



The European Legal Forum

Forum iuris communis Europae

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The European Legal Forum (E) 4-2004, 213 - 229

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4-2004

pp. 213 - 272

4th Year July/August 2004

INTERNATIONAL PRIVATE AND PROCEDURAL LAW

The Rome II Proposal on the Law Applicable to Non-Contractual Obligations

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INTRODUCTION

The Rome II Proposal¹

On 22 July 2003 the EC Commission presented a Proposal ("the Rome II Proposal") for a Regulation of the European Parliament and the Council on the Law Applicable to Non-contractual Obligations.²

The Proposal is based on the provisions of Title IV of the EC Treaty authorising the adoption of measures in the field of judicial co-operation in civil matters having cross-border implications, including measures promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws.³ Since the entry into force of the Treaty of Nice, such measures have to be adopted jointly by the Parliament and Council in accordance with the co-decision procedure specified by Article 251.⁴ Measures adopted under Title IV do not apply to Denmark, and they apply to the United Kingdom and to Ireland only if they opt to participate in the particular measure.⁵ But, as with all previous measures in the field of private international law, the United Kingdom and Ireland have elected to participate in the adoption and application of the Rome II measure.⁶ Thus the resulting regulation will apply

to all the Member States except Denmark. The Proposal envisages that the regulation will enter into force on 1 January 2005,⁷ but some further delay seems likely.

The Rome II Proposal lays down choice of law rules for non-contractual obligations (torts and restitution). Choice of law in respect of contracts is already regulated at Community level by the Rome Convention on the Law Applicable to Contractual Obligations, opened for signature on 19 June 1980.⁸ The Commission has recently issued a Green Paper on the Conversion of the Rome Convention into a Community Instrument and its Modernisation,⁹ and this is likely to lead in the near future to a Commission proposal for a Rome I regulation replacing the Rome Convention with amended provisions. There are also provisions on choice of law in various EC directives dealing with insurance,¹⁰ consumer¹¹ or employment contracts,¹² and in Regulation 1346/2000 on Insolvency Proceedings.¹³ But no Community measure has yet been adopted dealing with choice of law in re-

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¹ See [2003] EuLF (E) 236 *et seqq.*

² Document COM (2003) 427 final.

³ See especially Articles 61, 65 and 67-69 of the Treaty. As Recitals 2-3 to the Proposal indicate, the Rome II Proposal also takes account of the Action Plan of the Council and the Commission (OJ 1999, C 19, at 1); the conclusions of the Tampere European Council of October 1999; and the Mutual Recognition Programme (OJ 2001, C 12, at 1).

⁴ There is an exception for measures relating to family law, which remain for adoption by the Council acting unanimously, with the Parliament's role limited to consultation.

⁵ See Article 69 of the Treaty, and the associated Protocols. See also Recitals 22-23 to and Article 1(3) of the Rome II Proposal.

⁶ See, as regards the United Kingdom, Council document 13903/03, JUSTCIV 205, CODEC 1459, 27 October 2003; as regards Ireland, Council document 14119/03, JUSTCIV 219, CODEC 1494, 28 October 2003.

⁷ See Article 27 of the Rome II Proposal.

⁸ For its consolidated text after accessions, see OJ 1998, C 27, at 34.

⁹ Document COM (2002) 654 final.

¹⁰ See, as regards non-life insurance, Article 7 of Directive 88/357 (OJ 1988, L 172 at 1), as amended by Article 27 of Directive 92/49 (OJ 1992, L 228, at 1); and, as regards life insurance, Article 4 of Directive 90/619 (OJ 1990, L330, at 50).

¹¹ See Article 6(2) of Directive 93/13, on unfair terms in consumer contracts (OJ 1993, L95, at 29); Article 12(2) of Directive 97/7, on the protection of consumers in respect of distance contracts (OJ 1997, L 144, at 19); Article 7(2) of Directive 1999/44, on certain aspects of the sale of consumer goods and associated guarantees (OJ 1999, L 171, at 12); and Article 12(2) of Directive 2002/65, on the distance marketing of consumer financial services (OJ 2002, L 271, at 16); and Article 9 of Directive 94/47, on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis (OJ 1994, L 280, at 83).

¹² See Directive 96/71, on the posting of workers in the framework of the provision of services (OJ 1997, L 18, at 1). See also Articles 17 and 18 of Directive 86/653, on self-employed commercial agents, as interpreted in ECJ 9 November 2000 – C-381/98 – *Ingmar v Eaton Leonard*, [2000] ECR I-9305.

¹³ OJ 2000, L 160, at 1.

spect of torts or restitution,¹⁴ and it is this gap which the Rome II Proposal is designed to fill.

The underlying purposes of the harmonisation of choice of law rules envisaged by the Rome II Proposal are disclosed by Recitals 4 and 8: to improve the predictability of the outcome of litigation, certainty as to the law, and the free movement of judgments, by making applicable the same national law irrespective of the country of the court in which an action is brought; and to ensure a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage.

Material Scope

By Article 1(1), the Rome II Proposal applies, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters, and not to revenue, customs or administrative matters.

As the Explanatory Memorandum introducing the Proposal explains,¹⁵ the concept of civil and commercial obligations must be understood as an autonomous concept of Community law, and interpreted so that the Brussels I Regulation,¹⁶ the Rome Convention and Rome II Regulation constitute a coherent set of instruments covering the general field of private international law in matters of civil and commercial obligations. Thus the Rome II Regulation will be confined to claims which are governed by private law, and will not apply to a disputes between a private person and a public authority which arise out of acts done by the public authority in the exercise of its powers as such, or which involve a relationship entailing the exercise by the State of powers going beyond those existing under the rules applicable to relations between private persons.¹⁷

There are two classes of non-contractual obligation: torts, which are dealt with in the Proposal by Chapter II, Section 1, Articles 3-8; and restitutionary obligations, which are dealt with by Chapter II, Section 2, Article 9. Further rules, applicable to both torts and restitutionary obligations, are laid down by Chapter II, Section 3, Articles 10-25. The Proposal does not seek to define a tort, but it seems clear that the con-

cept refers to an act which is wrongful, other than by reason of its being a breach of contract or trust, and which therefore gives rise to liability to pay compensation for loss arising therefrom. In contrast, a restitutionary obligation does not require a wrongful act, but a situation involving unjust enrichment or agency without authority.¹⁸ For reasons of space, the present paper deals with torts only, and not restitution.

Several matters are excluded from the scope of the Proposal by Article 1(2). The exclusion by Article 1(2)(a)-(b) of obligations arising out of family or equivalent relationships (including maintenance obligations) or out of matrimonial property regimes and successions is explained by the absence of harmonised choice of law rules for other aspects of family law.¹⁹ The exclusion by Article 1(2)(c) of 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, echoes the Rome Convention and takes account of the Geneva Conventions of 7 June 1930 and 19 March 1931 on conflicts relating (respectively) to bills of exchange and promissory notes and to cheques.²⁰ The exclusion by Article 1(2)(d) of the personal legal liability of officers and members as such for the debts of a company or firm or other body corporate or incorporate, and the personal legal liability of persons responsible for carrying out the statutory audits of accounting documents, reflects the view that such matters should be referred to the law governing the company or entity.²¹ The exclusion by Article 1(2)(e) of obligations among the settlers, trustees and beneficiaries of a trust reflects the character of a trust as a *sui generis* institution. Finally, the exclusion by Article 1(2)(f) of obligations arising out of nuclear damage reflects the liability of States under the international scheme of nuclear liability established by various treaties.²²

Territorial Scope

By Article 2, any law specified by the Rome II Proposal must be applied, whether or not it is the law of a Member State. This echoes the Rome Convention, and avoids the entirely perverse complexity which would arise from any attempt to distinguish between intra-Community and extra-Community disputes.²³

Echoing Article 19 of the Rome Convention, Article 21(1) of the Rome II Proposal specifies that where a State comprises several territorial units, each of which has its own rules of law

¹⁴ In the negotiations which led to the adoption of the Rome Convention in 1980 it was until a late stage intended to cover torts and restitution as well as contracts, but eventually the measure was limited to contracts in order to bring the negotiations to a speedier conclusion. It was only in the late 1990s that work at Community level on choice of law in respect of torts and restitution was resumed.

¹⁵ Document COM (2003) 427 final, at 8.

¹⁶ Regulation 44/2001, on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (OJ 2001, L 12, at 1).

¹⁷ See ECJ 14 October 1976 – 29/76 – *LTU v Eurocontrol*, [1976] ECR-1541; ECJ 16 December 1980 – 814/79 – *Netherlands v Rüffer*, [1980] ECR 3807; ECJ 21 April 1993 – C-172/91 – *Sonntag v Waidmann*, [1993] ECR I-1963; ECJ 1 October 2002 – C-167/00 – *VKI v Henkel*, [2002] ECR I-8111; ECJ 14 November 2002 – C-271/00 – *Gemeente Steenberg v Baten*, [2002] ECR I-10489 = [2003] EuLF (E) 90; ECJ 15 May 2003 – C-266/01 – *Tiart*, [2003] ECR I-4867; ECJ 15 January 2004 – C-433/01 – *Freistaat Bayern v Blijdenstein* = [2004] EuLF (E) 42; and ECJ 5 February 2004 – C-265/02 – *Frabuil v Assitalia* = [2004] EuLF (E) 40.

¹⁸ See the Explanatory Memorandum, at 8.

¹⁹ See the Explanatory Memorandum, at 8.

²⁰ See the Explanatory Memorandum, at 9. The United Kingdom is not a party to these Geneva Conventions.

²¹ See the Explanatory Memorandum, at 9.

²² See the Explanatory Memorandum, at 9, referring to Paris Convention of 29 July 1960, the Additional Convention of Brussels of 31 January 1963, the Vienna Convention of 21 May 1963, the Convention on Supplementary Compensation of 12 September 1997, and the Protocol of 21 September 1988.

²³ See the Explanatory Memorandum, at 9-10.

in respect of non-contractual obligations, each territorial unit must be considered as a country for the purposes of identifying the law applicable under the Proposal. Similarly Article 21(2) adds that a State within which different territorial units have their own rules of law in respect of non-contractual obligations is not bound to apply the Proposal to conflicts solely between the laws of such units. No doubt, as in the case of the Rome Convention, the United Kingdom will decline to utilise the latter invitation to pointless complexity and confusion.

Article 18 of the Rome II Proposal specifies that in certain cases, for the purposes of the Proposal, installations on the continental shelf, ships on the high seas, and aircraft in the airspace, must be treated as part of the territory of a particular State. According to the Explanatory Memorandum, this provision is inspired by a Dutch Act of 11 April 2001, and is designed to apply to certain situations in which a connecting factor used in the Proposal – such as the place of injury, used by Article 3(1) – refers to a place which is not subject to territorial sovereignty.²⁴ By Article 18(a), the territory of a State includes installations and other facilities for the exploration and exploitation of natural resources in, on or below the seabed, which are situated outside the State's territorial waters, but at a place where the State enjoys sovereign rights under international law to explore and exploit natural resources.²⁵ By Article 18(b), the territory of a State includes a ship on the high seas which is registered in the State or bears lettres de mer or a comparable document issued by the State or on its behalf; or which, not being registered or bearing such documentation, is owned by a national of the State. By Article 18(c), the territory of a State includes an aircraft in the airspace, which is registered in or on behalf of the State or entered in its register of nationality; or which, not being so registered or entered, is owned by a national of the State.

While Article 18(a), on installations on the continental shelf, seems uncontroversial, Article 18(b) and (c) appear to create real difficulties. Firstly, it is unclear whether they should be construed as confined to disputes arising from events which are internal to a single ship or aircraft. Such a restriction seems desirable, since it would make little sense, in the case of a collision on (or over) the high seas between two ships (or two aircraft) registered in different countries, to treat each ship (or aircraft) as sustaining injury in its own country of registration,²⁶ with the result that each of the reciprocal claims be-

tween the ship (or aircraft) owners would be subjected by Article 3(1) to the law of the country of registration of the ship (or aircraft) belonging to the party making that claim. Another matter on which textual clarification seems desirable is whether or not Article 18(c) is confined to an aircraft which is flying either over the high seas, or at such a height as to be beyond the sovereignty of the State below. Such a restriction seems desirable, as there is no obvious need to disregard systematically the actual location of an aircraft where it is flying in airspace which is above a State and within its sovereignty. Finally it may also be doubted whether any special provision for ships or aircraft is really desirable. To the extent that the law of the country of registration (or similar connection) merits application to a tort connected with a ship or aircraft, recourse could be had to the rule in favour of the manifestly closest connection supplied by Article 3(3).

Relationship with Other Community Legislation

Article 23(1) of the Rome II Proposal specifies that the Proposal is not to prejudice the application of provisions contained in the EC Treaties or in acts of Community institutions which: (i) in relation to particular matters, lay down choice-of-law rules relating to non-contractual obligations; or (ii) lay down rules which apply irrespective of the national law governing the non-contractual obligation in question by virtue of the Proposal; or (iii) prevent application of a provision or provisions of the law of the forum or of the law designated by the Proposal. As Recital 19 and the Explanatory Memorandum²⁷ indicate, the three limbs of this uncontroversial provision refer respectively to Community provisions laying down conflict rules for specific matters, overriding mandatory rules of Community origin, and the Community public policy exception.

Much more controversially, Article 23(2) specifies that the Proposal is not to prejudice the application of Community instruments which, in relation to particular matters and in areas co-ordinated by such instruments, subject the supply of services or goods to the laws of the Member State where the service-provider is established and, in the area co-ordinated, allow restrictions on freedom to provide services or goods originating in another Member State only in limited circumstances. As Recital 19 and the Explanatory Memorandum²⁸ indicate, this is concerned with specific principles of the internal market, known as the "mutual recognition" and "home-country control" principles, and is designed to prevent the Rome II Proposal from creating obstacles to the proper functioning of the internal market, in particular as regards the free movement of goods and services. It is evidently designed to reassure the e-commerce lobby, who have campaigned in favour of the absurd proposition that measures such as Directive 2000/31 on Electronic Commerce²⁹ in some way affect ju-

²⁴ At 27.

²⁵ See, similarly, ECJ 27 February 2002 – C-37/00 – *Weber v Universal Ogden Services*, [2002] ECR I-2013, treating installations on the continental shelf as part of the adjacent State for the purpose of jurisdiction over an employment dispute under the Brussels I Convention and Regulation.

²⁶ See ECJ 5 February 2004 – C-18/02 – *DFDS Torline v SEKO* = [2004] EuLF (E) 37, which involved an action in Denmark seeking to establish the illegality of a notice of industrial action („blackning“) given by a Swedish trade union acting in the interests of the Polish crew of a Danish ship operating between Sweden and England. The European Court ruled that, for the purpose of jurisdiction under Article 5(3) of the Brussels I Convention and Regulation, the nationality or flag of the ship is decisive only if the national court reaches the conclusion that the damage arose on board the ship.

²⁷ At 29.

²⁸ At 29.

²⁹ OJ 2000, L, 178, at 1.

dicial jurisdiction and choice of law in relation to claims under private law.³⁰ It is submitted that it is undesirable to give the least semblance of encouragement to such arguments. But it is noteworthy that Article 23(2) merely makes a saving for the otherwise existing effect of measures such as Directive 2000/31. If, as seems entirely clear, no such effect exists in the present context, in due course the European Court will doubtless so rule, and the relevant lobbies will then receive their due disappointment.

Relationship with Existing International Conventions

By Article 25, the Rome II Proposal is not to prejudice the application of international conventions to which the Member States are parties when the Regulation is adopted and which, in relation to particular matters, lay down conflict-of-law rules relating to non-contractual obligations. Article 26 requires the Member States to notify to the Commission a list of such conventions, and the Commission to publish the list in the Official Journal of the European Union. As Recital 20 explains, publication of the list is designed to make the rules easier to read.

As the Explanatory Memorandum explains,³¹ the relevant conventions include the Hague Convention on Traffic Accidents (1971), and the Hague Convention on Products Liability (1973). Parties to the 1971 Convention include France, Belgium, the Netherlands, Luxembourg, Spain, Austria, Poland, Czech Republic, Slovakia, Slovenia, Latvia, and Lithuania.³² Parties to the 1973 Convention include France, the Netherlands, Luxembourg, Spain, Finland, and Slovenia.³³

THE MAIN RULES ON TORTS

Introduction

The main rules on the law applicable to most torts³⁴ are laid down by Article 3 of the Rome II Proposal. Article 3 specifies:

1. The law applicable to a non-contractual obligation shall be the law of the country in which the damage arises or is likely to arise, 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 arise.

2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country when the damage occurs, the non-contractual obligation shall be governed by the law of that country.

3. Notwithstanding paras 1 and 2, where it is clear from all the circumstances of the case that the non-contractual obligation is manifestly more closely connected with another country, the law of that other country shall apply. A manifestly closer connection with another country may be based in particular on a pre-existing relationship between the parties, such as a contract that is closely connected with the non-contractual obligation in question.

Several general characteristics of Article 3 seem worthy of remark. Firstly, despite its triple structure, in substance Article 3 lays down a single fairly definite rule, containing two limbs, and a single rather vague exception. Thus the combined effect of Article 3(1) and (2) is to establish a general rule whose operation depends on the existence or otherwise of an habitual residence common to the parties. If both parties were habitually resident in the same country, the tort is governed by the law of that country. If no such common habitual residence existed, the tort is governed by the law of the place of injury. Then Article 3(3) provides an exception in favour of the law of another country which has a manifestly closer connection with the tort.

Secondly, Article 3 envisages that a single law which will govern the various issues which may arise in respect of a tort claim between a given plaintiff and a given defendant. As will be seen,³⁵ Article 11 reinforces this by establishing a long (but non-definitive) list of broad issues which are subjected to the law which is made applicable by Article 3. Accordingly the law which is applicable by virtue of Article 3 may conveniently be referred to as “the proper law of the tort”. On the other hand, Article 3 also envisages that different laws may apply as between different pairs of party, even though the claims arise out of the same incident.

Thirdly, the rules laid down by Article 3 are neutral as between the parties and as regards the content and purposes of the conflicting laws. They seem to require the application of the substantive rules contained in a law whose identity is determined solely by reference to connecting-factors. No account is taken of whether the substantive rules so chosen favour the plaintiff or the defendant, of whether their purpose is deterrence or compensation, and of whether the country whose law is chosen, or any other country, may be regarded as having a substantial interest in the application of its substantive rules (in preference to the different substantive rules of another connected country) in the circumstances of the case. These choice of law rules are country-selecting, rather than rule-selecting, in character.

To this content-neutrality a rather minor qualification is made by Article 13, which specifies that, whatever may be the

³⁰ See *Stone*, Internet Consumer Contracts and European Private International Law, (2000) 9 Information & Communications Technology Law at 5, and *Stone*, The Treatment of Electronic Contracts and Torts in Private International Law under European Community Legislation, (2002) 11 Information & Communications Technology Law at 121.

³¹ At 29.

³² Other parties are Switzerland, Bosnia-Herzegovina, Croatia, Macedonia, Serbia-Montenegro, and Belarus.

³³ Other parties are Norway, Croatia, Macedonia, and Serbia-Montenegro.

³⁴ The special rules laid down by Articles 4-8 for certain particular torts (product liability; unfair competition; defamation and privacy; environmental damage; and infringement of intellectual property) are considered *intra* at 223-227.

³⁵ See *intra* at 227-228.

applicable law, in determining liability account must be taken of the rules of safety and conduct which were in force at the place and time of the event giving rise to the damage.³⁶ Recital 18 explains that the concern to strike a reasonable balance between the parties means that account must be taken of the rules of safety and conduct in operation in the country in which the harmful act was committed, even where the tort is governed by another law. But, as the Explanatory Memorandum points out,³⁷ taking account of foreign law is not the same thing as applying it; the court will apply only the proper law, but it must take account of another law as a point of fact, for example when assessing fault. Perhaps the most obvious example of the operation of Article 13 is that, although under Article 3 English law will govern liability arising from a road accident which has occurred in France between parties habitually resident in England, in determining whether a driver has acted with reasonable care, as his duty under English law requires, one must take account of the French rule of the road which specifies that normally the correct course is to keep to the right, rather than (as in England) to the left, side of the road.³⁸

Fourthly, the reference made by Article 3 is always to the internal law of the relevant country. Renvoi is excluded by Article 20, which declares that the application of the law of any country specified by the Proposal means the application of the rules of law in force in that country other than its rules of private international law.³⁹

The Law of the Common Habitual Residence

As we have seen, Article 3(2) ensures that the law of the country in which both parties were habitually residence will normally prevail over the law of the country in which the events constituting the tort occurred. It will remain possible, under Article 3(3), for the law of the law of the country in which the events constituting the tort occurred, or even that of a third country, to prevail over the law of the common residence, on the basis that it is the country with which the tort has a manifestly closer connection.

Ancillary rules on the habitual residence of companies and other bodies, and of self-employed individuals, are laid down by Article 19. As regards a company, firm, or other body incorporate or unincorporate, Article 19(1) specifies that its principal establishment must be treated as its habitual residence; but that where the event giving rise to the damage occurs or the damage arises in the course of operation of a sub-

siary, a branch or any other establishment, that establishment must be treated as its habitual residence. As regards an individual engaged in business activity on his own account,⁴⁰ Article 19(2) specifies that where the event giving rise to the damage occurs or the damage arises in the course of the business activity of an individual, his business establishment must be treated as his habitual residence. A likely (and welcome) effect of Article 19 is that, in the case of a tort committed by an employee in the course of his employment, the employer and the employee will often regarded as habitually resident in the same country, so that the same law will govern the liability of the employee as perpetrator and the vicarious liability of the employer for the employee's conduct. But unfortunately the Proposal offers no definition of habitual residence for an individual who is not, or not relevantly, engaged in a business activity on his own account.

The preference given by Article 3 to the common habitual residence over the place of the events constituting the tort reflects a general international trend in recent decades. Thus, as regards the measure of damages to be awarded in respect of road accidents, the English courts have, both at common law and under the Private International Law (Miscellaneous Provisions) Act 1995, awarded higher damages in accordance with the law of the common residence than would have been available under the law of the place of the accident.⁴¹ In the United States, ever since *Babcock v Jackson*⁴² the plaintiff has been given the benefit of the law of the common residence where it favours him in respect of a wide variety of issues;⁴³ and, after

⁴⁰ The Explanatory Memorandum, at 27, refers to individuals exercising a liberal profession or business activity in a self-employed capacity.

⁴¹ See *Boys v Chaplin*, [1971] AC 356, decided under an interest-based exception to the double actionability rule at common law; and *Edmunds v Simmons*, [2001] 1 WLR 1003, decided under the exception to the law of the place of injury in favour of a substantially more significant connection, specified by section 12 of the 1995 Act. See also *Johnson v Coventry Churchill*, [1992] 3 All ER 14, applying the law of the common residence of the employer and the employee so as to avoid the employer's social-security-related immunity existing under the law of the place where the construction accident occurred.

⁴² 191 NE2d 279 (1963).

⁴³ As regards duties to guest passengers, see *Babcock v Jackson*, 191 NE2d 279 (New York, 1963); *Tooker v Lopes*, 249 NE2d 394 (New York, 1969); *Clark v Clark*, 222 A2d 205 (New Hampshire, 1966); *Wilcox v Wilcox*, 133 NW2d 408 (Wisconsin, 1965); and *Wessling v Paris*, 417 SW2d 259 (Kentucky, 1967).

As regards inter-spousal claims, see *Haumschild v Continental Casualty*, 95 NW2d 814 (Wisconsin, 1959); *Thompson v Thompson*, 193 A2d 439 (New Hampshire, 1963); and *Brown v Church of the Holy Name of Jesus*, 252 A2d 176 (Rhode Island, 1969). See also *Corcoran v Corcoran*, [1974] VR 164 (Victoria, Australia).

As regards the measure of damages, see *Reich v Purcell*, 432 P2d 727 (California, 1967).

As regards a vehicle owner's liability for the negligence of a hirer-driver, see *Levy v Daniels*, 143 A 163 (Connecticut, 1928); *Farber v Smolack*, 229 NE2d 36 (New York, 1975); *Sexton v Ryder*, 320 NW2d 843 (Michigan, 1982); and *Veasley v CRST International*, 553 NW2d 896 (Iowa, 1996).

As regards a tavern-keeper's liability for injuries caused by its customers, see *Schmidt v Driscoll Hotel*, 82 NW2d 365 (Minnesota, 1957); and *Rong Yao Zhou v Jennifer Mall Restaurant*, 534 A2d 1268 (DC, 1987).

As regards contributory negligence, see *Sabell v Pacific Intermountain Express Co*, 536 P2d 1160 (Colorado, 1975); *Wallis v Mrs Smith's Pie Co*, 550 SW2d 453 (Arkansas, 1977); and *Noble v Moore*, 2002 WL 172665 (Connecticut, 2002).

As regards exemplary damages, see *Bryant v Silverman*, 703 P2d 1190 (Arizona, 1985).

³⁶ Article 13 accords with both the traditional English law and the Hague Conventions. See *The Halley*, (1868) LR 2 PC 193; *Kuwait Airways v Iraqi Airways* (Nos 4 and 5), [2002] 2 AC 883; Article 7 of the Hague Convention on Traffic Accidents (1971); and Article 9 of the Hague Convention on Products Liability (1973).

³⁷ At 25.

³⁸ See also *Ellis v Barto*, 918 P2d 540 (Washington, 1996), applying the law of the place of the accident to "rules governing vehicle turn-arounds", despite a common residence elsewhere.

³⁹ This accords with traditional English law. See section 9(5) of the Private International Law (Miscellaneous Provisions) Act 1995.

earlier rulings to the contrary,⁴⁴ the current trend is also to apply that law where it favours the defendant.⁴⁵ Enactments closely resembling Article 3(2) of the Rome II Proposal have been adopted in Germany,⁴⁶ Switzerland,⁴⁷ and Quebec.⁴⁸ And results similar to those envisaged by Article 3(2) may often be reached under the Hague Convention on Traffic Accidents (1971).

The merit of a firm and general preference for the law of the common residence over that of the place where the tort occurred, as adopted by Article 3(2) of the Rome II Proposal, is open to doubt. In its Explanatory Memorandum⁴⁹ the Commission merely asserts that in such a case the situation has only a tenuous connection with the country where the injury occurs, and that the rule in favour of the law of the common residence reflects the legitimate expectations of both parties. Certainly there are some situations in which it seems clear that the law of the common residence should prevail. In particular, in the case of most issues relating to a road accident, it seems desirable to apply the law of the common residence where it requires higher standards of conduct, or provides higher levels of compensation, than the law of the place of the accident. For the law of the common residence has a substantial interest in protecting its resident plaintiff, both in respect of his physical safety and his financial position, and (at least in the usual case where the defendant's residence coincides with the place of registration of his vehicle) its application can hardly defeat the legitimate expectations of its resident defendant and his insurer.⁵⁰ Moreover the law of the place of the accident lacks any substantial conflicting interest, since its rules on road acci-

dents are not intended to encourage dangerous or risk-taking activity, but to protect the financial position of resident defendants and their insurers. Thus it seems proper to apply the law of the common residence to a road accident, where its rules are more favourable to the plaintiff than those of the place of injury, in relation to such issues as the duty and standard of care owed by a driver to a gratuitous passenger; the possibility of liability between members of a family; the possible immunity from liability of a charitable body; the admissible heads of damage, and other questions affecting the measure of damages; the period within which proceedings must be commenced; and the existence of vicarious liability (including that of a vehicle-owner for the negligence of a driver to whom he has hired the vehicle; and that of a tavern-keeper for the negligent driving of a customer who has left the tavern). The same approach seems justified in respect of other kinds of accident giving rise to physical injuries, unless it is apparent that the lower standards of conduct or compensation accepted by the law of the place of the accident are designed to encourage risk-taking activity.

It is submitted, however, that preference for the law of the common residence is not justified in converse situations – where, in respect of the same issues arising in relation to a road or similar accident, the law of the common residence accepts lower standards of conduct, or provides lower levels of compensation, than the law of the place of the accident. Certainly the law of the common residence has an interest in protecting its resident defendant (and his insurer) from possibly excessive financial burdens. But the law of the place of the accident has a substantial conflicting interest in maintaining the deterrent effect of its rules in respect of all conduct within its borders, and also in protecting the financial position of persons who are physically injured within its borders, even if they reside elsewhere. Since each country has a substantial interest in the application of its own substantive rules, it is submitted that the law of the place of the accident should apply, as it would have done between the parties not having a common residence. Displacement of the law of the place of the accident in cases where that country has a substantial interest in applying its rules seems to the present writer to involve an unjustifiable disregard for the territorial sovereignty of that country, and for the normal expectations of most private persons (who tend to envisage the application of law on a territorial basis), without any sufficient countervailing advantage. Where substantial interests of different legal orders conflict, judicial weighing to determine the greater interest cannot be done on a principled basis, and in practice is likely to lead to preference for the law of the forum. The desirable solution to such conflicting interests is therefore to adhere to the law of the place of the accident. Thus, in accident cases involving the issues presently under discussion, the preferable solution is not, as under Article 3(2) of the Proposal, to prefer the law of the common residence regardless of its content, but to apply either the law of the common residence or that of the place of injury, whichever is more favourable to the plaintiff.

Moreover, it is submitted that, even in the case of road acci-

⁴⁴ On duties to guest passengers, see *Milkovitch v Saari*, 203 NW2d 408 (Minnesota, 1973); *Conklin v Horner*, 157 NW2d 579 (Wisconsin, 1968); *Arnett v Thompson*, 433 SW2d 109 (Kentucky, 1968); *Gagne v Berry*, 290 A2d 624 (New Hampshire, 1972); *Heath v Zellmer*, 151 NW2d 664 (Wisconsin, 1967); and *Zelinger v State Sand & Gravel Co*, 156 NW2d 466 (Wisconsin, 1968).

On intra-familial claims, see *Arnett v Thompson*, 433 SW2d 109 (Kentucky, 1968); *Taylor v Bullock*, 279 A2d 585 (New Hampshire, 1971); *Gordon v Gordon*, 387 A2d 339 (New Hampshire, 1978); *Zelinger v State Sand & Gravel Co*, 156 NW2d 466 (Wisconsin, 1968).

As regards a vehicle owner's liability for the negligence of a hirer-driver, see *Fu v Fu*, 733 A2d 1133 (New Jersey, 1999). On employer's liability, see *Rigdon v Pittsburgh Tank & Tower Co*, 682 So2d 1303 (Louisiana App, 1996).

⁴⁵ On duties to guest passengers, see dicta in *Neumeier v Kuehner*, 286 NE2d 454 (1972). On immunity between co-employees, see *Hunker v Royal Indemnity Co*, 204 NW2d 897 (Wisconsin, 1973). On charitable immunity, see *Schultz v Boy Scouts of America*, 480 NE2d 679 (New York, 1985). On the measure of damages, see *Collins v Trius*, 663 A2d 570 (Maine, 1995). On the exclusion of tort liability for road accidents in favour of a no-fault insurance scheme providing limited amounts of compensation, see *Myers v Langlois*, 721 A2d 129 (Vermont, 1998), and *Lessard v Clarke*, 736 A2d 1226 (New Hampshire, 1999).

⁴⁶ See the EGBGB (as amended in 1999), Article 40(2).

⁴⁷ See the Federal Statute on Private International Law 1987, Article 133.

⁴⁸ See the Civil Code 1991, Article 3126. See also the Louisiana Civil Code, Article 3544(1), which applies the law of the country in which both parties were domiciled at the time of the injury to issues pertaining to loss distribution and financial protection.

⁴⁹ At 12.

⁵⁰ It is arguable that, to avoid injustice to the liability insurer, a person involved in a road accident as a driver, driver's employer or vehicle-owner should be treated as habitually resident in the country where his vehicle is registered. The problem seems most likely to arise in Europe in cases where a tourist hires a car in the country which he is visiting; as happened in *Edmunds v Simmonds*, [2001] 1 WLR 1003.

dents, the effect of the plaintiff's own negligence (as barring recovery altogether, or as leading to the award of reduced damages, or as being wholly immaterial) should always be referred to the law of the place of the accident, even if the parties have a common residence elsewhere. For whichever rule is chosen by a legal system on this point, the choice reflects, at least in part, a policy as to the best way of distributing of the burden of taking precautions with a view to preventing accidents. Thus on this issue the country of the accident has a conduct-oriented interest in the application of its rule, whatever its content.

Further, it is submitted that the law of the place where the tort occurs should be adhered to, despite a common residence elsewhere, for all issues arising in respect of torts (such as battery; false imprisonment; and trespass to land or chattels) which involve deliberate interference with the plaintiff's person or tangible property. The case is perhaps clearest where the intentional interference involves the purported exercise of police powers, a situation excluded from the scope of the Rome II Proposal by Article 1 as a public rather than a civil matter.⁵¹ But even where no public authority is involved, the interest of any country in regulating the deliberate use of force within its borders is so strong that it should only be overridden by a stringent public policy against scandalous or unconscionable rules. Thus, for example, Spanish law should govern all aspects of a tort claim between English football supporters arising from a fight in a bar near the Real Madrid ground before or after a match which the parties were visiting Spain in order to attend.

On the other hand, in one respect Article 3(2) is too narrowly written, since it does not extend to cases where the parties are habitually resident in different countries, but (so far as relevant) the laws of those countries are identical to each other and different from that of the country where the tort occurred. Where it would be appropriate to apply, in preference to the law of the country where the tort occurred, that of the country in which both parties were habitually resident, it will be equally appropriate to apply the law common to the different countries in each of which one of the parties was habitually resident. For example, if English and Irish laws both admit the award of damages for pain and suffering in personal injury cases, but Maltese law does not, such an award should be possible in favour of an Irish plaintiff against an English defendant in respect of injuries arising from a road accident in Malta.⁵² Thus Article 3(2) should be amended so as to apply "where the person claimed to be liable and the person sustain-

ing damage both have their habitual residence in the same country, or in different countries having (so far as relevant) identical laws, when the damage occurs". But probably, on the existing text of the Proposal, the exception in favour of a manifestly closer connection, provided for by Article 3(3), can be invoked to achieve this result.

It has been noted that Article 3 envisages that different laws may apply as between different pairs of party even though the claims arise out of the same incident. Thus, for example, a plaintiff who has a common residence with the defendant will see his claim governed the law of the common residence under Article 3(2), while another plaintiff who suffers similar injuries as a result of the same conduct but who is resident in the country where the events occurred will see his claim governed by the law of the place of injury under Article 3(1). There is no doubt that this can lead to strange results, perhaps amounting to arbitrary discrimination. The facts of an American case, *Tooker v Lopes*⁵³, provide a useful illustration. Two gratuitous passengers in the same car were injured in Michigan as a result of the ordinarily, but not grossly, negligent driving by a New York driver of a car registered in New York. New York law imposed on a driver liability to a gratuitous passenger for ordinary negligence. Michigan law required gross negligence. The driver and one of the passengers were habitually resident in New York, but the other passenger was habitually resident in Michigan. Under the Rome II Proposal, as indeed under New York conflict rules,⁵⁴ the New York passenger's claim succeeds and the Michigan passenger's claim fails. To the present writer it is hard to accept this result.

It would therefore be better if Article 3(2) had required in principle that "the person claimed to be liable and the person sustaining damage, and all other persons whose entitlement or liability arising from the same incident is seriously arguable, all have their habitual residence in the same country [or countries with equivalent laws] when the damage occurs".⁵⁵ If that principle were accepted, one could concede an exception allowing the application between a pair of parties of the law of their common residence, despite the involvement in the accident of other persons who are resident in the country of the accident (or a country having an equivalent law), if there is no difference between the two laws which is capable of affecting the rights and obligations of the persons who belong to the country of the accident (or an equivalent country). A concrete example would be a collision, in a country whose law reduces the standard of care owed by a driver to his gratuitous passenger, between a car registered in, driven by a resident of, and

⁵¹ For example, if an arrest takes place in France, respect for French sovereignty, as well as the need for certainty, requires that the grounds which justify arrest, the manner in which an arrest should be effected, the amount of force which may properly be used in effecting an arrest, and the remedies open to a person unlawfully arrested, should be referred to French law – even if, for example, the person arrested is an Englishman and the person who makes the arrest is an English policeman who has been summoned through Interpol or Europol to assist the French police. See also *District of Columbia v Coleman*, 667 A2d 811 (DC, 1995), applying the law of the place of the incident in favour of a foreign police officer in respect of the permissible degree of force.

⁵² See *Reich v Purcell*, 432 P2d 727 (California, 1967).

⁵³ 249 NE2d 394 (New York, 1969).

⁵⁴ See *Tooker v Lopes*, 249 NE2d 394, and *Neumeier v Kuehner*, 286 NE2d 454 (1972).

⁵⁵ See also *Tolofson v Jensen*, (1994) 120 DLR4th 289, where the Canadian Supreme Court rejected, by reference to a Saskatchewan time-limitation, claims in respect of a Saskatchewan road accident by a British Columbian passenger against both his British Columbian driver and the Saskatchewan driver of another vehicle; and also rejected, by reference to Quebec legislation substituting a no-fault insurance scheme, claims in respect of a Quebec road accident by an Ontario passenger against both his Ontario driver and the Quebec driver of another vehicle.

containing a passenger from, a country whose law makes no such reduction, and a car registered in and driven by a resident of the country of the collision, but containing no passenger. The guest passenger issue cannot affect the rights or liabilities of the driver from the country of the collision, even to the passenger in the other car. So it is acceptable to allow the claim of the passenger against his own driver in accordance with the law of the country to which they belong.

The Law of the Place of Direct Injury

Under the general rule laid down by the Rome II Proposal, in the absence of a common habitual residence, the law applicable to a tort is that of the place of direct injury. Article 3(1) makes applicable "the law of the country in which the damage arises or is likely to arise, 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 arise." Thus, where the various events constituting the tort have occurred in more than one country, the reference is to the country in which the plaintiff incurred his direct or initial injury, rather than that in which the defendant's wrongful conduct occurred, or that in which the plaintiff suffered further loss, consequential on his initial injury. The reference to the place where the direct injury is likely to arise is designed to cover claims for an injunction against a threatened tort.⁵⁶

As the Explanatory Memorandum recognises,⁵⁷ in the case of a traffic accident, the place of the direct injury is the place where the collision occurs, and it is immaterial that consequential financial loss, or pain or grief, is sustained in another country. Moreover the decisions of the European Court distinguishing between the direct injury and consequential loss for the purpose of jurisdiction under Article 5(3) of the Brussels I Convention or Regulation will also be relevant to the application of Article 3(1) of the Rome II Proposal. Thus where a bank is sued for wrongful cancellation of credit in connection with a building project, the direct injury arises in the country where the project is suspended and the plaintiff's subsidiary is rendered insolvent, and only consequential loss is incurred at the plaintiff's residence in another country.⁵⁸ Similarly, where a person is wrongfully arrested and his tangible property is wrongfully seized, the direct injury arises in the country where the arrest and the seizure take place, and only consequential financial loss is incurred at his residence in another country.⁵⁹ Again, where a consignee of goods which have been damaged in the course of a transport operation comprising carriage by sea and then by land sues the maritime carrier, the direct injury arises at the place where the maritime carrier had to deliver the goods, and not at the consignee's

residence, where it received the goods at the conclusion of the transport operation and discovered the damage to them.⁶⁰ Similarly, in the case of a claim against a financial advisor for a financial loss resulting from a speculative investment in one country, the place of direct injury is not the plaintiff's residence, at which his assets are concentrated, in another country.⁶¹

As the Explanatory Memorandum indicates,⁶² where direct injury is sustained in several countries, the laws of all these countries will have to be applied on a distributive basis, each law applying to the injury sustained in its territory. This may occur, for example, in the case of a libel published in a newspaper, copies of which are distributed in several countries;⁶³ or a libel contained in a television broadcast received in several countries;⁶⁴ or a libel contained in a web-page on the Internet, downloaded by persons browsing in several countries.⁶⁵

As regards the tort of inducing breach of contract, it seems that the country of the direct injury under Article 3(1) is the country in which the breach induced occurred and the plaintiff suffered direct financial loss (for example, by failing to receive a benefit contracted for), even if the defendant's act of inducement took place elsewhere.⁶⁶ But this type of tort will often be governed by Article 5, on unfair competition,⁶⁷ rather than by Article 3.

As regards liability for false statements made by the defendant and relied on by the plaintiff, it seems that the country of the direct injury is the country in which goods were delivered or money was paid as a result of the plaintiff's reliance on the statement; rather than the country where the statement was issued by the defendant, or the country where the plaintiff received the statement and acted in reliance on it by taking decisions or giving instructions leading to the delivery or payment elsewhere.⁶⁸

The preference under Article 3(1) for the place of direct injury over the place of the defendant's conduct accords with the solution adopted in the United Kingdom by section 11 of the Private International Law (Miscellaneous Provisions) Act 1995 for cases of physical injury to person or property. It also accords with the existing laws of France, the Netherlands,

⁶⁰ See ECJ 27 October 1998 – C-51/97 – *Réunion Européenne v Spliethoff's Bevrachtungskantoor*, [1998] ECR I-6511.

⁶¹ See ECJ 10 June 2004 – Case C-168/02 – *Kronhofer v Maier* = [2004] EuLF (E) 191.

⁶² At 11.

⁶³ See ECJ 7 March 1995 – C-68/93 – *Shevill v Presse Alliance*, [1995] ECR I-415.

⁶⁴ See *Ewins v Carlton Television*, [1997] 2 ILRM 223.

⁶⁵ See *Dow Jones v Gutnick*, [2002] HCA 56.

⁶⁶ See *Metall und Rohstoff v Donaldson Lufkin & Jenrette*, [1990] QB 391 (CA).

⁶⁷ See *intra* at 225.

⁶⁸ See *Domicrest v Swiss Bank Corp*, [1999] QB 548 (Rix J); *Dunhill v Diffusion Internationale de Maroquinerie de Prestige*, [2001] WL 239707 (Rokison QC); *Raiffeisen Zentralbank v National Bank of Greece*, [1999] 1 Lloyd's Rep 408 (Tuckey J); and *ABCI v Banque Franco-Tunisienne*, [2003] 2 Lloyd's Rep 146 (CA). See also *Kronhofer v Maier* (*supra* note 61).

⁵⁶ See the Explanatory Memorandum, at 11.

⁵⁷ At 11.

⁵⁸ See ECJ 11 January 1990 – 220/88 – *Dumez v Hessische Landesbank*, [1990] ECR I-49.

⁵⁹ See ECJ 19 September 1995 – C-364/93 – *Marinari v Lloyd's Bank*, [1995] ECR I-2719.

and Switzerland.⁶⁹ On the other hand in Germany Article 40(1) of the Introductory Law to the Civil Code (as amended in 1999) gives the plaintiff an option between the law of the place of the defendant's conduct and the law of the place of injury, and the plaintiff is also given an option in Italy and Poland.⁷⁰

The rationale of Article 3(1) is addressed by Recital 8, which explains that the preference for the country where the direct damage occurred strikes a fair balance between the interests of the person causing the damage and the person sustaining the damage, and also reflects the modern approach to civil liability and the development of systems of strict liability. More fully, the Explanatory Memorandum⁷¹ declares that the Commission's objectives in confirming the *lex loci delicti* rule are to guarantee certainty in the law and to seek to strike a reasonable balance between the person claimed to be liable and the person sustaining the damage. It notes that in most cases the law of the place of direct injury corresponds to the law of the injured party's country of residence. The Commission has not adopted the principle of favouring the victim as a basic rule, which would give the victim the option of choosing the law most favourable to him. It considers that this solution would go beyond the victim's legitimate expectations and would reintroduce uncertainty in the law, contrary to the general objective of the Proposal. The solution in Article 3 is therefore a compromise between the extreme solutions of applying the law of the place where the event giving rise to the damage occurs, and of giving the victim the option. It further reflects the modern concept of the law of civil liability which is no longer oriented towards punishing for fault-based conduct; nowadays, it is the compensation function that dominates, as can be seen from the proliferation of no-fault strict liability schemes.

On the merits, it may be added, in support of the preference for the law of the place of the direct injury over that of the defendant's conduct, that the place of injury is easily determined, at least in cases of physical injury; that the rule will rarely defeat any legitimate expectation of the defendant; and that a plaintiff, injured in his own country, will have little ground for complaint if he is denied the benefit of more favourable rules laid down in the country where the defendant resided and acted. Thus to the present writer Article 3(1) accords with the optimal solution.

The Law of the Manifestly Closer Connection

By way of exception to the general rule laid down by Article 3(1)-(2) in favour of the law of the common residence or the place of injury, Article 3(3) gives preference to a manifestly closer connection. It provides that "where it is clear from all the circumstances of the case that the non-contractual obligation is manifestly more closely connected with another country, the law of that other country shall apply. A mani-

festly closer connection with another country may be based in particular on a pre-existing relationship between the parties, such as a contract that is closely connected with the non-contractual obligation in question."

The Explanatory Memorandum⁷² notes that Article 3(3) aims to bring a degree of flexibility, enabling the court to adapt the rigid rule to an individual case so as to apply the law which reflects the centre of gravity of the situation. It recognises however that, since the provision generates a degree of unforeseeability as to the applicable law, it must remain exceptional; and explains that its truly exceptional character is emphasised by the requirement of a "manifestly" closer connection. But no guidance is given as to the scope of the exception, or to meaning of the concept of a manifestly closer connection, or a centre of gravity of the situation, other than by reference to a pre-existing relationship between the parties, as mentioned in the second sentence of the provision. Even there the Memorandum explains that the law applicable to the pre-existing relationship does not apply automatically, and the court enjoys a degree of discretion to decide whether there is a significant connection between the non-contractual obligations and the law applicable to the pre-existing relationship.

The vagueness of Article 3(3) as to its central concept resembles the current English rule laid down by section 12 of the Private International Law (Miscellaneous Provisions) Act 1995, which provides for displacement of the *lex loci delicti* in favour of another law which the court considers in all the circumstances to be substantially more appropriate for application in the determination of all or any of the issues arising. Under section 12 such appropriateness is to be assessed by comparison of the significance of the factors which connect the tort with the country whose law would be applicable under the general rule, and that of any factors connecting the tort with another country whose law is being considered for application. The potentially relevant connecting factors include ones relating to the parties, to any of the events which constitute the tort, or to any of the circumstances or consequences of such events. But no guidelines are offered to assist in evaluating the significance of one connection or group of connections and its comparison with that of another connection or group, so as to enable the relative appropriateness of the application of each law to be determined. This extraordinary vagueness reflects the Law Commissions' earlier Consultation Paper,⁷³ which specifically rejected every known principle which could ascribe relative significance to the various connections.

As regards the second sentence of Article 3(3) of the Rome II Proposal, the Explanatory Memorandum⁷⁴ does indicate that the pre-existing relationship need not consist of an actual contract. It may take the form of a contractual relationship which is only contemplated, as in the case of the break-

⁶⁹ See the Explanatory Memorandum, at 11.

⁷⁰ See the Explanatory Memorandum, at 11.

⁷¹ At 11-12.

⁷² At 12.

⁷³ Working Paper, at 87, Consultative Memorandum, at 62 (1984).

⁷⁴ At 12-13.

down of negotiations or of annulment of a contract, or it may be a family relationship. But it is regarded as implicit that where the pre-existing relationship consists of a consumer or employment contract, and the contract contains a choice-of-law clause, Article 3(3) of the Rome II Proposal cannot have the effect, in relation to torts, of depriving the weaker party of the protection of the law which protects him, as regards contracts, under Articles 5 and 6 of the Rome Convention.

It is very obscure how far the exception provided by Article 3(3) can be utilised where there is no pre-existing relationship at all. The wording suggests that such application is in principle possible, albeit in rare circumstances. Perhaps the clearest case for such application is where the parties reside in different countries whose laws are in relevant respects identical to each other but different from the law of the place of injury. In that situation the application under Article 3(3) of the law common to the parties' residences will rectify a drafting defect in Article 3(2).

It also seems arguable that Article 3(2) may properly be used to make the law of the place of injury prevail over the law of the common residence where there would otherwise be an unacceptable discrimination between plaintiffs who are resident in different countries but are injured in the same incident. But beyond this it seems unlikely that Article 3(2) can properly be used to overcome what has been argued above to be the excessive width of Article 3(2), so as to apply the law of the place of injury, despite a common residence of the parties, whenever it seems clear that the law of the place of injury has a substantial interest in the application of its rules which favour recovery in accident cases, or which regulate the deliberate use of physical force within its borders.

Subsequent Agreements

It has been seen that under Article 3(3) of the Rome II Proposal a tort claim may in some cases be governed by the law which applies to a contract between the same parties, concluded before the events constituting the tort occurred.

In addition Article 10 of the Proposal enables parties to make an agreement, after their dispute has arisen, choosing the law applicable to a tort claim (other than a claim for infringement of an intellectual property right) between them. Echoing Article 3 of the Rome Convention, Article 10(1) adds that such an agreement must be either expressed, or be demonstrated with reasonable certainty by the circumstances of the case, and that it may not affect the rights of third parties (such as liability insurers).⁷⁵ Again under the influence of the Rome Convention, Article 10(2) specifies that if all the other elements of the situation at the time when the loss is sustained are located in a country other than the country whose law has been chosen, the choice of the parties shall be without prejudice to the application of rules of the law of that country which cannot be derogated from by contract. Article 10(3) ex-

tends this principle of safeguarding the mandatory rules of the law otherwise exclusively connected by adding that the parties' choice of the applicable law shall not debar the application of provisions of Community law where the other elements of the situation were located in the EC Member States of the European Community at the time when the loss was sustained. Recital 16 explains that protection should be given to weaker parties by imposing certain conditions on the choice. It is not apparent, however, that protection of weaker parties is really necessary in a context where a dispute has already arisen and the parties are presumably in receipt of legal advice. Nor is it apparent that any provisions of Community law yet exist to which Article 10(3) would apply.

Public Policy and Overriding Rules

Echoing Article 16 of the Rome Convention, Article 22 of the Rome II Proposal makes a classic saving for the stringent public policy of the law of the forum. It specifies that the application of a rule of the law of any country specified by the Regulation may be refused if such application is manifestly incompatible with the public policy ("ordre public") of the forum. Recital 17 explains that considerations of the public interest warrant giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy. As the Explanatory Memorandum notes,⁷⁶ the mechanism of the public policy exception allows the court to disapply rules of the foreign law designated by the conflict rule, and to replace it by the *lex fori*, where the application of the foreign law in a given case would be contrary to the public policy of the forum because its content is repugnant to the values of the forum.

While Article 22 is utterly conventional, Article 24 contains an extraordinary provision on exemplary damages. It specifies that the application of a provision of the law designated by the Proposal which has the effect of causing non-compensatory damages, such as exemplary or punitive damages, to be awarded shall be contrary to Community public policy. This seems to go beyond any question of choice of law and to establish a new substantive rule at Community level, applicable even where the law governing the tort under the Proposal is that of the forum, and even if the case involves no foreign element at all.⁷⁷ Moreover no explanation is given in the Preamble as to why exemplary damages are undesirable, or why their systematic elimination falls within the scope of the provisions of Title IV of the EC Treaty, on judicial co-operation in civil matters, on which the Proposal is based. It is submitted that this provision lacks any valid legal basis and that its inclusion borders on a misuse of powers (as contemplated by Article 230,

⁷⁵ See the Explanatory Memorandum, at 22.

⁷⁶ At 24-25 and 28.

⁷⁷ In contrast, Article 40(3) of the Introductory Law to the German Civil Code (as amended in 1999), which prevents the German courts from entertaining claims which go substantially beyond that which is required for appropriate compensation for the injured person, or which obviously serve purposes other than the provision of appropriate compensation for the injured person, is explicitly limited to claims which are governed by the law of another State.

ex Article 173, of the Treaty). It is therefore hoped that the Council or the Parliament will insist on its deletion.

In addition to the classic public-policy proviso specified by Article 22 of the Rome II Proposal, Article 12 makes provision for overriding mandatory rules.⁷⁸ Echoing Article 7(1) of the Rome Convention, Article 12(1) specifies that where the law of a specific third country is applicable by virtue of the Proposal, effect may be given to the mandatory rules of another country with which the situation is closely connected, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the tort; and in considering whether to give effect to such mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application. But unlike Article 7(1) of the Rome Convention,⁷⁹ there is no option given to each Member State not to apply Article 12(1). In addition, echoing Article 7(2) of the Rome Convention, Article 12(2) of the Proposal specifies that nothing therein shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the tort.⁸⁰

The Explanatory Memorandum offers no real justification for the inclusion of Article 12. It refers to the European Court decision in *Arblade*⁸¹, but that was concerned with the relationship between national legislation regulating employment and the fundamental freedom under Community law to provide services between Member States. It is submitted that the issues raised in *Arblade* offer no useful analogy to the problems arising in relation to transnational torts. Nor does Article 7 of the Rome Convention merit reproduction in the context of torts, for it deals with rules which are designed to override contractual terms, and not merely to override the law of another country. Thus it is submitted that certainty could be enhanced, without any countervailing loss to justice or policy, by the deletion of Article 12 of the Rome II Proposal.

SOME PARTICULAR TORTS

Particular rules for certain torts are laid down by Articles 4-8 of the Rome II Proposal. They derogate to a varying extent from the general provisions laid down by Article 3.

Product Liability

As regards product liability, Article 4 replaces the rule in favour of the place of direct injury, laid down by Article 3(1), by a rule in favour of the habitual residence of one of the parties. On the other hand Article 3(2) and (3), giving priority to the law of the common habitual residence or that of a manifestly closer connection, remain applicable. Article 4 provides:

Without prejudice to Article 3(2) and (3), the law applicable to a non-contractual obligation arising out of damage or a risk of damage caused by a defective product shall be that of the country in which the person sustaining the damage is habitually resident, unless the person claimed to be liable can show that the product was marketed in that country without his consent, in which case the applicable law shall be that of the country in which the person claimed to be liable is habitually resident.

According to the Explanatory Memorandum,⁸² the definitions of "product" and "defective product" laid down by Articles 2 and 6 of Directive 85/374 (as amended)⁸³ will apply for the purposes of Article 4 of the Rome II Proposal. Thus "product" means any movable, even if incorporated into another movable or into an immovable, and includes electricity; and a product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including its presentation, its reasonably expected use, and the time when it was put into circulation.

Article 4 appears to apply to any liability in tort for the safety of a product. Thus it applies where the defendant is a manufacturer or producer of the product itself, or of a raw material used or component incorporated therein, or a supplier or importer,⁸⁴ or (probably) a designer. Since the focus is on safety, it is limited to cases of physical injury to a person, or physical damage to other property,⁸⁵ but the plaintiff need not be a purchaser, a consumer or even an individual. The plaintiff could, for example, be a corporate owner of a lorry damaged in a collision with a defective car. Moreover Article 4 applies whether the claim is based on strict liability (for example, under Directive 85/374) or on fault. But the liability must be in tort; and where there is a contract between the parties for the supply of the product, the saving for Article 3(3) will usually mean that any tort claim will be governed either by the law which governs the contract, or (where relevant) by the law which provides mandatory protection to the plaintiff as consumer, under the Rome Convention.

Although the law of the EC Member States on product liability has been harmonised to a considerable extent by Direc-

⁷⁸ Recital 17 explains that considerations of the public interest warrant giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on overriding mandatory rules.

⁷⁹ In the Rome Convention, Article 22 enables a Member State to make a reservation excluding application of Article 7(1). The United Kingdom, Ireland, Germany, Luxembourg and Portugal have made such reservations.

⁸⁰ Article 12(2) corresponds to the saving by section 14(4) of the (UK) Private International Law (Miscellaneous Provisions) Act 1995 for any rule of law which has effect notwithstanding the rules of private international law applicable in the particular circumstances.

⁸¹ ECJ 23 November 1999 – C-369/96 and C-376/96 – *Jean-Claude Arblade and Arblade & Fils SARL, and Bernard Leloup, Serge Leloup and Sofrage SARL*, [1999] ECR I-8453.

⁸² At 13.

⁸³ Directive 85/374 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ 1985, L 210, at 29), as amended by Directive 1999/34 (OJ 1999, L 141, at 20).

⁸⁴ See the Explanatory Memorandum, at 15, and Directive 85/374, Article 3.

⁸⁵ See the Explanatory Memorandum, at 13. But see Directive 85/374, Article 9.

tive 85/374, the scope of Article 4 of the Rome II Proposal is wider. Even where the claim is connected only with EC countries and is based on Directive 85/374, a conflict may arise where one but not another of the connected countries has exercised the option offered by Article 15 of the Directive to eliminate the “state of the art defence” provided for by Article 7(e) thereof.⁸⁶ Where the situation contains a non-European element, conflicts are not unlikely as regards the existence of strict (as distinct from fault-based) liability, and as regards the availability of a defence under a “statute of repose”.⁸⁷

Subject to the exception for the law of a manifestly closer connection, the effect of Article 4 is to create a three-limbed rule. Firstly, product liability is governed by the law of the habitual residence of both parties, if such exists. If not, then the law of the plaintiff’s habitual residence applies, unless it is shown that the product was not marketed in that country with the defendant’s consent. If that is shown, then the law of the defendant’s habitual residence applies. None of the three limbs makes reference to the place of injury, or that of the defendant’s conduct. All three are subject to an exception for the law of a manifestly closer connection, but probably this will apply mainly where there is a contract between the parties, and will then operate in favour either of the law which governs the contract, or (where relevant) of the law which provides mandatory protection to the plaintiff as consumer, under the Rome Convention.

Owing to a drafting error, Article 4 prefers the plaintiff’s habitual residence to that of the defendant “unless the [defendant] can show that the product was marketed in [the country of the plaintiff’s habitual residence] without [the defendant’s] consent”. The literal wording would apply the law of the plaintiff’s residence even if the defendant showed that the product was not marketed there at all. But it is clear from the Explanatory Memorandum⁸⁸ that the intention is that the defendant’s habitual residence should be preferred if the defendant shows that the product was not marketed in the country of the plaintiff’s habitual residence at all, or was marketed there without the defendant’s consent. No doubt the provision will be amended or at least interpreted accordingly.

What exactly is “the product” which must not be marketed

in the plaintiff’s country with the defendant’s consent? Read literally, the reference appears to be to the particular item of product which is defective and causes the injury, rather than the line of similar products, intended to be identical and perhaps produced together from the same production-line. Moreover the literal reading makes sense, since a producer can be expected, without the least impropriety, to charge differential prices in different markets in view of the relative burden of product liability in the respective countries. Hence if an English consumer, while visiting Taiwan, buys goods produced there by a producer resident there, there seems no justification for giving the consumer the benefit of more favourable English rules on product liability, merely because similar goods have been marketed in England (perhaps at a much higher price) with the producer’s consent. Unfortunately however it is apparent from the Explanatory Memorandum⁸⁹ that the Commission’s intention is otherwise; “product” is to be understood for this purpose as referring to the line of similar products emanating from the same producer. It is submitted that clearer wording is required to produce that (very unreasonable) result.

Another doubt relates to the determination of the defendant’s habitual residence, especially where the manufacturer is a large multinational corporation with factories and sales offices in numerous countries. For example, let us suppose that the goods are manufactured by a company which is incorporated in Delaware and has its headquarters in New York. The goods are manufactured at its factory in Illinois, and its marketing of goods in Europe is carried out by its sales office in Ireland, which sells to independently owned distributors in various European countries, including Norway. It declines to sell in Germany because in its view the high level of product liability there prevents such sales from being commercially worthwhile, but a German resident buys such a product while visiting Norway. Under Article 19(1), in the case of a company, the principal establishment is treated as the habitual residence; but where the event giving rise to the damage occurs or the damage arises in the course of operation of a subsidiary, a branch or any other establishment, that establishment is treated as the habitual residence. In relation to the situation just described, should the defendant company be regarded as habitually resident in New York, as its principal establishment; or in Illinois, on the basis that the manufacture of the product counts as the event giving rise to the damage; or in Ireland, on the basis that the marketing by the Irish branch amounts to the relevant event? No obvious answer is apparent. More narrowly, it is suggested that where an establishment of the defendant is located in the country where the plaintiff is habitually resident, and that establishment is in some way involved in the manufacture or marketing of the product, that establishment should be treated as the relevant

⁸⁶ By Article 7(e), producer is not liable under the Directive if he proves that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered.

⁸⁷ A statute of repose is a provision which eliminates liability if the injury has not occurred within a specified period from the marketing of the goods. Article 11 of Directive 85/374, which specifies that the rights conferred upon the injured person under the Directive are extinguished upon the expiry of a period of 10 years from the date on which the producer put into circulation the actual product which caused the damage, unless the injured person has in the meantime instituted proceedings against the producer, is an example. Such conflicts loom large in the recent American case-law on product liability; see, for example, *Maly v Genmar Industries*, 1996 WL 28473 (ND Illinois, 1996); *Rutherford v Goodyear*, 943 FSupp 789 (WD Kentucky, 1996); *Denman v Snapper Division*, 131 F3d 546 (C5 for Mississippi, 1998); *McKinnon v Morgan*, 750 A2d 1026 (Vermont, 2000); and *Phillips v General Motors*, 995 P2d 1002 (Montana, 2000).

⁸⁸ At 14.

⁸⁹ At 14. The reasoning is that “where the victim acquired abroad a product also marketed in their country of residence, for instance in order to enjoy a special offer (...) the producer had already foreseen that his activity might be evaluated by the yardstick of the rules in force in that country, and Article 4 designates the law of that country, since both parties could foresee that it would be applicable.”

residence of the defendant, so that the law of that country becomes applicable under Article 3(2).

As a justification of Article 4, Recital 10 to the Rome II Proposal explains that, regarding product liability, the conflict rule must meet the objectives of fairly spreading the risks inherent in a modern high-technology society, protecting consumers' health, stimulating innovation, securing undistorted competition and facilitating trade. It concludes that connection to the law of the place where the person sustaining the damage has his habitual residence, together with a foreseeability clause, is a balanced solution in regard to these objectives. The Explanatory Memorandum adds⁹⁰ that Article 4 proceeds from the need to avoid unnecessary complexity. The requirement that the product be marketed in the country of the victim's habitual residence for his law to be applicable makes the solution foreseeable for the producer, who has control over his sales network. It also reflects the legitimate interests of the person sustaining damage, who will generally have acquired a product which is lawfully marketed in his country of residence. Moreover Article 4 corresponds also to the European Union's more general objectives of a high level of protection of consumers' health and the preservation of fair competition on a given market. By ensuring that all competitors on a given market are subject to the same safety standards, producers established in a low-protection country will no longer be able to export their low standards to other countries, and this will be a general incentive to innovation and scientific and technical development.

Although the present writer would be inclined to place more emphasis on the place at which the individual item of goods was last marketed at a commercial establishment (whether or not belonging to the defendant) with the defendant's consent, it has to be conceded that there is much to be said for the solution proposed by Article 4 in terms of both certainty and reasonable balance of interests. Subject to the ironing out of the minor difficulties mentioned above concerning the "product" marketed with consent and the identification of the defendant's habitual residence, the provision appears to be broadly acceptable.

Unfair Competition

Article 5 of the Rome II Proposal deals with torts "arising out of an act of unfair competition". By Article 5(1), the law applicable to such a claim is that of the country where competitive relations or the collective interests of consumers are, or are likely to be, directly and substantially affected. Then Article 5(2) makes an exception where an act of unfair competition affects exclusively the interests of a specific competitor; in such a case Article 3(2), in favour of a common habitual residence, and Article 3(3), in favour of a manifestly closer connection, apply.

Recital 11 explains that in matters of unfair competition, the

conflict rule must protect competitors, consumers and the general public and ensure that the market economy functions properly. The connection to the law of the relevant market generally satisfies these objectives, though in specific circumstances other rules might be appropriate. The Explanatory Memorandum⁹¹ adds that the purpose of rules against unfair competition is to protect fair competition by obliging all participants to play the game by the same rules. Modern competition law seeks to protect not only competitors (the horizontal dimension) but also consumers and the public in general (vertical relations). This three-dimensional function of competition law must be reflected in a modern conflict-of-laws instrument.

The Memorandum⁹² also explains that Article 5 covers rules prohibiting acts calculated to influence demand (such as misleading advertising or forced sales), acts which impede competing supplies (such as disruption of deliveries by competitors, enticing away a competitor's staff, or boycotts), and acts which exploit a competitor's value (such as passing off).

It adds⁹³ that Article 5(1) is designed to apply the law of the country in which the market where competitors are seeking to gain the customer's favour is located. This solution corresponds to the victims' expectations, since the rule generally designates the law governing their economic environment, and it also secures equal treatment for all operators on the same market, thus respecting the macro-economic purpose of competition law, to protect a market.

The reference by Article 5(1) is to the law of the location of the market which is directly and substantially affected. This law will also govern liability for consequential losses sustained elsewhere. But the Memorandum recognises⁹⁴ that there may be direct and substantial effects in more than one market, resulting in the distributive application of the laws involved.

In substance Article 5(1) replaces the test of direct injury, applicable under Article 3(1) to torts in general, by a test of direct effect on the market, regarded as better suited to torts involving unfair competition. Moreover Article 5(2) limits the role of a common residence, as envisaged by Article 3(2), or a manifestly closer connection, as envisaged by Article 3(3), to cases where the act of unfair competition affects exclusively the interests of a specific competitor. According to the Explanatory Memorandum,⁹⁵ this applies to cases of enticing away a competitor's staff, corruption, industrial espionage, disclosure of business secrets, or inducing a breach of contract. In such cases the bilateral nature of the situation is regarded as justifying the normal departures from the law of the place of the direct injury or effect.

Article 5 does not apply to claims for infringement of an intellectual property right, since this matter is definitively regu-

⁹⁰ At 14-15.

⁹¹ At 15.

⁹² At 15.

⁹³ At 16.

⁹⁴ At 16.

⁹⁵ At 16.

lated by Article 8.

Intellectual Property

Article 8 deals with infringements of intellectual property rights. As Recital 14 indicates, this refers to copyright (author's rights, neighbouring rights, and sui generis rights in databases) and industrial property rights (such as patents, registered trade marks, and design rights).

Article 8(1) specifies that the law applicable to an infringement of a intellectual property right is that of the country for which protection is sought. As Recital 14 and the Explanatory Memorandum⁹⁶ indicate, this preserves the universally acknowledged principle in favour of the *lex loci protectionis*, and respects the independent and territorial character of an intellectual property right granted or recognised in a given country. No exception is admitted in favour of the law of a common residence or a manifestly closer connection.

The same principle is applied by Article 8(2) in the case of infringements of a unitary Community industrial property right. Such Community-wide rights now exist for plant varieties,⁹⁷ registered trade marks,⁹⁸ and designs,⁹⁹ and are proposed for patents.¹⁰⁰ The relevant Community legislation applies; and for any question not governed by such legislation, the applicable law is that of the Member State in which the act of infringement is committed.

Defamation and Privacy

Article 6 of the Rome II Proposal lays down two supplementary rules for torts which involve "a violation of privacy or rights relating to the personality". These provisions are directed especially at defamation by the mass media.¹⁰¹ The normal rules laid down by Article 3 (in favour of the place of direct injury, the common habitual residence, and the manifestly closer connection) remain applicable, subject to the two exceptions made by Article 6. In the case of a multiple publication (for example, by newspaper), the place of direct injury, for the purpose of Article 3(1), is the place where the publication is commercially distributed so as to reach third parties; and the effect of Article 3(1) is refer distributively to the law of each country of distribution as regards the injury caused thereby.¹⁰²

By Article 6(1), as regards a tort arising out of a violation of privacy or rights relating to the personality, the law of the forum applies if the application of the law designated by Arti-

cle 3 would be contrary to the fundamental principles of the forum as regards freedom of expression and information. Recital 12 explains that, in view of the Charter of Fundamental Rights of the European Union and the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, in relation to violations of privacy and rights in the personality, respect for the fundamental principles that apply in the Member States as regards freedom of the press must be secured by a specific safeguard clause. As the Explanatory Memorandum indicates,¹⁰³ Article 6(1) makes it explicitly clear that the law designated by Article 3 must be disapplied in favour of the *lex fori* if it is incompatible with the public policy of the forum in relation to freedom of the press.¹⁰⁴

By Articles 6(2), the law applicable to the right of reply or equivalent measures (such as the mandatory publication of a correction)¹⁰⁵ is the law of the country in which the broadcaster or publisher has its habitual residence. By Article 19(3), in the case of a broadcaster, the place where it is established within the meaning of EC Directive 89/552¹⁰⁶, as amended by EC Directive 97/36¹⁰⁷, counts as its habitual residence.¹⁰⁸ The rationale appears to be the impracticability of the distributive application to these issues of several laws under Article 3, and the inappropriateness of a reference to the law of the forum by analogy with Article 6(1).¹⁰⁹

Environmental Damage

Article 7 of the Rome II Proposal lays down a special rule for torts "arising out of a violation of the environment". Ac-

¹⁰³ At 18.

¹⁰⁴ Compare section 13 of the (UK) Private International Law (Miscellaneous Provisions) Act 1995, which preserves for defamation claims the common-law rule requiring double actionability under the *lex fori* and the *lex loci delicti*.

¹⁰⁵ See the Explanatory Memorandum, at 18.

¹⁰⁶ Directive 89/552 on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989, L 298, at 23).

¹⁰⁷ OJ 1997, L 202, at 60.

¹⁰⁸ By Article 2(3) of Directive 89/552, as amended by Article 1(2) of Directive 97/36, a broadcaster is deemed to be established in a Member State in the following cases: (a) if the broadcaster has its head office in that Member State and the editorial decisions about programme schedules are taken in that Member State; (b) if a broadcaster has its head office in one Member State but editorial decisions on programme schedules are taken in another Member State, it is deemed to be established in the Member State where a significant part of the workforce involved in the pursuit of the television broadcasting activity operates; if a significant part of the workforce involved in the pursuit of the television broadcasting activity operates in each of those Member States, the broadcaster is deemed to be established in the Member State where it has its head office; if a significant part of the workforce involved in the pursuit of the television broadcasting activity operates in neither of those Member States, the broadcaster is deemed to be established in the Member State where it first began broadcasting in accordance with the system of law of that Member State, provided that it maintains a stable and effective link with the economy of that Member State; (c) if a broadcaster has its head office in a Member State but decisions on programme schedules are taken in a third country, or vice-versa, it is deemed to be established in the Member State concerned, provided that a significant part of the workforce involved in the pursuit of the television broadcasting activity operates in that Member State.

¹⁰⁹ See the Explanatory Memorandum, at 18.

⁹⁶ At 20.

⁹⁷ See EC Regulation 2100/94 (OJ 1994, L227, at 1).

⁹⁸ See EC Regulation 40/94 (OJ 1994, L 11, at 1).

⁹⁹ See EC Regulation 6/2002 (OJ 2002, L 3, at 1).

¹⁰⁰ See the Commission Proposal for a Council Regulation on the Community Patent (OJ 2000, C 337E, at 278).

¹⁰¹ See the Explanatory Memorandum, at 17.

¹⁰² See *Shevill v Presse Alliance* (*supra* note 63); and the Explanatory Memorandum, at 18.

cording to the Explanatory Memorandum,¹¹⁰ the rule covers both damage to property and persons and damage to the ecology itself, provided that it is the result of human activity. But it is submitted (without great confidence) that the concept must be understood as limited to situations in which widespread damage is caused, usually by an industrial or commercial activity. Thus a claim between neighbours in dwelling-houses for nuisance by noise would not count as a violation of the environment within Article 7. Clarification of the concept is clearly desirable.

By Article 7, the law applicable to a tort arising out of a violation of the environment is the law determined by the application of Article 3(1), unless the person sustaining damage prefers to base his claim on the law of the country in which the event giving rise to the damage occurred. This amounts in substance to a rule of alternative reference, in favour of the law of the place of direct injury, or the law of the place of the defendant's conduct, whichever is more favourable to the plaintiff. But apparently the plaintiff has to elect between the two laws, at a stage in the proceedings determined by the procedural law of the forum.¹¹¹ In any event the normal rules laid down by Article 3(2) and (3) giving priority to the law of the common residence or the law of a manifestly closer connection are excluded.

As regards the rationale for Article 7, Recital 13 refers to Article 174 of the EC Treaty, which requires a high level of protection based on the precautionary principle, the principle that preventive action must be taken, the principle of priority for corrective action at source, and the principle that the polluter pays. It proceeds to assert that this fully justifies the use of the principle of discriminating in favour of the person sustaining the damage. The Explanatory Memorandum¹¹² emphasises that the rule of alternative reference laid down by Article 7 is designed to raise the general level of environmental protection.

The Memorandum also suggests,¹¹³ rather puzzlingly, that, as regards issues such as the permissible level of toxic emissions, the defendant may somehow improve his position by invoking the rule laid down by Article 13 of the Proposal, that in determining liability account must be taken of the rules of safety and conduct which were in force at the place and time of the event giving rise to the damage. If a defence is available under Article 13 in this context, the effect will be to negate totally, rather than adjust marginally, the rule laid down by Article 7 in favour of the law of the place of direct injury where it is more favourable to the plaintiff than the law of the place of the defendant's conduct. It seems that on this point the Commission's thinking is either confused or disingenuous.

VARIOUS ISSUES

The Scope of the Proper Law

Article 11 of the Rome II Proposal defines the issues which are governed by the proper law of the tort, determined in accordance with Articles 3-8. The definition is wide¹¹⁴ but not exhaustive.¹¹⁵ Thus the issues listed in Article 11 must be treated as substantive and referred to the proper law, but other issues may be treated as procedural and referred to the law of the forum.¹¹⁶

Under Article 11 the proper law of the tort applies both to issues relating to liability, and to issues relating to damages. It also applies to time-limitation, and has some effect on the availability of injunctions.

As regards liability, by Article 11(a) and (b), the proper law governs "the conditions and extent of liability, including the determination of persons who are liable for acts performed by them" and "the grounds for exemption from liability, any limitation of liability and any division of liability". According to the Explanatory Memorandum,¹¹⁷ these provisions cover such issues as whether liability is strict or fault-based; the definition of fault;¹¹⁸ the causal link between the wrongful act and the injury; the persons potentially liable; any maximum amount awardable; the division of liability between defendants; the availability of defences such as force majeure, necessity, third-party fault and fault of the plaintiff; and the admissibility of actions between spouses.

In addition, by Article 11(f)-(h), the proper law governs "the question whether a right to compensation may be assigned or inherited;" the "persons entitled to compensation for damage sustained personally;" and "liability for the acts of another person". According to the Explanatory Memorandum,¹¹⁹ these provisions cover such issues as whether an action can be brought by a deceased victim's estate to obtain compensation for injury sustained by the deceased; whether a claim is assignable, and the relationship between assignor and debtor; whether the spouse and children of a deceased victim can obtain compensation for their own grief and financial loss;

¹¹⁴ See the Explanatory Memorandum, at 23.

¹¹⁵ The opening phrase of Article 11 introduces the issues listed in paragraphs (a)-(i) by specifying that the law applicable under Articles 3-10 shall govern in particular the listed issues.

¹¹⁶ See the Explanatory Memorandum, at 9. However, under the influence of the Rome Convention, Article 16 of the Proposal specifies that a unilateral act intended to have legal effect and relating to a non-contractual obligation is formally valid if it satisfies the formal requirements either of the law which governs the non-contractual obligation in question or of the law of the country in which the unilateral act is done, and Article 17(2) adds that acts intended to have legal effect may be proved by any mode of proof recognised by the law of the forum or by any of the laws referred to in Article 16 under which the act is formally valid, provided that such mode of proof can be administered by the forum.

¹¹⁷ At 23.

¹¹⁸ On the exception made by Article 13, which specifies that, whatever may be the applicable law, in determining liability account must be taken of the rules of safety and conduct which were in force at the place and time of the event giving rise to the damage, see *supra* at 216.

¹¹⁹ At 24.

¹¹⁰ At 19.

¹¹¹ See the Explanatory Memorandum, at 20.

¹¹² At 19.

¹¹³ At 20.

and vicarious liability (including that of parents for their children and of principals for their agents).

The proper law also governs the admissibility and assessment of damages. By Article 11(c) and (e), it determines “the existence and kinds of injury or damage for which compensation may be due” and “the assessment of the damage in so far as prescribed by law”. Thus it seems that the proper law must be applied to all issues concerning the assessment of the damages to be awarded, including mere quantification, except insofar as the proper law lacks any rule on the issue which is sufficiently definite to enable a court elsewhere to apply it with reasonable confidence and accuracy. It is submitted that this represents an improvement over the current approach in England, where an unduly wide application of the *lex fori* has resulted from the treatment of such issues as the deductibility of social security benefits in personal injury or fatal accident cases as relating to mere quantification and thus as procedural.¹²⁰

By Article 11(d), the proper law applies, “within the limits of [the court’s] powers, [to] the measures which a court has power to take under its procedural law to prevent or terminate injury or damage or to ensure the provision of compensation”. This appears to require the application of the proper law in the grant of both permanent and interlocutory injunctions, “though without actually obliging the court to order measures that are unknown in the procedural law of the forum.”¹²¹ It is submitted that a more cautious provision would be wiser, in view of the undesirability of requiring a court to make non-monetary orders which it would have difficulty or reluctance in enforcing.

Further, by Article 11(i), the proper law governs “the manners in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement of a period of prescription or limitation and the interruption and suspension of the period.” This evidently covers both ordinary time-limitations and statutes of repose.¹²²

In addition, Article 17(1) specifies that the proper law “applies to the extent that, in matters of non-contractual obligations, it contains rules which raise presumptions of law or determine the burden of proof.”

Direct Actions against Liability

Article 14 of the Rome II Proposal provides a special rule governing the availability to a tort victim of a direct action against the tortfeasor’s liability insurer. It specifies that the right of persons who have suffered damage to take direct ac-

tion against the insurer of the person claimed to be liable shall be governed by the law applicable to the tort, unless the person who has suffered damage prefers to base his claims on the law applicable to the insurance contract. According to the Explanatory Memorandum,¹²³ this rule strikes a reasonable balance between the interests at stake, as it protects the plaintiff by giving him the option, while limiting the choice to the two laws which the insurer can legitimately expect to be applied. But apparently the option is limited to the admissibility of the direct action, for the Memorandum emphasises that the scope of the insurer’s obligations is determined by the law governing the insurance contract.

Subrogation and Multiple Liability

Echoing Article 13 of the Rome Convention, Article 15 of the Rome II Proposal lays down rules on subrogation and multiple liability. By Article 15(1), where a person (“the creditor”) has a non-contractual claim upon another (“the debtor”), and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, it is for the law which governs the third person’s duty to satisfy the creditor to determine whether the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship in whole or in part. This appears to have the effect of referring the possibility of subrogation by a victim’s loss insurer to the law governing the insurance contract.

By Article 15(2), the same rule applies where several persons are subject to the same claim and one of them has satisfied the creditor. The effect is apparently that where one tortfeasor has made a payment to the victim, the possibility of his claiming contribution or indemnity from another tortfeasor who is also liable for the same injury is governed by the law which governs the victim’s claim against the tortfeasor who has made the payment.

SOME CONCLUSIONS

It is submitted that the Rome II Proposal merits a warm welcome as a major contribution to legal certainty. Enhanced legal certainty should arise both from the adoption of harmonised choice of law rules applicable throughout the European Union, and from the content of the rules proposed, especially as compared with the current English rules under the Private International Law (Miscellaneous Provisions) Act 1995. Nonetheless the Proposal leaves scope for improvement.

The provision which to the present writer appears to need most refinement is the systematic reference by Article 3(2) to the law of the common habitual residence. It is submitted that this should be excluded in cases where the country where the events constituting the tort occurred has a substantial interest in the application of its conflicting rules, and should also be

¹²⁰ See *Coupland v Arabian Gulf Petroleum Co*, [1983] 2 All ER 434 (Hodgson J), affirmed without consideration of this point, [1983] 3 All ER 226 (CA); and *Roerig v Valiant Trawlers*, [2002] 1 All ER 961 (CA). See also *Edmunds v Simmonds*, [2001] 1 WLR 1003 (Garland J); and *Hulse v Chambers*, [2001] 1 WLR 2386 (Holland J).

¹²¹ See the Explanatory Memorandum, at 24.

¹²² See *supra* note 87.

¹²³ At 25-26.

restricted to cases where all the parties whose entitlement or liability arising from an incident may be affected by the conflicting rules were habitually resident in the same country. On the other hand, countries with relevantly equivalent laws should be treated as a single country. It also seems desirable to offer some definition of habitual residence for individuals not carrying on a business activity on their own account, and to clarify the concept of a manifestly closer connection, used in Article 3(3).

There are several narrower matters where further consideration seems desirable. It would be useful to clarify further the relevant residence of a product manufacturer for the purpose of Article 4. It would also be useful to clarify the concept of environmental damage within Article 7, and the relation between Article 7 and Article 13 (on rules of safety and conduct). It would also be preferable to delete the provisions on overriding rules contained in Article 12; those on ships and aircraft contained in Article 18; and (most importantly) those on exemplary damages contained in Article 24.

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Article 17(1)(2) Lugano Convention/Brussels Convention – International jurisdiction – Requirement of writing – Practices established between the parties

The requirement of writing in Article 17(1)(2)(a) Lugano Convention is not already complied with, if the party, to whose disadvantage the proposed agreement conferring jurisdiction is, makes a declaration in writing, after having taken notice of the content of the clause proposing such an agreement, as used by the other party on his form.

“Practices” in terms of Article 17(1)(2)(b) Lugano Convention mean practices actually established between the parties and which are based on the consent of the parties; they may replace the written form but not the consent.

Extract from the Decision: “(...) Die zulässige Revision hat keinen Erfolg.

I. Das Berufungsgericht hat die internationale Zuständigkeit des angerufenen Gerichts bejaht. Es hat dazu ausgeführt:

Eine dem Schriftformerfordernis nach Art. 17 Abs. 1 des Übereinkommens über die gerichtliche Zuständigkeit und die Vollstreckung gerichtlicher Entscheidungen in Zivil- und Handelssachen vom 16. 9. 1988 (Lugano-Übereinkommen, LugÜ) genügende Vereinbarung zwischen den Parteien liege nicht vor. Zwar genüge auch ein Briefwechsel oder der Austausch von Fernschreiben. Wenn die Gerichtsstandsklausel in Allgemeinen Geschäftsbedingungen enthalten sei, müsse in beiden Willensäußerungen darauf Bezug genommen werden. Diese Voraussetzungen lägen aber nicht vor, weil die Klägerin das Vertragsangebot der Beklagten nicht schriftlich angenommen habe. Die Parteien hätten lediglich mündlich über einzelne Vertragsklauseln verhandelt und die dabei getroffene Vereinbarung schriftlich bestätigt. Aus dem weiteren Schriftverkehr sei eine Vereinbarung der Gerichtsstandsklausel nicht zu entnehmen. Auch eine stillschweigende Ei-

nigung über die Einbeziehung der Allgemeinen Geschäftsbedingungen und der darin enthaltenen Gerichtsstandsklausel genüge dem Schriftformerfordernis des Art. 17 Abs. 1 LugÜ nicht, weil es an einer schriftlichen Bestätigung fehle. Hinsichtlich der weiteren zwischen den Parteien geschlossenen Verträge über die Anfertigung und Lieferung von 14 Sedimentbeckenmodulen bzw. zwei Lagerkonstruktionen sei dem Schriftformerfordernis des Art. 17 Abs. 1 LugÜ ebenfalls nicht genüge getan. Eine Gerichtsstandsvereinbarung ergebe sich auch nicht aus Art. 17 Abs. 1 Satz 2 lit. b LugÜ, weil hinsichtlich der dort vorausgesetzten „Gepflogenheit“ der Zeitpunkt des Vertragsschlusses und nicht derjenige der Klageeinreichung maßgebend sei. Im übrigen fehle es bereits an einer wirksam zustande gekommenen Vereinbarung, auf die sich eine Gepflogenheit stützen könnte. Da der Gerichtsstand des Art. 17 Abs. 1 LugÜ nicht wirksam sei, sei Karlsruhe als Gerichtsstand des Erfüllungsortes zuständig, weil die Vereinbarung des Schweizer Rechts wirksam sei und nach diesem Geldschulden an dem Ort zu zahlen seien, an dem der Gläubiger zur Zeit der Erfüllung seinen Wohnsitz habe.

II. Gegen diese Erwägungen wendet sich die Revision ohne Erfolg.

1. Da die Beklagte ihren Sitz in der Schweiz hat, findet im Streitfall das Lugano-Übereinkommen Anwendung (Art. 54 b Abs. 2 lit. a LugÜ). Art. 17 Abs. 1 LugÜ stimmt mit Art. 17 Abs. 1 EuGVÜ überein. Nach der Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften zu dieser Vorschrift sind die in Art. 17 Abs. 1 EuGVÜ aufgestellten Voraussetzungen eng auszulegen, weil die Bestimmung sowohl die allgemeine Zuständigkeit nach dem Wohnsitz des Beklagten (Art. 2 EuGVÜ) als auch die besonderen Zuständigkeiten nach den Art. 5 und 6 EuGVÜ ausschließt.¹ Die Formerfordernisse des Art. 17 EuGVÜ sollen gewährleisten, daß eine Einigung zwischen den Parteien zweifelsfrei festgestellt werden kann. Von diesen Grundsätzen ist auch für die inhaltsgleiche Regelung in Art. 17 LugÜ auszugehen. Eine schriftliche Vereinbarung im Sinne von Art. 17 Abs. 1 Satz 2 lit. a 1. Alt. EuGVÜ/LugÜ liegt nur dann vor, wenn jede Partei ihre Willenserklärung schriftlich abgegeben hat. Das kann – abweichend von § 126 Abs. 2 BGB – auch in getrennten Schriftstücken geschehen, sofern aus ihnen die inhaltliche Übereinstimmung beider Erklärungen hinreichend deutlich hervorgeht. Nach ganz überwiegender Auffassung genügt die Übermittlung durch moderne Kommunikationsmittel, die keine handschriftlichen Unterzeichnungen ermöglichen.²

2. Eine diesem Formerfordernis genügende Erklärung hat die Klägerin nicht abgegeben.

a) Wertet man die Übersendung der Vertragsentwürfe seitens der Beklagten bereits als Angebot einer Gerichtsstandsvereinbarung,³ ist die in Art. 17 Abs. 1 Satz 2 lit. a 1. Alt. LugÜ geforderte Schriftform gleichwohl nicht gewahrt. Eine Erklärung der Klägerin ist in der Urkunde nicht enthalten. Notwendig ist eine auf den konkreten Vertrag bezogene schriftliche Willenskundgabe beider Vertragspartner. Eine solche Erklärung geht aus den Vertragsunterlagen nicht hervor; sie ist auch später nicht in der gebotenen Form erfolgt.

b) Das Schriftformerfordernis ist nicht schon dann erfüllt, wenn die Partei, zu deren Lasten die vorgesehene Gerichtsstandsvereinbarung geht, eine schriftliche Erklärung abgibt, nachdem sie vom Inhalt der Klausel Kenntnis erhalten hat. Eine solche Betrachtungsweise wäre mit dem Sinn und Zweck des Schriftformerfordernisses nicht zu vereinbaren. Sie hätte zur Folge, daß eine schriftliche Gerichtsstandsvereinbarung in der Regel schon dann zu bejahen wäre, wenn ein entsprechender Vertragstext dem anderen Teil ohne eigene Unterschrift übersandt worden und von jenem unterzeichnet zurückgegeben worden ist. Das entspricht nicht dem, was im Rechtsverkehr allgemein unter einer schriftlichen Vereinbarung verstanden wird, und stünde im

¹ EuGH 14. 12. 1976 – C-24/76 – *Estasis Salotti*, Slg. 1976, 1831 = NJW 1977, 494; EuGH 20. 2. 1997 – C-106/95 – *MSG/Les Gravières Rhénanes*, Slg. 1997, I-911 = NJW 1997, 1431 f.

² BGH (D) 22. 2. 2001 – IX ZR 19/00, NJW 2001, 1731 = BGHR LugÜ Art. 17 Abs. 1 Satz 2 – Gerichtsstandsvereinbarung 1 m.w.N.

³ Vgl. BGHZ 116, 77, 81.