defendant's card were too high), the location of the relevant market under Article 6(3), was noted to be common ground: "where the market is, or is likely to be, affected" is the country in which the Merchant retailer was based at the time of the transaction upon which a merchant service charge was paid.<sup>1285</sup> In the context of a jurisdiction challenge, it was briefly noted that a claim for equitable breach of confidence would probably be regarded as an act of unfair competition within Article 6.<sup>1286</sup> It has also been held that a passing off claim fell within Article 6 rather than Article 8.<sup>1287</sup>

9. *The specific rule on environmental damage (Art. 7)*

Recently, there have been the first references to Article 7. It has been mentioned, but not considered in detail, in cases alleging damage suffered as a result of pollution.<sup>1288</sup> In a claim following the death of a worker who fell from height whilst involved in the demolition of an oil tanker at a shipyard in Bangladesh, Jay J considered Article 7 briefly and without the benefit of full argument. He held that the Claimant had a real prospect of success that English law applied pursuant to Article 7 as, although the proximate cause of death was the fall from height in Bangladesh, it was arguable that the accident resulted from a chain of events which led to the vessel being grounded and involved damage to a beach and tidal waters and that accordingly Article 7 could be engaged.<sup>1289</sup>

10. *The specific rule on infringements of intellectual property rights (Arts. 8, 13)*

11. *The specific rule on industrial action (Art. 9)*

Articles 8, 9 and 13 have not been considered in detail by the Courts.

## 2.3 Chapter III - Unjust Enrichment, *Negotiorum Gestio* And *Culpa In Contrahendo*

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to the implementation of:*

12. *The specific rule on unjust enrichment (Art. 10), including its relationship with the general rule for tort/delict in Art. 4.*

There is currently an issue as to whether a claim for knowing receipt falls within Article 4 or Article 10. Cockerill J invited submissions on the issue at in *FM Capital Partners Ltd v Marino* [2018] EWHC 1768 (Comm) [482] but the parties did not accede to her invitation and she did not address it further. The issue was raised in *ED&F Capital Markets Limited v Come Harvest* [2019] EWHC 1661 (Comm). In that case, the knowing receipt claim was pleaded alongside a conspiracy claim (which was subject to Article 4). The Court did not need to resolve the issue as to whether Article 4 or 10 applied as, in the circumstances of that case, both Articles led to the same law – partly as the claims were all related.

As unjust enrichment claims frequently arise against a backdrop of a pre-existing relationship between the parties, in cases where Article 10 does apply, the law applicable to such claims will most often be resolved by the application of Article 10(1). In *Banque Cantonale de Geneve v Polevent Limited* [2015] EWHC 1968 Teare J held that Article 10(1) has no application where no relationship existed prior to the facts that gave rise to the index claim. Consequently, Article 10(1) was held not to apply to the claimant bank's claim in circumstances where an individual, masquerading

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<sup>1285</sup> *Deutsche Bahn AG v MasterCard Incorporated* [2018] EWHC 412 (Ch).

<sup>1286</sup> *Conductive Inkjet Technology v Uni-Pixel Displays* [2013] EWHC 2968 (Ch), noting that, as the act affected exclusively the interests of a specific competitor, the claim would probably be governed by Article 4, pursuant to Article 6(2).

<sup>1287</sup> *Lyle & Scott Limited v American Eagle Outfitters* [2021] EWHC 90 (Ch).

<sup>1288</sup> *Okpabi v Royal Dutch Shell* [2017] EWHC 89 (TCC) at [55].

<sup>1289</sup> *Begum v Maran (UK) Limited* [2020] EWHC 1846 (QB).



as someone else, requested the transfer of funds to an account that he controlled, and the claimant, assuming the individual to be honest, complied with the request.

*13. The specific rule on negotiorum gestio (Art. 11)*

Article 11 has not been considered by the Courts.

*14. The specific rule on culpa in contrahendo (Art. 12)*

Article 12 has only received passing comment to-date. In the context of a hearing considering an order for an injunction Bryan J noted that there was a debate in the academic commentary as to whether a misrepresentation made by a non-contracting party would fall within Article 12 at all, highlighting the fact that both leading textbooks (Dicey, Morris and Collins on The Conflict of Laws and Andrew Dickinson on Rome II) indicated that such a claim could fall outside Article 12.<sup>1290</sup>

## 2.4 Chapter IV - Freedom of Choice

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

*15. The implementation in legal/business practice and by courts of the rule on freedom of choice, any difficulties therein and any discussion that has been carried out in your Member State regarding possible reasons which would justify the need to rethink it (Art. 14)*

There has been little direct consideration of Article 14. The Article, and in particular the more restricted regime it contains for agreements on choice of law for non-contractual obligations in comparison to contractual obligations, was a central part of the context of the dispute in *Committeri v Club Med* (see above). In *Bazhanov v Fosman* [2017] EWCH 3404 (Comm), the Judge, having noted the requirements of Article 14, held that an alleged oral choice of jurisdiction was insufficient to be a choice of law – and that, in any event, there was no evidence that non-contractual obligations were within the scope of the agreement.<sup>1291</sup>

## 2.5 Chapter V - Common Rules

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

*16. The scope of the exclusion of 'evidence and procedure' in Art. 1(3) and any difficulties in relation to that exclusion or to questions of formal validity or the burden of proof (Arts. 21-22)*

See 18

*17. The approach in your Member State to questions of pleading, proof and application to individual cases of the substantive rules of the law applicable under the Rome II Regulation governing non-contractual obligations.*

Foreign law is treated as a matter of fact in the English court. The Court is not taken to know foreign law and is not permitted to carry out its own research into foreign law. As a result, English procedural rules require that foreign law must be pleaded and proved, usually by expert evidence, or occasionally other means. The established position is that, in the absence of satisfactory evidence of foreign law, the Court will apply English law. This is traditionally referred to as the "presumption" that English law is the same as foreign law, but it is now more frequently referred to as a "default rule".<sup>1292</sup>

The English court's traditional approach to foreign law and the application of the presumption has been challenged in a number of recent cases on different grounds. In the context of claims governed by Rome II, it has been argued that

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<sup>1290</sup> *Angola v Perfectbit* [2018] EWHC 965 (Comm)

<sup>1291</sup> *Bazhanov v Fosman* [2017] EWHC 3404 (Comm); and see *Pan Oceanic v Unipecc* [2016] EWHC 2774 (Comm) holding that Article 14 did not apply as it had not been established that the agreement was freely negotiated.

<sup>1292</sup> Dicey, Morris and Collins on the Conflict of Laws 15<sup>th</sup> edition, Chapter 9, 9R-001

the “presumption” is incompatible with Rome II and, in particular, the mandatory nature of the choice of law rules it imposes on Member States. That argument has so far been rejected on the basis that it is a rule of evidence of the English Courts.<sup>1293</sup> The Supreme Court may give guidance on this issue in 2021.

*18. The delimitation of the scope of the applicable law (Art. 15(a)-(h)), including any difficulties as its relationship to the issues addressed at points 16 17 above)*

The Courts have grappled with a number of difficult issues concerning the scope of the applicable law. In a landmark decision, *Wall v Mutuelle de Poitiers SA* [2014] EWCA Civ 138, the Court of Appeal gave guidance on the meaning of the “law applicable” in Article 15. This was the first large claim where, pursuant to Rome II, the English court was required to assess compensation according to foreign law, in this case French law. Liability was not in issue and the initial dispute between the parties concerned the correct approach to expert evidence to assist the Court in determining the value of the claim. The Claimant sought to adduce evidence from numerous experts of different disciplines, in line with a standard English approach, whereas the Defendant argued that the Court should adopt the more streamlined method of 1 medico-legal expert, in accordance with a French style approach. The Court of Appeal held that, as Rome II did not apply to evidence and procedure pursuant to Article 1(3), the English approach to expert evidence should be adopted, albeit that the assessment of damages had to be carried out in accordance with French law.

Having decided the specific point relating to expert evidence, the Court of Appeal went on to consider the meaning of “law applicable” and in particular whether it should be construed narrowly – to include only rules or ‘hard law’ or broadly to include practices and conventions or ‘soft law’. This issue arose against the background that, in the context of assessing damages, many systems of law have very limited legal rules. Many have a general principle of full compensation but even applying that same principle, the courts in different jurisdictions apply practices and conventions and guidelines built up over time – and arrive at vastly different awards. The question was how that reality should be reflected in practice. The Court held unanimously that “law” for the purposes of Rome II included practices, guidance and conventions, or “soft law” as Longmore LJ described it. The decision is very important in practice and is the starting point for all cases where foreign law is applicable. It has not proved to be easy to apply in practice, particularly when combined with the Court’s ruling that English style evidence is the correct approach.

Article 1(3) and 15 are commonly raised together. By way of example, the Courts have recently considered a provision of the applicable law which required proceedings to be both issued and served before limitation would be interrupted. The claimant contended that the matters of issue and service were purely procedural, within Article 1(3), and therefore governed by English law as the law of the forum. The defendant contended the matters were within the applicable law’s rules on limitation and applied pursuant to Article 15(h). The Court concluded that, as service of proceedings was an essential step, integral to the applicable law’s limitation rules, it could not be downgraded to a matter of mere procedure and accordingly Article 15(h) applied.<sup>1294</sup> The Court noted that to hold otherwise would result in limitation being different depending on the forum which would be antithetical to Rome II’s objective of providing certainty and clarity of outcomes.

Disputes have arisen as to whether a rule of English law is a limitation on the content of a right such as to fall under Article 15(a) to (h), or whether it is, in reality, a procedural bar to the exercise of the right. The English law rule against “reflective loss” was considered by the Court in *KMG International NV v Chen* [2019] EWHC 2389 (Comm). That rule of English company law prevents a shareholder bringing a claim in respect of a diminution to their shareholding on the basis that the company was the primary sufferer of loss rather than the shareholder. It was argued that this rule determined the admissibility of an action - so as to be a procedural bar - rather than determining the substance or content of a party’s rights.<sup>1295</sup> The Court held however, that Article 15 should be construed widely to promote certainty, and Article 1(3) construed narrowly, concluding that the rule against reflective loss fell within Article 15(f).

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<sup>1293</sup> *OPO v MLA* [2014] EWCA Civ 1277 per Arden LJ; *FS Cairo (Nile Plaza) v Brownlie* [2020] EWCA Civ 996.

<sup>1294</sup> *Anjali Pandya v Intersalonika General Insurance Company SA* [2020] EWHC 273 (QB).

<sup>1295</sup> See *KMG International NV v Chen* [2019] EWHC 2389 (Comm). The English company law rule referred to is known as the rule against “reflective loss”. (For a detailed discussion of the development of the rule see *Sevilleja v Marex Financial Ltd* [2020] UKSC 31.)

Article 1(3) has been held to be applicable rather than Article 15 in the context of the procedural rules governing an application for a declaration of non-infringement (“DNI”) of a patent. It has been held that where a party sought DNIs in respect of infringements of the English designation of a patent alongside the French, Spanish and Italian designations, in the English Court, the English law rules on the steps required to get a DNI were matters of procedure and went to admissibility of the action rather than the content of the rights.<sup>1296</sup>

Whether or not interest on damages falls within Article 1(3) or Article 15 has been controversial. In one case the Judge held there were persuasive arguments that the rate of interest was part of the applicable law and that any procedural power conferred on the Court to award interest should be exercised in line with the applicable law.<sup>1297</sup> More recently, however it has been held that the award of interest is a matter that falls within Article 1(3) as it is a discretionary procedural remedy which English judges are permitted by statute to award and that where a judge exercises their discretion there is no obligation to do so in line with the applicable law.<sup>1298</sup>

Where the Court is applying foreign law and will be required to make factual findings, it has been argued that the Court should apply the standard of proof required by the applicable law. In dismissing that argument and holding that the standard of proof was a matter of evidence and procedure for the forum, Dingemans J noted that Article 22 refers to “presumptions of law” and the “burden of proof” but does not mention the standard of proof.<sup>1299</sup>

#### *19. The application of the rule on overriding mandatory provisions (Art. 16)*

In the context of Rome II, the Courts have not yet concluded that a provision of English law is an overriding mandatory rule which applies irrespective of the law applicable. In *KMG v Chen*, it was argued, unsuccessfully, that a rule of English company law preventing a shareholder in certain circumstances from suing in respect of the diminution of a shareholding they held in a company was an overriding mandatory provision.<sup>1300</sup> In *Syred v PZU*, the Court held that an English law rule on the assessment of damages requiring state benefits paid or likely to be paid by reason of the injury to be disregarded from an assessment of damages did not apply in circumstances where the applicable law would take account of such benefits.<sup>1301</sup>

Although pre-Rome II English courts were not averse to according overriding effect to a provision of English law<sup>1302</sup>, in the context of Rome II the Courts have demonstrated they appreciate the standard for the application of Article 16 is high: the provision must be crucial for the protection of the political, social or economic order so as to require compliance by all persons present in the national territory and all legal relationships within the state.<sup>1303</sup>

#### *20. The application of the specific rule on direct action against the insurer of the person liable (Art. 18)*

Article 18 has not been controversial in the Courts. Claimants continue to make frequent use of direct actions. The increased scope for reliance on such actions under the law of the tort in addition to the law of the insurance contract has proved to be important in practice. (The availability of such actions under English law is significantly less than under many other systems of law.)

#### *21. The application the specific rule on subrogation (Art. 19)*

The operation of Article 19 was considered briefly in *Bianco v Bennett* [2015] EWHC 625(QB), a claim in respect of sums paid to the family of an Italian man killed in an accident in England. The sums were paid by an Italian workers’

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<sup>1296</sup> *Actavis UK Limited v Eli Lilly & Co* [2015] EWCA Civ 555.

<sup>1297</sup> *AS Latvijas Krajbanka v Antonov* [2016] EWHC 1679 (Comm).

<sup>1298</sup> *Troke and another v Amgen Seguros* [2020] EWHC 2976.

<sup>1299</sup> See [24] and [25] of Dingemans J’s judgment in *Pickard v Marshall* [2015] EWHC 3421 (QB) cf *Gilmour v Linea Directa* [2017] SC EDIN 81.

<sup>1300</sup> *KMG International NV v Chen* [2019] EWHC 2389 (Comm).

<sup>1301</sup> *Syred v PZU SA* [2016] EWHC 254 (QB).

<sup>1302</sup> (1) *The Soldiers, Sailors, Airmen and Families Association – Forces Help* (2) *The Ministry of Defence v Allgemeines Krankenhaus Viersen* [2020] EWCA Civ 926. This decision is currently the subject to an application for permission to appeal to the Supreme Court.

<sup>1303</sup> See Christopher Hancock QC’s judgment in *KMG International NV v Chen* [2019] EWHC 2389 (Comm).

compensation fund and the deceased's employer. The Judge held that the claim failed due to the way it was pleaded but he also considered the law applicable to the subrogated claim pursuant to Article 19.

*22. The application of the specific rule on multiple liability (Art. 20)*

Article 20 has not been considered in detail by the Courts. In *XL Insurance Company SE v AXA and AIG* [2017] EWHC 3383 (Comm), the Court briefly considered whether Article 20 applied to a claim for equitable contribution between insurers. The Court concluded that Article 20 would be unlikely to apply as the insurer's obligation to its insured under a policy of insurance is contractual: for Article 20 to apply the relevant underlying obligation must be non-contractual. The Judge noted that the paradigm case under Article 20 is contribution between joint tortfeasors and, given the scope for dispute on the wording of Article 20, it is likely that cases will arise concerning its application in other cases.<sup>1304</sup>

## 2.6 Chapter VI - Other Provisions

*Please indicate the general trend, in your Member State and if any difficulties have emerged with respect to:*

*23. The implementation of the concept of habitual residence in the Rome II Regulation, with reference both to persons covered by Art. 23 and natural persons acting otherwise than in the course of business*

As noted above in relation to Article 4(2), issues have arisen in practice as to the habitual residence of individuals, not acting in the course of business.

*24. The application of and any difficulties with the specific rules on exclusion of renvoi (Art. 24) and States with more than one legal system (Art. 25)*

There has been no substantial consideration of the operation of Article 24.

Whilst Article 25(2) expressly provides that Rome II is not required to apply to conflicts solely between the laws of constituent territorial units, legislation has been passed to apply rules equivalent to Rome II to intra-UK cases.<sup>1305</sup> On a related note, issues have arisen in practice as a result of the existence of the different legal systems with the United Kingdom. For example, in relation to the application of Article 4(2) where parties have their habitual residence in different parts of the United Kingdom.

*25. The application of and any difficulties with the specific rule on public policy of the forums (Art. 26)*

Article 26 has been raised, but only unsuccessfully to date. In the case concerning the rule against reflective loss (considered above in the context of Article 16) it was also argued that Article 26 was engaged. The Judge rejected the argument that Article 26 applied, noting that whilst Article 16 was focused on the mandatory nature of an English rule, Article 26 was focused instead on the application of the foreign law and whether it ran contrary to English public policy. The Judge considered that whilst the Dutch law provision in question might be contrary to a substantive rule of English law, the rule was not to be equated with infringing a fundamental principle.<sup>1306</sup>

In practice, arguments have been raised that extremely low (or extremely high) levels of damages available under the applicable law might be manifestly incompatible with public policy, usually identified as a policy of adequate compensation for a victim. Such arguments have not yet been considered by the Courts.

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<sup>1304</sup> The position regarding contribution claims under the pre-Rome II English choice of law rules is controversial: see (1) *The Soldiers, Sailors, Airmen and Families Association – Forces Help* (2) *The Ministry of Defence v Allgemeines Krankenhaus Viersen* [2020] EWCA Civ 926 which is currently subject to an application for permission to appeal to the Supreme Court.

<sup>1305</sup> For England, Wales and NI: The Law Applicable to Non-Contractual Obligations (England and Wales and Northern Ireland) Regulations 2008. For Scotland: The Law Applicable to Non-Contractual Obligations (Scotland) Regulations 2008.

<sup>1306</sup> *KMG International NV v Chen* [2019] EWHC 2389 (Comm)

26. *Practical interaction between the Rome II Regulation and other EU and international legal instruments, in specific areas such as environmental damages, intellectual property rights or data protection (Arts. 27, 28, 29)*

Articles 27, 28 and 29 have not yet received detailed consideration.

## 2.7 Comments on other Practical Problems

27. *The impact of the application of the 1971 Hague Convention on the law applicable to traffic accidents on legal certainty (where relevant for your Member State)*
28. *Any other practical problems with respect to the application or interpretation of the Rome II Regulation, including but not limited to the suitability of the mosaic approach*

**Assessment of damages in personal injury claims:** Following the judgment of the Court of Appeal in *Wall v Mutuelle de Poitiers* – see paragraphs 36-37 above, this continues to be a problematic area in practice and numerous issues remain unresolved.

## 3. Comments on areas of interest

There are a significant number of decisions in the context of financial torts. These are mainly addressed in the context of Article 4.

In a number of claims concerning environmental damage/corporate abuse of human rights, Claimants have relied on Article 7, but this has not been controversial to-date.

## 4. List of national case law

### England and Wales

<u>Court or tribunal</u>	<u>Case name and reference number</u>  <u>Reference to decision of the Court of Justice if applicable</u>	<u>Date</u>	<u>Article(s) of Rome II</u>	<u>Issues / subject areas</u>	<u>Findings (only for key cases)</u>
High Court Queen's Bench Division	Qatar Airways Group v Middle East News and others  [2020] EWHC 2975 (QB)  Saini J	06/11/2020	Article 1	Judge notes in passing but without detailed analysis that there was a powerful argument that malicious falsehood fell within Rome II as it was not a claim for defamation and was a claim targeted at economic interests rather than privacy rights [166].	
High Court Queen's Bench Division	BVC v EWF  [2019] EWHC 2506 (QB)  HHJ Parkes QC	26/09/2019	Article 1	Alleged harassment carried out via email. Concluded that though Rome II did not apply to claims arising from violation of privacy and rights relating to personality, that did not include harassment.	
Court of Appeal	Committeri v Club Med	9/08/2018	Article 1	Whether a claim was properly characterised as contractual or non-contractual.	Claim in respect of injuries suffered in a climbing accident whilst on a holiday booked with the Defendant. Considered that the booking

	[2018] EWCA Civ 1889				contract was indispensable to the claim for breach. Accordingly, the claim was not non-contractual [48] to [59].
High Court	Rai v MOD [2016] 5 WLUK 135 HHJ Gargan	9/05/2016	Article 1	Injury sustained during armed forces training exercise abroad did not arise out of an acte iura imperii.	
High Court Commercial Court	Impala Warehousing v Wanxiang [2015] EWHC 811 (Comm) Blair J	25/03/2015	Article 1	Conclusion that bailment on terms was contractual rather than non-contractual [63] – [81].	
Court of Appeal	Jacobs v MIB [2010] EWCA Civ 1208	27/10/10	Article 1	Question as to whether there was a conflict of laws issue.	
High Court Queen's Bench Division	Owen v Galgey and others [2020] EWHC Linden J	21/12/2020	Article 4	Application of Article 4(3). Conclusion that Article 4(3) was engaged to revert to the Article 4(1) law.  Detailed treatment of Article 4(2) [30] – [35] and Article 4(3) [36] – [45].	
High Court Commercial Court	Avonwick Holdings Limited v Azito Holdings Limited	14/07/2020	Article 4	Application of Article 4(1) and Article 4(3).  Detailed treatment of Article 4(3) at [154] – [159].	

	[2020] EWHC 1844 (Comm) Picken J				
High Court Commercial Court	ED&F Man Capital Markets Limited [2019] EWHC 1661 (Comm) Daniel Toledano QC	4/07/2019	Article 4	Applicable law of unlawful means conspiracy claim and knowing receipt claim.	Consideration of identifying direct damage for unlawful means conspiracy claim. Underlying issue was non-receipt of a product paid for. Conclusion that the direct damage was where the money had been paid out for the product [59] to [69].  Further noted the debate as to whether a knowing receipt claim fell within article 4 or article 10.
High Court Commercial Court	FM Capital Partners v Marino [2018] EWHC 1768 (Comm) Cockerill J	11/07/2018	Article 4 and Article 10	Applicable law of conspiracy, dishonest assistance and knowing receipt claims.	Cockerill J noted it was common ground that she should apply Article 4 to the knowing receipt claim despite the academic debate as to whether Article 10 or Article 4 is applicable [482].  Detailed consideration of the location of damage in a financial loss claim [481] - [520].
High Court Chancery Division	Mx1 v F [2018] 1041 (Ch) Marcus Smith J	8 May 2018	Article 4	Applicable law to a lawful/ unlawful means conspiracy claim where the substance of the claim were tweets said to cause damage to C's business.	The touchstone for identifying damage in cases of financial and non-material loss is reversibility i.e. the point at which an act or omission taken by a victim which will cause that victim loss, ceases to become reversible by their own actions. In this case a point of irreversible loss occurred at the point a contract was made with a third party in England and Wales to uncover the identity of who sent the tweets [39] and [40].
Supreme Court	Brownlie v Four Seasons	19/12/2017	Article 4	Court of Appeal held that English law applied to a claim by a	



Court of Appeal	[2017] UKSC 80 [2015] EWCA Civ 665	03/07/2015		dependant arising out of a fatal accident in Egypt. Common ground, following <i>Lazar</i> , in the Supreme Court that the Court of Appeal were wrong to do so and that Egyptian law, as the place of the accident, applied.	
High Court Queen's Bench Division	Pickard v Marshall [2017] EWCA Civ 17 (application for permission to appeal) [2015] EWHC 3421 (QB) Cranston J Dingemans J	19/01/2017 27/11/2015	Article 4	Application of Article 4 to a road traffic accident in France involving an uninsured French national, and two British nationals.	Article 4(2) applies to the claims against individuals of like habitual residence regardless of there being more than two parties involved. It was not confined to cases where there are only two parties.  Article 4(3) could apply to return to a law designated under Article 4(1) but excluded by Article 4(2).  Treatment of applicable law at [9] to [23].
High Court Commercial Court	Pan Oceanic Chartering Inc v UNIPEC [2016] EWHC 2774 (Comm) Carr J	10/11/2016	Article 4 and Article 14	Application of Article 14 and location of financial loss for Article 4.	Article 14 did not apply because whilst a party had played a part in negotiating the terms of an agreement containing a choice of law clause, it had not negotiated on its own behalf and it was hard to see how there had been a "genuine opportunity to influence its contents".  Consideration of the location of damage in a financial loss claim [183] to [210].
Court of Appeal	Erste Group Bank AG v JSC 'VMZ Red October' [2015] EWCA Civ 379	17/04/2015	Article 4	Consideration of applicable law of conspiracy claim	Article 4 must be given an autonomous interpretation, broadly in line with the treatment of the Brussels regime, noting the important distinction that under the Brussels regime a C may choose between the place where the harmful event occurred and the place where

					damage was sustained whereas Rome II sought to identify an applicable law. Application of Article 4(3). [89] to [98].
High Court Queen's Division	Bench Winrow v Hemphill [2014] EWHC 3164 (QB) Slade J	06/10/2014	Article 4	Early consideration of issues under article 4(2) and article 4(3).	Detailed consideration of habitual residence and the operation of article 4(3).
High Court Queen's Division	Bench Stylianou v Suncorp [2013] EWHC 2188 (QB) Sir Robert Nelson	24/07/2013	Article 4	Interaction between recital 33 and Article 4(3), concluding that recital 33 cannot override a proper interpretation of Article 4.	
High Court Commercial Court	Alliance Bank v Aquanta [2011] EWHC 3281 (Comm) Burton J	14/12/2011	Article 4 and Article 10	Question of the law applicable to claims in respect of dishonest and knowing receipt and whether knowing receipt fell within article 4 or article 10.	
High Court Queen's Division	Bench Hillside (New Media) Limited v Bjarte Baasland [2010] EWHC 3336 (Comm) Andrew Smith J	20/12/10	Article 4	Considers where immediate loss was suffered in a case where a betting company sought a negative declaration against a gambler who had lost substantial money placing bets and sought to contend that the betting company were liable for the same. Noted that the claimant suffered loss when he placed bets and thus funds left his online wallet, rather than merely transferring funds	

				into the wallet from his bank accounts.	
High Court Chancery	Lyle & Scott Limited v American Eagle Outfitters  [2021] EWHC 90 (Ch)  Miles J	20/01/2021	Article 6 and Article 8	Question of whether Article 6 or Article 8 governed a passing off claim relying on Dicey [72]. Concluded it fell under Article 6.	
Court of Appeal	Shenzen Senior Technology v Celgard  [2020] EWCA Civ 1293	9/10/2020	Article 6 and Article 4	Claim for unfair competition affecting exclusively the interests of a specific competitor, and so under Article 6(2), Article 4 applies.  Question of where the damage occurred.	
High Court Chancery Division	Deutsche Bank AG v Mastercard  [2018] EWHC 412 (Ch)  Barling J	09/03/2018	Article 6	“Where the market is or is likely to be affected” is the country in which the Merchant was based at the time of the transactions when the Merchant paid the Acquiring Bank.	
High Court Chancery Division	Conductive Inkjet v Uni-Pixel  [2013] EWHC 2968 (Ch)  Roth J	7/10/2013	Article 6	Claim for equitable breach of confidence probably regarded as an act of unfair competition exclusively affecting the interests, in this case, of a specific competitor, so article 4 applies by article 6(2).	
High Court	Begum v Maran	13/07/2020	Article 7	Consideration of whether it was reasonably arguable that a fall from height whilst shipbreaking was	

Queen's Bench Division	[2020] EWHC 1846 (QB) Jay J			causally connected to environmental damage.	
High Court Technology and Construction Court	Okpabi v Shell [2018] EWHC 1768 (TCC) Fraser J	26/01/2017	Article 7	Article 7 raised in passing at [55].	
High Court Commercial Court	Banque Cantonale v Polevent [2015] EWHC 1968 (Comm) Teare J	10/07/2015	Article 10	Application of Article 10(3).	
High Court Commercial Court	Angola v Perfectbit [2018] EWHC 965 (Comm) Bryan J	26/04/2018	Article 12	Noted the debate that a claim by a contracting party against a non-contracting party for misrepresentation could fall outside article 12.	
High Court Commercial Court	Bazhanov v Fosman [2017] EWHC 3404 (Comm) Daniel Toledano QC	17/01/2018	Article 10 and 14	No basis for application of Article 14, and application of Article 10 meant that only Article 10(3) was engaged and 10(4) did not yield a different law.	
High Court Queen's Bench Division	Troke and others v Amgen Seguros [2020] EWHC 2976 (QB) Griffiths J	6/11/2020	Article 15	The award of interest falls within Article 1(3), and judges, when exercising their discretion over interest under the law of the forum, were not obliged to award interest in line with the applicable law.	

High Court Queen's Division	Bench Pandya v Inters Alonika [2020] EWHC 273 (QB) Tipples J	28/01/2020	Article 15	Scope of Article 15(h) vs Article 1(3): to stop limitation under Greek law one must serve as well as issue, accordingly service could not be downgraded to a matter of procedure.	
High Court Commercial Court	KMG International v Chen [2019] EWHC 2389 (Comm) Christopher Hancock QC	13/09/2019	Article 15, 16 and 26	Question of whether the reflective loss principle is a rule of procedure, overriding provision or rule of public policy	Judge considered that the reflective loss rule was a rule that limited liability and fell within article 15(f) so it was a matter for the applicable law rather than the law of the forum. Also held that the rule was not an overriding provision or part of public policy. See [21] to [56].
High Court Queen's Division	Bench Folkes v Generali Assurances [2019] EWHC 801 (QB) Nicol J	02/04/2019	Article 15	Process of awarding an interim payment is part of the procedure of the forum, rather than the applicable law.	
High Court Commercial Court	AS Latvijas v Antonov [2016] EWHC 1679 (Comm) Leggatt J	08/07/2016	Article 15	Issue was whether interest was governed by applicable law and concludes that it was persuasive that the applicable law rather than the law of the forum would govern the same, and that any procedural power the Court has to award interest should be exercised in line with the applicable law.	
Court of Appeal	Actavis UK Limited v Elli Lilly	25/06/2015	Article 15	Whether a party applying for a DNI in respect of the UK, French, Italian and Spanish designations of a	

	[2015] EWCA Civ 555			patent, needed to satisfy only the lex fori, English test, for the availability of such a declaration or, needed to satisfy the requirements of the respective foreign laws.  Concluded the rules were about the admissibility of an action and were therefore procedural.	
Court of Appeal	Wall v Mutuelle de Poitiers [2014] EWCA Civ 138	20/02/2014	Article 15	Whether expert evidence fell within Article 1(3) or Article 15	Where the applicable law has certain requirements or practices regulating expert evidence, should the court give effect to the same, or do the rules of the forum prevail? Concludes that expert evidence is a matter for the law of the forum [15] – [20], [39] – [45] and [48].  Important decision on the meaning of “applicable law”. The applicable law for the purposes of Rome II includes not just black letter rules but also judicial practices or guidelines [21] - [29], [32] – [38] and [49].
High Court Queen’s Division	Bench Syred v PZU [2016] EWHC 254 (QB) Soole J	12/02/2016	Article 16	Whether a provision that benefits paid or likely to be paid following personal injury should be disregarded was a mandatory overriding provision.	
High Court Queen’s Division	Bench Bianco v Bennett [2015] EWHC 626 (QB) Warby J	12/03/2015	Article 19	The law applicable to a right of subrogation is distinct and must remain distinct from the law applicable to the beneficiary’s rights against a defendant.	

High Court Commercial Court	XL Insurance Co v AXA [2017] EWHC 3383 (Comm) HHJ Waksman QC	22/12/2017	Article 20	Tentative remarks that Article 20 did not apply where the underlying obligation was contractual rather than non-contractual [46] and [47].	
Court of Appeal	FS Cairo (Nile Plaza) LLC v Brownlie [2020] EWCA Civ 996	29/07/2020	Pleading and Proof	Issue as to the English Court's approach to foreign law (applicable under Rome II) and in particular whether there is scope for a party to rely on the traditional presumption that foreign law is the same as English law.	This important issue will be the subject of a judgment of the Supreme Court in 2021.
High Court Commercial Court	Iranian Offshore v Dean [2018] EWHC 2759 (Comm) Baker J	22/10/2018	Pleading and Proof	Approach of English Court to foreign law.	
Court of Appeal	OPO v MLA [2014] EWCA Civ 1277	09/10/2014	Pleading and Proof	The presumption that English law is the same as a foreign law when the foreign law is not pleaded and proved is not incompatible with Article 4.	
High Court Queen's Bench Division	Allen v Depuy International [2014] EWHC 753 (QB) Stewart J	18/03/2014	Article 31	Temporal scope of Rome II in a product liability claim.	Concludes that, on the facts, for a product liability claim it was date of manufacture.

High Court Queen's Division	Bench Homawoo v GMF Assurance SA [2010] EWHC 1941 (QB) Slade J Reference made to CJEU, C-412/10	27/07/2010	Article 31	Temporal scope of Rome II.	CJEU determined that Rome II applied where the event giving rise to damage occurred after 11 January 2009.
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### Scotland

Sheriff Court	Gilmour v Linea Directa [2017] SC EDIN 81 Sheriff PJ Braid	14 November 2017	Article 15 and 1(3)	Whether applicable law governs both burden of proof and standard of proof.  Held that the Judge should approach the matter as far as possible in the manner of a Spanish judge so within Spanish law.	
Sheriff Court	Fitzsimmons v MIB [2020] EDIN 32 Sheriff Kenneth J McGowan	13 May 2020	Article 1	Argument that a requirement of the Greek Auxillary Fund that a driver take all reasonable steps to assist in the identification of the driver of the vehicle at fault, was a matter for the law of the forum and not part of the applicable law.	



Ireland

High Court	SPV Sam Dragon v GE Transport Finance Ltd [2012] IEHC 240 McGovern J	15/06/2012	Article 4	Application of Article 4. Concludes that Korea is the "country most closely connected with the alleged wrong" [18].	
High Court	ICDL GCC v Sharikat and another [2011] IEHC 343 Clarke J	4/8/2011	Article 4	Judge expressed an unwillingness to have claims against two closely linked defendants determined by separate laws despite the conclusions reached by application of Article 4(1).  Judge considered this was dépeçage. Dicey considers this is not an example of dépeçage because it was two separate claims against two defendants.	

## 2.4 Comparative table

The following comparative table summarises the issues (x) identified per provision in the legal studies conducted across the Member States.

	AT	BE	BG	HR	CY	CZ	EE	FI	FR	DE	EL	HU	IE	IT	LV	LT	LU	MT	NL	PL	PT	RO	SK	SI	ES	SE	UK
Material scope (Art. 1)				x						x	x								x				x	x			
Temporal scope (Arts. 31-32)	x			x					x	x	x	x							x	x							x
Concept of "non-contractual obligations" (Art. 2)	x			x					x	x	x	x		x									x	x			
Universal application (Art. 3)											x				x												
General rule (Art. 4)		x	x		x						x	x	x							x	x	x		x			x
Suitability of Art. 4 for financial market torts									x	x				x													
Product liability (Art. 5) and interaction with the application of 1973 Hague Convention on the Law Applicable to Products Liability										x										x				x			
Unfair competition (Art. 6)	x	x		x						x													x	x			
Environmental damage (Art. 7)									x	x																	
Infringement of intellectual property rights (Arts. 8, 13)		x							x	x				x						x			x				
Industrial action (Art. 9)										x										x							x



	AT	BE	BG	HR	CY	CZ	EE	FI	FR	DE	EL	HU	IE	IT	LV	LT	LU	MT	NL	PL	PT	RO	SK	SI	ES	SE	UK
Unjust enrichment (Art. 10)	x		x			x				x												x	x				x
<i>Negotiorum gestio</i> (Art. 11)	x									x																	
<i>Culpa in contrahendo</i> (Art. 12)	x									x				x					x	x		x					
Freedom of choice (Art. 14)	x			x			x		x	x				x													
Exclusion of 'evidence and procedure' (Art. 1(3)) and relation to Arts. 21-22										x																	
Pleading, proof and application of the substantive rules of the law applicable												x		x	x										x		x
Scope of the law applicable (Art. 15)									x	x		x															x
Overriding mandatory provisions (Art. 16)										x																	
Direct action against the insurer of the person liable (Art. 18)										x										x				x	x		
Subrogation (Art. 19)										x	x											x		x			
Multiple liability (Art. 20)										x										x							
Concept of "habitual residence" (Art. 23)			x						x												x						
Exclusion of renvoi (Art. 24) and States with more than one legal system (Art. 25)																											x



	AT	BE	BG	HR	CY	CZ	EE	FI	FR	DE	EL	HU	IE	IT	LV	LT	LU	MT	NL	PL	PT	RO	SK	SI	ES	SE	UK
Public policy (Art. 26)									x								x										
Interaction with other EU and international legal instruments (Recital 7, Arts. 27, 28, 29)	x	x		x					x	x		x					x			x				x			
Traffic accident cases, and the impact of the application of the 1971 Hague Convention on the law applicable to traffic accidents on legal certainty	x			x											x		x		x				x	x	x		
Suitability of the mosaic approach	x							x		x		x		x						x				x		x	
Personality rights (including defamation), treatment of data protection, SLAPPs	x			x					x	x		x						x						x	x		
Corporate abuses against human rights										x									x								
Artificial intelligence																											



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### 3. Empirical Study

A consultation was conducted across all the Member States via an online survey and qualitative individual interviews. The resulting data was collected from stakeholders including academics, lawyers, and judges. **Information on the practical problems** deriving from the application of the Regulation was collected and served to identify gaps in the Regulation and make recommendations for future action during the review process.

The following Empirical Study comprises:

- An overall analysis of the data laying out the answers of the respondents, analysing the key issues identified, and listing the suggested improvements.
- An analysis of the data per issue, including those of particular interest to the Commission: privacy, personality rights, data protection and SLAPPs, business and human rights, artificial intelligence, and personal injury claims.
- A complete view of the data collected.

### 3.1 Overall analysis of the data

In total, 102 respondents participated to the survey. Stakeholders comprise:

57 academics

28 lawyers

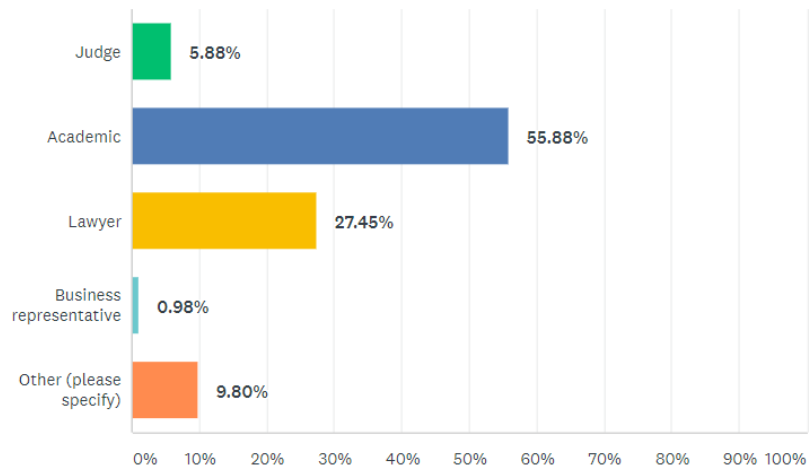
6 judges

1 business representative

10 categorising themselves as "other", including stakeholders with multiple professions (academic/lawyer, senior law clerk, arbitrator, consultant).

Are you a:

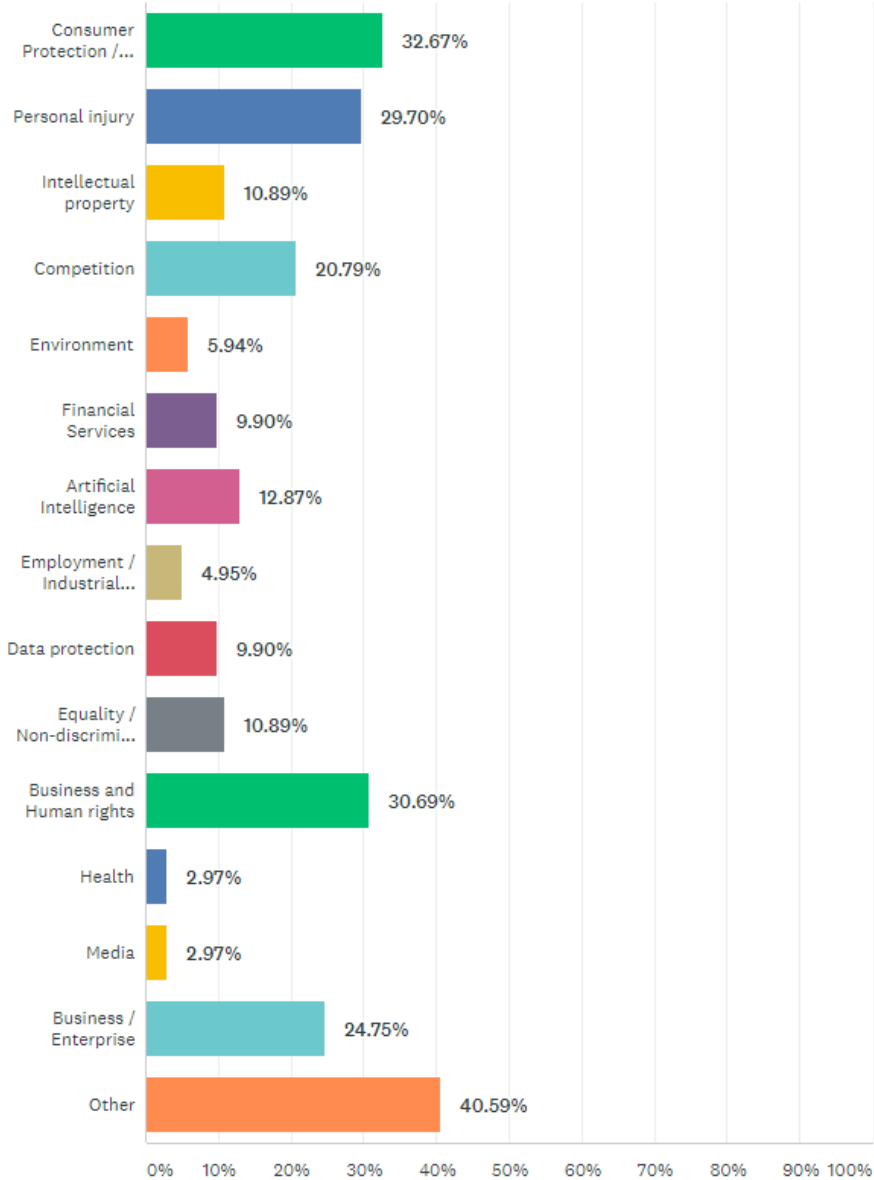
Answered: 102 Skipped: 0



Respondents covered a range of different sectors, most prominently consumer protection / product liability, business and human rights, and personal injury.

# Please select your field(s) of expertise

Answered: 101 Skipped: 1



The respondents represent 27 Member States (Denmark excluded). 3 stakeholders with a specific expertise in business and human rights answered generally.

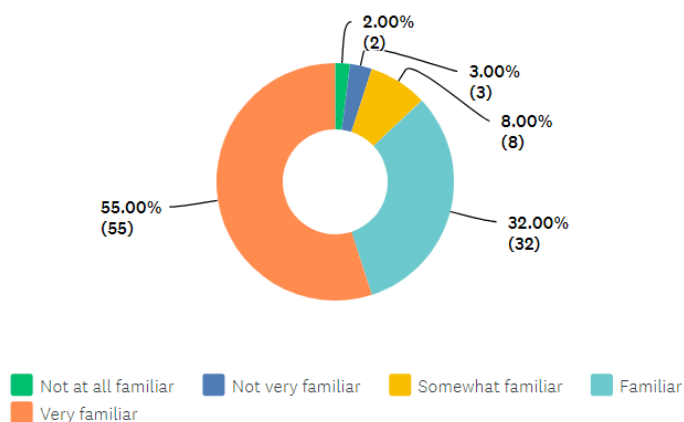
	Surveys	Interviews	Total
AT	5		5
BE	4		4
BG	2		2
HR	1		1
CY	2		2
CZ	3		3
EE	3		3
FI	2		2
FR	5	1	6
DE	4		4
EL	4	1	5
HU	4	2	6
IE	1		1
IT	6	1	7
LV	1	1	2
LT	4		4
LU	1		1
MT	3		3
NL	2	1	3
PL	5		5
PT	2	2	4
RO	1		1
SK	3		3
SI	4		4
ES	3		3
SE	3		3
UK	12		12
<i>BHR</i>	2	1	3
	<b>92</b>	<b>10</b>	<b>102</b>





## How familiar would you say that you are with the Rome II Regulation?

Answered: 100 Skipped: 2



Participating stakeholders have a good command of the Rome II Regulation and **practical experience** with its application. 87% of the respondents categorised them as “very familiar” (55%) and “familiar” (32%) with the Rome II Regulation. 44% of the respondents refer frequently to Rome II in their practice, and 52% refer to it occasionally. Academics commented that they refer to Rome II in their research, academic writing, teaching, and some in their advisory work as consultants. Practising lawyers commented they referred to Rome II in cases involving inter alia personal injury, business and human rights, competition, and intellectual property rights.

In their practice, stakeholders refer most prominently to the **general rule of Article 4** (84%). The provisions regarding the **scope of applicability** (Arts. 1 and 2), and the **scope of the law applicable** (Art. 15) are then referred to most frequently (with respectively 54%, 48% and 47% of the respondents referring to them in their practice). **Article 14** allowing parties to choose the applicable law is applied by 44% of the respondents in their work, followed by Article 16 on **overriding mandatory provisions** (42%).

## Which provisions of the Rome II Regulation do you refer to most frequently in your practice/work?

Answered: 95 Skipped: 7

ANSWER CHOICES–	RESPONSES–
Art. 4 General rule	84.21% 80
Art. 1 Scope	53.68% 51

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ANSWER CHOICES-	RESPONSES-
Art. 2 Non-contractual obligations	48.42% 46
Art. 15 Scope of the law applicable	47.37% 45
Art. 14 Freedom of choice	44.21% 42
Art. 16 Overriding mandatory provisions	42.11% 40
Art. 3 Universal application	38.95% 37
Art. 23 Habitual residence	29.47% 28
Art. 26 Public policy of the forum	28.42% 27
Art. 6 Unfair competition and acts restricting free competition	27.37% 26
Art. 28 Relationship with existing international conventions	26.32% 25
Art. 17 Rules of safety and conduct	24.21% 23
Art. 18 Direct action against the insurer of the person liable	22.11% 21
Art. 5 Product liability	20.00% 19
Art. 7 Environmental damage	17.89% 17
Art. 10 Unjust enrichment	17.89% 17
Art. 12 Culpa in contrahendo	17.89% 17
Art. 31 Application in time	17.89% 17
Art. 8 Infringement of intellectual property rights	16.84% 16
Art. 22 Burden of proof	16.84% 16

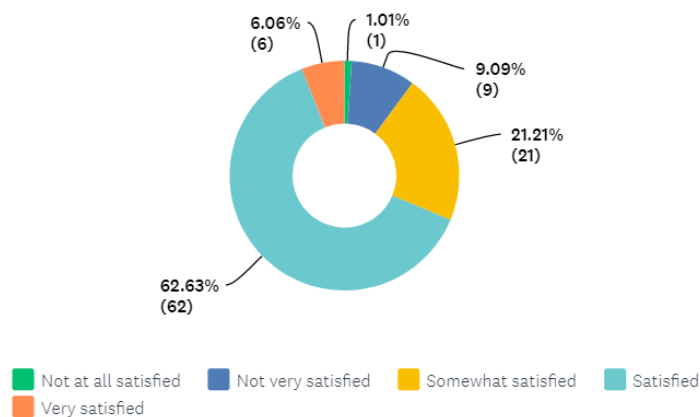


ANSWER CHOICES-	RESPONSES-
Art. 24 Exclusion of renvoi	15.79% 15
Art. 19 Subrogation	14.74% 14
Art. 20 Multiple liability	14.74% 14
Art. 27 Relationship with other provisions of Community law	14.74% 14
Art. 32 Date of application	12.63% 12
Art. 11 Negotiorum gestio	11.58% 11
Art. 9 Industrial action	6.32% 6
Art. 25 States with more than one legal system	6.32% 6
Art. 13 Applicability of Article 8	5.26% 5
Art. 29 List of conventions	5.26% 5
Art. 30 Review clause	3.16% 3
Art. 21 Formal validity	2.11% 2
Total Respondents: 95	

The participating stakeholders expressed a **general satisfaction with the operation of the Rome II Regulation** in their practice, with 63% of them declaring themselves "satisfied" (6% "very satisfied"). 21% were "somewhat satisfied", and the remaining 10% ranged from "not very satisfied" to "not at all satisfied".

## How satisfied are you with the operation of the Rome II Regulation in your area(s) of practice/work?

Answered: 99 Skipped: 3



Of the **features of Rome II**, most respondents were of the opinion that the Art. 4 general rule “works well” (62%). Half of all participants thought that Art. 3 (universal application) “works well” (50%), while there was moderate support for Arts. 1 (scope – 43%), 2 (non-contractual obligations – 36%) and 14 (freedom of choice – 27%). Most Rome II provisions were deemed to “work well” by 10-21% of respondents. Those provisions receiving approval from less than 10% of respondents were: Art. 30 (review clause – 1%), Art. 9 (industrial action – 3%), Art. 13 (applicability of Art. 8 – 5%), Art. 25 (states with more than one legal system – 6%), Art. 29 (list of conventions – 6%), Art. 19 (subrogation – 7%), Art. 21 (formal validity – 7%), Art. 32 (date of application – 8%), Art. 20 (multiple liability – 9%), Art. 27 (relationship with other provisions of Community law – 9%), and Art. 31 (application in time – 9%). Note, however, the potential influence of unfamiliarity: all the provisions in this list were identified as ones to which respondents refer to frequently in their work by fewer than 20% of participants, and all except Art. 20 by fewer than 15%.

## Which features of the Rome II Regulation work well, in your opinion?

Answered: 86 Skipped: 16

ANSWER CHOICES	RESPONSES	
▼ Art. 4 General rule	61.63%	53
▼ Art. 3 Universal application	50.00%	43
▼ Art. 1 Scope	43.02%	37
▼ Art. 2 Non-contractual obligations	36.05%	31
▼ Art. 14 Freedom of choice	26.74%	23
▼ Art. 23 Habitual residence	20.93%	18
▼ Art. 15 Scope of the law applicable	19.77%	17
▼ Art. 16 Overriding mandatory provisions	18.60%	16
▼ Art. 24 Exclusion of renvoi	18.60%	16
▼ Art. 6 Unfair competition and acts restricting free competition	17.44%	15
▼ Comments	Responses	17.44%
▼ Art. 5 Product liability	16.28%	14
▼ Art. 7 Environmental damage	13.95%	12
▼ Art. 12 Culpa in contrahendo	13.95%	12
▼ Art. 17 Rules of safety and conduct	13.95%	12
▼ Art. 22 Burden of proof	13.95%	12
▼ Art. 26 Public policy of the forum	13.95%	12
▼ Art. 18 Direct action against the insurer of the person liable	12.79%	11
▼ Art. 28 Relationship with existing international conventions	12.79%	11
▼ Art. 10 Unjust enrichment	11.63%	10
▼ Art. 8 Infringement of intellectual property rights	10.47%	9
▼ Art. 11 Negotiorum gestio	10.47%	9
▼ Art. 20 Multiple liability	9.30%	8
▼ Art. 27 Relationship with other provisions of Community law	9.30%	8
▼ Art. 31 Application in time	9.30%	8
▼ Art. 32 Date of application	8.14%	7
▼ Art. 19 Subrogation	6.98%	6
▼ Art. 21 Formal validity	6.98%	6
▼ Art. 25 States with more than one legal system	5.81%	5
▼ Art. 29 List of conventions	5.81%	5
▼ Art. 13 Applicability of Article 8	4.65%	4
▼ Art. 9 Industrial action	3.49%	3
▼ Art. 30 Review clause	1.16%	1
Total Respondents: 86		

These satisfaction levels may also be underrepresentative. For example, four participants commented that all Rome II articles work well, while selecting none of the options. One participant commented that they had



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only selected articles that work well where there would be 'scope for concern', ignoring articles that were 'straightforward'. Another included some articles which they described courts as not having had 'major problems' with, but 'in specific situations' generating difficulties of interpretation, such as in identifying whether a claim is contractual or non-contractual for the purposes of Arts. 1 and 2. Respondents may therefore have varied in their degrees of selectiveness.

In addition to receiving the highest rate of approval, Art. 4 (general rule) also had the highest number of respondents who thought that it was "in need of improvement" (29%). This includes 7 respondents of the opinion both that Art. 4 works well and needs improvement (9% of all respondents to this question). Arts. 1 (scope) and 14 (freedom of choice) also ranked highly in both "working well" and "needing improvement", Art. 1 receiving 43% approval with 28% calling for improvement, and Art. 14 27% approval with 18% need for improvement.

18% of participants also identified Art. 5 (product liability) as requiring improvement, while Arts. 6 (unfair competition – 16%) and 16 (overriding mandatory provisions – 16%) also ranked highly. Most provisions were identified as needing improvement by 5-15% of respondents. No respondents thought that Art. 29 (list of conventions) needed improvement, but note also the relatively low level of approval (6%) and frequency of interaction (5%) (see above).

Fewer than 5% of respondents identified the following provisions as in need of improvement, with an asterisk to indicate that these articles also received particularly low levels of support, and italicised to indicate that fewer than 15% of respondents frequently engage with this provision (see above): *Art 13\** (applicability of Art. 8 – 1%), *Art. 21\** (formal validity – 1%), Art. 24 (exclusion of renvoi – 1%), *Art. 25\** (states with more than one legal system – 1%), Art. 11 (*negotiorum gestio* – 3%), *Art. 19\** (subrogation – 3%), *Art. 27\** (relationship with other provisions of Community law – 3%), *Art. 30\** (review clause – 3%), Art. 12 (culpa in contrahendo – 4%), and Art. 22 (burden of proof – 4%).



## Which features of the Rome II Regulation are in need of improvement, in your opinion?

Answered: 80 Skipped: 22

ANSWER CHOICES	RESPONSES
▼ Comments	Responses 50.00% 40
▼ Art. 4 General rule	28.75% 23
▼ Art. 1 Scope	27.50% 22
▼ Art. 5 Product liability	17.50% 14
▼ Art. 14 Freedom of choice	17.50% 14
▼ Art. 6 Unfair competition and acts restricting free competition	16.25% 13
▼ Art. 16 Overriding mandatory provisions	16.25% 13
▼ Art. 2 Non-contractual obligations	15.00% 12
▼ Art. 15 Scope of the law applicable	12.50% 10
▼ Art. 7 Environmental damage	11.25% 9
▼ Art. 8 Infringement of intellectual property rights	8.75% 7
▼ Art. 17 Rules of safety and conduct	8.75% 7
▼ Art. 26 Public policy of the forum	8.75% 7
▼ Art. 31 Application in time	8.75% 7
▼ Art. 23 Habitual residence	7.50% 6
▼ Art. 28 Relationship with existing international conventions	7.50% 6
▼ Art. 9 Industrial action	6.25% 5
▼ Art. 32 Date of application	6.25% 5
▼ Art. 3 Universal application	5.00% 4
▼ Art. 10 Unjust enrichment	5.00% 4
▼ Art. 18 Direct action against the insurer of the person liable	5.00% 4
▼ Art. 20 Multiple liability	5.00% 4
▼ Art. 12 Culpa in contrahendo	3.75% 3
▼ Art. 22 Burden of proof	3.75% 3
▼ Art. 11 Negotiorum gestio	2.50% 2
▼ Art. 19 Subrogation	2.50% 2
▼ Art. 27 Relationship with other provisions of Community law	2.50% 2
▼ Art. 30 Review clause	2.50% 2
▼ Art. 13 Applicability of Article 8	1.25% 1
▼ Art. 21 Formal validity	1.25% 1
▼ Art. 24 Exclusion of renvoi	1.25% 1
▼ Art. 25 States with more than one legal system	1.25% 1
▼ Art. 29 List of conventions	0.00% 0
Total Respondents: 80	



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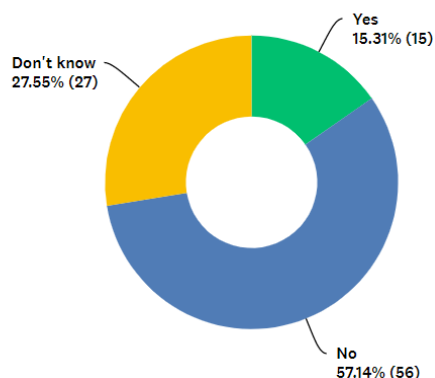
Half of all respondents to this question responded with a **comment**, of which the vast majority (78%) saw participants further explain their identified problem(s) and/or suggest solutions. Other comments included that no change is necessary (13%), that they are unsure (5%), or that their responses only represent a selection of the most significant areas for improvement (3%).

The explanatory comments include a **broad range** of specific suggestions with limited overlap between respondents. One common theme not captured by the numerical measure included above was a call for Rome II's scope to be expanded to include violations of **personality rights**, specified in 23% of comments.

Several comments also suggested specific reforms to the **Art. 14 choice of law provisions**, which the majority of respondents indicated that parties rarely make use of. This is not uniform, however, with one participant describing such clauses as 'a standard practice' in their experience. Where they are used, wording varies, but respondents gave examples of clauses governing disputes 'arising out of a contract, including non-contractual claims', 'arising out of contract, tort or otherwise', and arising 'in connection with this contract'. One participant cited the Loan Market Association standard clauses.

To your knowledge, do parties take advantage of the option given by Art. 14 of the Rome II Regulation to choose the law applicable to non-contractual obligations?

Answered: 98 Skipped: 4

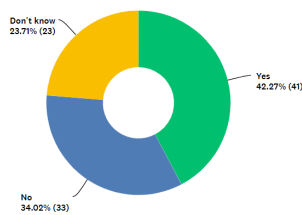


When asked about **judicial application of Rome II**, 42% of participants responded that courts in legal systems with which they are familiar had had difficulties in applying its provisions, while 49% noted courts' difficulties in ascertaining the content of foreign law.



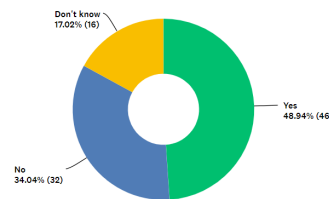
Have the courts in the legal systems with which you are familiar encountered any difficulties in applying the Rome II Regulation?

Answered: 97 Skipped: 5



Have the courts in the legal systems with which you are familiar encountered any difficulties in ascertaining the content of foreign law, in particular with expert opinions?

Answered: 94 Skipped: 8



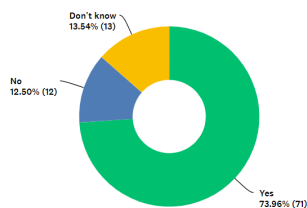
Most participant comments about **difficulties encountered in applying Rome II** can be categorised as either relating to difficulties in **applying specific provisions**, or to judicial tendency to **overlook or refuse to apply Rome II altogether**.

Comments on the **difficulties in ascertaining the content of foreign law** highlight **procedural divergence** between Member States, specifically in the roles of judges; parties; experts; national organisations, for example the Member State's Ministry of Justice or the Portuguese Centre of Comparative Law; and reference to foreign embassies and jurisdictions, including under European Convention on Information on Foreign Law ('the London Convention'). Many participants highlight the **inadequacy of existing expertise**, particularly in the context of less frequently encountered legal systems or linguistic barriers. Several also refer to the **lengthiness** of processes for ascertaining foreign law, particularly where national bodies or foreign jurisdictions are engaged. One respondent proposes a European-level institute for comparative law to provide expert advice to Member State courts on the content of foreign laws.

Most participants agree that **Rome II works well alongside Rome I and Brussels I bis**.

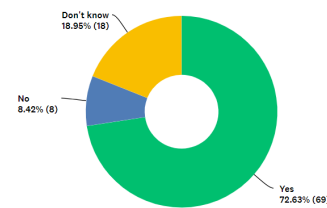
In your opinion, do the rules in the Rome II Regulation work well alongside those in the Rome I Regulation governing the law applicable to contractual obligations?

Answered: 96 Skipped: 6



In your opinion, do the rules in the Rome II Regulation work well alongside those in the Brussels I Regulation on jurisdiction and recognition and enforcement of judgments in civil and commercial matters?

Answered: 95 Skipped: 7



As regards **compatibility with Rome I**, while broadly praising the complementary nature of the Regulations, many respondents identified shortcomings with the existing regime. As to **scope**, comments included that 'dovetailing between the two [Regulations is] too readily assumed'; that there is a 'grey zone' between Rome I and II where positive and negative conflicts arise regarding the Regulations' applicability; that characterisation of claims is a difficult issue; that the scope of non-contractual obligations encompassed by Rome II beyond simply delicts is insufficiently clear; and that there is a need to 'fill gaps' in Rome II, such as



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the exclusion of personality rights. Three respondents suggested consolidating Rome I and Rome II into a single instrument.

To improve the **coherence of specific provisions**, two participants commented that the rules on **overriding mandatory provisions** under Art. 9 Rome I are superior to their equivalent under Art. 16 Rome II, one suggesting that the definition in Art. 9(1) Rome I be imported into the latter. Two participants noted difficulties in **labour law**, concerning the scope and purpose of Art. 9 (industrial action) and the relationship between employment contracts and tort. Two respondents also noted the interaction between Rome I and Rome II in interpreting **choice of law agreements** about non-contractual obligations. One of these suggested expanding Art. 15 Rome II to include such cases, although the other described the question as 'academic'. In **product liability**, one respondent commented that it is not clear where contractual liability ends and non-contractual liability begins. Another noted the difficulties faced by courts in differentiating between contractual and non-contractual issues in the context of **motor vehicle insurance in traffic accidents**. A further respondent questioned whether the scope of the **set-off** rule in Art. 17 Rome I encompasses the set-off of non-contractual obligations, or solely contractual ones. A question was also raised as to the relationship between Rome I and Rome II in the context of **corporate social responsibility**.

**Compatibility with Brussels I bis** receives more praise, in particular thanks to common interpretation as developed in case law, although one comment suggests that the need for consistent interpretation has been overemphasised by national judges given CJEU 'confusion' on the matter. One participant suggests that 'it does not make any sense' for victims (eg of road traffic accidents and direct injury) to be entitled to issue proceedings in their home country under a foreign law.

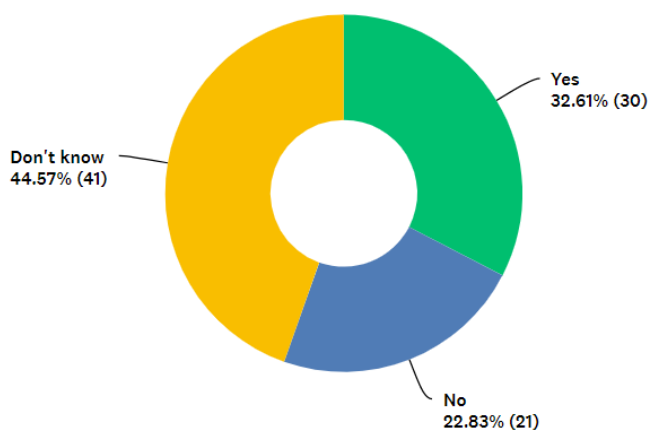
Specific problem areas identified include **personality rights, financial and indirect damages**, and a **lack of harmonisation** of the concepts contractual and non-contractual obligations. One respondent opines that **Art. 7(2) of Brussels I bis** (connecting factor for matters relating to tort, delict or quasi-delict) has been 'interpreted in a claimant-friendly manner' on economic injury, and that it undermines Art. 9 Rome II when industrial action in one country causes economic damages in another. Another respondent suggests that it is unclear whether the scope of Art. 7(2) Brussels I bis extends beyond core 'tort, delict and quasi-delict' to concepts identified as specific categories in Rome II, such as unjust enrichment, culpa in contrahendo and negotiorum gestio. That same respondent also notes and questions divergence between **domicile and habitual residence** under Brussels I bis and Rome II respectively.

Several respondents highlight difficulties arising from **areas reserved for the national law** when applying Rome II and Brussels, specifically issues of **characterisation**; the permissibility of **judicial orders with effects in more than one country**, for example where the order would prohibit conduct in or remove a product from another Member State; and **divergent levels of damage awards** resulting in **forum shopping** and the obtaining of **negative declarations** to establish jurisdiction.

Participants were less familiar with **Rome II's interaction with other international conventions**, such as the Hague Conventions on traffic accidents and product liability, with 45% responding that they did not know whether Rome II works well alongside them, and several comments that the respondent's Member State was not party to the identified conventions. Of those who expressed an opinion, 59% thought that Rome II does work well with such conventions, and 41% that it does not.

In your opinion, do the rules of the Rome II Regulation work well alongside other international conventions (including, e.g., the Hague Conventions on traffic accidents and product liability)?

Answered: 92 Skipped: 10



Most participants focussed on **the Hague Conventions** given as examples in the question. Many reported that the Conventions work well alongside Rome II, one participant stating that 'the position has now regularised' following some initial disputes around applicable law.

As a **conceptual** matter, several respondents expressed dissatisfaction with the 'two track system' for parties and non-parties to the Conventions, as it results in different legal treatment of the same fact in different parts of the Union, and encourages forum shopping. In particular, one respondent commented that the tendency of Convention party states to apply the Conventions even where the dispute involves a non-party Member State appears to run counter to the principles of Rome II. However, others observed that such difficulties would be difficult to overcome given that pre-existing international obligations prevail over EU law under both the Treaty on the Functioning of the European Union and the Vienna Convention on the Law of Treaties, and that limiting such international conventions to ensure uniformity among Member States would be difficult to achieve under international law.

From a **practical** perspective, numerous comments referred to 'uncertainty' and 'confusion' under the current system, describing the relationship between the Conventions and Rome II as 'unclear'. One proposed including specific mention of relevant Conventions in the Rome II Regulation. Another suggested improving the drafting of Art. 28 Rome II to make even clearer that it encompasses Conventions to which not all Member States are party. One participant advocated denouncing both Hague Conventions on traffic accidents and product liability because of the difficulty of their relationship with Rome II.

Assessing **the merits of the Conventions themselves**, one participant was of the opinion that the Hague Convention on the law applicable to traffic accidents works well except where compensation is claimed by a co-driver from the driver of the car and both are domiciled in the same country. The respondent suggests that Rome II Art. 4(2) provides a preferable outcome. Another participant called for a 'simple solution' for



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all EU Member States, indicating that Art. 4 of the Hague Convention on the law applicable to traffic accidents did not meet this criterion of simplicity. One respondent went further, describing the Hague Convention on the law applicable to traffic accidents as 'an old and quite backward, way too complicated legal instrument that should not be in use between the European Member States.'

When considering **international conventions more broadly**, one participant advocated for more coordination at the EU and international level to address modern developments, such as in the field of technologies.

Some respondents also commented more generally on improvements that would **support the work of judges in national courts** across the Member States, to contribute to a better application of Rome II as well as others EU instruments. Two respondents (a Greek academic and a Greek lawyer) pointed out the need for additional training for judges on cross-border disputes, to ensure a better understanding and application of the EU instruments. The need for the development of an efficient database encompassing all domestic decisions and/or an easier access to materials and databases on EU Private International Law was mentioned by two respondents (a Greek lawyer and a Hungarian academic).

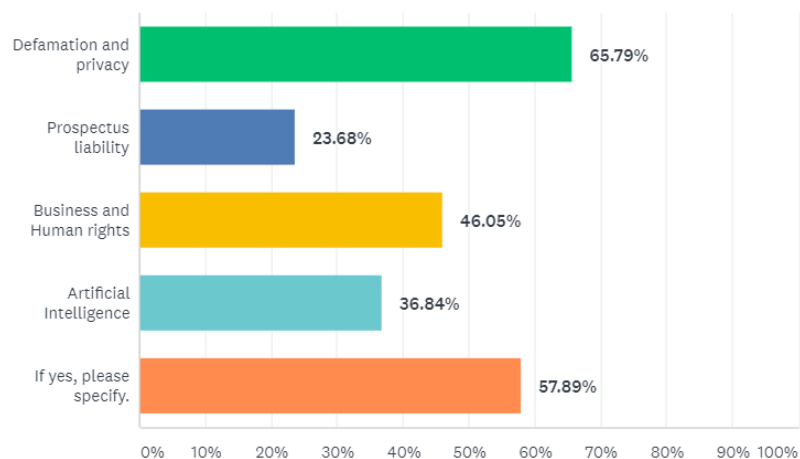
## 3.2 Analysis of the data per issue

### 3.2.1 Privacy, personality rights, data protection and SLAPPs

11 of the 102 respondents identified **data protection** as one of their fields of expertise, and one respondent identified **personality rights and defamation** as their field of expertise. This includes one lawyer and 10 academics, 3 of whom are also lawyers. The experts represent **10 Member States**: Cyprus (1), Lithuania (1), France (1), Austria (1), Belgium (1), the UK (1), Portugal (1), Italy (2), Czech Republic (1), and Hungary (1).

In your opinion, would it be helpful to have a common set of EU choice of law rules specifically dealing with the following areas:

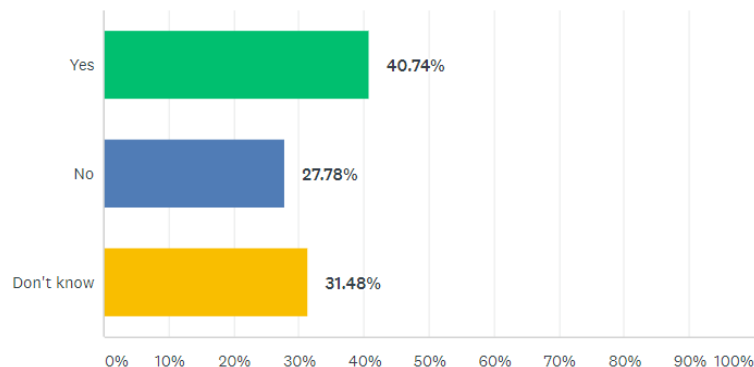
Answered: 76 Skipped: 26



When asked about the need for specific rules in some areas, 66% of all the respondents answered that the sector of **defamation and privacy needed a common set of EU choice of law rules**. Two respondents noted that including relevant provisions on defamation and privacy in Rome II would lead to a better **compatibility with the jurisdictional rules of the Brussels I bis Regulation**. 3 respondents mentioned that the inclusion of such rules would address the risks of **forum shopping**, and 5 respondents further added this would support **legal certainty and predictability**.

Did the exclusion of violations of privacy and personality rights, including defamation, from the scope of the Rome II Regulation cause any problem in your Member State?

Answered: 54 Skipped: 48



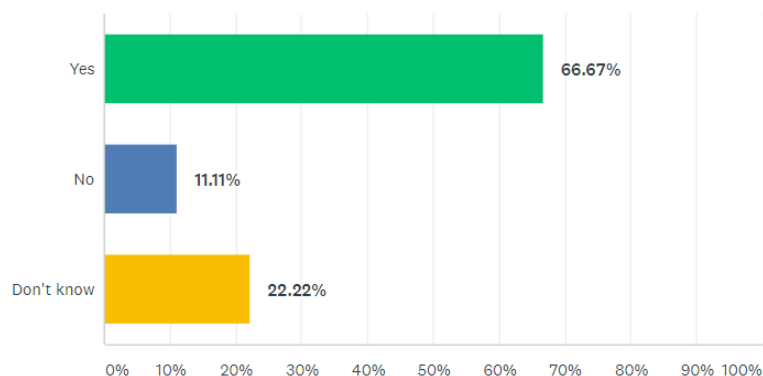
41% of all respondents identified **problems in their Member States caused by the exclusion of violations of privacy and personality rights**, including defamation, from the scope of Rome II. Out of the 22 respondents who identified issues, 14 specifically pointed towards the **uncertainty and lack of clarity** that comes with the application of domestic rules: the **lack of harmonisation at the EU level** regarding applicable law to violations of privacy and personality rights creates a patchwork of rules across the Member States. One Latvian academic qualified those rules as “underdeveloped and inappropriate”. One Portuguese academic added that the exclusion of personality rights and defamation created problems before Portuguese courts because there are divergent interpretations as to what is included in personality rights. One Polish academic/lawyer described Article 16 of the Polish Act on International Private Law as “very difficult to apply”. One academic/lawyer from Belgium with practical experience in cases involving cross-border defamation pointed out that the exclusion of defamation from the scope of Rome II complicated the position of the victims significantly. In one of the cases he was involved in, it led to significant investments in expert reports on the content of foreign law. Two other respondents also commented on the risk of **forum shopping**.

Regarding the **interplay of the Rome II Regulation with data protection**, four respondents answered that the relationship between Rome II and the **General Data Protection Regulation (GDPR)** should be thoroughly addressed.

Four respondents commented on **Strategic Lawsuits Against Public Participation (SLAPPs)**. Three of them argued that the lack of relevant choice-of-law rules in Rome II incites **forum shopping**, and they were of the opinion that specific rules are needed. One Belgian academic and lawyer based this observation on his personal practical experience with three cases where he encountered SLAPPs.

## Should the Rome II Regulation contain a specific provision on violations of privacy and personality rights?

Answered: 54 Skipped: 48

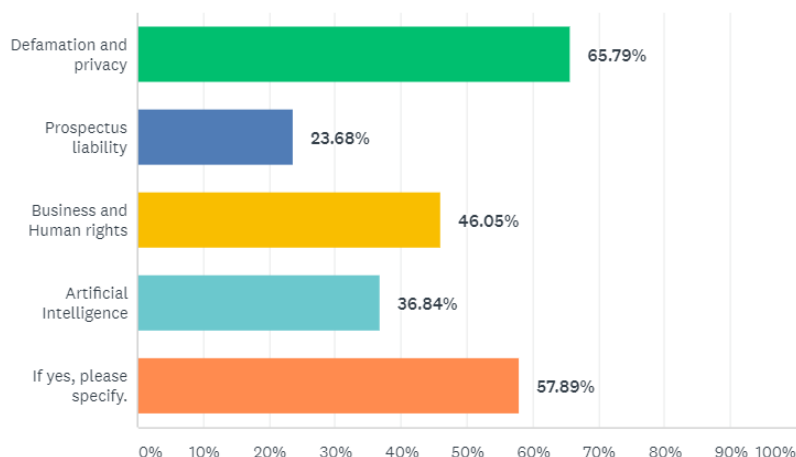


67% of the respondents are of the opinion that Rome II should contain specific provisions on violations of privacy and personality rights. Among them, 6 respondents suggested to apply the law of the **centre of interest and/or habitual residence** of the victim. 5 respondents suggested that **general rule of Article 4** (law of the country in which the damage occurs) should apply. 4 respondents suggested a choice-of-law rule allowing the claimant to choose between **the law of the place where the damage occurred** and **the law of the place where the event giving rise to the damage occurred**.

### 3.2.2 Business and Human Rights

In your opinion, would it be helpful to have a common set of EU choice of law rules specifically dealing with the following areas:

Answered: 76 Skipped: 26



When asked about the need for specific rules in some areas, 46% of all the respondents answered that the sector of business and human rights needed a **common set of EU choice of law rules**.

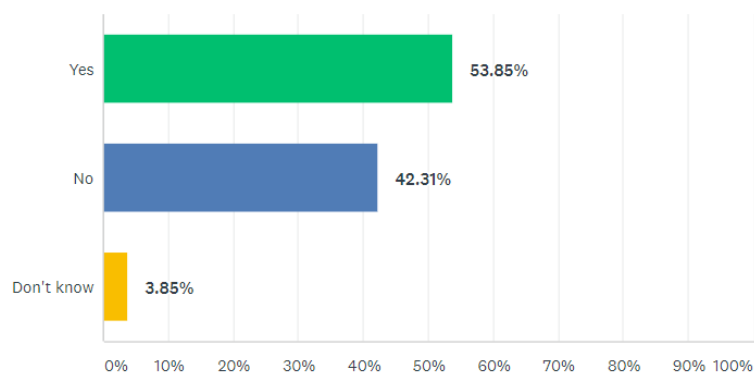
31 of the 102 respondents identified business and human rights as one of their **fields of expertise**. Among those respondents are 20 academics, 4 of whom are also lawyers, 9 lawyers and 2 judges. The BHR experts represent **17 Member States**: Belgium (2), Finland (2), Poland (1), Germany (2), Italy (4), France (2), Hungary (1), Sweden (1), the Netherlands (2), the UK (2), Latvia (1), Lithuania (2), Czech Republic (1), Malta (1), Spain (3), Greece (2) and Portugal (2).

11 of the 102 respondents have been involved in cases in which the Rome II Regulation has been applied to corporate abuses against human rights, including 5 academics/BHR consultants from Portugal, the Netherlands, the UK, Finland and Greece, 2 academics/lawyers from Belgium, 3 lawyers from Italy, the UK and Germany, and one judge from the Netherlands.



To your knowledge, are there any issues that emerged from the application of the Rome II Regulation to corporate abuses against human rights?

Answered: 26 Skipped: 5

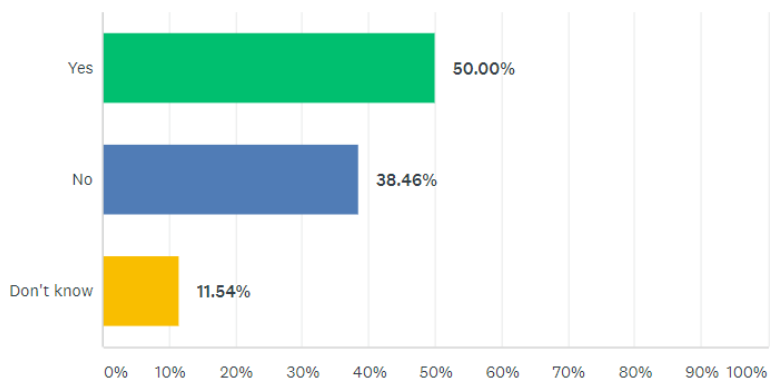


56% of the BHR experts replied that issues emerged from the application of the Rome II Regulation to corporate abuses against human rights. Respondents commented that Rome II was not sufficiently tailored to the specificities of corporate human rights abuses, and 8 out of the 14 respondents who identified issues specifically mentioned the application of **Article 4** as problematic. According to them, the application of the law of the place where the harm occurred is ill-fitted to the nature of such cases and ultimately constitutes an obstacle to access to justice, in particular because of the lack of efficient enforcement, shorter limitation statutes, and liability and damages issues in the host states. The KiK case in Germany, the Boliden case in Sweden and the Shell case in the Netherlands (first instance) were cited as examples.

Three BHR experts also identified issues regarding the determination of the notion of “**environmental damage**” and the determination of the place where the harmful event occurred in such a case under **Article 7**.

To your knowledge, are there any issues that emerged from the interplay of the Rome II and the Brussels I Regulations in cases of corporate abuses against human rights?

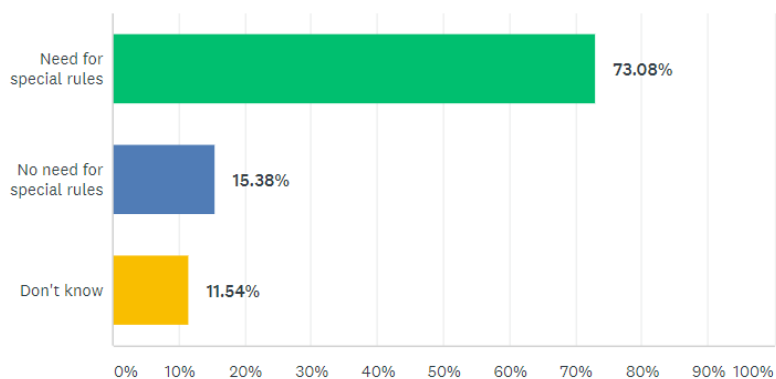
Answered: 26 Skipped: 5



50% of the BHR experts identified issues with the **interplay of the Rome II and Brussels I bis Regulations** in cases of corporate abuses against human rights. Among the issues identified were Article 33 and 34 of Brussels I bis, and the determination of the place where the harmful event occurred, in particular relating to Article 7(2) of Brussels I bis and Article 7 of Rome II. One academic also cited the Vedanta case and in particular the application of Articles 4.1 and 6.1 of Brussels I bis.

According to you, does the Rome II Regulation lay down an effective set of rules to regulate business and human rights cases or would special rules be needed?

Answered: 26 Skipped: 5



73% of the BHR experts are of the opinion that a set of **special rules tailored to the specificities of corporate human rights abuses** is needed in Rome II. Out of the 19 experts who believe specific rules are needed, 7 of them pointed out to the mechanism of **Article 7 of Rome II** as a good solution. One of the experts further commented that the introduction of specific criteria leading to the application of the law of the place of incorporation / establishment of the parent company enhance the accountability of MNCs and would strengthen predictability and legal certainty for victims. Another respondent referred to the European Parliament's draft proposal<sup>1307</sup> and its Article 6a allowing victims to choose between the law of the country in which the damage occurred (*lex loci damni*), the law of the country in which the event giving rise to the damage occurred (*lex loci delicti commissi*) and the law of the place where the defendant undertaking is domiciled or, lacking a domicile in the Member State, where it operates. Another respondent designated Article 11 of the Second Revised Draft of the Binding Treaty<sup>1308</sup> as a better option, less complex and demanding than Article 6a of the Draft proposal.

On the contrary, two respondents were of the opinion that amending Rome II was not necessary, and they favoured the protection of human rights abuses victims through **mandatory due diligence** and the application of **Article 16 of Rome II**. They suggested that the provisions of the European Parliament's Draft proposal on corporate due diligence and corporate accountability should be imperative and thus qualified as overriding mandatory provisions under Article 16 of Rome II. One of those two experts nonetheless noted that mandatory due diligence at the EU level was "ambitious" and required a "firm commitment" from the EU in the protection of human rights.

One BHR expert suggested a mechanism similar to **Article 26 of Rome II** (public policy) but specifically adapted to human rights abuses.

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<sup>1307</sup> European Parliament Committee on Legal Affairs, Draft report with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)). Available at <[https://www.europarl.europa.eu/doceo/document/JURI-PR-657191\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/JURI-PR-657191_EN.pdf)>.

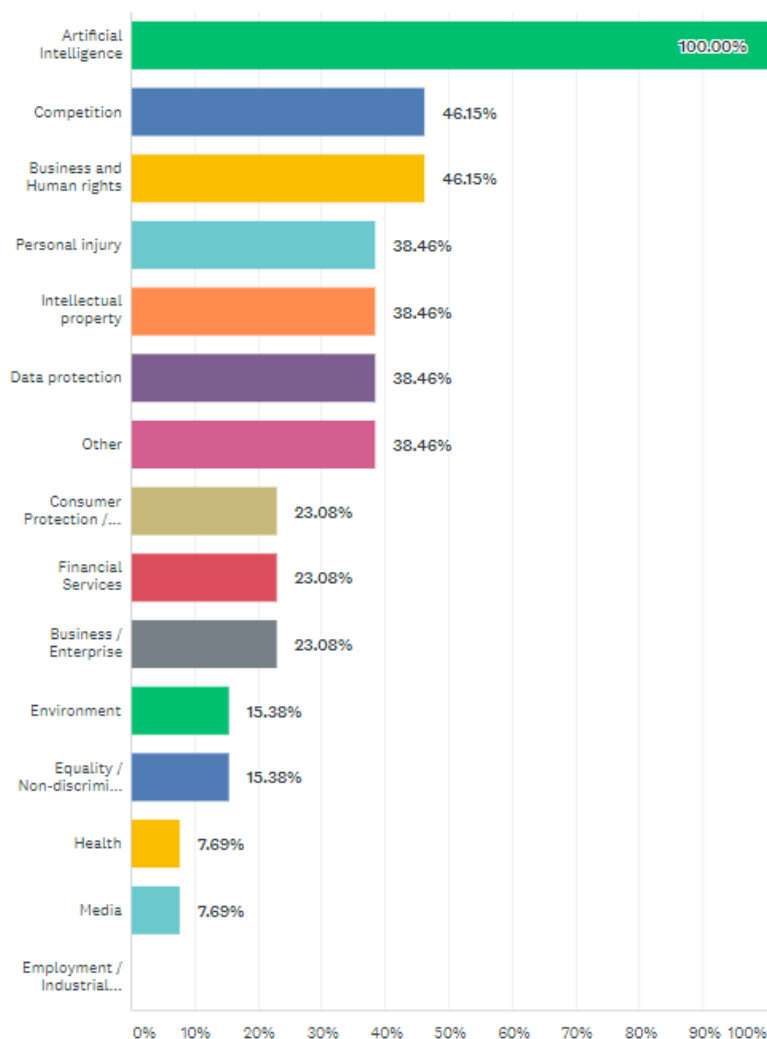
<sup>1308</sup> United Nations Intergovernmental Working Group (IGWG), Second Revised Draft of the proposed binding treaty on business and human rights. Available at <[https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG\\_Chair-Rapporteur\\_second\\_revised\\_draft\\_LBI\\_on\\_TNCs\\_and\\_OBEs\\_with\\_respect\\_to\\_Human\\_Rights.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf)>.

### 3.2.3 Artificial Intelligence

13 of the 102 participants in the empirical study identified **AI** as one of their **fields of expertise**. This comprised 11 academics, two of whom were also lawyers, one further lawyer and one judge. The AI experts represented **9 Member States**: Poland (3), Cyprus (2), Hungary (2), Belgium (1), Finland (1), France (1), Germany (1), Italy (1) and the UK (1). There were **significant overlaps with other areas** of expertise, most notably competition, business and human rights, data protection, IP and personal injury:

Please select your field(s) of expertise

Answered: 13 Skipped: 0



Only two of the 102 respondents were aware of **Rome II having been applied to cases involving AI**. Both were academics and experts in AI, one from Poland and the other from the UK. The Polish respondent



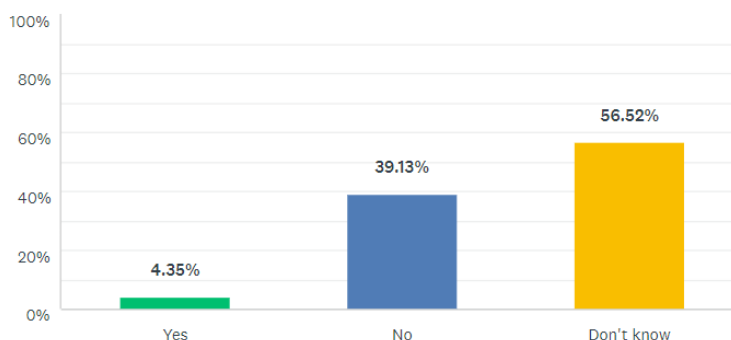
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identified cases involving damage caused by autonomous vehicles and drones, engaging Rome II's product liability rules.

To your knowledge, has the Rome II Regulation been applied in relation with artificial intelligence in your Member State or elsewhere in Europe?

Answered: 46 Skipped: 56



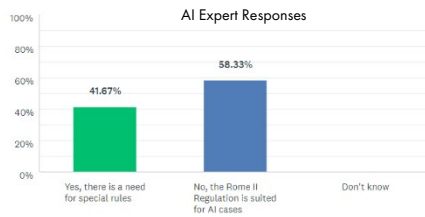
The responses highlight **low incidences of cases involving Rome II and AI**, and low exposure to the issues. As one respondent stated, difficulty in applying Rome II to AI contexts is **currently theoretical**, but as it might be a problem in future, it may be helpful to address the issue in a proactive manner. By contrast, another respondent suggested that it may be too early to try to regulate AI, while one noted that AI's rapid and unpredictable development may render any statutory rule outdated within a couple of years.

It may also be difficult to address problems arising from applying Rome II to AI cases when it is not **yet clear how national legal systems will respond** to AI. One expert participant noted that AI raises issues of liability in the first instance (as a matter of substantive national law), and that a deeper integrated approach may be needed in the EU or internationally in order to redefine notions of liability to incorporate damage by AI systems.

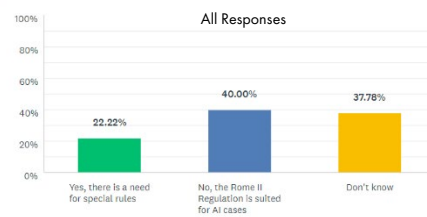
In terms of **conflict of laws in AI cases**, 64% of AI experts responded that it would be helpful to have a **common set of EU choice of law rules** specifically dealing with AI, compared to 37% of all respondents. Of the AI experts, 58% thought that **Rome II is suited** to address non-contractual liability in AI cases, while 42% responded that it is not, such that **special rules** are needed. While the proportion of AI experts who believe that Rome II is not suited to AI at first looks far higher than the proportion of general respondents (22.22% ill-suited/40% adequate), once the general respondents who selected 'Don't know' are removed, the difference is smaller (35.71% ill-suited/64.29% adequate).

In your opinion, is the Rome II Regulation suited to address non-contractual liability arising in context with artificial intelligence or would special rules be needed?

Answered: 12 Skipped: 1



Answered: 45 Skipped: 57



The **uncertainty as to whether AI is a product** falling within Rome II's product liability rules was highlighted by three respondents. The scope of the product liability rules will affect how readily AI systems can be addressed by Rome II and its current doctrine. Some other respondents also supported **integrating AI's specific aspects into the existing Rome II framework**, one noting the reliance on *lex loci damni* that could arise from difficulty in determining the place where the action occurred; and another suggesting a closer connecting factor to the corporation with control of the device in question, to ensure accountability in AI systems.

One academic expert in AI commented on all sections of the empirical study from an AI perspective, noting specific issues where **AI overlaps with other sectors of interest**. Specifically, the respondent identified that AI governance systems may not be able to address **privacy and personality rights** on a discretionary basis, such that privacy and personality legislation should account for such systems; that algorithmic decision-making in the global digital economy will likely lead to novel requirements in **business and human rights legislation**; and that existing **road traffic rules** emphasising master's liability have been shown by studies to be inadequate in the context of automated traffic control. The specific impacts of automation and AI systems should therefore be considered in all contexts regulated by Rome II.

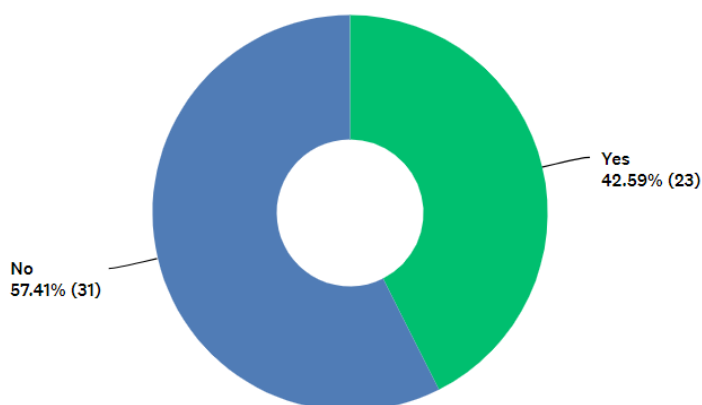
By contrast, there were also respondents who **did not believe that AI requires specific rules**. Comments included that AI is not a special case but merely a new application of rules on work, contract and tort; that special conflicts rules are inadvisable compared to judicial development; and that exceptional rules should in general be avoided but that sub-rules placing new issues in existing frameworks may be helpful.



### 3.2.4 Personal Injury Claims

Have you been involved in cases in which the Rome II Regulation has been applied to personal injury claims?

Answered: 54 Skipped: 48



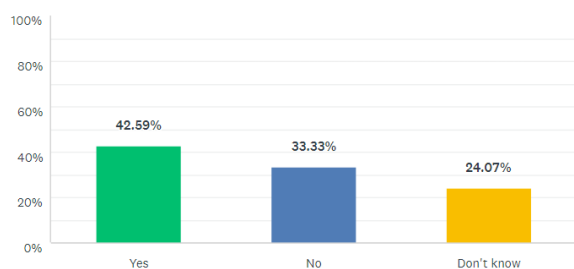
57% of respondents to the **personal injury** section had been involved in cases where Rome II was applied to personal injury claims. Comments show that the vast majority of these were involved with personal injury arising from road traffic accidents, while respondents also had experience of insurance, accidents caused by other activities (eg skiing), product liability, maritime and aviation, business and human rights, and intentional crimes.

43% of respondents were aware of **issues** emerging from the application of Rome II to personal injury claims, in particular road traffic accidents. This accounts for 56% of those who expressed an opinion. The proportion is higher (78%) amongst respondents who have been involved in cases to which Rome II has been applied to personal injury claims. Of those who responded 'No' or 'Don't know', a few commented that this is because their Member State applies the Hague Traffic Accident Convention in place of Rome II.

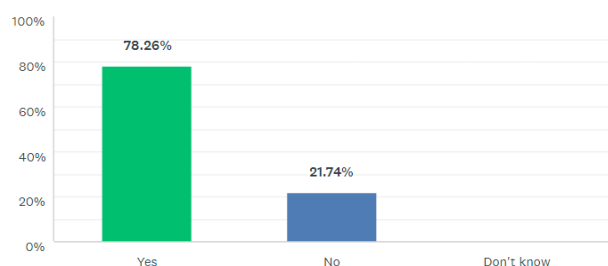
To your knowledge, are there any issues that emerged from the application of the Rome II Regulation to personal injury claims, and in particular road traffic accidents?

Answered: 54 Skipped: 48

*All respondents to this question:*



*Respondents involved in cases where Rome II was applied to PI claims:*



Five respondents identified issues with the **application of the general rule in Art. 4** to traffic accidents. Two commented on difficulties in defining the place of harm as the place of direct or indirect damage. The remaining three highlighted confusion about the exceptions to the general rule, one mentioning Art. 4(2) (habitual residence) and two emphasising the challenges of Art. 4(3) (closest connection).

The most common issues, however, concerned **quantification of damages**, including assessment of damages under foreign law, evidence of damages, and provisional damages.

As to the **general assessment of damages under foreign law**, many respondents noted the difficulties of applying Member States' different rules on damage calculation, in particular the application of foreign tariffs. One highlighted that these tariffs are set to the standard of living in the state of the law being applied, rather than the country where the victim lives. Another questioned the significance of Recital (33), and whether it has any meaning for such assessment. One comment noted difficulties in determining whether to credit third party payments, such as social security and insurance payments, in such calculations.

**Evidence to prove damage** was also highlighted as an issue, where different countries have different requirements concerning medical evidence. This was primarily (but not exclusively) a difficulty identified by UK respondents due to certain peculiarities of English medical evidence rules.



Two respondents further noted difficulties with **orders for provisional damages**, in the sense of remedies for future deterioration or aggravation of injuries, including in catastrophic injury claims and as periodical payment orders.

Closely related to quantification is the issue of **interest** on damages, identified by three respondents. One in particular described initial uncertainty in Hungary over whether Rome II applied to interest, the court interpreting Arts. 2(1) and 15(c) to decide that it did.

Other matters identified that could be classed as procedural include **limitation periods**, identified by two respondents; and the **establishment of foreign law**, including the extent of its application 'as the foreign judge would do', identified by two respondents.

**Direct claims against insurers** gave rise to several challenges, including issues under Art. 18 Rome II, and concerning the interaction of Rome II with Brussels I bis. One respondent raised the particular difficulties of **insurers bringing claims against tortfeasors**, for example in understanding which law determines the insurer's ability to bring a claim, the amount of the claim, and the substantive requirements for liability.

Claims involving **multiple parties** caused concern for three respondents, including whether a single applicable law or the mosaic approach should apply where Rome II's general rule prima facie indicates different laws for different victims.

Respondents also mentioned **secondary victims**, and the standing of victims' **family members** to request compensation under Art. 15. One respondent reported that the Greek Supreme Court decided the latter to be a matter for domestic law.

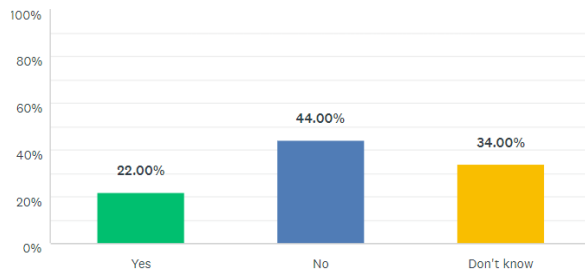
Two respondents highlighted difficulties where **the applicable law conflicts with public policy of the forum**, including the state's ability to limit the amount of damages.

22% of respondents identified **issues emerging from the interplay of Rome II and the Hague Traffic Accident Convention**, compared to 44% of respondents who were not aware of any such issues. Once those who responded 'Don't know' are excluded, this represents 33% of participants (11/33), the same proportion (7/21) as of those who have been involved in cases where Rome II has been applied to personal injury claims. Many respondents explained their response by indicating that their state is not party to the Convention.

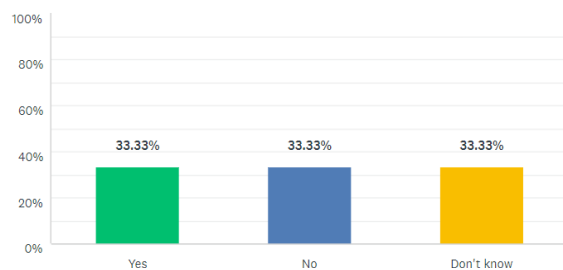
To your knowledge, are there any issues that emerged from the interplay of the Rome II and the 1971 Hague Traffic Accident Convention?

Answered: 50 Skipped: 52

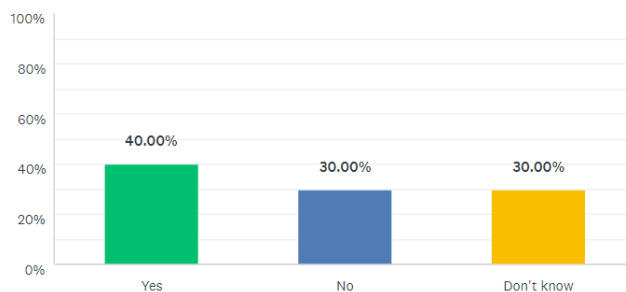
*All respondents to this question:*



*Respondents involved in cases where Rome II was applied to PI claims:*



*Respondents from Contracting Parties to the 1971 Convention:*



Of those who did respond, many broadly echoed the sentiments expressed in the general part on Rome II's compatibility with other international instruments, including the Hague Conventions on Traffic Accidents and Product Liability which were given as examples (see above).

The applicability of the Hague Convention over Rome II is sometimes **overlooked**. One respondent noted that this is a particular habit of German lawyers in Austrian courts, the latter state being a party to the Convention and the former not. Another respondent qualified the issue by observing that most of the cases of which they are aware where Rome II was erroneously applied would have resulted in the same outcome under either instrument.

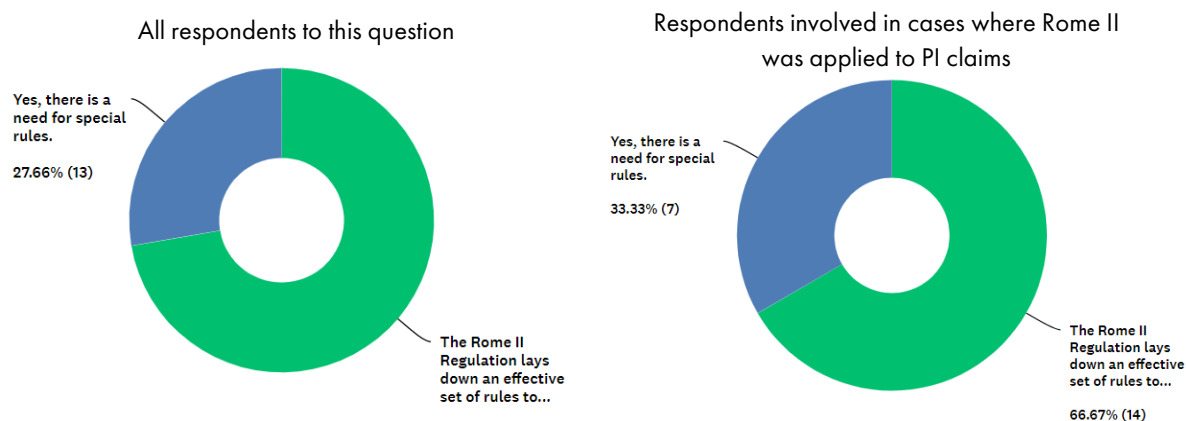
One respondent raised the risk of **forum shopping**, the interplay between the two instruments in some circumstances giving the victim the unfair advantage of being able to select the forum that entails application of the law most favourable to them.

**Confusion** is expressed regarding the parallel systems, in particular where a co-driver claims against the driver responsible for the accident. Some respondents call for **harmonisation** of rules amongst Member States or **abandonment** of the Hague Convention altogether.

72% of respondents think that **Rome II lays down an effective set of rules to regulate personal injury claims**, in particular road traffic accidents, while 28% would prefer special rules. Amongst those who have been involved in cases where Rome II has been applied to personal injury claims, a higher proportion (33%) calls for special rules.

According to you, does the Rome II Regulation lay down an effective set of rules to regulate personal injury claims, and in particular road traffic accidents, or would special rules be needed? If yes, what would you suggest?

Answered: 47 Skipped: 55



We received multiple **suggestions for special rules to regulate personal injury claims**. One respondent suggested relying on the 'most connecting factor' rule rather than the general rule in Art. 4(1). Other respondents suggested applying either the law of the forum or the victim's 'home law' where to do so would be more favourable to the victim. One noted difficulties created by separating material damage, dealt with under Rome II, from interests, addressed by national law.

Participants also suggested **specific areas that could benefit from special rules**, including: rules on **indirect victims** and **claims by family members**, for example in wrongful death cases; rules on **multi-vehicle accidents**, to which Art. 4 seems ill-suited, for example because it leaves unanswered whether Art. 4(2) applies where a driver injures multiple pedestrians from different countries; **product liability** rules, which could be more consumer-friendly; rules on **automated traffic control** in, for example, shipping and aviation, where current laws inappropriately emphasise master's liability; rules on particular issues in **assessing loss and damage**, including the extent of damages to be recovered for long-term health problems; rules on **interest**; special

**insurance rules**, including a suggestion of limiting amounts of compensation payable and a reference to the Commission Proposal to amend the Motor Insurance Directive<sup>1309</sup>; and harmonisation of **limitation periods**, with reference to the EU Added Value Assessment on the Harmonisation of Limitation Periods for Claims Arising out of Cross-Border Road Traffic Accidents<sup>1310</sup>, although another respondent was of the opinion that limitation is better addressed by applying the rule of the place of residence.

### 3.3 Collected data

Below is the complete view of the data collected through the consultation across all Member States.

Q1 Please indicate your name and contact information for internal purposes only. All of your responses will remain anonymous.

Answered: 101 Skipped: 1

ANSWER CHOICES	RESPONSES	
Name	100.00%	101
Affiliation	86.14%	87
Email address	100.00%	101

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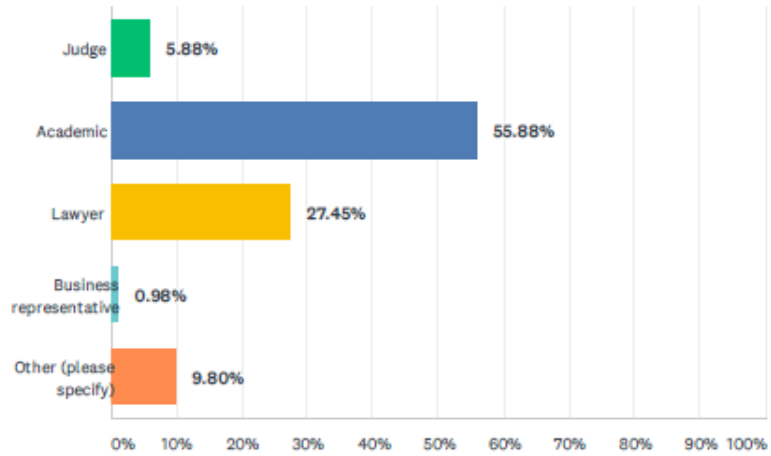
<sup>1309</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52018PC0336&from=en>

<sup>1310</sup>

[https://www.europarl.europa.eu/RegData/etudes/STUD/2016/581386/EPRS\\_STU\(2016\)581386\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2016/581386/EPRS_STU(2016)581386_EN.pdf)

## Q2 Are you a:

Answered: 102 Skipped: 0



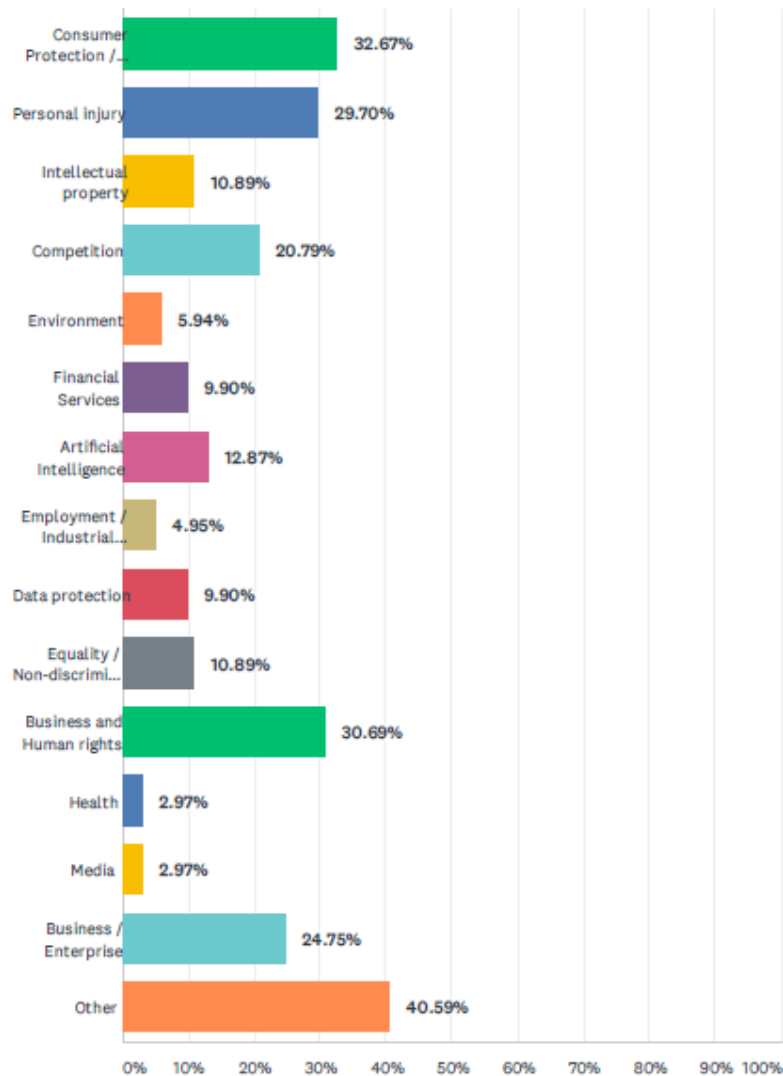
ANSWER CHOICES	RESPONSES	
Judge	5.88%	6
Academic	55.88%	57
Lawyer	27.45%	28
Business representative	0.98%	1
Other (please specify)	9.80%	10
TOTAL		102



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### Q3 Please select your field(s) of expertise

Answered: 101 Skipped: 1



### Q4 In which EU Member State are you based (in case of companies please indicate primary place of business) ?

Answered: 99 Skipped: 3



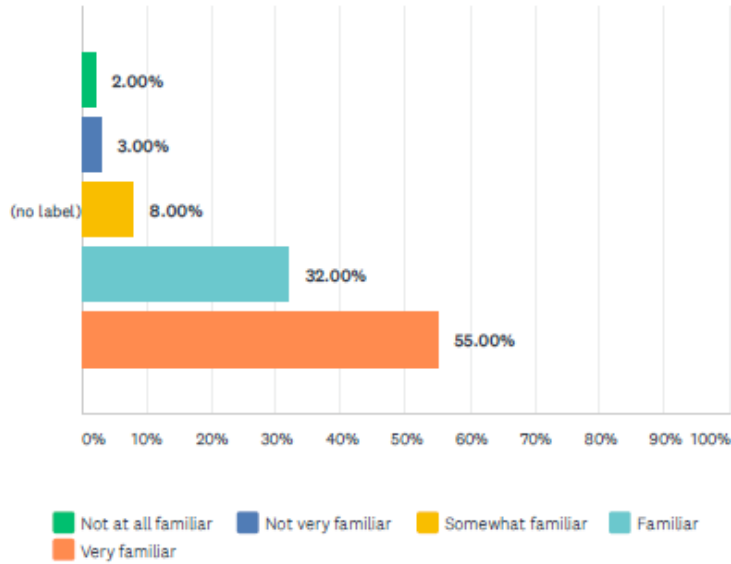
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Comparative Law

	Surveys	Interviews	Total
AT	5		5
BE	4		4
BG	2		2
HR	1		1
CY	2		2
CZ	3		3
EE	3		3
FI	2		2
FR	5	1	6
DE	4		4
EL	4	1	5
HU	4	2	6
IE	1		1
IT	6	1	7
LV	1	1	2
LT	4		4
LU	1		1
MT	3		3
NL	2	1	3
PL	5		5
PT	2	2	4
RO	1		1
SK	3		3
SI	4		4
ES	3		3
SE	3		3
UK	12		12
<i>BHR</i>	2	1	3
	<b>92</b>	<b>10</b>	<b>102</b>



## Q5 How familiar would you say that you are with the Rome II Regulation?

Answered: 100 Skipped: 2



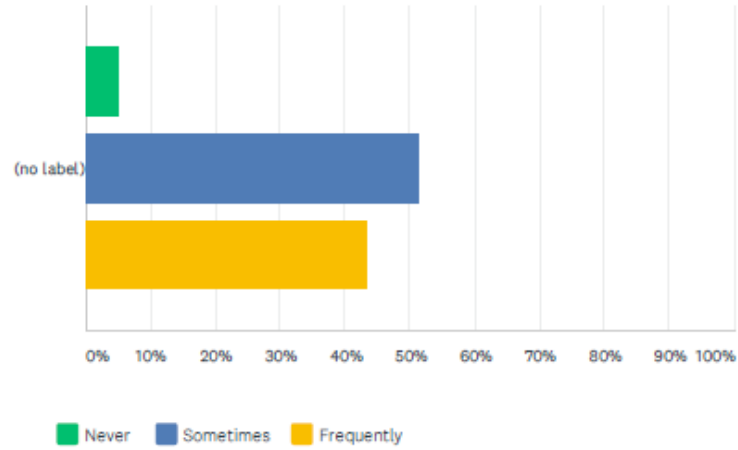
	NOT AT ALL FAMILIAR	NOT VERY FAMILIAR	SOMEWHAT FAMILIAR	FAMILIAR	VERY FAMILIAR	TOTAL	WEIGHTED AVERAGE
(no label)	2.00% 2	3.00% 3	8.00% 8	32.00% 32	55.00% 55	100	4.35





### Q6 How frequently do you refer to the Rome II Regulation in your practice/work?

Answered: 101 Skipped: 1



	NEVER	SOMETIMES	FREQUENTLY	TOTAL	WEIGHTED AVERAGE
(no label)	4.95% 5	51.49% 52	43.56% 44	101	2.39

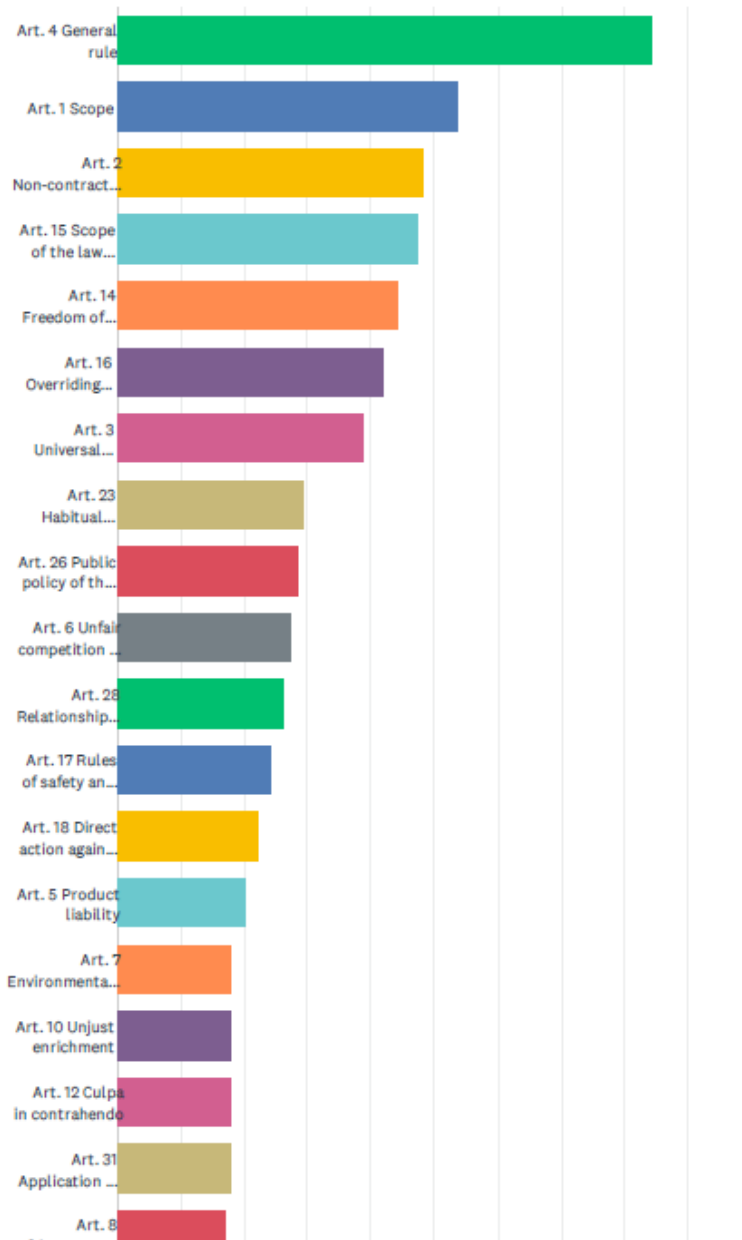
### Q7 In what contexts do you use the Rome II Regulation in your practice/work?

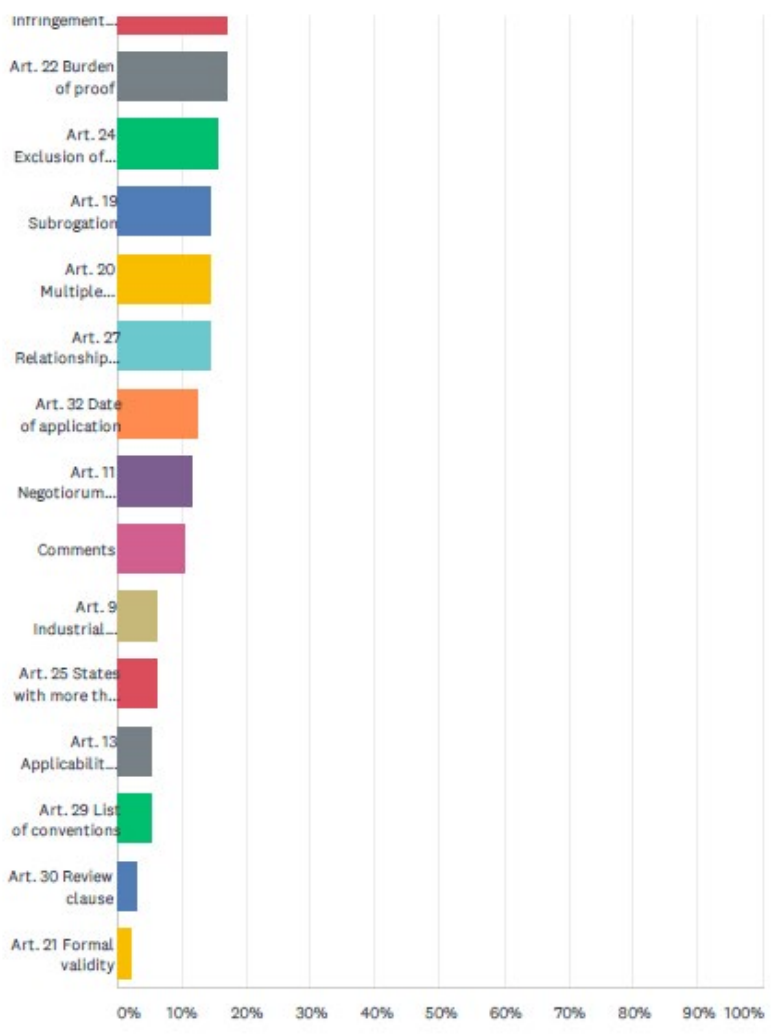
Answered: 90 Skipped: 12



## Q8 Which provisions of the Rome II Regulation do you refer to most frequently in your practice/work?

Answered: 95 Skipped: 7



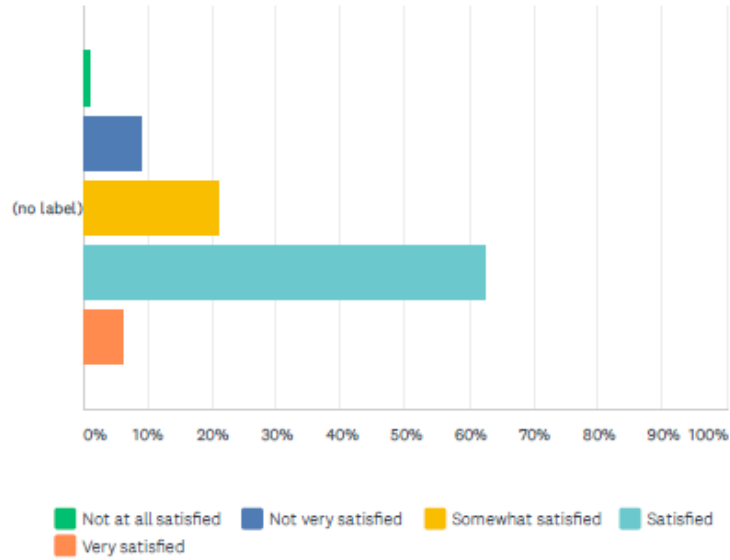


ANSWER CHOICES	RESPONSES	
Art. 4 General rule	84.21%	80
Art. 1 Scope	53.68%	51
Art. 2 Non-contractual obligations	48.42%	46
Art. 15 Scope of the law applicable	47.37%	45
Art. 14 Freedom of choice	44.21%	42
Art. 16 Overriding mandatory provisions	42.11%	40
Art. 3 Universal application	38.95%	37
Art. 23 Habitual residence	29.47%	28
Art. 26 Public policy of the forum	28.42%	27
Art. 6 Unfair competition and acts restricting free competition	27.37%	26
Art. 28 Relationship with existing international conventions	26.32%	25
Art. 17 Rules of safety and conduct	24.21%	23
Art. 18 Direct action against the insurer of the person liable	22.11%	21
Art. 5 Product liability	20.00%	19
Art. 7 Environmental damage	17.89%	17
Art. 10 Unjust enrichment	17.89%	17
Art. 12 Culpa in contrahendo	17.89%	17
Art. 31 Application in time	17.89%	17
Art. 8 Infringement of intellectual property rights	16.84%	16
Art. 22 Burden of proof	16.84%	16
Art. 24 Exclusion of renvoi	15.79%	15
Art. 19 Subrogation	14.74%	14
Art. 20 Multiple liability	14.74%	14
Art. 27 Relationship with other provisions of Community law	14.74%	14
Art. 32 Date of application	12.63%	12
Art. 11 Negotiorum gestio	11.58%	11
Comments	10.53%	10
Art. 9 Industrial action	6.32%	6
Art. 25 States with more than one legal system	6.32%	6
Art. 13 Applicability of Article 8	5.26%	5
Art. 29 List of conventions	5.26%	5
Art. 30 Review clause	3.16%	3
Art. 21 Formal validity	2.11%	2



### Q9 How satisfied are you with the operation of the Rome II Regulation in your area(s) of practice/work?

Answered: 99 Skipped: 3

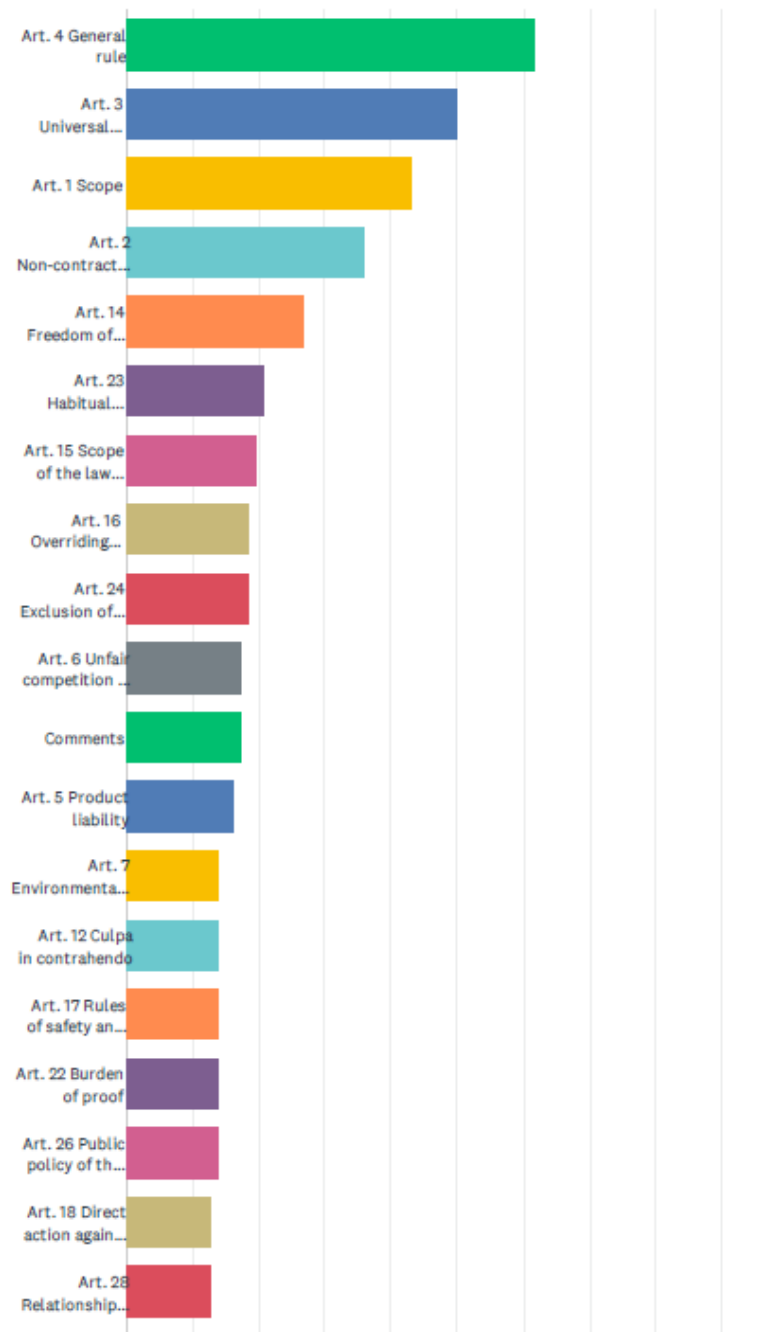


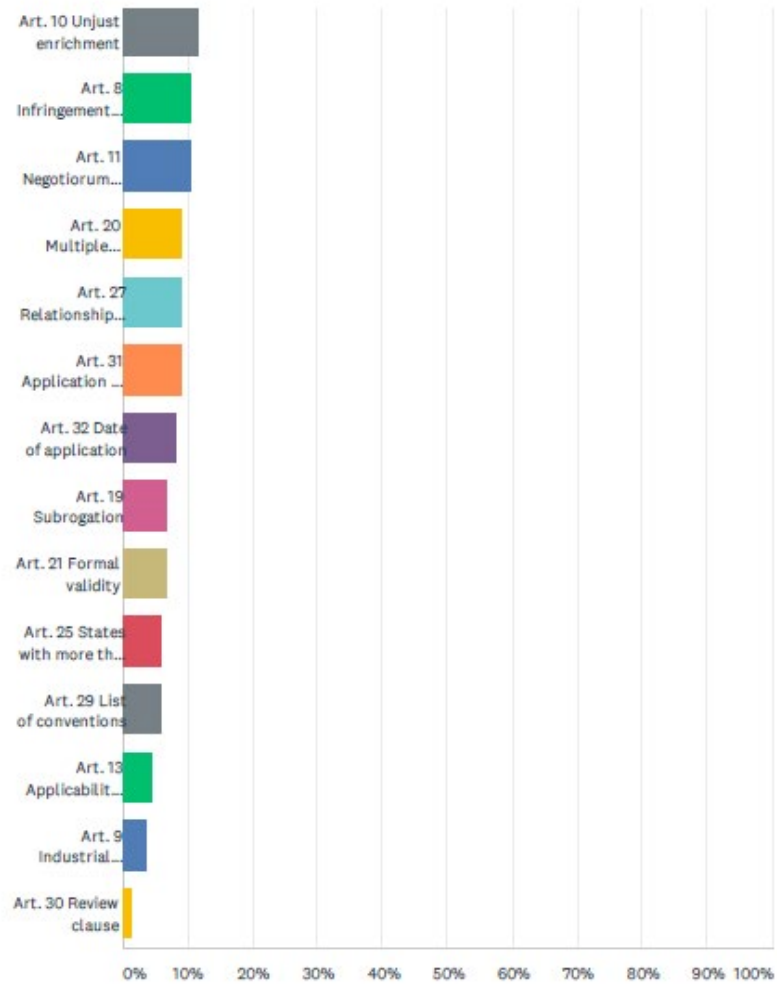
	NOT AT ALL SATISFIED	NOT VERY SATISFIED	SOMEWHAT SATISFIED	SATISFIED	VERY SATISFIED	TOTAL	WEIGHTED AVERAGE
(no label)	1.01% 1	9.09% 9	21.21% 21	62.63% 62	6.06% 6	99	3.64



## Q10 Which features of the Rome II Regulation work well, in your opinion?

Answered: 86 Skipped: 16





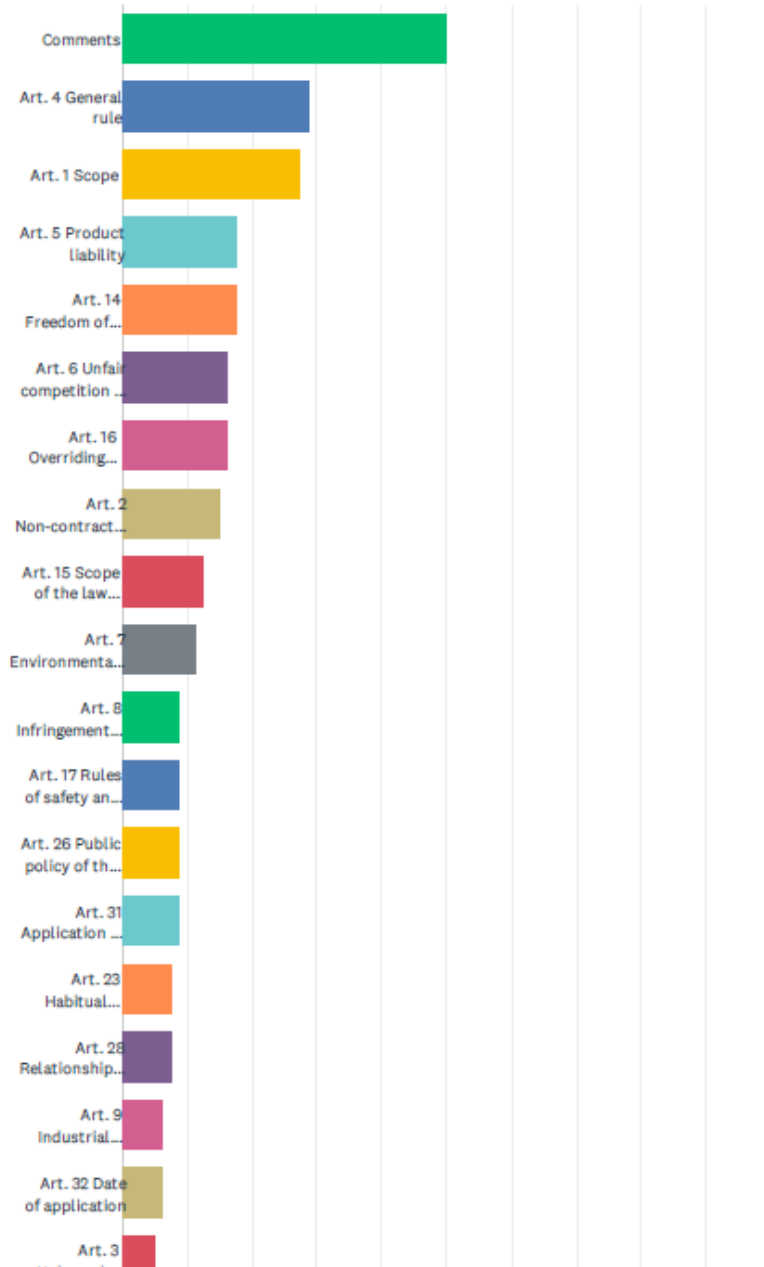
ANSWER CHOICES	RESPONSES	
Art. 4 General rule	61.63%	53
Art. 3 Universal application	50.00%	43
Art. 1 Scope	43.02%	37
Art. 2 Non-contractual obligations	36.05%	31
Art. 14 Freedom of choice	26.74%	23
Art. 23 Habitual residence	20.93%	18
Art. 15 Scope of the law applicable	19.77%	17
Art. 16 Overriding mandatory provisions	18.60%	16
Art. 24 Exclusion of renvoi	18.60%	16
Art. 6 Unfair competition and acts restricting free competition	17.44%	15
Comments	17.44%	15
Art. 5 Product liability	16.28%	14
Art. 7 Environmental damage	13.95%	12
Art. 12 Culpa in contrahendo	13.95%	12
Art. 17 Rules of safety and conduct	13.95%	12
Art. 22 Burden of proof	13.95%	12
Art. 26 Public policy of the forum	13.95%	12
Art. 18 Direct action against the insurer of the person liable	12.79%	11
Art. 28 Relationship with existing international conventions	12.79%	11
Art. 10 Unjust enrichment	11.63%	10
Art. 8 Infringement of intellectual property rights	10.47%	9
Art. 11 Negotiorum gestio	10.47%	9
Art. 20 Multiple liability	9.30%	8
Art. 27 Relationship with other provisions of Community law	9.30%	8
Art. 31 Application in time	9.30%	8
Art. 32 Date of application	8.14%	7
Art. 19 Subrogation	6.98%	6
Art. 21 Formal validity	6.98%	6
Art. 25 States with more than one legal system	5.81%	5
Art. 29 List of conventions	5.81%	5
Art. 13 Applicability of Article 8	4.65%	4
Art. 9 Industrial action	3.49%	3
Art. 30 Review clause	1.16%	1

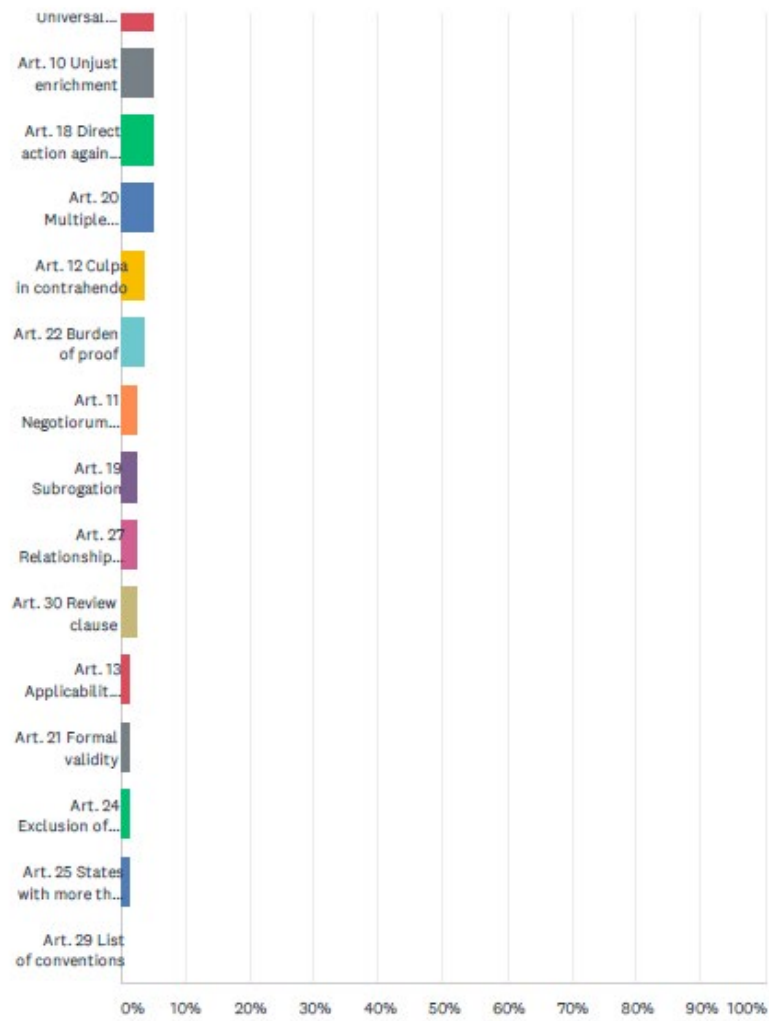




## Q11 Which features of the Rome II Regulation are in need of improvement, in your opinion?

Answered: 80 Skipped: 22



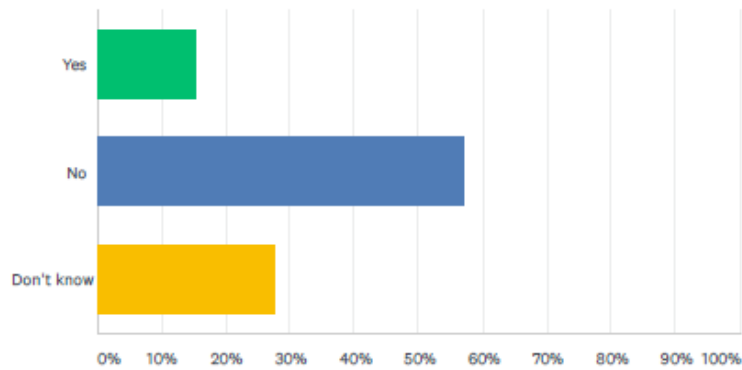


ANSWER CHOICES	RESPONSES	
Comments	50.00%	40
Art. 4 General rule	28.75%	23
Art. 1 Scope	27.50%	22
Art. 5 Product liability	17.50%	14
Art. 14 Freedom of choice	17.50%	14
Art. 6 Unfair competition and acts restricting free competition	16.25%	13
Art. 16 Overriding mandatory provisions	16.25%	13
Art. 2 Non-contractual obligations	15.00%	12
Art. 15 Scope of the law applicable	12.50%	10
Art. 7 Environmental damage	11.25%	9
Art. 8 Infringement of intellectual property rights	8.75%	7
Art. 17 Rules of safety and conduct	8.75%	7
Art. 26 Public policy of the forum	8.75%	7
Art. 31 Application in time	8.75%	7
Art. 23 Habitual residence	7.50%	6
Art. 28 Relationship with existing international conventions	7.50%	6
Art. 9 Industrial action	6.25%	5
Art. 32 Date of application	6.25%	5
Art. 3 Universal application	5.00%	4
Art. 10 Unjust enrichment	5.00%	4
Art. 18 Direct action against the insurer of the person liable	5.00%	4
Art. 20 Multiple liability	5.00%	4
Art. 12 Culpa in contrahendo	3.75%	3
Art. 22 Burden of proof	3.75%	3
Art. 11 Negotiorum gestio	2.50%	2
Art. 19 Subrogation	2.50%	2
Art. 27 Relationship with other provisions of Community law	2.50%	2
Art. 30 Review clause	2.50%	2
Art. 13 Applicability of Article 8	1.25%	1
Art. 21 Formal validity	1.25%	1
Art. 24 Exclusion of renvoi	1.25%	1
Art. 25 States with more than one legal system	1.25%	1
Art. 29 List of conventions	0.00%	0



Q12 To your knowledge, do parties take advantage of the option given by Art. 14 of the Rome II Regulation to choose the law applicable to non-contractual obligations?

Answered: 98 Skipped: 4

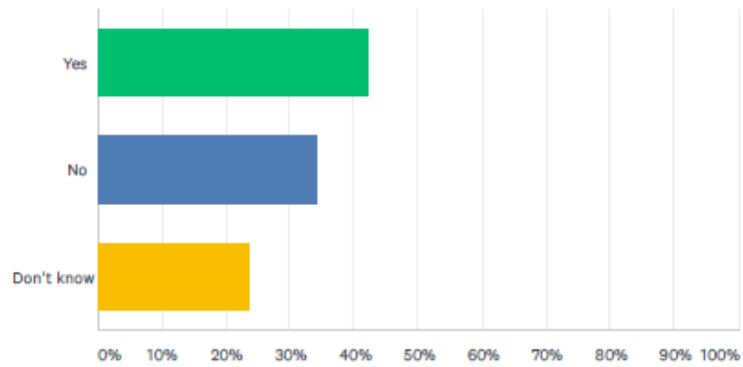


ANSWER CHOICES	RESPONSES	
Yes	15.31%	15
No	57.14%	56
Don't know	27.55%	27
TOTAL		98



Q13 Have the courts in the legal systems with which you are familiar encountered any difficulties in applying the Rome II Regulation?

Answered: 97 Skipped: 5

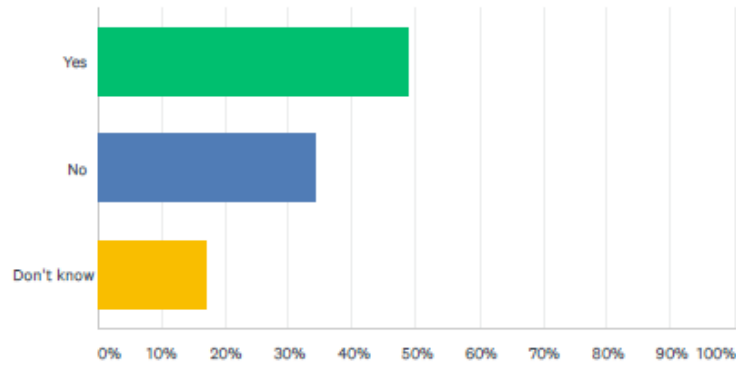


ANSWER CHOICES	RESPONSES	
Yes	42.27%	41
No	34.02%	33
Don't know	23.71%	23
TOTAL		97



Q14 Have the courts in the legal systems with which you are familiar encountered any difficulties in ascertaining the content of foreign law, in particular with expert opinions?

Answered: 94 Skipped: 8

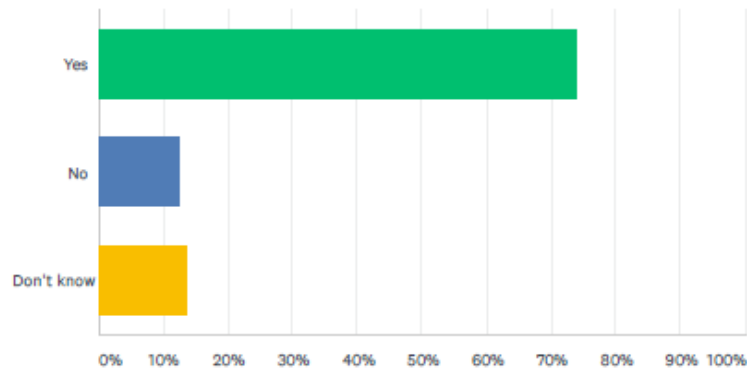


ANSWER CHOICES	RESPONSES	
Yes	48.94%	46
No	34.04%	32
Don't know	17.02%	16
TOTAL		94



Q15 In your opinion, do the rules in the Rome II Regulation work well alongside those in the Rome I Regulation governing the law applicable to contractual obligations?

Answered: 96 Skipped: 6

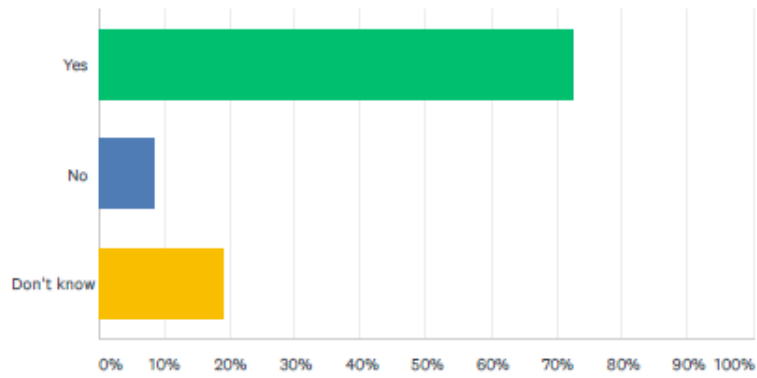


ANSWER CHOICES	RESPONSES	
Yes	73.96%	71
No	12.50%	12
Don't know	13.54%	13
TOTAL		96



Q16 In your opinion, do the rules in the Rome II Regulation work well alongside those in the Brussels I Regulation on jurisdiction and recognition and enforcement of judgments in civil and commercial matters?

Answered: 95 Skipped: 7



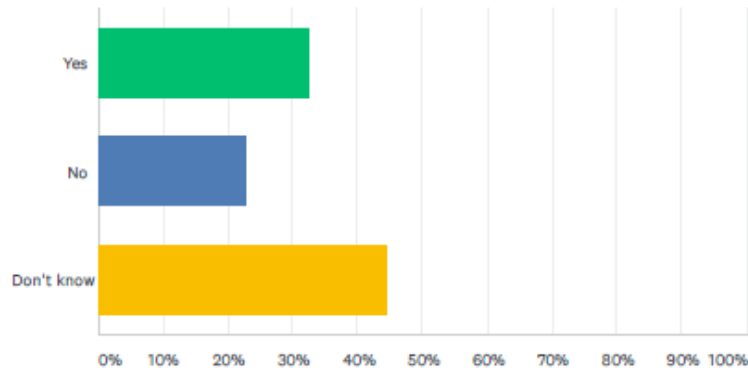
ANSWER CHOICES	RESPONSES	
Yes	72.63%	69
No	8.42%	8
Don't know	18.95%	18
TOTAL		95





Q17 In your opinion, do the rules of the Rome II Regulation work well alongside other international conventions (including, e.g., the Hague Conventions on traffic accidents and product liability)?

Answered: 92 Skipped: 10

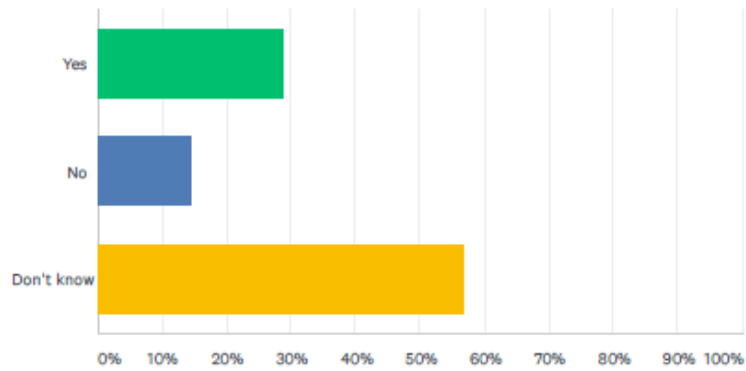


ANSWER CHOICES	RESPONSES	
Yes	32.61%	30
No	22.83%	21
Don't know	44.57%	41
TOTAL		92



Q18 13. In your opinion, do the rules of the Rome II Regulation work well alongside other provisions of EU law (including, e.g., the provisions of the eCommerce Directive)?

Answered: 90 Skipped: 12

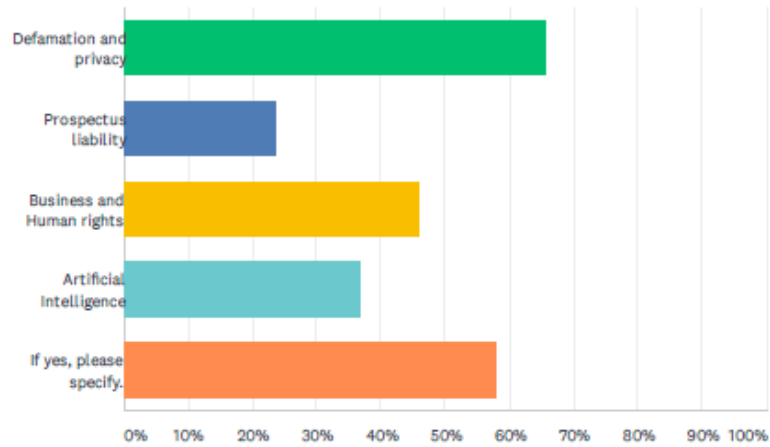


ANSWER CHOICES	RESPONSES	
Yes	28.89%	26
No	14.44%	13
Don't know	56.67%	51
TOTAL		90



Q19 In your opinion, would it be helpful to have a common set of EU choice of law rules specifically dealing with the following areas:

Answered: 76 Skipped: 26

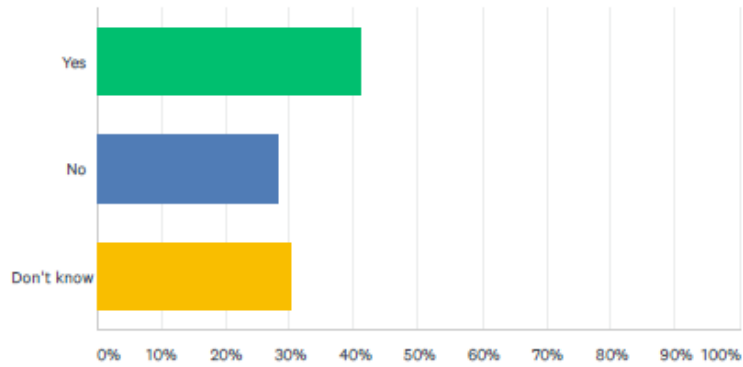


ANSWER CHOICES	RESPONSES
Defamation and privacy	65.79% 50
Prospectus liability	23.68% 18
Business and Human rights	46.05% 35
Artificial Intelligence	36.84% 28
If yes, please specify.	57.89% 44
Total Respondents: 76	



Q20 Are there specific issues concerning the Rome II Regulation that have caused debate at a doctrinal or political level?

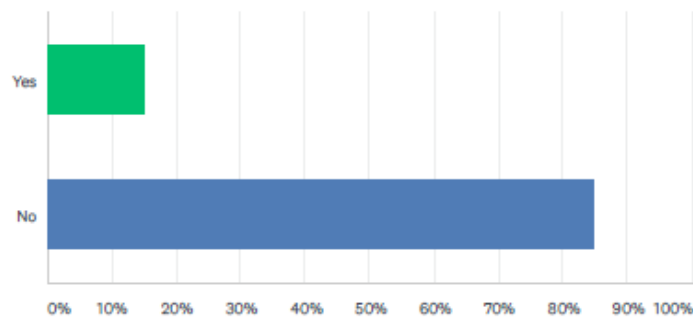
Answered: 92 Skipped: 10



ANSWER CHOICES	RESPONSES	
Yes	41.30%	38
No	28.26%	26
Don't know	30.43%	28
TOTAL		92

Q21 Are there any aspects of your experience(s) of the Rome II Regulation that you would like to add or comment upon but which you did not have the opportunity to state in your responses to this questionnaire?

Answered: 86 Skipped: 16

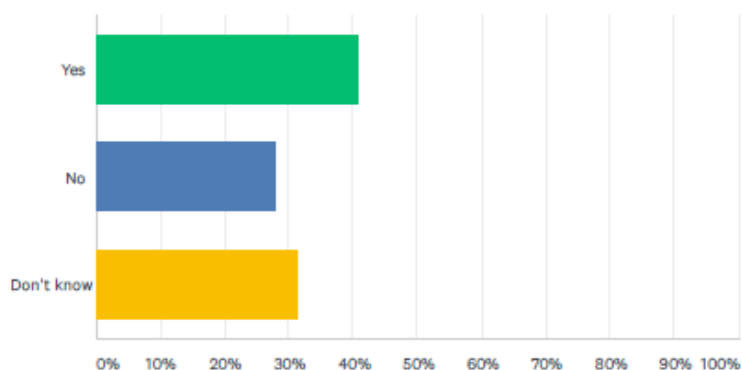


ANSWER CHOICES	RESPONSES	
Yes	15.12%	13
No	84.88%	73
TOTAL		86



Q22 Did the exclusion of violations of privacy and personality rights, including defamation, from the scope of the Rome II Regulation cause any problem in your Member State?

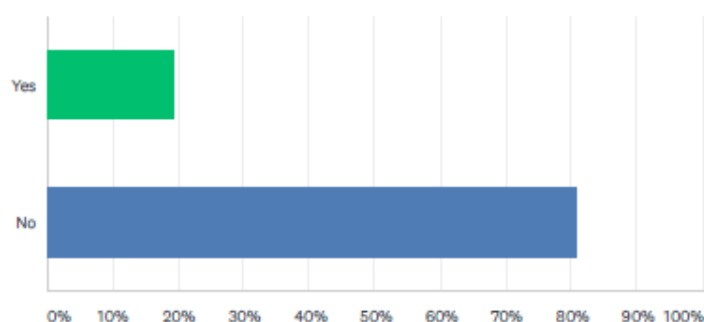
Answered: 54 Skipped: 48



ANSWER CHOICES	RESPONSES	
Yes	40.74%	22
No	27.78%	15
Don't know	31.48%	17
TOTAL		54

Q23 Do you have any comment regarding the interplay of the Rome II Regulation with data protection?

Answered: 52 Skipped: 50

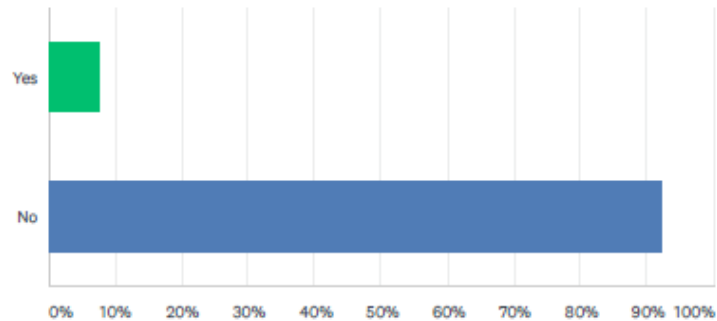


ANSWER CHOICES	RESPONSES	
Yes	19.23%	10
No	80.77%	42
TOTAL		52



## Q24 Do you have any comment regarding the relevance of Strategic Lawsuits Against Public Participation (SLAPPs)?

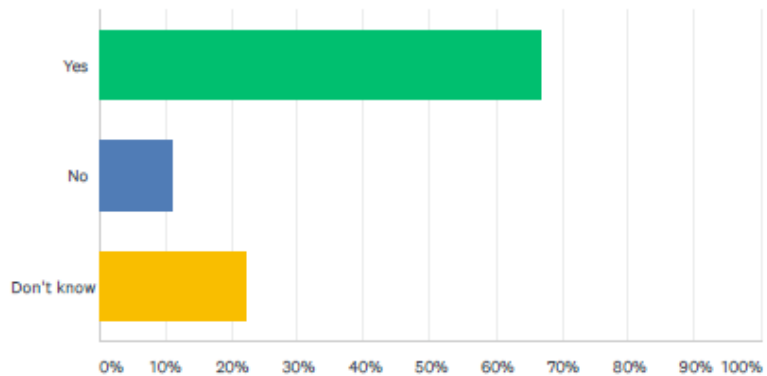
Answered: 51 Skipped: 51



ANSWER CHOICES	RESPONSES	
Yes	7.84%	4
No	92.16%	47
TOTAL		51

## Q25 Should the Rome II Regulation contain a specific provision on violations of privacy and personality rights?

Answered: 54 Skipped: 48



ANSWER CHOICES	RESPONSES	
Yes	66.67%	36
No	11.11%	6
Don't know	22.22%	12
TOTAL		54



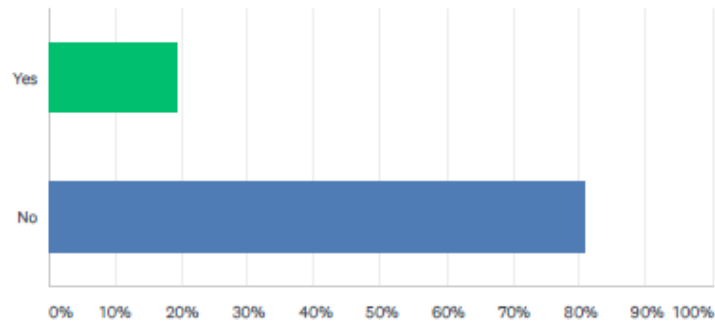
## Q26 Do you have any other comments?

Answered: 10 Skipped: 92

Individual answers, no graphs available.

## Q27 Have you been involved in cases in which the Rome II Regulation has been applied to corporate abuses against human rights?

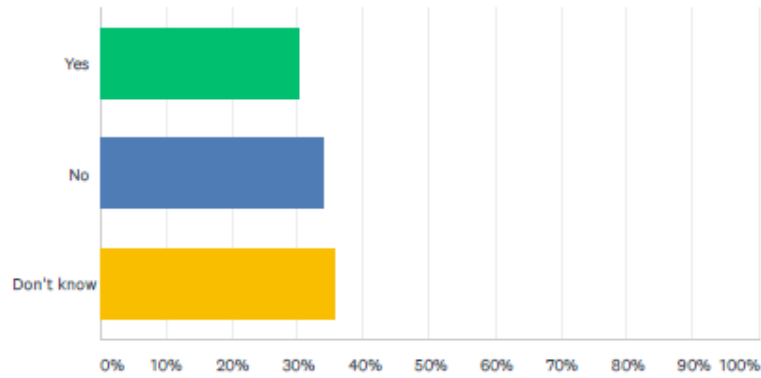
Answered: 57 Skipped: 45



ANSWER CHOICES	RESPONSES	
Yes	19.30%	11
No	80.70%	46
TOTAL		57

Q28 To your knowledge, are there any issues that emerged from the application of the Rome II Regulation to corporate abuses against human rights?

Answered: 56 Skipped: 46



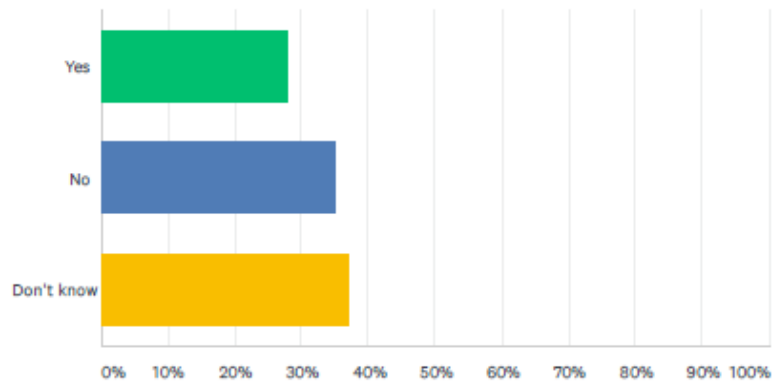
ANSWER CHOICES	RESPONSES	
Yes	30.36%	17
No	33.93%	19
Don't know	35.71%	20
TOTAL		56





Q29 To your knowledge, are there any issues that emerged from the interplay of the Rome II and the Brussels I Regulations in cases of corporate abuses against human rights?

Answered: 54 Skipped: 48

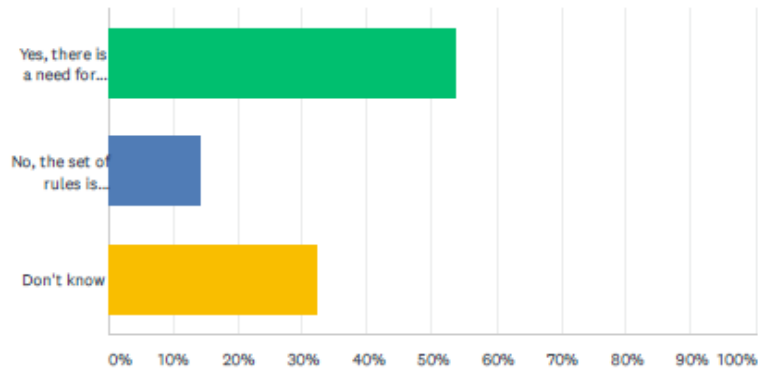


ANSWER CHOICES	RESPONSES	
Yes	27.78%	15
No	35.19%	19
Don't know	37.04%	20
TOTAL		54



Q30 According to you, does the Rome II Regulation lay down an effective set of rules to regulate business and human rights cases or would special rules be needed?

Answered: 56 Skipped: 46



ANSWER CHOICES	RESPONSES	
Yes, there is a need for special rules	53.57%	30
No, the set of rules is effective	14.29%	8
Don't know	32.14%	18
TOTAL		56

Q31 Do you have any other comments?

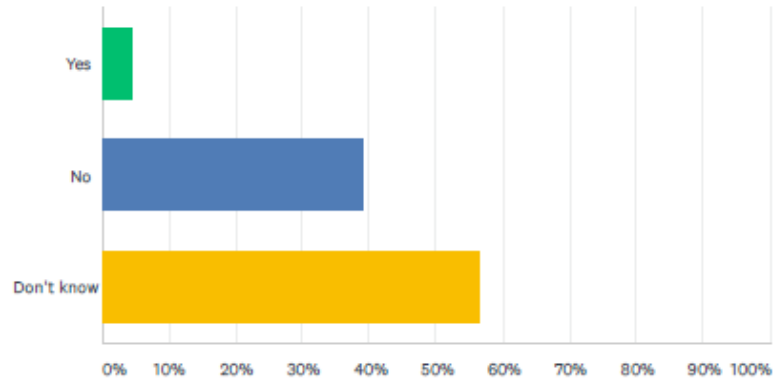
Answered: 10 Skipped: 92

Individual answers, no graphs available.



Q32 To your knowledge, has the Rome II Regulation been applied in relation with artificial intelligence in your Member State or elsewhere in Europe?

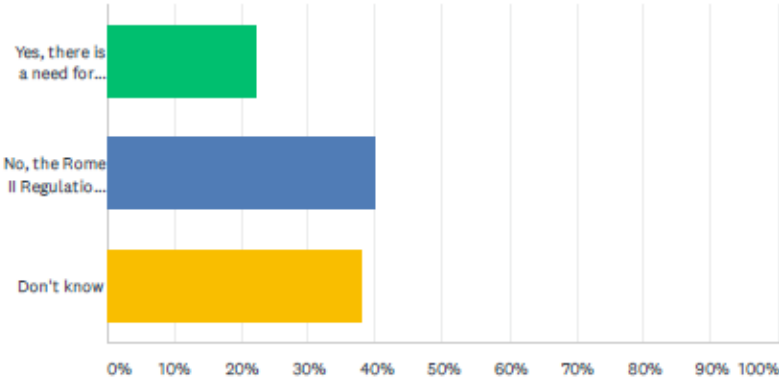
Answered: 46 Skipped: 56



ANSWER CHOICES	RESPONSES	
Yes	4.35%	2
No	39.13%	18
Don't know	56.52%	26
TOTAL		46

Q33 In your opinion, is the Rome II Regulation suited to address non-contractual liability arising in context with artificial intelligence or would special rules be needed?

Answered: 45 Skipped: 57

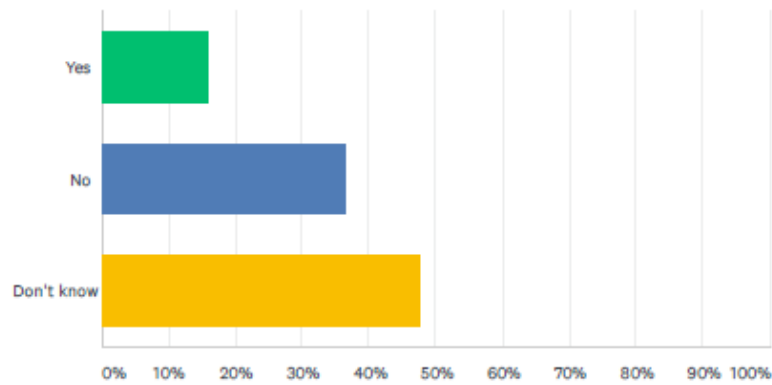


ANSWER CHOICES	RESPONSES	
Yes, there is a need for special rules	22.22%	10
No, the Rome II Regulation is suited for AI cases	40.00%	18
Don't know	37.78%	17
TOTAL		45



### Q34 Are you aware of any doctrine or study that addresses this issue?

Answered: 44 Skipped: 58



ANSWER CHOICES	RESPONSES
Yes	15.91% 7
No	36.36% 16
Don't know	47.73% 21
TOTAL	44

### Q35 Do you have any other comments?

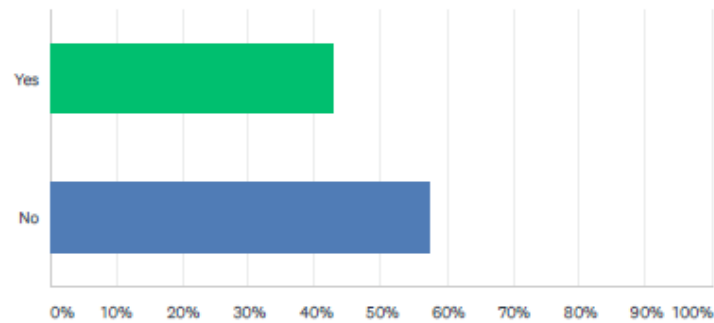
Answered: 10 Skipped: 92

Individual answers, no graphs available.



### Q36 Have you been involved in cases in which the Rome II Regulation has been applied to personal injury claims?

Answered: 54 Skipped: 48

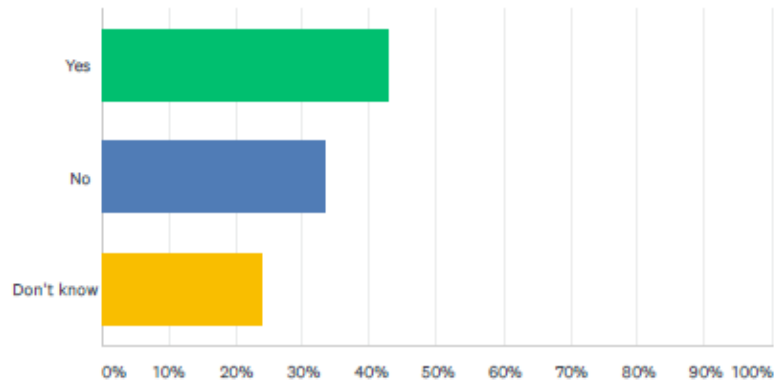


ANSWER CHOICES	RESPONSES	
Yes	42.59%	23
No	57.41%	31
TOTAL		54



Q37 To your knowledge, are there any issues that emerged from the application of the Rome II Regulation to personal injury claims, and in particular road traffic accidents?

Answered: 54 Skipped: 48

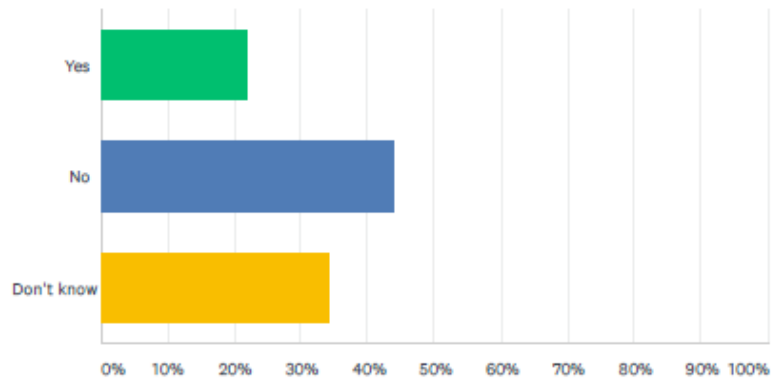


ANSWER CHOICES	RESPONSES	
Yes	42.59%	23
No	33.33%	18
Don't know	24.07%	13
TOTAL		54



Q38 To your knowledge, are there any issues that emerged from the interplay of the Rome II and the 1971 Hague Traffic Accident Convention?

Answered: 50 Skipped: 52



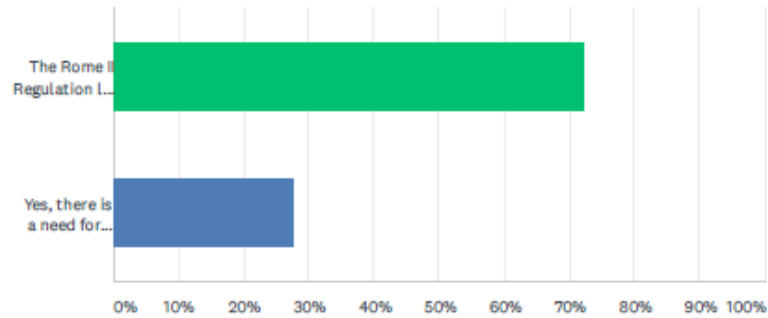
ANSWER CHOICES	RESPONSES	
Yes	22.00%	11
No	44.00%	22
Don't know	34.00%	17
TOTAL		50





Q39 According to you, does the Rome II Regulation lay down an effective set of rules to regulate personal injury claims, and in particular road traffic accidents, or would special rules be needed? If yes, what would you suggest?

Answered: 47 Skipped: 55



ANSWER CHOICES	RESPONSES	
The Rome II Regulation lays down an effective set of rules to regulate personal injury claims.	72.34%	34
Yes, there is a need for special rules.	27.66%	13
TOTAL		47

Q40 Do you have any other comments?

Answered: 11 Skipped: 91

Individual answers, no graphs available.



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