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International Law Code**

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Section I

PRIVATE INTERNATIONAL LAW AND INTERNATIONAL CIVIL PROCEDURE

The Rome II Regulation: On the way towards a European Private International Law Code

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I. Introduction¹

1. The correct functioning of any market calls for a sound institutional framework. Among other things, this institutional framework must provide a clear assignment of property rights and an adequate protection of those rights. Private law is, accordingly, a key element for the market. A sound set of property law, contract law, and tort law, on the one hand, and procedural law, on the other hand, are key elements to guarantee the “security in the possession” and the “security in the exchange” that any economy based on the market assignment of resources demands.²

2. This principle also applies to supra-national integrated markets, *i.e.* markets which are the result of the integration of several national markets, as is the case of the European market. The functioning of supra-national integrated markets also calls for a sound institutional framework. Nevertheless, in this case, the point of departure is somehow different to the extent that there are *already* several national markets, *each of them* with its own private law and with its own judicial mechanism of implementing property rights. In this scenario, the question faced by the supra-national lawmaker is whether, for the smooth functioning of the integrated market, a unification of private and procedural law is needed, or is a minimum of harmonisation accompanied by the unification of private international law (PIL) rules enough.³ The European lawmaker

is conscious of this dilemma, and the question is still open. One point seems, nevertheless, clear. Regardless of how much material harmonisation were ideal, in the meantime, the unification of PIL rules is feasible and absolutely necessary. In other words, in a scenario of material-law diversity, a “uniform set of PIL rules” (an *European PIL code*) is essential for the seamless functioning of an integrated market.

3. The procedural dimension of this *European PIL code* is to a great extent consolidated.⁴ On the basis of Articles 61(c) and 65 of the EC Treaty, the Community has adopted several Regulations on judicial cooperation in civil matters: Brussels I, Brussels IIbis, Bankruptcy, Service of Documents or Evidence.⁵ Nevertheless, in the conflict of laws dimension, the panorama is not so promising. Apart from the rules contained in particular regulations or directives, the 1980 Rome Convention is the only real element of uniformity, even though it is not technically community law (but see COM (2005) 650 final foreseeing its transformation into a regulation). That explains why the Rome II Regulation constitutes a stepping stone in this area.⁶ It sets forth a uniform set of conflict of laws rules applicable to torts and other related subjects (unjust enrichment, *negotiorum gestio* and *culpa in contrahendo*). This set of common rules minimises the “conflict risk” in Europe. In cross-border cases, operators in the market can foresee in advance which national law will apply to a tort, and this law will be the same no matter where the case is litigated.

4. The origins of the Rome II Regulation (from now on, the Regulation) date back to the proposal of the Commission of

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² See, Kronmann, “Contract Law and State of Nature”, *J.L.Econ.Org.*, 1985, p. 4 *et seq.*

³ The literature on this point is very extensive. See, Garcimartín, “Regulatory Competition: A Private International Law Approach”, *Eur.J.L. & Econ.*, 1999, p. 251 *et seq.* Recently, and with further references, Muir Watt, “Integration and Diversity: The Conflict of Laws as a Regulatory Tool”, in CAFAGGI (ed.), *The Institutional Framework of European Private Law*, 2004, p. 107 *et seq.*

⁴ The *status quaestionis*, recently summarised by Kreuzer, “Zu Stand und Perspektiven des Europäischen Internationalen Privatrecht”, *RabelsZ*, 2006, p. 1 *et seq.*

⁵ See Regulation (EC) 44/2001, of 22 of December 2000; Regulation (EC) 2201/2003, of 27 of November 2003; Regulation (EC) 1346/2000, of 29 of May 2000; Regulation (EC) 1348/2000, of 29 of May 2000; Regulation (EC) 1206/2001, of 28 of May 2001; Regulation 805/2004, of 21 of April of 2004 (creating a European Enforcement Order).

⁶ Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations (“Rome II”).

July, 27th 2003.⁷ The final text is the result of the conciliation proceedings laid down by Article 251 paras 3, 4 and 5 of the EC Treaty.

5. The goal of this Article is not to provide an in-depth analysis, but merely to make a general presentation of the text. In certain cases, the basic policy decisions underpinning some of the thorniest issues will be highlighted. A critical comment to some provisions of the text will also be unavoidable.

II. Legal nature

6. The Rome II Regulation is community law. It is a regulation and, therefore, it has general application, is binding entirely and is directly applicable in all Member States (Article 249 of the EC Treaty). The Regulation takes effect automatically and simultaneously in all Member States, without the need of being transposed or implemented by national legislation.

7. The legal foundation of this Regulation is Article 65.b of the EC Treaty. Accordingly, the position of the United Kingdom and Ireland, on the one hand, and Denmark, on the other, is subject to special rules (see Article 69 EC Treaty). The United Kingdom and Ireland have exercised the opting-in option, *i.e.* they have expressed their wish to participate in the adoption of this Regulation and are therefore bound by it (see recital 39). Denmark, on the other hand, does not have a right to opt-in, and therefore it has not participated in the adoption of this Regulation. Consequently, the Rome II Regulation does not apply to Denmark. Danish judges will continue applying its national conflict of laws rules on torts. The same consideration is applicable, in principle, to the territories referred to in Article 299(3) of the EC Treaty (such as the French overseas territories, Aruba or the Netherlands Antilles). The universal nature of the Regulation (*infra*) implies that this text is applicable in the rest of the Member States even when its conflict of law rules point to Danish law as the law governing the case.

8. The European Court of Justice has jurisdiction to give

preliminary rulings concerning the validity and interpretation of the Regulation. The conditions are laid down in Article 68 EC Treaty. Pursuant to this provision, when an interpretative question is raised in a case pending before a national court, against whose decisions there is no judicial remedy, that court shall, if it considers that a decision on the issue is necessary to give its ruling, request the Court of Justice to rule on it.

III. Sphere of application

1. Sphere of territorial application

9. The Regulation has general applicability. Article 3 makes clear the universal character of the conflict of laws rules in the Regulation: the law designated by those rules is applicable whether or not it is the law of a Member State.

10. Furthermore, the Regulation is applicable without any additional link with the European Community further than the mere judicial competence of the corresponding Member State. This means that the Regulation determines the law applicable *ad intra and ad extra*, that is to “intra-Community cases” and to “extra-Community cases”. So, for example, the Regulation even applies to a conflict between two extra-Community citizens in relation to a damage suffered in a third State that, for any conceivable reason, come to litigate to a Member State. It has been argued whether Article 65 EC Treaty gives enough basis of competence to embrace any “extra-Community case”. Nevertheless, the solution finally adopted seems convincing. On the one hand, at the conflict of laws level, the separation between intra-community and extra-community cases is very hard to embody in a rule. The different solutions essayed were artificial, difficult to put into practice or under-inclusive. On the other hand, the establishment of a dual-system, *i.e.* a uniform set of conflict of laws rules for intra-community cases and twenty-six potentially different sets for extra-community cases, would result in a highly complex solution for the real addressees of this Regulation: private operators, lawyers and judges.⁸ In general, clear and practical rules enhance certainty, which is a value in itself, and therefore contribute to the proper functioning of the internal market. Finally, the potential application of the “Brussels I Regulation” to the recognition and enforcement of all judgments, regardless of any other Community link, may be invoked to legitimate that general scope of the Rome II Regulation. A system of recognition and enforcement of judgments that excludes any control of the applicable law as a ground for non-recognition (see Articles 34-36 of the Brussels I Regulation) can be more easily justified if all Member States shared the same conflict of laws rules.⁹

⁷ COM (2003) 427 final. The articles and notes published about that text are numerous. See, among others, Amores/Torralba, “XI Tesis sobre el estatuto delictual”, in www.reci.org; Bariatti, “La future disciplina delle obbligazioni non contrattuali nel quadro della comunitarizzazione del diritto internazionale privato”, *Riv.dir.int.priv. e processuale*, 2005, p. 5 *et seq.*; Benecke, “Auf dem Weg zu Rom II – Der Vorschlag für eine Verordnung zur Angleichung des IPR der ausservertraglichen Schuldverhältnisse”, *RIW*, 2003, p. 830 *et seq.*; Carella, “La disciplina internazionaleprivatistica delle obbligazioni da fatto lecito nella proposta di regolamento Roma II”, *Riv.dir.int.priv. e processuale*, 2005, p. 25 *et seq.*; Fuchs, “Zum Kommissionsvorschlag einer Rom II Verordnung”, *GPR*, 2/03-04, p. 11 *et seq.*; Huber/Bach, “Die Rom II-VO”, *IPRax*, 2005, p. 73 *et seq.*; Leible/Engel, “Der Vorschlag der EG-Kommission für eine Rome II-Verordnung”, *EuZW*, 1/2004, p. 7 *et seq.*; Kreuzer, “Die Vergemeinschaftung des Kollisionsrechts für ausservertragliche Schuldverhältnisse (Rom II)”, in Reichelt/Eichelt/Trechberger (ed.), *Europäisches Kollisionsrecht*, 2004, p. 13 *et seq.* For an in-depth comparative law analysis, see Kadner Grazino, *Gemeineuropäisches Internationales Privatrecht*, 2003; with a reduced version in French *Id. La responsabilité délictuelle en droit international privé européen*, 2004; Nourissa/Treppoz, “Quelques observations sur l’avant-projet de proposition de règlement du Conseil sur la loi applicable aux obligations non contractuelles Rome II”, *J.D.I.*, 2003, p. 7 *et seq.*; Palau Moreno, “Hacia la unificación de las normas de conflicto en materia de obligaciones extracontractuales”, in *Derecho patrimonial europeo*, 2003, p. 271 *et seq.*; Stone, “The Rome II Proposal on the Law Applicable to Non-Contractual Obligations” = [2004] *EuLF* (E) 213 *et seq.*

⁸ See, on this argument, *Hamburg Group for Private International Law*, “Comments on the European Commission’s Draft Proposal for a Council Regulation on the Law Applicable to Non-Contractual Obligations”, *RabelsZ*, 2003, p. 1 *et seq.*, pp. 3-4. In more general terms, Kreuzer (2006) *loc.cit.*, p. 86.

⁹ As stated by the Mutual Recognition Program (O.J. C 12, of 15th January 2001, p. 1), the measures to harmonise conflict of laws rules constitute supporting measures, facilitating implementation of the principle of mutual recognition of judgments in civil and commercial matters. However, see, *i.a.*, Leible/Engel, *loc.cit.*, p. 9 (with a more cautious approach to this issue).

2. Internationality

11. The Regulation applies to any situation linked to more than one legal system, and therefore that potentially implies a conflict of laws. In the Explanatory Memorandum accompanying the Commission proposal, this term was defined as “situations in which there are one or more elements that are alien to the domestic social life of a country”. The Regulation does not define its application by reference to specific factors. In principle, any foreign element (typically the nationality or domicile of the parties, the place where the direct or indirect damage arises or where the event causing the damage occurs, or even the fact that the damage is suffered in the context of a pre-existing relation governed by a foreign law) triggers the application of the Regulation.

12. Still, it could be argued that the mere selection of a foreign law by the parties would be enough to trigger the application of the Regulation to the extent that there is a special rule for these situations (Article 14.2). This rule is parallel to Article 3.3 of the 1980 Rome Convention. The Rome II Regulation allows the parties to choose the applicable law to the non-contractual obligation (*infra*). The parties can choose any law, even if it has no objective connection with the tort. Nevertheless, the rule introduces an exception to prevent parties from internationalising a domestic case merely by choosing a foreign law. When all the other elements of the situation are located in one country other than the country whose law has been chosen, the choice is valid, and the foreign law will apply, but without prejudice to the application of the internal mandatory rules of the law of the former country.

Article 14.2 specifies the relevant time to qualify a case as “domestic”: the time when the event giving rise to the damage occurs. Accordingly, an *ex post* internationalisation does not seem enough. Nevertheless, this rule is a limit to the parties’ autonomy and should not be interpreted in a restrictive way.

That article means that the autonomy of the parties has material effects, not conflict of laws effects: they can incorporate by reference the foreign law but within the limits of law with which the case is objectively connected. The mandatory rules of Article 14.2 are those rules that cannot be derogated by contract in purely internal cases (*internal mandatory rules*). These must be distinguished from the *international* overriding mandatory rules contemplated in Article 16. Unlike the 1980 Rome Convention, the Regulation does not make a reference to the fact that the parties have chosen a foreign law accompanied with a forum selection clause. Nevertheless, this difference should not have any hermeneutic relevancy on this issue.

13. Article 14.3 extends by analogy the same principle to harmonised sectors of Community law. Where all the elements of the case are located in two or more different Member States, the choice by the parties of the law of a third State shall not debar the application of the mandatory rules set forth by the Community law. To the extent that the Community provisions are mandatory, the condition that “all the relevant elements...are located in one or more Member State” does not make much sense: even though not all the elements are situated within the Community, the Community provisions shall

apply if they are mandatory and declare themselves applicable to the case (see, in contractual matters, ECJ C-381/98, “Ingmar case”). Or, in other words, what determines the application of a mandatory provision of Community law is not the fact that all the elements are located in the EU, but the scope of cross-border application unilaterally defined by the Community instrument itself (or inferred by interpretation from its sense and purpose, as in the Ingmar Case).

In addition –and in spite of Article 1.4, for the purposes of Article 14.3, Denmark must be considered as a Member State. If the parties choose Danish law, where mandatory community rules are in force, Article 14.3 should not be applied as parties are not “escaping from” harmonised community law.

The final version of this Regulation resolves an issue omitted in the Commission’s proposal. When the harmonised rules are contained in a Directive that permits Member States to implement them differently (as is the case where the Directive sets forth a minimum standard that can be raised by national law), it is necessary to designate the national applicable law *in concreto*. The Regulation opts for the application of the *lex fori*, instead of the application of the law designated by Articles 4 *et seq.* (that is, the law that would have been applicable, had the parties not chosen the law of a third country). This option for the *lex fori* simplifies things.¹⁰ Nevertheless, it may incentive *forum shopping* and appears somehow paradoxical. If the parties had not chosen the law of a third country, the law applicable would have normally been the law designated by Articles 4 *et seq.*, for example, the *lex loci delicti* (Article 4.1). Nevertheless, due to the fact that the parties have chosen the law of a third country, the (mandatory) law applicable changes in favour of the *lex fori*. An example can serve to illustrate this idea. In a harmonised subject-matter, the situation is an intra-Community case only connected with France, Spain and Portugal. The material harmonisation has been carried out by a Directive, which has been transposed in those three Member States in different ways. The damage is suffered in Portugal and the case is litigated before the Spanish court. If the parties do not choose any law, the Portuguese law of transposition shall apply. Nevertheless, the fact that the parties have chosen New York law changes the result, triggering the application of the Spanish law of transposition. It is not easy to find a sound justification for this result.

3. Sphere of material application

14. The Regulation applies to non-contractual obligations arising from civil and commercial matters except those listed in Article 1 para. 2. The concept of non-contractual obligations is an autonomous concept that, in this context, includes unjust enrichment, *negotiorum gestio* and *culpa in contrahendo* (see Recital 11 and Article 2.1).

3.1. The concept of civil and commercial matters

15. The Regulation only applies in *civil and commercial*

¹⁰ Huber/Bach, *loc.cit.*, p. 75.

matters. This concept is an autonomous concept of Community law. Its meaning must be uniform and independent of the national laws of Member States. This autonomous interpretation must be drawn, first, from the objectives and general scheme of the Community text and, second, from the general principles underpinning the corpus of national legal systems. This ensures that the Community norm is applied uniformly in all Member States. Moreover, the meaning of this concept must be *prima facie* consistent in all community legal texts. Accordingly, the reference to the interpretation given by the ECJ to the same concept in the context of the “Brussels I Regulation” is an avoidable hermeneutic element from Rome II. In the context of the “Brussels I Regulation” the ECJ has pointed out some features of this term that can be extended to the Rome II Regulation: (a) The relevant element to characterise an issue as “civil and commercial matters” is the legal relationship between the parties and not the nature of the court where the case is litigated. It means that the Regulation must be applied also to decisions given in civil matters by criminal, labour or administrative courts (see recital 8). (b) The mere fact that one of the parties in the case is a public authority does not mean that the Regulation is not applicable. The key point is the fact that the Public authority is acting in the exercise of its public powers and the case derives from that act.¹¹

16. The Regulation clarifies that the concept of civil and commercial matters does not include revenue, customs or administrative matters or the liability of the State for acts or omissions in the exercise of State authority (“*acta iure imperii*”). Recital 9 explains that this exclusion covers claims against officials who act on behalf of the State and liability for acts of public authorities, including liability for publicly appointed office-holders. The reference to the *acta iure imperii*, which has been taken from the Regulation 805/2004 (see Article 2.1), may be considered superfluous. The interpretation of the concept “civil and commercial matters” given by the ECJ would be sufficient to exclude those *acta* from the scope of the Regulation: in principle, when a State authority is acting in the exercise of its public powers it is also acting “in the exercise of State authority”. This addition fulfils mainly a narrative function that clarifies explicitly the exclusion. In principle, the scope of this exclusion will coincide with the scope of the jurisdictional immunity granted by Public International Law. This means, for instance, that the liability of a diplomat for damages caused in the territory of a foreign country, claimed in the State of origin of that diplomat, is not subject to the Regulation.

17. The Regulation, on the contrary, applies to the liability of the State for *acta iure gestionis*. This means that the liability of a State for the damages caused in the territory of another State for *acta iure gestionis* (for example, the damages caused by a public educational institution in a foreign country) could

be subject to a foreign law (according to Article 3.1). The principle underpinning this solution is that, from a conflict of laws perspective, States acting *iure gestionis* are considered as any other private person. Nevertheless, this solution may cause some problems when, from a material law perspective, there is a special regime for the liability of the State which applies independently of the nature of the act (*iure gestionis* or *iure imperii*). In fact, under the law of some Member States, the liability of public authorities is subject to a regime stricter than the general regime applicable to private persons, regardless of the nature of the State activity (*i.e. iure gestionis* or *iure imperii*). The question then is whether this qualified regime also applies to foreign States when they cause a damage in the territory of the former.

3.2. Non-contractual obligations

18. In civil and commercial matters, the Regulation only determines the law applicable to non-contractual obligations, including unjust enrichment, *negotiorum gestio* and *culpa in contrahendo*. These concepts must also be interpreted in an *autonomous* way. Again, the jurisprudence of the ECJ in relation to the Brussels I Regulation offers a necessary hermeneutic reference. In particular, the ECJ has defined the concept of “non-contractual obligations” by default *vis à vis* the concept of “contractual obligations”. The former comprises the liability for damages caused by a person that does not derive from an obligation freely assumed by one party towards the other.¹² Nevertheless, it is necessary to be cautious when extending this case-law to the Rome II Regulation: the ECJ has traditionally argued that the special *fora* of the Brussels I Regulation are exceptions to the general *forum* (*i.e.* the domicile of the defendant) and, therefore, must be interpreted strictly. This hermeneutic criterion does not apply to the Rome II Regulation.

19. The Regulation applies to damages and non-contractual obligations that are likely to arise (see Article 2). Accordingly, it covers preventive actions such as actions for a prohibitive injunction. Naturally, the Regulation only determines the law applicable to the material aspects of those actions. The procedural aspects are governed by the *lex fori*.

20. In order to clarify the scope of the Regulation and to prevent characterisation problems, Article 1.2 contains a list of exclusions. This list is mainly inspired by Article 1.2 of the Rome Convention. Some of the exclusions are perfectly sensible in the context of this text (*i.e.* in the context of contract law), but it is not always easy to understand their sense in the context of the Rome II Regulation (*i.e.* in the context of non-contractual obligations).¹³ The exclusions are the followings.

¹¹ See, among others, the rulings of the ECJ: 14 October 1976 – 29/76 – *LTU v Eurocontrol* [1976] ECR 1541, 16 December 1980 – 814/79 – *Netherlands State* [1980] ECR 3807, 14 November 2002 – C-271/00 – *Baten* [2002] ECR I-10489 = [2003] EuLF (E) 90; 15 May 2003 – C-266/01 – *Préservatrice Foncière TIARD* [2003] ECR I-4867 = [2003] EuLF (E) 172; 18 May 2006 – C-343/04 – *CEZ* [2006] ECR I-4557 = [2006] EuLF 2006 I-109; 15 February 2007 – C-292/05 – *Lechouritou and others*, not yet published in the ECR = [2007] EuLF I-91 (in this issue).

¹² See, among others, the cases of the ECJ: 27 September 1988 – C-189/87 – *Kalfelis v Schröder and others* [1988] ECR 5565; 26 March 1992 – C-261/90 – *Reichert and Kockler v Dresdner Bank* [1992] ECR I-2149; 27 October 1998 – C-51/97 – *Réunion européenne SA and Others* [1998] ECR I-6511; 11 July 2002 – C-96/00 – *Gabriel* [2002] ECR I-6367 = [2002] EuLF 2002 I-307; 26 June 2003 – C-334/00 – *Glencore Grain Rotterdam* [2003] ECR I-6769; 1 October 2002 – C-167/00 – *Henkel* [2002] ECR I-8111 = [2002] EuLF I-302.

¹³ See, *Hamburg Group*, *loc.cit.*, p. 5; *Amores/Torralba*, *loc.cit.*, p. 4 (arguing, with good reasons, that the right approach would have been to include those non-contractual obligations under the Regulation, but to

(a) Non-contractual obligations arising out of family relationships. This term embraces parentage, marriage, affinity and collateral relatives. The exclusion also extend to relationships that under the applicable law have comparable effects (but see Recital 10, referring to the *lex fori*).¹⁴ The exclusion covers, for example, damages deriving from the violations of family obligations, like a late payment of maintenance obligations.

(b) Non-contractual obligations arising out of matrimonial property regimes, property regimes of relationships deemed by the law applicable as having comparable effects, and successions.

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

(d) Non-contractual obligations arising out of the law of companies and other bodies corporate or unincorporated such as the creation, legal capacity, internal organisation or winding up, the personal liability of officers and member as such for the obligations of the company or body and the personal liability of auditors to a company or its members in the statutory audits or accounting documents. The purpose of this exclusion is to cover liability arising from company law (governed by the *lex societatis*), and questions related to the “piercing of the veil” for obligations of the company. In principle, this exclusion covers liability towards other members of the company and the company itself but also towards third parties that base their claim for compensation on a breach of company law duties. Nevertheless, the interplay between liability under company law and liability under general tort law is not always easy to delimit. For example, it is doubtful whether this exclusion also covers the rules of those legal systems where the liability may be based not on company law but rather on general duties of conduct for which company law is merely a preliminary question.

(e) Non-contractual obligations arising out of the relationship among the settler, trustees and beneficiaries of a trust *created voluntarily*. Unlike the text of the 1980 Rome Convention, and as a consequence of the Parliament opinion, the exclusion only covers trust created voluntarily.

(f) Non-contractual obligations arising out of nuclear damages. Though international conventions on this issue have harmonised the main aspects, neither this harmonisation is complete, nor have those conventions been ratified by all Member States.¹⁵ Outside the scope of the conventions, each Member State applies its own conflict of laws rule. The exclusion, however, prevents this field from turning into a Community competence (with the subsequent attribution of external competence to the Community, *infra*).

(g) Non-contractual obligations arising from violations of privacy and rights relating to personality, including defamation. This exclusion was not contained in the original proposal of the Commission but was finally included as a consequence of the impossibility of reaching a common conflicts rule on this area.¹⁶ Though the main discussions took place in relation to the media, the difficulties to precise this concept led to formulate the exclusion in very broad terms and not limited to the damage caused by that sector (but see Article 30.2 of the Regulation foreseeing future proposals on this field).

21. Finally, para. 3 of Article 1 is another narrative norm that makes it clear that the Regulation does not apply to procedural questions (that are subject to the *lex fori*), without detriment to the special rules laid down in Articles 21 and 22 (*infra*).

4. Sphere of application in time

22. Apart from Article 29, which contains a rule imposing certain obligations to Member States and to the Commission, the Regulation will apply from 18 months after the date of its adoption (Article 32). The relevant date is the moment when *the event giving rise to the damage occurs* (Article 31). This means that where there is a temporal lapse between that event and the moment when the damage arises, as may be the case in environmental damages or product liability, the Regulation only applies if the former has occurred after that date.¹⁷

5. Relation with existing international conventions

23. Once the Regulation has been adopted, Member States are pre-empted from undertaking obligations with non-Members which affect the rules therein contained. In the future, the competence to conclude or accede to international conventions belongs to the EC (but see Recital 37).¹⁸

Nevertheless, the Regulation respects the international conventions concluded before its adoption (Article 22). Accordingly, Member States can continue to apply the conflict of laws rules contained in international conventions to which they are parties, for instance, the Hague Convention on traffic accidents of 4th May 1971 or the Hague Convention on prod-

determine the law applicable to them by reference to the law that govern the qualifying relationship).

¹⁴ This means that the legal attributes of those relationships are fixed by the law applicable to them. However, the *lex fori* determines whether they can be considered as having comparable effects to marriage and other family relationship.

¹⁵ See, *Hamburg Group*, *loc.cit.*, pp. 8-9; *Fuchs*, *loc.cit.*, p. 101.

¹⁶ Recently, on this issue, *Siebr*, “European Private International Law of Torts. Violation of Privacy and Rights Relating to the Personality”, *R.D.I.P.P.*, 2004, p. 1201 *et seq.*

¹⁷ Note that Article 31 refers to the “entry into force” of the Regulation while Article 32 refers to the “date of application”. In principle, both concepts mean the same (unlike in Article 33 of the Regulation 805/2004).

¹⁸ For the *status quaestionis* in this area, see Opinion of the ECJ 7 February 2006 – 1/03. Recently, *Brière*, “Réflexions sur les interactions entre la proposition de règlement Rome II et les conventions internationales”, *J.D.I.*, 2005, p. 677 *et seq.* On this issue, Recital 37 of the Regulation is noteworthy. During the negotiations, several Member States expressed their interest in maintaining the possibility of concluding bilateral agreements with third countries, for example, in order to regulate activities in border areas, that may contain conflict of laws rules. This concern is mirrored in that Recital. According to its text: the Commission will make a proposal concerning the procedures and conditions according to which Member states would be entitled to negotiate and conclude on their own behalf agreements with third countries in individual and exceptional cases, concerning sectoral matters, containing provisions on the law applicable to non-contractual obligations.

uct liability of 2nd October 1973. These two conventions have a universal character; therefore in those Member State which are part of the corresponding convention, the law applicable will be determined by that convention and not by the Regulation. This sacrifices the harmonisation in the EU area,¹⁹ but it is more in compliance with the compromises that Member States had assumed *vis à vis* third countries. The Regulation does oblige Member States to notify the Commission of the list of those conventions, and this list has to be published in the Official Journal (Article 29).

24. On the contrary, the Regulation prevails over the conventions concluded *exclusively* between two or more Member States before its adoption (Article 28.2). The difference with the former rules is that, in this case, there are no third-countries affected.

6. Relationship with other provisions of Community law

25. In relation to other Community instruments, the Regulation lays down the principle of *lex specialis*. The Rome II Regulation is not detrimental to the application of other acts of the Community institutions which, *in relation to particular matters*, lay down conflict of laws rules relating to non-contractual obligations (Article 27). Unlike the original proposal (see Article 23.2 of the proposal presented by the Commission), the final draft of this provision does not contain any reference, direct or indirect, to the internal market clause or to the "State of origin" principle. However, Recital 35 echoes that concern and states that the Rome II Regulation "should not prejudice the application of other instruments laying down provisions designated to contribute to the proper functioning of the internal market insofar as they cannot be applied in conjunction with the law designated by the rules of this Regulation. The application of provisions of the applicable law designated by the rules of this Regulation should not restrict the free movement of goods and services as regulated by Community instruments, such as the e-Commerce Directive".

The inter-relation between the general conflict of law rules applicable to torts or contract, on the one side, and the principle of State of origin, on the other, is not peaceful.²⁰ In fact, the question of "if and under what conditions" the State of origin principle modifies the application of the general conflict of laws rules is one of the thorniest issue in Community Law. Unfortunately, Recital 35 of the Rome II Regulation does not shed light on this problem and merely states something that may seem obvious.

IV. First conflict of laws rule: The autonomy of the parties

26. The Regulation allows the parties to select the law appli-

cable to non-contractual obligations (Article 14). This freedom of will also encompasses unjust enrichment, *negotiorum gestio* and *culpa in contrahendo*. Parties are allowed to choose any State law, be it the law of a Member or the law of a non-Member State, and whether or not it has an objective connection with the case. The only limits on this point are those related to purely domestic cases and purely intra-Community cases (*supra*).

27. In the Commission's proposal, the choice was only permitted *ex post*: by an agreement entered into after the dispute arose. The final version is more liberal. It also allows an *ex ante* agreement, *i.e.* before the event giving rise to the damage occurred (which may make sense in certain fields, such as construction or investment contracts), but limited to parties pursuing a commercial activity and who have negotiated freely the corresponding law governing clause. In order to prevent abuses, consumer and workers are, therefore, excluded from the possibility of choosing *ex ante*. And even between professionals, the clause must have been freely negotiated, which in principle excludes law governing clauses included among general conditions pre-drafted by one party. The reluctance to accept an *ex ante* autonomy explains this caution (which does not have a parallel rule in contractual obligations). In any case, and following the 1980 Rome Convention terminology, the Regulation requires that the choice must be expressed or demonstrated with reasonable certainty by the circumstances of the case. The reference to the protection of third parties expressly included in the text may be relevant in relation to Article 18 (*infra*): arguably, Article 14 could not be used to look for a law that lays down a direct action against the insurer, when this direct action is not foreseen by the *lex loci damni* or by the *lex contractus*.

28. Moreover, freedom of will is not accepted in the matters ruled by Articles 6 and 8, neither *ex ante* nor *ex post*. This option is arguable insofar as the Regulation only deals with damages *inter privatos*.²¹ Nevertheless, it was considered that (a) due to the "supra-individual function" of these branches of the legal system, where there are important public interests at stake, and (b) due to the complexity that the exercising of party autonomy may introduce, it would be preferable to restrict it. Naturally, the damages referred to in para. 2 of Article 6 (*i.e.*, where exclusively the interests of a specific competitor are affected) are not covered by this restriction.

29. Despite the resistance to accept the role of parties' autonomy, its practical consequences will presumably not be very relevant. On the one hand, it is difficult to imagine cases where parties have the opportunity to meet before the damage occurs and to agree on the law applicable to that eventuality. On the other hand, once the damage has occurred, and the case goes to courts, the parties are normally confronted with a zero-sum game in which there will be no room for agreement on the law applicable. The material law that is favourable to one party will be detrimental to the other party, and *vice versa*. Only in marginal cases may the parties *ex post* have a common gain opting for the same material law.

¹⁹ Brière, *Ibid.*, pp. 687-689.

²⁰ See, with many reference, Deinert, "Das Herkunftslandprinzip und seine Bedeutung für das Internationale Deliktsrecht", *EWs*, 2006, p. 445 *et seq.*; Hellner, "The Country of Origin Principle in the E-Commerce Directive- A Conflict with Conflict of Laws?", *Eur.R.P.L.*, 2-2004, p. 193 *et seq.*

²¹ Amores/Torralba, *loc.cit.*, p. 18.

V. Rules regarding torts: General rule

1. Introduction

30. The starting point of the Regulation is the traditional rule on this area: the *lex loci delicti commissi* (see Article 4.1). Nevertheless, the Regulation lays down a wide range of exceptions to that rule, which reduce notably its scope of application. One group are material-blind exceptions aimed to find a better location of the case in general terms: the habitual residence of the parties (Article 4.2) or the closest connection (Article 4.3). Another group of exceptions are formulated paying attention to the particularities of a material sector: products liability (Article 5), unfair competition (Article 6), environment (Article 7), intellectual property (Article 8) and industrial actions (Article 9). Technically, some of these special rules are not true exceptions to the *lex loci delicti*, but mere specifications of it, such as Articles 6 or 8. This is confirmed by Recital 21 of the Regulation, in relation to Article 6: the special rule in Article 6 is not an exception to the general rule in Article 4(1) but rather a clarification of it. There is no special rule for traffic accidents.²²

31. The Regulation excludes the *renvoi* (Article 24) and contains a rule for multi-unit States (Article 25). Both articles are identical to the corresponding rules of the 1980 Rome Convention (see Articles 15 and 19). In particular, the Regulation does not determine the law applicable to purely domestic conflicts.²³

2. Common place of residence

32. If the parties have their common place of residence in one State, the law of this State shall apply, irrespective of the place of damage. The common place of residence, therefore, has a rank superior to the *lex loci delicti*. This option can be criticised.²⁴ On the one hand, the argument that this solution “reflects the legitimate expectancies of the two parties”²⁵ is not very persuasive when the two parties are completely unknown to each other. On the other hand, it is not very consistent that a pre-existing relationship between the parties only plays the role of a presumption of the escape clause (Article 4.3), while a common place of residence automatically overrides the *lex loci*. Finally, the solution is not very consistent either with the fact that in the case of unjust enrichment, *negotiorum gestio* or *culpa in contrahendo*, the common place of residence plays a subsidiary role. In general terms, the internal consistency of the text flaws when one compares the different weight that the same connecting factor has in different articles. In addition, it is remarkable that the text does not contain a special rule for

those cases where the parties, although they do not have their common residence in the same Member State, do have their common residence in the Community and it is a matter governed by harmonised Community law.

33. The connecting factor refers to the person claimed to be liable, who does not necessarily coincide with the person who caused the damage (e.g., cases of vicarious liability) and the person who has sustained the damage. The concept of habitual residence is defined in Article 23. In cases of legal persons, the relevant criterion is the central administration of the company, *i.e.* the place where the administration of the activities of the legal person takes place on a regular basis. This criterion is different from the concept of “principal establishment” or from the concept of “registered office” (Article 48 of the Treaty and Article 60 of the “Brussels I” Regulation distinguish between these three concepts). It refers to the place where the “head” (*i.e.* the directing power) is located, not the “muscles” (*i.e.* the assets, factories).²⁶ The Regulation adds a rule, inspired by Article 4.2 *in fine* of the 1980 Rome Convention, for those cases where the legal person has more than one establishment and the damage occurs or is suffered in the course of the operations of that particular establishment. In this case, that establishment takes the place of the habitual residence. This particular rule applies both when the legal person is responsible for the damage and when the legal person is the victim.

34. The Regulation does not specify the habitual residence of natural persons. However, it contains a particular rule for individuals that are engaged in an independent business or professional activity. In this case, if the damage occurs or is suffered in the context of that activity, the habitual residence shall be where his or her principal place of business is located. Surprisingly, for individuals the reference is not to the “administrative connection” but to the “operation connection” (place of business), and there is no rule for the case where the individual has more than one place of business. On the contrary, if the damage occurs or is suffered in his sphere of private life, the habitual residence shall be where he or she usually lives.

35. This specification of the concept of habitual residence contained in Article 23 applies to the whole text: Not only to Article 4.2, but to any other article which employs the same connecting factor (e.g. Articles 5, 10 or 11).

3. Place of damage

36. If the parties have their habitual residence in different countries, the applicable law is the law of the country where the damage arises, *i.e.* the *lex loci delicti commissi* (Article 4.1). In the general scheme of the Regulation, this rule plays a marginal role: it only applies when the damage is not governed by a special rule (Articles 5-9), the parties have not chosen a different law (Article 14), have their habitual residence in different countries (Article 4.2), and the case is not more closely

²² See Staudinger, “Rome II and traffic accidents” = [2005] EuLF I-61 *et seq.*, exploring the application of the general rules of the Regulation to this subject-matter. Note, however, that Article 30 foresees a study of the Commission on the effects of Article 28 with respect to the Hague Convention on traffic accidents.

²³ It is noteworthy that Article 21 of the Commission Proposal of Rome I Regulation expands its rules also to these cases.

²⁴ See, Amores/Torrallba, *loc.cit.* p. 12; Stone, *loc.cit.*, p. 218-220; Staudinger, *loc.cit.* p. 61.

²⁵ See Commission Proposal, p. 12.

²⁶ See, Virgos/Garcimartin, The European Insolvency Regulation, 2004, pp. 39-41 (arguing that to a certain extent this criterion coincides with the term “centre of main interest” as defined by recital 13 of the Insolvency Regulation).

connected with the law of another country (Article 4.3). In practice, its main area of application will be traffic accidents (except in those Member States that are part of the Hague Convention of 1971).

37. The formula employed by the Regulation is the place “where 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”. In addition, this provision must be read in conjunction with Recital 17, which indicates that in cases of personal injury or damage to property, the country in which the damage occurs “should be the country where the injury was sustained or the property was damaged”. With these expressions, the Regulation attempts to solve two types of cases.

Firstly: the distance torts (*Distanzdelikte*). When the causing event is located in one country but the damages are suffered in another country, the Regulation opts for the second (*lex loci laesionis* instead of *lex loci actus*). The law applicable shall be the law of the country where the damage occurs (*Erfolgsort*), irrespective of where the event causing the damage has taken place (*Handlungsort*). The connecting factor is a neutral criterion, not a material-oriented criterion, and refers to the links with the territory of a country, not with its legal system.²⁷ This rule departs from the “principle of ubiquity” enshrined by the ECJ in the context of the “Brussels I” Regulation.²⁸ Nevertheless, it offers a certain and foreseeable solution that meets the legitimate expectations of the victim. Moreover, it guarantees that each State can rule the negative externalities suffered within its boundaries and, accordingly, gives incentives to legal and natural persons to internalise the consequences that their conduct may provoke abroad.

Secondly, and in relation to the place where the damage occurs, the Regulation only grants relevancy to the *direct damage* (i.e., *first or direct impact*). The indirect or consequential damages are not taken into account as a connecting factor. For instance, in the event of an accident in country X, the financial or non-material damages sustained in country Y deriving from that accident are not relevant for the determination of the law applicable. This is so, regardless of the nature of these damages according to the material law of country Y.²⁹ By the same token, if the accident takes place in country X and the victim is moved to a hospital in country Y, where he or she dies, the law applicable shall be the law of country X. Naturally, the material law designated under this rule applies to the total amount of damages, not only to the damages sustained within the boundaries of country X.

38. The option in favour of the place where the damage is sustained implies that when the same conduct *directly* causes damages to different assets located in different countries, the law of each country has to be applied on a distributive basis.

The so-called *Mosaikbetrachtung* cannot be avoided when a conduct impacts directly in different territories.

4. Escape clause

39. The general rule concludes with an escape clause (Article 4.3). The purpose of this clause is to introduce a certain degree of flexibility in the system allowing the judge to apply a different law from that designated by Articles 4.1 (*loci delicti*) or 4.2 (common residence): exceptionally, when the tort is manifestly more closely connected with another country, the law of this country will apply. This clause can only be invoked in exceptional cases and that is why the tenor of Article 4.3 reads “where it is *clear* from all the circumstances of the case that the tort/delict is *manifestly more closely connected*”. This rule may also be of some help in those cases where the conflict of laws rules contained in paras 1 and 2 of Article 4 cannot be applied, for instance, when the damage occurs in a territory not subject to State sovereignty. In any case, the clause, in principle, aims to encounter the centre of gravity of the tort and, therefore, material-oriented results should not be incorporated in that test.

40. The Regulation reduces the uncertainty that the escape clause may introduce by adding a presumption. This presumption not only facilitates the application of the clause but also gives some hints as to the cases in which the clause can be invoked. The presumption is based on the fact that the parties are linked by a pre-existing relationship and the damage takes place in the context of that relationship. If that is the case, the judge may extend the law governing that relationship (designated according to the conflict of laws rules of the forum) to the tort. That solution prevents characterisation (contractual/non-contractual) and adaptation problems. The Regulation, nevertheless, is very flexible on this point: the fact that there is a pre-existing relationship between the parties is a factor that may be taken into account by the judge to resort to the escape clause. But its application is not automatic. That is why para. 3 *in fine* of Article 4 employs the term “might”.³⁰

VI. Special rules for torts

1. Product liability

41. The Regulation lays down a special rule for non-contractual obligations arising from damages caused by defective products (Article 5). There are good reasons to justify the establishment of a special rule in this case. The rule *lex loci delicti* is not suitable in the subject-matter of products liability.³¹ The place of damage can lead to a law which presents a marginal connection with the case, for instance when the damage is suffered in the course of a trip in a foreign country, or can be difficult to specify, for instance, when the damage is caused by a medical product consumed during a trip through different countries. In some cases, the place of damage is completely unforeseeable to the producers and even unexpected to

²⁷ See Krenzer, (2004), *loc.cit.*, p. 30.

²⁸ See ECJ 30 November 1976 – 21/76 – *Handelskwekerij Bier v Mines de Potasse d'Alsace* [1976] ECR 1735.

²⁹ On this issue, the jurisprudence of the ECJ in relation to the Brussels I Regulation can be applied (see, i.a., ECJ 11 January 1990 – C-220/88 – *Dumez France and others v Hessische Landesbank and others* [1990] ECR I-49, 28 March 1995 – C-364/93 – *Kleinwort Benson v City of Glasgow District Council* [1995] ECR I-615).

³⁰ See, Staudinger, *loc.cit.*, p. 62.

³¹ See, *Hamburg Group*, *loc.cit.*, p. 16.

the victim. This unsuitability of the *lex loci delicti* as a connecting factor explains the cascade system adopted by the Hague Convention of 1973. Article 5 of the Regulation follows that scheme but attempts to simplify it. This special rule combines four connecting factors: the habitual residence of the parties, the place of marketing of the product, the place of acquisition, and the place of damage. The rule contained in Article 5 combines these elements in order to find a law that, at the same time, (i) meets the legitimate expectancies of the victim and (ii) is not completely unforeseeable to the producer. It must also be taken into account that this rule applies to any damage caused by a defective product, regardless of the nature of the victim, *i.e.* consumer or professional.

42. The cascade of connecting factors designed in Article 5.1 has a common element: the marketing of the product which caused the damage or of products of the same type produced by the same person.³² This clause, referring to products of the same type (and obviously produced by the same person whose liability is claimed), is not explicit in paras a, b and c, of Article 5.1 but it is implicit in the sense of letters a and c, and can also be inferred from para. 2 of this provision. The fact that the product has been marketed in one of the countries whose law is finally applicable guarantees that this law is foreseeable for the producer, and therefore is a risk under his or her sphere of control.³³ If this is not the case (for instance, when the marketing of the product in one country was made against the consent of the producer or was totally ignored by him), the law applicable shall be the law of the country in which the producer is habitually a resident (Article 5.1 para.2). The concept of habitual residence shall be specified pursuant to Article 23 (*supra*).

43. The cascade laid down in Article 5.1 is the following. Firstly, the law applicable shall be the law of the country where the person sustaining the damage has his or her habitual residence when the damage occurs, if the product was marketed in that country. Secondly: failing that, the law applicable shall be the law of the country in which the product was acquired if the product was marketed in that country. Thirdly: failing that (for instance, when the product is acquired in a second-hand market of a country where the product is not commercialised), the law applicable shall be the law of the country in which the damage occurs, if the product was marketed in that country. As mentioned, the marketing condition covers the marketing of products of the same producer and of the same type that the one causing the damage. One additional point is important to mention. The expression “failing this”, and therefore the step into the following connecting factors combination, covers two types of cases: when the former combination is not met and when, even though the combination is met, the law designated is not foreseeable to the producer according to para. 2. This means that if the conditions of

letter a are met, but the law designated is not foreseeable for the producer, letter b and c must still be checked before jumping into the application of the habitual residence of the producer.

44. There is a gap in Article 5.1. para. 2 (the predictability clause) which presumes that one of the hypotheses of letters a-c is met, though it points to a law that the producer could not have reasonably foreseen. Accordingly, Article 5.1 does not solve the case where none of the combinations enumerated in letters a to c is met, that is, when the country where the product is marketed does not coincide with any of the other three connecting factors. Nevertheless, in this case, para. 2 should be applied by analogy (with the possible intervention of the escape clause, see following paragraph).

45. Article 5 applies without detriment to Article 4.2, *i.e.* the common residence of the parties prevails over the connections contained in Article 5.1, and is supplemented by an escape clause equivalent to Article 4.3. If the parties have their habitual residence in the same country, the law of that country shall apply. Failing that, the law applicable shall be determined by Article 5. Nevertheless, in both cases, if the situation is manifestly more closely connected with another country, the law of that country shall apply. That means that Article 5 is not an exception to the whole Article 4, but merely to para. 1 of this article. One consequence of this structure is that the application of the escape clause (Article 5.2) is not limited by the predictability clause (Article 5.1 para. 2).

46. In those Member States that have ratified the Hague Convention on Product Liability of 1973, the law applicable shall be determined by this instrument and not by the Regulation. However, even in those Member States, the Regulation shall be applicable in relation to the products or aspects excluded from the scope of the Convention (see, for instance, Article 16.2 of the Hague Convention).

2. Unfair competition and acts restricting free competition

47. The second special rule laid down by the Regulation deals with non-contractual obligations arising out of an act of unfair competition or of an act restricting competition (Article 6). In relation to the general rules of Article 4, Article 6 fulfils two functions: first, it specifies the *locus delicti* in relation to a market, not to a territory,³⁴ and second, it excludes the application of paras 2 and 3 of Article 4 (common habitual residence and closer connection). The exception of the common residence of the parties (Article 4.2) and the clause of the closer connection (Article 4.3) should play no role in this subject-matter because they could thwart the “*ordering-of-the-market function*” of this rule.

48. Unfair competition law and free trade law set forth the rules of the game in a market, *i.e.* in an institutional framework: all participants (supply and demand) are to play in accordance with these rules. In cross-border situations, the

³² Though the text refers to the producer, it must be taken into account that the scope of application of this article is defined by reference to the origin of the damage: a product. The “person claimed to be liable” can be the producer, the manufacturer or any other intermediary depending on the content of the applicable law.

³³ See, Kadner Graziano, “The Law Applicable to Product Liability: The Present State of the Law in Europe and Current Proposal for Reform”, *I.C.L.Q.*, 2005, p. 475 *et seq.*, p. 482.

³⁴ See, *i.a.*, Buchner, “Rom II und das Internationale Immaterialgüter- und Wettbewerbsrecht”, *GRUR Int.*, 2005, p. 1004 *et seq.*, pp. 1008-1009, arguing in favour of this clarification.

point of departure is that each State organises its own market, *i.e.* each State designs the framework within which the participants in its market must play. Accordingly, the interest of each State is that its competition game rules apply to any participant in its market; or, better to say, to any conduct that may have a substantial repercussion on its market. The “affected market” criterion tries to reflect this interest. This effects-based approach ensures, in the conflict of laws dimension, the satisfaction of the supra-individual or macro-economic function that this part of the legal systems attempts to achieve, including its private interest repairing role.³⁵ Private reparations indirectly contribute to the implementation of the rules of the game in each market.

49. Although the underpinning normative principle is the same in both cases, Article 6 distinguishes between acts of unfair competition and acts restricting free competition. Paras 1 and 2 deal with acts of unfair competition. In principle, the rule is the application of the law of the State on whose territory competitive relations or collective interests of consumers are affected. The connecting factor employed by para. 1 is the country where the relations are or are likely to be affected. Formally, it seems to refer to a territory while para. 3 (acts restricting free competition) refers to a market: “the country on whose market ...”. Nevertheless, in both cases, the connecting factor has to be construed under a “market oriented test”: the relevant market (which points to a State law) is the market in which competitors are seeking to gain the consumer’s favour.³⁶ As pointed out, this solution suits the interest of the State, *i.e.* ensuring an adequate protection of the market as institutional framework, corresponds to the victim’s expectation and guarantees an equal treatment of all competitors *in the same* market. The concept of unfair competition includes acts such as: misleading advertising, forced sales, disruptions of deliveries by competitors, boycotts or passing off. The reference to collective interests of consumers clarifies that this rule applies not only to actions brought by other competitors in the market, but also to actions brought by consumers associations (for instance, injunctions).

50. Para. 2 of Article 6 introduces a special rule for those cases in which the unfair competition act targets a particular competitor. These are, typically, cases of industrial espionage, inducing breach of contract, corruption, and so on. These situations have a direct impact on a private interest, and only indirectly on the market as institution. That explains the reference that para. 2 of Article 6 makes to the general rule of Article 4. As the *lex loci damni* will usually coincide with the market affected, the main consequence of this reference to the general rule is to allow for the application of the habitual residence of the parties (Article 4.2) and of the escape clause (Article 4.3).

51. In this context, the Directive 2005/29/CE of 11 May 2005, on unfair business-to-consumers commercial practices, must also be taken into account. The final version of this Directive does not contain either a special conflict of laws rule,

or a “principle of State of origin” (as was the case in the original proposal), but it does include an internal market clause (Article 4). This means, according to recital 35 of the Rome II Regulation, that the conflict of laws rules laid down by the Rome II Regulation shall not be detrimental to the application of that instrument insofar as this cannot be applied in conjunction with the law designated by those conflict of laws rules.³⁷

52. Unlike the original proposal, the final text establishes an explicit rule for non-contractual obligations arising out of restriction of competition, such as agreement between undertakings, concerted practices or abuse of dominant position (Article 6.3, see also recital 23 giving more examples).³⁸ This rule covers private damages, *i.e.* non-contractual obligations, arising from violations of antitrust law.³⁹ Public remedies are, naturally, excluded from the scope of the Regulation. Recital 22 clarifies that this provision includes violations of both national law and Community competition law (Articles 81 and 82 of the EC Treaty). In the second case, this means that the law applicable shall be the law the Member States on whose market the anti-EC competition law act causes effects.

53. When various markets are affected, each law shall apply on a distributive basis.⁴⁰ This may be cumbersome for the judges and for the victims as they may be confronted with an obligation to prove and apply several laws. The final version of Article 6 includes a rule to lighten this charge while at the same time limiting the possibility of forum shopping: where the market is affected in more than one country, the person seeking compensation may choose to base his or her claim on the *lex fori* provided that (i) the defendant has the domicile in the forum and (ii) the forum is amongst the countries directly and substantially affected (Article 6.3.b para. 1). If there are more than one defendant, the claimant may invoke the same rule when all the defendants are sued in the domicile of one of them (Article 6.3.b para. 2; and see Article 6.1 of the Brussels I Regulation).

The application of this provision (Article 6.3.b) is not formally restricted to Community law. However, it is in this context where it can be better explained. In the absence of Community rules on this matter, the damages’ claims for infringement of Community antitrust law (Articles 81 and 82 of the EC Treaty) are governed by the national laws of Member States. Accordingly, if -as a consequence of a concerted practice- a company has suffered damages in ten different Member States, it may be obliged to proof ten different laws. This increases the costs of the proceedings and, therefore, constitutes an obstacle to damages’ claims. The choice given to the claim-

³⁵ See, Commission Proposal COM (2003), 427 final, p. 15; Kreuzer, (2004), *loc.cit.*, p. 36.

³⁶ See Commission Proposal, COM (2003) 427 final, p. 16.

³⁷ See, Piekenbrock, “Die Bedeutung des Herkunftslandprinzips im europäischen Wettbewerbsrecht”, *GRUR Int.*, 2005, p. 997 *et seq.*

³⁸ See, Zimmer/Leopold, “Private Durchsetzung des Kartellrechts und der Vorschlag zur Rom II-VO”, *EWS*, 2005, pp. 149 *et seq.*, advocating for the introduction of a special rule.

³⁹ See judgment of the ECJ 20 September 2001 – C-453/99 – *Courage and Crehan* [2001] ECR I-6297 = [2000/01] EuLF (E) 465, highlighting the role of private actions to ensure full effectiveness of the antitrust rules of the Treaty.

⁴⁰ See, on this point, Zimmer/Leopold, *loc.cit.*, pp. 150-152; and Green Paper on damages actions for breach of the EC antitrust rules (COM 2005 672 final), pp. 10-11.

ant by Article 6.3.b of the Rome II Regulation prevents this result.⁴¹

3. Environmental damages

54. The third special rule laid down by the Regulation refers to civil liability arising from environmental damages (Article 7). This special solution presupposes a distant tort, and is based on the so-called *Günstigkeitprinzip*. In this type of situations, the victim can choose: The law applicable shall be the law of the country where the damage occurs unless the person seeking compensation opts for the law of the country where the causing event occurs.⁴² This possibility of opting between two laws implies that, at the conflict of laws level, the environment enjoys a higher protection than other assets. This over-protection has been explained by two reasons. On the one hand, environment generates positive externalities. Accordingly, its protection must be promoted by offering incentive to private actions: as generator of positive externalities, private actions benefit not only the claimant but also third parties. And, at the margin, the incentives to bring actions increase insofar as the victim can opt for a more favourable law. On the other hand, the rule prevents opportunistic behaviour by potential polluters: “Applying exclusively the law of the place where the damage is sustained could give an operator an incentive to establish his facilities at the border so as to discharge toxic substance into a river and enjoy the benefits of neighbouring country’s laxer rules”.⁴³

55. The special rule contained in Article 7 covers both damages to public goods (waters or natural habitats, for example, see Recital 24), to the extent that under the applicable law the author can incur civil liability –though the action is usually brought by public authorities or associations–, as well as damages to persons or private property *as a result of such damages* (see Recital 24).⁴⁴ Accordingly, personal injuries, damages to private property or private economic losses are only included in Article 7 if they result from damages to the environment. The scope of application of Article 7 is broader than the scope of the Directive 2004/35/CE of 21 April 2004 on environmental liability, that only applies to damages to “public goods” (see Article 2.1 and Recital 14). Nevertheless, this instrument has to be taken into account as a hermeneutic reference to define the concept of “environmental damages”.

Article 7 allows the victim to choose between two laws, and this option also applies when the damages “is likely to arise”. This implies that the victim can invoke the law of the place of damage to sustain an injunction order even if the conduct ful-

fills with the standards of the place of origin.

56. Article 7 does not contain a reference to Articles 4.2 and 4.3. This is an “eloquent silence”: on this subject matter, neither the habitual residence of the parties, nor the escape clause can modify the law designated by that provision (the place of damage or, if it is located in another country, the place of the causing event). The exclusion of those two rules can be explained taking into account the policy decision underpinning the special rule. The objective of Article 7 is to force the potential polluter to comply with the (civil) standards both of the law of origin and of the law of destination. This policy could be frustrated if the judge opts for applying a different law (the common residence of the parties or the closer connection). Only by agreement between the parties can the law designated by the special rule be changed.

57. The Regulation offers the option between the two laws designated in Article 7 to the victim and not to the judge. In principle, the law where the damage is suffered shall apply *unless* the person seeking compensation invokes the law of the country where the causing event has occurred. However, the Regulation does not specify the stage in the proceedings at which the plaintiff has to exercise that option. This question is left to the *lex fori*, i.e. to the procedural law of the forum (see Recital 25 *in fine*). In order to balance that right of option and to prevent *secundum eventum litis* strategies, a rule of preclusion is called for. In principle, the more sensible rule is to require the plaintiff to invoke the law of the country of origin at the first procedural stage in which he can present the legal foundations of his action.

4. Intellectual property rights

58. The third special rule laid down by the Regulation refers to non-contractual obligations arising from infringements to intellectual property rights (Article 8). Intellectual property is an intangible asset with no physical presence. They are monopolies of use granted by the State. From a private international law perspective, the assignment and protection of intellectual and industrial rights is based on a territoriality principle: rights are held independently in each country. Accordingly, each country applies its own law to infringements of an intellectual property right which has been recognised or granted for its territory. The connecting factor that corresponds to this idea is the *loci protectionis*. The law applicable to infringements of intellectual property rights is the law of the country *for which* protection is claimed (*lex loci protectionis*).⁴⁵

59. Recital 26 clarifies the concept of intellectual property. This includes, *i.a.*, copyright, related rights, rights for the protection of databases or industrial property rights. The list is not exhaustive. Article 8 also applies to the infringements of

⁴¹ See, Green Paper on damages actions for breach of the EC antitrust rules, *cit.*, *passim*.

⁴² See Amores/Torralba, *loc.cit.*, p. 31; Crespo, “Daños al medio ambiente y regla de la ubicación en el art. 8 del futuro Reglamento de Roma II”, <http://www.indret.com>; Betlem/Bernasconi, “European Private International Law, The Environment and Obstacles for Public Authorities”, *L.Q.R.*, 2006, p. 124 *et seq.*; Fach Gomez, “The Law Applicable to Cross-Border Environmental Damage: From the European National Systems to Rome II”, *Y.P.I.L.*, 2004, p. 291 *et seq.* pp. 299-300, arguing in favour of this option. Nevertheless, see Leible/Engel, *loc.cit.*, p. 13.

⁴³ Commission Proposal, COM (2003) 427 final, p. 20.

⁴⁴ See Betlem/Bernasconi, *loc.cit.*, *passim*.

⁴⁵ See, Kreuzer, (2004), *loc.cit.*, pp. 41-42; Buchner, *loc.cit.*, pp. 1005-1007 (exposing the problems that this connecting factor may posed). Note that in this rule “prepositions matter”. The rule points to the application of the law of the country *for which* protection is claim, not *in which* protection is claimed. The reason is that nothing impedes claiming *in one country* (for instance, where the defendant is domiciled) the protection of intellectual property rights granted *for (or by)* another country.

unitary Community rights such as the Community trade mark⁴⁶ or the Community designs and models.⁴⁷ These instruments confer a unitary right for the whole territory of the Community, different from the rights conferred by national laws. Nevertheless, the uniform regime established by the Community instrument is not complete. There are still certain issues left to national laws. Article 8.2 of the Regulation includes a supplementary conflict of laws rule for these cases: for any question that is not governed by the relevant Community instrument, the applicable law shall be the law of the State in which the act of infringement was committed. This solution may lead to the application of several laws on a distributive basis, when the acts of infringement are committed in more than one Member State. The article refers to “country” without the qualification of Member State to include Denmark: if the act of infringement is committed in Denmark, Danish law shall apply.

60. The relationship between Article 8 and other provisions of the Regulation does not seem problematic. Article 8 prevails over Articles 4, 10, 11, 12 and 14. In cases of violations of intellectual property rights, the law applicable shall be determined by Article 8 exclusively. Accordingly, neither the will of the parties (Article 8.3), nor the common habitual residence or the escape clause play any role in this subject matter. Even if there is an unjust enrichment derived from those violations, the law shall be determined by Article 8, and not by Article 10 (for the *culpa in contrahendo* cases, *infra*).

5. Industrial action

61. The special rule contained in Article 9 was introduced to solve the conflict of laws problems that may arise in situations like the “DFDS Torline” case (ECJ C-18/02).⁴⁸ In this preliminary ruling, the ECJ dealt with the interpretation of Article 5.3 of Brussels I regulation in the context of an industrial action. The dispute concerned the legality of industrial actions promoted by Swedish Trade Unions against a Danish ship owner. In brief, the industrial actions were taken in Sweden and they instructed the member of the unions not to engage in any work relating to a cargo ship which was registered in Denmark. The Danish ship owner claimed for the financial losses suffered by those industrial actions and alleged that the damages were suffered in the place where it had its establishment, *i.e.* in Denmark. The ECJ does not reject this solution and affirms that “it is for the national court to inquire whether such financial losses may be regarded as having arisen at the place where DFDS (the cargo owner) is established” (para. 43 of the ruling). The transposition of this idea into the conflict of laws dimension would mean that the legality of the actions planned by the Swedish trade unions would be judged under Danish law. In general terms, it would mean that the industrial actions taken in one country could generate non-contractual liability under the law of another country when the financial losses are

suffered by a company established abroad. This could imply that the latter country imposes the standard of behaviour to, for example, trade unions acting in the former country. The main purpose of Article 9 of the Rome II Regulation is to prevent this result in the scope of this instrument.

62. Article 9 should be understood as a clarification of the general rule (*lex loci delicti*) for certain types of torts, more than as a true exception to that rule. What this article tries to say is that the impact of an industrial action takes place where the action is carried out, and this is also the place where the harm is directly caused. Accordingly, the law applicable to the civil liability arising from an industrial action is the law of the country where this action is carried out, and not the law of the country where the financial losses consequence of that action may be suffered. Understood in this way, Article 9 does not contradict the basic principle of the Regulation. The reference to para. 2 of Article 4 may in particular make sense in relation to industrial actions carried out in special locations or in relation to workers posting abroad. Recital 27 clarifies that the concept of industrial actions covers actions aiming at protecting the rights and obligations of the workers and trade unions, such as strikes, but also industrial actions organised by employers, such as lock-outs.

VII. Unjust enrichment, *negotiorum gestio* and *culpa in contrahendo*

63. The Regulation contains an autonomous chapter for non-contractual obligations that do not arise from a tort: cases of unjust enrichment, *negotiorum gestio* and *culpa in contrahendo*.

1. Unjust enrichment and *negotiorum gestio*

64. The provision laid down for cases of unjust enrichment, for example payments made by mistake, is structured in a cascade of connections (Article 10).⁴⁹ The first rule is based on the accessory relationship technique: if the enrichment takes place in the context of a pre-existing relationship between the parties, it shall be governed by the law applicable to that relationship (Article 10.1). The concept of *pre-existing relationship* covers not only contracts but also torts or delicts as those enumerated in Chapter II of the Regulation. The fact that the entire legal situation is governed by the same law reduces problems of characterisations and material adjustment between legal systems. The subsidiary rule is the common habitual residence of the parties (Article 10.2): where the applicable law cannot be determined by reference to a pre-existing relationship, if the parties have their habitual residence in the same country, the law of this country shall apply. The relevant moment to specify the connecting factor is the moment when the *event giving rise to the enrichment* occurs. Finally, if the law cannot be determined by this rule, the enrichment shall be subject to the law of the country in which it takes place. The

⁴⁶ Regulation (EC) 40/94, of 20 December 1993.

⁴⁷ Regulation (EC) 6/2002, of 12 December 2001.

⁴⁸ Although in a different context, see also ECJ Opinion of 23 May 2007 – C-341/05 – *Laval un Partneri*.

⁴⁹ See, in relation to the Commission's Proposal, Busse, “Internationales Bereicherungsrecht zwischen EGBGB-Reform und Rom II”, *RfW*, 2003, p. 406 *et seq.*

provision concludes with an escape clause: the manifestly closest connection (Article 10.4).

65. Article 11 follows the same structure. Its scope of application is defined as obligations arising out of actions performed without due authority in connection to the affairs of another person (*negotiorum gestio*). The only relevant difference is the reference, in para. 3, to the country “where the action took place”, typically, in cases of measures of assistance, the place where the property or person assisted is located.

2. Culpa in contrahendo

66. The proposal presented by the Commission did not include a special rule for cases of pre-contractual liability (*culpa in contrahendo*). These cases were to be subsumed under the escape clause of Article 3.3.⁵⁰ Nevertheless, this interpretation was not self-evident. To clarify the text and to facilitate its application, the final version of the Regulation does contain a special rule for those cases (Article 12). This rule applies to damages arising from *dealings* prior to the conclusion of a contract, and accordingly directly linked to the negotiations, typically the violations of the duty to disclosure, the provision of misleading information or the breakdown of contractual negotiations. It does not apply to personal injuries that a person may suffer in that context, for instance an accident inside a shop (see Recital 30).

67. The special rule connects the pre-contractual liability to the *lex contractus*, i.e. the law applicable to the contract during the negotiations of which the damage was caused. This law is determined by the 1980 Rome Convention (and, in the future, by the Rome I Regulation).⁵¹ If the contract was frustrated, the law governing the pre-contractual liability shall be the law applicable to the contract, had it been concluded.⁵² This solution has several advantages. Firstly, it is easier to apply than the general rule, i.e. the *lex loci delicti*, for in this type of situations the place where the damage occurs is usually difficult to locate. Secondly, in most cases, the issue of the pre-contractual liability is closely linked to the fact of whether a contract has been concluded or not, or at what moment it has been concluded. If the latter point is determined by the *lex contractus*, it seems reasonable to apply the same law to the former. Thirdly, even if there is not a formal contract between the parties, the existence of dealings or negotiations qualifies their relationship.⁵³ The standards of behaviour between the parties are not the general standards *vis à vis* third parties. Accordingly, it may be justified to submit those qualified standards to the same legal system that would govern their relationship if the parties had entered into a formal contract.

68. Para. 2 of Article 12 adds a supplementary rule without a clear justification, but which will presumably play a marginal role. If the scope of application is limited to those cases where it is not feasible to determine the law hypothetically applicable (because, for example, at that stage of the negotiations it is impossible to foresee the content of the hypothetical contract and therefore its characteristic obligation).⁵⁴ In these cases, the law shall be determined by a cascade of connecting factors inspired by the general rule (Article 4). Nevertheless, the text of Article 12.2, instead of including a reference to Article 4, incorporates expressly a parallel rule. Unfortunately, the final drafting is misleading. The three paragraphs -a, b and c- are linked by “or”, and so, for example, the *lex loci damni* is *alternative* to the common habitual residence of the parties. Only by reconstructing Article 12.2 in the same sense as Article 4 will it not be converted into a challenge to legal reasoning.

VIII. Scope of the applicable law

1. Questions governed by the law designated in Articles 4 *et seq.*

69. The Regulation lists the questions to be settled by the law designated by the conflict of laws rules of the Regulation (Article 15). The starting point is the principle of unity of the applicable law. Accordingly, the list included in Article 15, though non-exhaustive, intends to be as broad as possible. It basically replicates Article 10 of the 1980 Rome Convention, with minor adjustments.

70. The law applicable governs, in particular, the following questions:

(a) The basis and extent of liability, including the determination of the persons that can be held liable for acts performed by them (i.e. the delictual capacity). The proposal of the Commission can be helpful to interpret these concepts. They cover aspects such as the nature of the liability (strict or fault-based), the definition of fault, the causal link between a particular damage and a particular event, the persons potentially liable or the division of liability among several authors.⁵⁵

(b) The grounds for exemption from liability, any limitation and any division. This covers aspects such as the exemptions or limitations due to *force majeure*, third-party fault, fault by the victim or the existence of a particular relation with the victim.

(c) The existence, the nature and the assessment of damages or the remedy claimed. This includes, for example, the determination of damages for which compensation can be claimed (moral damages, financial losses, loss of an opportunity).

⁵⁰ See COM (2003) 427 final, p. 13.

⁵¹ See, COM (2005) 650 final.

⁵² For example, if one of the parties is clearly the one who would have carried out the performance of the characteristic obligation of the contract, had this been concluded, the law of his or her habitual residence shall govern his pre-contractual liability (see Article 4.2 of the 1980 Rome Convention).

⁵³ Mankowski, “Die Qualifikation der culpa in contrahendo. Nagelprobe für den Vertragsbegriff des europäischen IZPR und IPR, Praxis des internationalen Privat- und Verfahrensrechts”, IPRax, 2003, p. 127 *et seq.*

⁵⁴ The scope of application of para. 2 of Article 12 may give rise to some problems, see J. v Hein, “Die culpa in contrahendo im europäischen Privatrecht: Wechselwirkungen zwischen IPR und Sachrecht”, GPR, 2007, p. 54 *et seq.*, p. 59. In principle, as explained in recital 30, para. 2 of Article 12 does not apply to a personal damage suffered by a party while a contract is being negotiated. This reduces the scope of that paragraph to marginal cases: where the damage is directly linked with the negotiations of a contract but the *lex hypoteci contractus* cannot be identified.

⁵⁵ COM (2003) 427 final, p. 23.

(d) Within the limits of powers conferred on the court by the *lex fori*, the measures which a court may take to prevent or terminate damage or to ensure the provision of compensation. This refers to questions such as the means of compensation or the possible actions to prevent or halt the damage. The reference to the *lex fori* means that a court cannot be forced to adopt a measure unknown in its procedural law. On the contrary, if the measure is foreseen by the *lex fori* but for other types of damages, that measure could be taken according to the *lex causae*.

(e) The question whether a non-contractual claim can be transferred, including by inheritance. In cases of voluntary assignments, the rest of the questions (for instance, the relationships between assignor and assignee) are governed by the law designated under the 1980 Rome Convention.⁵⁶

(f) The persons entitled to compensation for damages sustained personally. This refers to the question of whether a person other than the direct victim can claim a compensation for his own moral or financial damages, following the damage sustained by the direct victim.

(g) Liability for acts of another person (*i.e.* the conditions and consequences of vicarious liability).

(h) The manner in which an obligation may be extinguished and the rules of prescription.

2. Mandatory provisions

71. The law designated according to Articles 4 to 14 does not interfere with the overriding mandatory rules of the forum (Article 16). This prevalence of the *lois de police* is a classical conflicts of law principle. However, unlike the 1980 Rome Convention (see, Article 7.1), the Regulation does not contemplate the application of the mandatory rules of the law of “another country” (different from the *lex fori* and, in principle, also from the *lex causae*). Several reasons justify this decision. First, the uncertainty and practical difficulties such a provision could imply; second, the marginal role that it would presumably play in the field of non-contractual obligations; and third, its possible overlap with Article 13 (rules of safety and conduct). Naturally, this exclusion does not impede that the overriding mandatory rules of another country may be “taken into account” under the framework of the *lex causae*.

72. The concept of “overriding mandatory rules” implies that the rules are “mandatory” in the private international law sense. The rules must be applied even to situations that are transnational, this compulsion being explicit (by a unilateral conflicts of laws rule) or implicit (based on the underlying fundamental policy which requires the application even to non-domestic cases). This concept of “mandatory rules” is different from the concept used in Article 14.2 of the Regulation that refers to mandatory rules in the internal sense.

73. In order to characterise a rule as “overriding manda-

tory”, the jurisprudence of the EJC in *Arblade* (C-369/96 and C-374/96) can be helpful. In this ruling, the ECJ referred 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 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”. The concept covers both national rules and Community rules.

3. Rules of safety and conduct

74. The Regulation, following the Hague Conventions on traffic accidents (Article 7) and products liability (Article 9), includes a provision on rules of safety and conduct. When the law applicable does not coincide, the judge shall take into account “in assessing the conduct of the person claimed to be liable” and “as a matter of fact and in so far as appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability” (Article 17).

75. The wording of the Regulation departs slightly from that of the conventions: it gives more flexibility to the judge. In particular, the foreign rules of safety and conduct shall only be taken into account to assess the conduct of the perpetrator and “in so far as appropriate”. The main purpose of these conditions is to prevent those rules from frustrating the coherent application of the *lex causae*.⁵⁷ So, for example, only if under the applicable law the good or bad faith of the person claimed to be liable or his fault are relevant, shall the foreign rules of safety and conduct be taken into account to specify those elements. On the contrary, if under the *lex causae* a rule of strict liability applies, Article 17 cannot be invoked to escape from that rule arguing that in the place where the event causing the damage occurred the rule was different (fault-based liability).

4. Direct action

76. The Regulation lays down an alternative conflict of laws rule to determine the law applicable to the direct action: the victim may bring his action directly against the insurer of the person liable if the law applicable to the non-contractual obligation or the law applicable to the insurance contract so provides (Article 18). The victim, therefore, can base his direct action either on the *lex contractus* or on the law designated by the Regulation. This option is favourable to the victim and does not impose an unbearable burden on the insurer insofar as both laws are, in principle, foreseeable for him. Naturally, this provision only governs the question of whether the victim may bring his action directly against the insurer:⁵⁸ the rest of the obligations and duties of the insurer are governed by the *lex contractus*.

⁵⁶ See Article 12. That provision of the Rome II Regulation should correspond to para. 2 of Article 12 of the Rome Convention. Therefore, the law applicable to the non-contractual obligations governs not only its assignability, but also the relationship between the assignee and the debtor.

⁵⁷ See, *Hamburg Group*, *loc.cit.*, p. 44; *Siems*, “Die Harmonisierung des Internationalen Deliktsrechts und die Einheit der Rechtsordnung”, *RIW*, p. 662 *et seq.*, p. 666.

⁵⁸ In this field, see Article 11 of the Brussels I Regulation.

5. Subrogation

77. The Regulation contains two rules on subrogation (Articles 19 and 20). Although they are based on Article 14 of the 1980 Rome Convention, the wording is quite different. The Regulation makes clear the meaning of this rule by separating two types of cases. The first concerns the question of whether the insurer has a right of action against the liable person by way of subrogation. Pursuant to Article 19, when a third party, typically an insurer, has the duty to satisfy the victim or has in fact satisfied him in discharge of that duty, the law which governs that duty (*i.e.* the *lex contractus*) shall determine whether and to what extent the third party is entitled to exercise the rights that the creditor (*i.e.* the insured victim) may have against the liable person. Naturally, the content of this right against the liable person is governed by the law applicable under the conflict of laws rules of the Regulation.

78. The second rule presupposes a case of multiple liability. Several persons are jointly liable *vis à vis* the victim. Despite this joint liability, the law applicable to each of them may be different (for instance, because some of them have their habitual residence in the same country as the victim but the others do not). In this scenario, if one of the debtors pays for the damage, the question of which law governs the right of this debtor to demand compensation from the others arises. Article 20 solves this question designating as applicable the law that governs that debtor's (the debtor who has paid) obligation.

6. Formal validity

79. The Regulation also includes a rule concerning the formal validity of unilateral acts (Article 21). Regarding the creation of non-contractual obligations, the role of this rule will presumably be minor, but it may have some relevance concerning the modification or the cancellation of those obligations. The rule is inspired in a *favour validitatis* principle: a unilateral act intended to have legal effects in this matter shall be formally valid if it satisfies the formal requirements of the law which governs the non-contractual obligation or the law of the country in which the act is carried out.

7. Burden of proof

80. Also inspired by the 1980 Rome Convention (Article 14), the Regulation includes a rule on the law applicable to the legal presumptions and the burden of proof. This rule has to be read together with Article 1, 15 and 21. Its main purpose is to resolve a problem of characterisation. In principle, questions relating to evidence fall within procedural law and are therefore governed by the *lex fori* (see Article 1.3). Nevertheless, the legal presumptions and the rules on burden of proof are usually established for material reasons, for example the protection of certain types of assets or the encouragement of the adoption of a high precautionary level, and are balanced with other aspect of the material regulation (capping, time limits for the action, and so on). That justifies the characterisation of these rules as material law and, accordingly, its submission to the *lex causae*. This characterisation only covers those rules laid down "in matters of non-contractual obligations". On the contrary, if the rule on burden of proof is based on mere procedural reasons (for example, the fact that the relevant documents are in the hands of one party), it should be subject to the *lex fori*. Para. 2 of this provision concerns the admissibility of means of proving acts referred to in Article 21.

8. Public Policy

81. Finally, the Regulation contains the public policy clause (Article 26). The application of a provision of the *lex causae* may be refused if such application is *manifestly incompatible* with the public policy of the forum. The proposal of the Commission included an independent reference to the "Community public policy" and, in addition, a specification of this clause for one particular case (non-compensatory damages).⁵⁹ The final version of the text does not make any mention regarding this issue. Only Recital 32 makes a reference to exemplary or punitive damages, but it leaves the question to the public policy of each Member State (non-compensatory damages can be regarded as being contrary to the public policy "...depending on the circumstances of the case and the legal order of the Member State of the court seised...").

⁵⁹ See, on this issue, *Kreuzer*, (2004), *loc.cit.*, p. 54.

Civil Procedure

ECJ 15 February 2007 – C-292/05 – *Irimi Lechouritou and others v Dimosio tis Omospondiakis Dimokratias tis Germanias*

Brussels Convention Article 1 – First sentence of the first para. of Article 1 – Scope – Civil and commercial matters – Meaning – Action for compensation brought in a Contracting State, by the successors of the victims of war massacres, against another Contracting State on account of acts perpetrated by its armed forces

On a proper construction of the first sentence of the first para. of Article 1 of the Brussels Convention,¹ 'civil matters' within the meaning of that provision does not cover a legal action brought by natural persons in a Contracting

¹ Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic.