

The Rome II Regulation The Law Applicable to Non-Contractual Obligations

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First Online Supplement – May 2009

Author's Introduction

This supplement focuses on developments since October 2008. In particular, in the absence of judicial consideration of the Regulation's provisions following its application date (11 January 2009), it draws attention to legislation implementing the Regulation in the United Kingdom, to recent ECJ cases concerning other EC private international law instruments, to new decisions of the English courts concerning the pre-Regulation rules of applicable law, and to recent books and journal articles.

There is an ever growing body of literature on the Regulation, in the form of both books and articles. As is to be expected, the authors consider a wide array of issues and express widely diverging views on many of those issues. It is, of course, no more legitimate to resolve difficult or controversial questions by counting the number of supporters for a particular position than it is to determine the law applicable to a non-contractual obligation by numerically listing the number of contacts to a particular country or its law. Accordingly, the references in the following commentary to the views of other writers are intended to facilitate access to their reasoning on specific points, whether in line with or opposed to the reasoning in the main work, rather than attempts to buttress or weaken the author's position on those points by citation alone.

Notes

A second cumulative supplement to Dicey, Morris & Collins, *The Conflict of Laws* (14th edn, 2006) was published in December 2008. The paragraph numbering in the second supplement is understood to reflect that in the first supplement, to which reference is made in several places in the book.

Unless otherwise stated, cross-references are to the paragraph numbers of this supplement. References to the main work are specifically identified as such.

Supplemental List of Abbreviations (Main work, Ixiii-lxx)

"Hague Agency Convention"	Convention on the law applicable to agency (The Hague, 14 March 1978)
"Cheshire, North & Fawcett"	J Fawcett and J Carruthers, <i>Cheshire, North and Fawcett: Private International Law</i> (14 th edn, Oxford: Oxford University Press, 2008)
"JIBFL"	Journal of International Banking and Finance Law
"RDIPP"	<i>Rivista di diritto internazionale privato e processuale</i>
"YPIL"	Yearbook of Private International Law

Para Commentary

Chapter 1 Background

- 1.01** (n 7) **Add** For the application of the Rome I Regulation in the United Kingdom (which had originally decided not to opt-in to the negotiations), see the Commission's Decision of 22 December 2008 approving the request from the United Kingdom to accept the Regulation (OJ L10, 22 [15.1.2009]).
- 1.05** (n 18) **Add** A revised, final outline version of the Draft Common Frame of Reference was published in February 2009, and is also available at <www.law-net.eu/en_index.htm> (log in required). A full version is expected to be published later in 2009.
- (n 21) **Add** Cf T M de Boer (2008) 9 YPIL 19, 28-29 (4.04 and 4.23 below).
- 1.12** (n 44) **Add** For a recent, thorough examination and application of the pre-Regulation English rules of applicable law for restitutionary claims, see *OJSC Oil Co Yugraneft v Abramovich* [2008] EWHC 2613, [239]-[262] (Christopher Clarke J).

1.18 (n 73) **Add** France is also a party to the Hague Agency Convention (discussed at **11.23-11.25** and **12.10A** below).

1.29 (n 108) **Add** The Netherlands is also a party to the Hague Agency Convention (discussed at **11.23-11.25** and **12.10A** below).

Chapter 2 Treaty Base

2.99 (n 228) Michael Wilderspin criticises this aspect of the Council Legal Service's opinion as being founded on "extremely cursory reasoning", and supports the Community legislature's approach (M Wilderspin, "The Rome II Regulation : Some Policy Observations" (2008) 26 *Nederlands internationaal privaatrecht* 408, 411).

2.29 (n 63) For an example of an apparent restriction on free movement generated by rules governing non-contractual liability, see Case C-115/08, *Land Oberösterreich v ČEZ*, Opinion of Adv Gen Maduro, 22 April 2009.

Chapter 3 Foundations and Scope

3.01 **Add** Although implementing legislation was not required to give legal force to the Rome II Regulation under UK law, the UK and Scottish Parliaments have passed measures designed to clarify the Regulation's relationship with pre-existing statutory rules of applicable law, and to confirm that the Regulation will apply to conflicts solely between the constituent legal systems of the UK or between one or more of those systems and Gibraltar ("intra-UK conflicts").

As their title suggests, the Law Applicable to Non-Contractual Obligations (England and Wales and Northern Ireland) Regulations 2008 (SI 2008/2986) apply only to England and Wales and Northern Ireland. Regulations 2 and 3 amend the PILA (UK) to confirm the primacy of the Regulation. Regulations 4 and 5 amend, respectively, the legislation for England and Northern Ireland relating to limitation periods (in the form of the Foreign Limitation Periods Act 1984 and the Foreign Limitation Periods (Northern Ireland) Order 1985 (SI 1985/754). Regulation 6 extends the Regulation's rules to intra-UK conflicts.

Similar provision is made for Scotland by the Law Applicable to Non-Contractual Obligations (Scotland) Regulations 2008 (SSI 2008/404).

Both sets of Regulations come into force on 11 January 2009. Links to the full-text with explanatory notes can be found at www.romeii.eu > **News** (<http://www.oup.com/uk/booksites/content/romeii/news/>).

(n 1) Add Also G Itzcovich, "The Interpretation of Community Law by the European Court of Justice" (2009) 10 German Law Journal 537 and the materials cited at fn 1 of that article.

3.12 (n 31) Add In her opinion in Case C-180/06, *Ilsinger v Dreschers*, delivered on 11 September 2008, Adv Gen Trstenjak had considered (paras 49-50), the Draft Common Frame of Reference (main work, 1.04) and other comparative law sources in considering the concept of a "contract" in Art 15(1) of the Brussels I Regulation (cf **3.120-3.121** below). In its judgment, delivered on 14 May 2009, the Court chose not to refer to the Adv Gen's opinion or to materials of this kind.

3.26 The reference on line 2 to "Art 14" should be to "Recital (14)".

(n 59) Add R J Weintraub, "When it's good it's very, very good: the new EU Regulation on the Law Applicable to Non-Contractual Obligations" (2008) 10 JIBFL 537 advocates a similar, content oriented approach to Art 4(3) of the Regulation.

3.33 (n 102) The ECJ's decision on this point in Case C-435/06, *C* was affirmed in Case C-523/07, *A* [2009] ECR I-0000, paras 21-29.

3.41 (n 127) Add For a note of regret at the exclusion of *renvoi*, see L de Lima Pinheiro, "Choice of Law on Non-Contractual Obligations Between Communitarization and Globalization. A First Assessment of EC Regulation Rome II" (2008) 44 RDIPP 5, 35.

3.48 Add In other cases, Professor Hohloch has suggested that it was not necessary to define a term which, in his

view, has a self-explanatory meaning, referring to the factual centre of gravity (*factische Lebensmittelpunkte*) of a person's life.[**144A**]

[**Footnote 144A** G Hohloch, "Place of Injury, Habitual Residence, Closer Connections and Substantive Scope – the Basic Principles" (2007) 9 YPIL 1, 11-12; cf Case C-523/07, A, Opinion of Adv Gen Kokott (29 January 2009), para 15; M Illmer (2009) 73 *Rabels Zeitschrift für Ausländisches und Internationales Privatrecht* 271, 286-287).]

3.49 (n 147) **Replace existing text with** The ECJ's judgment, delivered on 2 April 2009, in Case C-523/07, A [2009] ECR I-0000 is discussed at **3.52A** below.

3.50 (n 151) **Add** Note, however, that this approach was not followed by the ECJ in Case C-523/07, A (**3.49** above), para 36, quoted at **3.52A** below.

(n 152) **Add** Cf Case C-523/07, A, Opinion of Adv Gen Kokott (29 January 2009), paras 32-36.

3.51 **Line 11 – Insert text before "his intention"** (possibly)

(n 158) **Add** The ECJ in Case C-523/07, A, appears to have favoured an objective approach, requiring that the intention be manifested by other tangible factors (**3.52A** below).

Insert new paragraphs 3.52A-3.52C

3.52A The view that the concept of "habitual residence" in the Rome II Regulation must be given an autonomous interpretation, having regard to the nature and purpose of the Regulation's rules of applicable law in which that concept appears, is strongly supported by the ECJ's decision upon a recent reference, also concerning the Brussels II *bis* Regulation. In Case C-523/07, A[**158A**], the Court was asked to address the meaning of "habitual residence" in Art 8(1) of Brussels II *bis*, a provision that regulates jurisdiction in matters of parental responsibility. Following the opinion of Advocate General Kokott, it concluded that:[**158B**]

Since Article 8(1) of the Regulation does not make any express reference to the law of the Member States for the purpose of determining the meaning and scope of the concept of 'habitual residence', that determination must be

made in the light of the context of the provisions and the objective of the Regulation, in particular that which is apparent from Recital 12 in the preamble, according to which the grounds of jurisdiction which it establishes are shaped in the light of the best interests of the child, in particular on the criterion of proximity.

The case-law of the Court relating to the concept of habitual residence in other areas of European Union law[**158C**] cannot be directly transposed in the context of the assessment of the habitual residence of children for the purposes of Article 8(1) of the Regulation.

The 'habitual residence' of a child, within the meaning of Article 8(1) of the Regulation, must be established on the basis of all the circumstances specific to each individual case.

In addition to the physical presence of the child in a Member State other factors must be chosen which are capable of showing that that presence is not in any way temporary or intermittent and that the residence of the child reflects some degree of integration in a social and family environment.

In particular, the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration.

As the Advocate General pointed out in point 44 of her Opinion, the parents' intention to settle permanently with the child in another Member State, manifested by certain tangible steps such as the purchase or lease of a residence in the host Member State, may constitute an indicator of the transfer of the habitual residence. Another indicator may be constituted by lodging an application for social housing with the relevant services of that State.

By contrast, the fact that the children are staying in a Member State where, for a short period, they carry on a peripatetic life, is liable to constitute an indicator that they do not habitually reside in that State.

[Footnotes

158A [2009] ECR I-0000 (Judgment of 2 April 2009), paras 30-44. Also Opinion of Adv Gen Kokott, 29 January 2009, paras 13-52.

158B Judgment, paras 35-41.

158C The Court referred, in particular, to Case C-452/93P, *Magdalena Fernández v Commission* [1994] ECR I-4295, para 22; Case C-372/02, *Adanez-Vega* [2004] ECR I-10761, paragraph 37; and Case C-66/08, *Kozłowski* [2008] ECR I-0000 (Judgment of 17 July 2008).]

3.52B In this connection, it appears significant that the Court, in considering the relevance of a subjective intention in the penultimate paragraph of the above extract appeared to require an outward manifestation of that intention. In her opinion, Adv Gen Kokott also downplayed the significance of intention in determining “habitual residence”, at least for children:**[158D]**

Apart from the fact that this background of the law of officials has nothing in common with the family law context in the present case, the definition is also unsuitable for transposition to the present case, since it places too much emphasis on the intention of the person concerned. That may be possible in the case of adults. Thus it is no coincidence that the Borrás report refers to those cases in connection with jurisdiction for divorce. At least in the case of younger children, however, it is not the child’s own will that is decisive but that of the parents, who as part of the right of custody also have the right to determine the child’s place of residence. But precisely in the context of disputes over custody, the ideas of the persons entitled to custody as to where the child is to reside may well diverge. The intention of the father and/or mother to reside with the child in a particular place can therefore be only an indication of the child’s habitual residence, not a sole deciding condition.

[Footnote 158D Opinion, para 36.]

3.52C The concept of “habitual residence” to be developed for the purposes of the Rome II Regulation must, of course, be capable of applying equally to adults and minors. This supports the view that an intention to reside should, at most, be one factor to be taken into account. Further, the objective of the Regulation in promoting legal certainty is consistent with the requirement that, in order to be taken into account, there must be some tangible, outward manifestation of that intention.**[158E]**

[Footnote 158E Main work, 3.29.]

3.54 **Add** In *889457 Alberta Inc v Katanga Mining Limited* [2008] EWHC 2679 (Comm), a Brussels I Regulation case, Tomlinson J stated (at [23]):

Central administration and principal place of business may well and will frequently be found in the same country ..., but that will not always be so. Although I am not attracted to it, there may be a case for saying that the principal place of business is here Canada because that is where corporate authority ultimately resides, even if only for the most part

by reason of a conference call being facilitated through a Canadian telephone connection. I cannot however conclude that central administration is to be found in Canada. No administration is to be found in Canada, and it is not shown that the day-to-day activities in London are subject to the control of senior management located elsewhere. The influence of Canada is at best strategic. Professor Briggs at paragraph 2.115 of *Civil Jurisdiction and Judgments* [4th edn, 2005] suggests that one approach to central administration in the Regulation may be to examine where those who have the serious responsibilities in the company have their place of work, and that this may also indicate the principal place of business. I agree that this is a helpful approach.

- 3.72** (n 230) **Add** For a narrower view, excluding situations in which the only foreign connection arises by reason of a choice of law, see L de Lima Pinheiro (2008) 44 RDIPP 5, 13-14.
- 3.78** (n 237) **Add** Also *CMA CGN SA v Hyundai Mipo Dockyard Co Ltd* [2008] EWHC 2791 (Comm), [45] (Burton J).
- 3.88** (n 273) **Add** Cheshire, North & Fawcett, 778, 794, 820-821.
- 3.94** (n 284) For the opposite view, see Cheshire, North & Fawcett, 794. In *Bank of Tokyo-Mitsubishi Ltd v Baskan Gida Sanayi Ve Pazarlama AS* [2004] EWHC 945 (Ch); [2004] 2 Lloyd's Rep 395, Lawrence Collins J (at [218]) applied Art 5(3) of the Brussels I Regulation (matters relating to tort etc) to a claim based on the tort of conversion.
- 3.98** (n 298) **Add** For later proceedings in the same case, see Case C-115/08, *Land Oberösterreich v ČEZ*, Opinion of Adv Gen Maduro, 22 April 2009.
- 3.106** (n 314) **Add** Cheshire, North & Fawcett, 677-679, 777-778.
- 3.108** (n 324) **Add** Although the UK originally decided not to opt-in to the negotiations leading to the adoption of the Rome I Regulation, its request to participate in the Regulation has been accepted by the Commission (Decision of 22 December 2008 on the request by the United Kingdom to accept Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I) (OJ L10, 22 [15.1.2009])).

(n 330) Add Cf Cheshire, North & Fawcett, 822.

3.109 Insert footnote 330A at end of paragraph Also Cheshire, North & Fawcett, 822.

3.120 (n 359) Replace existing text with Ibid, paras 51-56 (emphasis added). Contrast the approach taken in *Engler* and in the later decision in Case C-180/06, *Ilsinger v Dreschers* as to the concept of “contract” in the consumer contract provisions of the Brussels Convention (*Engler*) and Brussels I Regulation (*Ilsinger*), discussed at **3.120A** below.

Insert new paragraphs 3.120A-3.120D

3.120A In the earlier part of its judgment in *Engler***[361A]** the ECJ had concluded that there was not a “contract” falling within any of the categories set out in Art 13 of the Brussels Convention (consumer contracts). In particular, the Court appeared to consider it decisive that there was no order for goods**[361B]** and that the claimant did not herself assume any reciprocal obligation.**[361C]** The Court did not, however, consider that conclusion to be determinative of the question whether the obligation in question fell within Art 5(1), as to which it took a broader view.**[361D]**

[Footnotes

361A Ibid, paras 34-43.

361B Art 13(3) of the Brussels Convention refers specifically to a contract “for the supply of goods or a contract for the supply of services.

361C *Engler*, para 38.

361D Ibid, paras 45-49.]

3.120B More recently, the ECJ had occasion to revisit this aspect of the decision in *Engler* in considering the concept of a “contract” in the consumer contract provisions (Arts 15 and following) of the Brussels I Regulation. In *Ilsinger v Dreschers***[361E]**, the facts of which follow closely those in *Engler*, the Court concluded that the concept of a “contract” in Art 15(1) of the

Brussels I Regulation did not require that the parties assume reciprocal obligations.**[361F]** Thus:**[361G]**

[I]t is, of course, conceivable, in the context of Article 15(1)(c) of Regulation No 44/2001, that one of the parties merely indicates its acceptance, without assuming itself any legal obligation to the other party to the contract. ...

[Footnotes

361E [2009] ECR I-0000 (Judgment of 14 May 2009).

361F Ibid, para 51.

361G Ibid, para 54, first sentence.]

3.120C However, the mere existence of reciprocal acts between the parties was not considered by the Court to be sufficient to constitute a “contract” for the purpose, as the Court explained:**[361H]**

... However, it is necessary, for a contract to exist within the meaning of that provision, that the latter party should assume such a legal obligation by submitting a firm offer which is sufficiently clear and precise with regard to its object and scope as to give rise to a link of a contractual nature as referred to by that provision.

That latter requirement may be regarded as being satisfied only where, in the context of a prize notification, such as that at issue in the main proceedings, there has been a legal commitment contracted by the mail-order company. In other words, the latter must have expressed clearly its intention to be bound by such a commitment, if it is accepted by the other party, by declaring itself to be unconditionally willing to pay the prize at issue to consumers who so request. It is for the national court to determine whether that requirement is fulfilled in the dispute before it.

[Footnote 361H Ibid, paras 54 (second sentence), 55. Later in its judgment, the Court referred with a degree of circularity to the professional undertaking “contractually” (para 59) and “in law” (para 60).

In her opinion, delivered on 11 September 2008, Adv Gen Trstenjak had considered (paras 48-50) other European instruments, the Draft Common Frame of Reference (main work, 1.04) and other comparative law sources in concluding (para 46) that one the basic conditions for the conclusion of a contract under Community law is that, on the basis of an offer and an acceptance of this offer, both parties reach a voluntary agreement to conclude a contract. The Court did not refer to the Adv Gen’s opinion in its judgment.]

3.120D Turning to the relationship between the consumer contract provisions and the jurisdiction in “matters relating to a contract” recognised in Art 5(1) of the Brussels I Regulation, the Court continued:**[361I]**

If that were not the situation in this case, a commercial practice of the kind which has given rise to this dispute could not, without more, be regarded as assuming a contractual nature or as relating to a contract within the meaning of Article 15 of Regulation No 44/2001 in its current version.

In that latter case, such a situation would at most be liable to be classified as pre-contractual or quasi contractual and might therefore, where appropriate, be covered solely by Article 5(1) of that regulation, a provision which must be acknowledged as having, on account of its wording and its position in the scheme of that regulation, a broader scope than that of Article 15 thereof.

[Footnote 361I Ibid, paras 56-57.]

3.121 **Line 2 – Add after “Engler” and *Ilsinger***

Line 12 – Add after “Regime” , although it is not necessary that both parties should assume reciprocal obligations (**3.120B** above). *Ilsinger* (Brussels I Regulation, Art 15(1)) also takes a narrower approach than *Engler* (Brussels Convention, Art 5(1)) in that the Court’s reasoning suggests that the obligor’s voluntary act must consist, at least, of an unconditional declaration of his willingness to perform (**3.120C** above). It remains to be seen whether this element will be required as a pre-condition to the application of the Rome I Regime on the basis that the obligation is “contractual”.

Line 12- Add after “contract” “(however it is defined)”

3.122 **(n 366) Add** Similarly, Bart Volders expresses the view that “the exchange of particular pre-contractual documents between the parties may accordingly cause the characterization of claims arising out of dealings prior to the conclusion of contract to shift to a contractual matter” (B Volders, “*Culpa in Contrahendo* in the Conflict of Laws: A first appraisal of Article 12 of the Rome II Regulation” (2008) 26 *Nederlands internationaal privaatrecht* 464, 466).

- 3.131** (n 387) **Add** For the opposite view, that concurrent liability in contract and tort should be classified as exclusively a matter of “tort/delict” within the Rome II Regulation, see Cheshire North & Fawcett, 779-780.
- 3.141** (n 412) **Add** In *Benatti v WPP Holdings Italy SRL* [2007] EWCA Civ 263; [2007] 1 WLR 2316, Toulson LJ (at [58]) dealt with a claim for breach of fiduciary duty brought by a company against a former consultant within Art 5(3) of the Brussels I Regulation (matters relating to tort, delict or quasi-delict).
- 3.146** The quotation is from Commission Proposal, 9.
- 3.149** **Insert text after n 443** Council Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations was adopted on 18 December 2008.[443A] The Commission has given a positive opinion on the application of the Regulation to the UK, which sought to opt-in after the conclusion of the negotiations.[443B]

[Footnotes

443A OJ L7,1 [10.1.2009]. Also Commission Proposal for a Council Decision on the conclusion by the European Community of the Protocol on the Law Applicable to Maintenance Obligations (COM (2009) 81 final [23.2.2009]).

443B COM (2009) 181 final [21.4.2009].]

- 3.151** **Line 3 - Insert footnote 445A after “comparable to marriage”** Cf Cheshire, North & Fawcett, 781, n 135, relying on the exclusion by Art 24 of *renvoi*. Both Art 1(2)(a) and Art 1(2)(b) refer, however, to “the law applicable to such relationships”.
- 3.172** (n 172) **Add** T Arons, “All Roads Lead to Rome’: Beware of the Consequences! : the Law Applicable to Prospectus Liability Claims Under the Rome II Regulation” (2008) 26 *Nederlands internationaal privaatrecht* 481.
- 3.177** (n 511) **Add** Cf Draft Common Frame of Reference (2009 outline edition, 1.05 above), Book X, Art 1:201 (“A trust is a legal relationship in which a trustee is obliged to administer or dispose of one of more assets (the trust fund”) in accordance with the terms governing

the relationship (trust terms) to benefit a beneficiary or advance public benefit purposes”).

3.221 (n 637) A comparative study report, prepared by the Commission’s selected contractor, Mainstrat, in combination with the University of the Basque Country was submitted in February 2009 (JLS/2007/C4/028 Final Report), but the report and Commission’s follow-up to the study have not yet been published.

3.243 Line 5 – Insert footnote 722A after colon Cf Cheshire, North & Fawcett, 790-792.

(point 4) Add As one commentator notes: “It is important here to look past the ‘dogmatic’ rim of national developments so as to reach, for the purposes of a ‘functional qualification’, the harmony sought from Art 2 in regards indemnification and damage prevention.”[732A]

[**Footnote 732A** G Hohloch (3.48 above), 14.]

3.264 (n 799) Add Also Case C-420/07, *Apostolides v Orams* [2009] ECR I-0000 (Judgment of 28 April 2009), paras 42-45.

3.265 (n 804) Add Also *Apostolides v Orams* (3.264 above), para 45.

3.293 Replace existing text with Regulations to give effect to the Regulation in the UK have now been approved (3.01 above). As expected, these extend the Regulation’s rules of applicable law to conflicts arising solely between the constituent territorial units of the UK (including, for these purposes, Gibraltar).

3.291 (n 877) Add Also T Hartley, “Choice of Law for Non-Contractual Liability: Selected Problems under the Rome II Regulation” (2008) 57 ICLQ 899, 901.

3.309 (n 923) Add Following the reference in *Apostolides*, the ECJ ruled on 28 April 2009 ([2009] ECR I-0000) that the suspension of the Community *acquis* in the non-controlled area did not preclude a Member State court from recognising and enforcing under the Brussels I Regulation a judgment given by a court of the Republic of Cyprus involving elements with a bearing on that area. By the same force of reasoning, the Rome II

Regulation would apply in proceedings before a Member State court despite the existence of a connection to the non-controlled area, however substantial.

3.313 (n 930) Add An argument of this kind was accepted by the District Court of Rotterdam, considering pre-Regulation Dutch applicable law rules, in *The Netherlands Postal Service v Nedlloyd* (1977) 74 ILR 212, 214.

(n 931) Add The editors of Cheshire, North & Fawcett, refer to the Report in concluding (pp 860-863) that the Regulation's rules of applicable law cannot be applied to torts and other non-contractual obligations arising from acts or omissions on the high seas.

3.319 (n 948) Add This view is also not without support among English commentators (e.g. P Stanley, *Solicitors Journal* (2008), vol 152, no 46, 15). Also X Kramer, "The Rome II Regulation on the Law Applicable to Non-Contractual Obligation: the European Private International Law Tradition Continued" (2008) 26 *Nederlands internationaal privaatrecht* 414, 417.

For detailed analysis by two German commentators, reaching opposing conclusions on this issue, see J Glöckner: "Keine klare Sache: der zeitliche Anwendungsbereich der Rom II-Verordnung" (2009) 29 *Praxis des Internationalen Privat- und Verfahrensrechts* (IPRax) 121 (application from 11 January 2009 to events since 20 August 2007); A Bücken, "Intertemporaler Anwendungsbereich der Rom II-VO" (2009) 29 IPRax 125 (application and entry into force on 11 January 2009).

Insert footnote 948A at end of paragraph The view that the Regulation applies from 11 January 2009 to events which give rise to damage after 20 August 2007 is acknowledged (*obiter* and without argument on the point) by Blair J in *Maher v Groupama Grand Est* [2009] EWHC 38 (QB); [2009] 1 All ER 1116, [16]. Also M Wilderspin, "The Rome II Regulation : Some Policy Observations" (2008) 26 *Nederlands internationaal privaatrecht* 408, 412, describing the result as "alarming".

3.320 (n 950) **Add** Also T Hartley (3.291 above), 899, note 2.

Chapter 4 Tort/Delict – General Rules

4.01 (n 2) **Also** G Hohloch, "Place of Injury, Habitual Residence, Closer Connection and Substantive Scope: The Basic Principles" (2007) 9 YPIL 1.

4.04 (n 14) **Add** This element of the Commission's reasoning is criticised by Professor de Boer, who describes the references in the explanatory memorandum and in Recital (17) to the modern approach to civil liability as "token remarks" (T M de Boer (2007) 9 YPIL 19, 28-29).

4.07 (n 32) **Add** For the view that, as a result of these exclusions, Art 4 is of limited significance, see G Hohloch (4.01 above), 9-10.

4.13 (n 49) **Add** Cf Cheshire, North & Fawcett, 824-825.

4.23 **Add** Indeed (consistently with Recital (16)), the selection of the country of damage as the connecting factor, although more favourable to the injured person than the country of the event giving rise to damage, appears neutral between the parties. **[71A]**

[Footnote 71A cf T M de Boer (2007) 9 YPIL 19, 28.]

4.29 (n 91) **Add** Professor Hohloch, while outwardly supporting an autonomous approach, suggests (with reference to German law) that "The country in which the damage occurs is the country where the legally protected interest is injured ('Rechtsgutverletzung')." (G Hohloch (4.01 above), 9-10). With respect, unless Member State courts are to be encouraged to take a parochial view or to analyse the putative applicable law(s), this would not appear to take matters significantly further forward.

(n 93) **Add** Professor de Lima Pinheiro suggests a test focussing on "the direct practical effect of the tortious conduct" (L de Lima Pinheiro (2008) 44 RDIPP 5, 17).

4.37 (n 121) **Add** Cf L de Lima Pinheiro (4.29 above), 17.

4.41 (n 130) **Add** The extract quoted is from p 279 of the article by Rushworth and Scott. The authors conclude

that, in the example, English law should apply to the nervous shock claim. The same view is taken by A Reed, "Something old, something borrowed, something new" (2009) 153 *Solicitors Journal*, no 1, 17 and by Cheshire, North & Fawcett, 798

- 4.42** (n 136) **Add** For the opposing view, see Cheshire, North & Fawcett, 798
- 4.54** (n 157) **Add Also** Cheshire, North & Fawcett, 797 and A Reed (4.41 above), 17, favouring the law of the place of discovery of damage.
- 4.55** (n 157) **Add** Cf Cheshire, North & Fawcett, 860-863.
- 4.58** (n 162) **Add** Similar questions arise, in the context of interpretation of an insurance policy, in *Durham v BAI (Run Off) Ltd* [2008] EWHC 2692 (QB) (Burton J). The Judge held that the policy wording responded at the time of exposure to asbestos fibres, not the time of diagnosis.
- 4.59** (n 164) **Add** Cf, in a different context, *Burton v Islington Health Authority* [1992] 3 All ER 833 (EWCA), referring to the civilian maxim "*Qui in utero est, perinde ac si in rebus humanis esset, custoditur, quoties de commodis ipsius partus quaeritur*" (Digest, Book I, Title V, section 7) ("An unborn child is taken care of just as much as if it were in existence, in any case in which the child's own advantage comes into question; though no-one else can derive any benefit through the child before its birth"). Also P H Winfield, "The Unborn Child" (1942) 4 *Univ Toronto LJ* 278; K McNorrie, "Protecting the Child from its Drug or Alcohol Abused Mother", in M Freeman and A Lewis (eds), *Law and Medicine, Current Legal Issues 2000*, vol 3, 224-225.
- 4.66** (n 175) Contrary to the view taken by some commentators (eg T Arons (2008) 26 *Nederlands internationaal privaatrecht* 481, 484), the ECJ's decision in Case C-168/02, *Kronhofer v Maier* deals only with the second of these issues and does not assist in resolving the first, as the Court limited itself to observing (para 17) that "[i]t is clear from the order for reference that the [referring court] takes the view that, in the case in the main proceedings, the place where the damage

occurred and the place of the event giving rise to it were both in Germany”.

4.67 (n 178) Add In *Maple Leaf Macro Volatility Master Fund v Rouvroy* [2009] EWHC 257 (Comm), a Brussels I Regulation case, Andrew Smith J concluded (at [214]):

Does this mean that the ‘harmful event’ occurred in England in the sense that the damage occurred here? In my judgment, it does. Maple Leaf suffered its damage when it committed itself to accepting the deal and sending its subscription form. In a case like this, to my mind, once Maple Leaf had put it outside its control to prevent the loss, the harmful effect occurred. It is beside the point whether the contract was concluded when Maple Leaf sent its communication or when it was received.

(n 179) Add If the claimant has done all that is necessary on its part to conclude the contract, it is not necessary that the contract be concluded at the same time or in the same place (*Maple Leaf v Rouvroy*, n 178 above).

4.78 (n 196) Add at end of footnote Professor Symeonides’ views on this issue are echoed by Professor Hartley (2008) 57 ICLQ 899, 900-901. Professor de Lima Pinheiro, however, goes further, suggesting that “the application of [Art 4(2)] by analogy does not seem excluded” in cases where the tortfeasor and victim have their habitual residences in different countries with substantially identical laws (L de Lima Pinheiro (4.29 above), 18). With respect, there is nothing in the Regulation or *travaux préparatoires* to support that view, which promotes uncertainty as to the law applicable.

4.80 (n 205) The footnote reference (“Ibid”) should be to Commission Proposal, 12.

4.81 (n 210) Add Cf T Hartley (4.78 above), 900.

4.83 (n 218) Add It is the prospect of the application of different laws to liability arising from the same damage that leads Professor de Lima Pinheiro to suggest that, for Art 4(2) to apply, all “tortfeasors” and “victims” must share the same habitual residence (L de Lima Pinheiro (4.29 above), 18). That solution, which may reflect either the second or third of the interpretations

considered in the main work (pp 337-338), should be rejected for the reasons given in that paragraph.

- 4.86** **(n 230) Add** Professor Weintraub (2008) 10 JIBFL 537 takes a different view, suggesting that Art 4(3) should be given a “consequences-based interpretation”, taking into account the nature and purpose of the laws applicable to the tort/delict in the countries that have contacts with the parties and the occurrence and the consequences of the application or non-application of those laws. This would appear to be an attempt to disinter the European Parliament’s approach to the rule of displacement, with which Professor Weintraub was involved (main work, 1.75, 3.25 n 57).
- 4.89** **(n 239) Add after the reference to Dicey, Morris & Collins** Also opposed to this interpretation: Cheshire, North & Fawcett, 804.
- 4.92** **(n 249) Add** For criticism of the Commission’s position, see Cheshire, North & Fawcett, 801.
- 4.94** **(n 251) Add** For the application of Art 4(3) to “factual relationships”, see L de Lima Pinheiro (**4.29** above), 20; X Kramer, “The Rome II Regulation on the Law Applicable to Non-Contractual Obligation: the European Private International Law Tradition Continued” (2008) 26 *Nederlands internationaal privaatrecht* 414, 421.
- 4.97** **(n 266) Add** A view also taken by the editors of Cheshire, North & Fawcett, 790.
- 4.99** **(n 268) Add** Also Cheshire, North & Fawcett, 791, 792-793.
- 4.101** **Add** In *OJSC Oil Co Yugraneft v Abramovich* [2008] EWHC 2613, Christopher Clarke J (at [223]) concluded that a dishonest assistance claim was capable of being characterised as lying in “tort” for the purposes of the pre-Regulation English rules of applicable law in the Private International Law (Miscellaneous Provisions) Act 1995. In his view:

Dishonest assistance a form of equitable wrongdoing, is so closely analogous to a claim in tort (as characterised for purely domestic purposes) that it should, I would have thought, be so characterised for private international law purposes.

- 4.104** (n 293) Add *OJSC Oil Co Yugraneft v Abramovich* [2008] EWHC 2613, [237] (Christopher Clarke J). This and the other cases listed in the footnote in the main work concerned the pre-Regulation English rules of applicable law and should not be taken as requiring the same approach in the context of the Regulation.
- 4.107** (n 311) On 10 February 2009, the ECJ ruled that it was incompatible with the Brussels I Regulation for a Member State court to grant an injunction restraining proceedings pending in another Member State court on the ground that those proceedings were contrary to the parties' agreement to arbitrate disputes between them ([2008] ECR I-0000; [2009] 1 All ER (Comm) 435).
- 4.114** (n 335) Add T Kadner Graziano, "The Rome II Regulation and the Hague Conventions on Traffic Accidents and Product Liability : Interaction, Conflicts and Future Perspectives" (2008) 26 *Nederlands internationaal privaatrecht* 425, 425-427.

Chapter 5 Product Liability

- 5.03** (n 3) Add For further background, see M Illmer, "The New European Private International Law of Product Liability – Steering Through Troubled Waters" (2009) 73 *Rabels Zeitschrift fur Auslandsches und Internationales Privatrecht* 271.
- 5.07** The quotation is from Commission Proposal, 13.
- 5.10** **Insert footnote 29A at end of paragraph** For the view that the Directive definition of "product" should be carried forward into the Rome II Regulation, see P Huber and M Illmer, "International Product Liability" (2007) 9 YPIL 31, 37-38; A Schwartze, "A European Regime on International Product Liability : Article 5 Rome II Regulation" (2008) 26 *Nederlands internationaal privaatrecht* 430, 430; Cheshire, North & Fawcett, 806; M Illmer (5.03 above), 283-284.
- 5.15** **Add footnote 44A at end of paragraph** For the contrary view, that Art 5 only applies to claims for damage caused by "defective products", see M Illmer, 5.03 above, 283.

5.16 Add As the Rome II Regulation is concerned only with non-contractual obligations, the Rome I Regime will apply (for example) to a claim founded on breach of an express or implied contractual warranty as to quality or witness.

5.20 (n 55) Add Also A Schwartze (5.10 above), 431.

(p 373, line 8) The reference should be to "Art 6(1)(b) of the Rome I Regulation".

Add at end of paragraph In the view of Martin Illmer:**[56A]**

[M]arketing is better understood as occurring in every country where the product is distributed, ie offered for supply to end users via sale, hire or otherwise. The definition is not restricted to distribution in the physical presence of seller and buyer. It applies equally in the case of sale and supply of the product via the Internet by online distribution which may be run by the manufacturer himself or other person in the distribution chain such as importers or retailers: Marketing takes place in every country where a potential buyer will be supplied with the product.

[Footnote 56A M Illmer (5.03 above), 291.]

5.21 Line 2 – Insert footnote 56B after "of the same type" Cf P Huber and M Illmer (5.10 above), 42-43 and M Illmer (5.03 above), 292-294, who consider that all references in Art 5 to "product" should cover any product of the same type, defined by reference to the safety features of the product (5.35 below).

Line 5 – Insert text after "product of the same type" In this connection, it should be noted that the contrast in the "foreseeability clause" between "the product" and "a product of the same type" is also logically consistent with the narrower view that "the product" refers only to the thing that actually caused damage, a view that is favoured by some commentators**[56B]** but rejected by others**[56C]**. Nevertheless, this narrower view appears not only to be out of line with the Commission's approach to the special rule for product liability cases (main work, 5.18-5.19), but also to incompatible with the structure and objectives of Art 5, which gives priority to the country of habitual residence over the country of acquisition and treats the place of marketing as a subordinate rather

than a primary connecting factor.**[56D]** If it were to be accepted, a person buying a defective product on a foreign holiday would be unable to invoke his “home” product liability law even if an identical product had been distributed, and advertised, in the country of his habitual residence.

[Footnotes

56B See, albeit with some hesitation, T Hartley (2008) 57 ICLQ 899, 904 and Dicey, Morris & Collins, 2nd Supplement, para S35-203).

56C e.g. Cheshire, North & Fawcett, 807; A Schwartze (**5.10** above), 431.

56D P Huber and M Illmer (**5.10** above), 42-43; M Illmer (**5.03** above), 292-296; also P J Kozyris (main work, ch 5, n 12), 488-489.]

5.23 **(n 64) Add** Martin Illmer (**5.03** above), 290 argues that the concept of “putting into circulation” in the Product Liability Directive is unhelpful in the context of the Rome II Regulation:

Putting into circulation in Art 6 and 7 of the Directive aims at establishing the relevant point in time for assessing whether the product is defective and whether the producer could have discovered and avoided the defect. After that point in time the producer lacks control over the product so that responsibility for defects has to be limited. *Marketing* and its foreseeability in Art 5 Rome II determine the applicable law, taking account of the predictability concerns of the person potentially liable. He shall not be subject to the laws of those countries where he did not intend to offer the product for purchase. Hence, *putting into circulation* refers to a point in time whereas *marketing of the product* refers to the countries where the product is offered to end users. Owing to these differences, it is not appropriate to transfer the meaning of *putting into circulation* in the Product Liability Directive to the *marketing element* of Art 5 Rome II.

(n 66) Add A further reference to the ECJ in the same case, on another point, was made in *O’Byrne v Avensis Pasteur SA* [2008] UK 34; [2008] 4 All ER 881.

5.28 **(n 76) Add** Cf M Illmer (**5.03** above), 303, arguing that the victim, if he wishes to rely on sub-rule (b) or (c), must disprove the application of any prior sub-rule. It would appear, however, unduly burdensome to require a

person claiming compensation, often an individual, to disprove the fact of marketing in a particular country. Further, the suggestion (M Illmer, *ibid*) that a failure of the person claimed to be liable to raise a pleaded objection to the application of a particular sub-rule constitutes an agreement to the application of the law identified by that sub-rule seems questionable (main work, 13.36).

5.30 **Line 17 – Insert footnote 82A after “strong one”**
Also M Illmer (**5.03** above), 287.

5.33 **Add footnote 89A at end of paragraph** This alternative solution is favoured by the editors Cheshire, North & Fawcett, 808.

5.34 **(n 91) Add** For comment, see M Illmer (**5.03** above, 298-300. For the operation of the foreseeability test where a product has been marketed within a free trade area (such as the EC/EFTA), see main work, 5.24; M Illmer (**5.03** above), 300.

5.35 **Add footnote 97A at end of paragraph** For a narrower view, focussing on the safety features of a product, see P Huber and M Illmer (**5.10** above), 43; M Illmer (**5.03** above), 293-294. This approach, it is submitted, is too restrictive and adds an undesirable element of uncertainty.

5.36 **Insert new paragraph 5.36A** As to the application of the foreseeability test, which must depend on the facts of the individual case, Martin Illmer comments: **[99A]**

Whether marketing of the product or products of the same type in a specific country is reasonably foreseeable for the person claimed to be liable depends primarily on the precautionary measures he has taken to prevent marketing in the respective country. These precautionary measure may be restrictions of marketing tied to the product itself or restrictions in the distribution or sale contracts. Contractual relations are regularly sufficient to establish that marketing was not reasonably foreseeable. The objective suitability of the product for use in a specific country and the knowledge of the person claimed to be liable of distribution in the relevant country despite contractual restrictions are important circumstances that have to be taken into account.

Other factors, such as the state of distribution technology and political stability in a particular region may also need to be taken into account.

[**Footnote 99A** M Illmer (**5.03** above), 300.]

5.45 Line 4 - Insert footnote 117A after "default rule"

This view is also taken by Professor Peter Huber and Martin Illmer (**5.10** above), 43-44 (also M Illmer (**5.03** above), 296-297), by Professor de Lima Pinheiro (2008) 44 RDIPP 5, 23 and by Professor Schwartze (**5.10** above), 432-433.

(n 118) Add Cheshire, North & Fawcett, 807-808. Also T Hartley (**5.21** above), 904-905, suggesting other possible solutions to this problem.

Add at end of paragraph ... and with the proposition that Art 5 provides a special rule for cases involving "damage caused by a product".**[118A]**

[**Footnote 118A** P Huber and M Illmer (**5.10** above), 43.]

5.46 (n 120) Add Cf P Huber and M Illmer (**5.10** above), 45, describing the absence of a specific reference to Art 4(3) as "rather aesthetic" and suggesting elsewhere (at 39) that "the provisions of Art 4(2) and Art 4(3) apply to cases of product liability"; also Cheshire, North & Fawcett, 808; A Schwartze (**5.10** above), 433; M Illmer (**5.03** above), 301.

5.47 (n 121) Add As a consequence, Art 5(2) is likely to apply principally, if not exclusively, where there is a contractual relationship between the parties (e.g. seller-consumer; importer-supplier) (A Schwartze (**5.10** above), 433). For the possible application of Art 5(2) in "bystander" cases (main work, 5.40), see P Huber and M Illmer (**5.10** above), 46; M Illmer (**5.03** above), 302.

5.49 (n 128) Add For comment, see T Kadner Graziano, "The Rome II Regulation and the Hague Conventions on Traffic Accidents and Product Liability : Interaction, Conflicts and Future Perspectives" (2008) 26 *Nederlands internationaal privaatrecht* 425, 427-428.

Chapter 6 Unfair Competition/Restriction of Competition

6.11 Line 5 - Insert footnote 39A after "appear to suggest" Also M Hellner, "Unfair Competition and Acts Restricting Free Competition" (2007) 9 YPIL 49, 51-55.

- 6.19** (n 55) Add M Hellner (6.11 above), 67-69.
- 6.25** (n 66) Add For the view that the common law rules creating the English tort of passing off are capable of having overriding mandatory effect under the Regulation, see Cheshire, North & Fawcett, 850-851. The argument is unsupported by authority, raises questions of EC free movement law and seems, in any event, unlikely to be tested given the “market oriented” approach of Art 6(1).
- 6.29** (p 406, line 25) Insert footnote 80A after “rather than Art 6(2)” Cf Cheshire, North & Fawcett, 810.
- 6.30** (n 82) Insert text after “Ch 4 above” Also M Hellner (6.11 above), 56-58.
- 6.31** (p 407, Line 4) Insert text after “mutually exclusive” Although a factual scenario may, no doubt, generate separate non-contractual obligations falling within both Art 6(1) and Art 6(3), it would be undesirable if the autonomous classification of a single obligation depended on the claimant’s election or the label attached to it.[93A]
- [Footnote 93A Cf Main work, 3.129-3.139. Michael Hellner (6.11 above, 69) suggests that the concepts of “unfair competition” and “restrictions of competition” will likely overlap, but it is unclear whether his focus is on their autonomous legal definition or their practical application to a single set of facts. The latter, but not the former, seems possible.]
- (n 95) Add Also T Rosenkranz and E Roder, “The Law Applicable to Non-Contractual Obligations Arising Out of Acts of Unfair Competition and Acts Restricting Free Competition Under Article 6 Rome II Regulation” (2008) 26 *Nederlands internationaal privaatrecht* 435, 436
- 6.33** (n 99) Add L de Lima Pinheiro (2008) 44 RDIPP 5, 24.
- 6.34** Line 10 - Insert footnote 103A after “Regulation” Cf D van Engelen, “Rome II and Intellectual Property Rights: Choice of Law Brought to a Standstill” (2008) 26 *Nederlands internationaal privaatrecht* 440, 441-442.
- 6.49** (n 122) Add Also M Hellner (6.11 above), 56.

(n 126) Add For the meaning attributed to the “collective interests of consumers” here and elsewhere in EC legislation, see M Hellner (**6.11** above), 55.

With effect from 29 December 2009, the Injunctions Directive will be repealed and replaced by Directive (EC) No 2009/22 on injunctions for the protection of consumer interests (OJ L110,30 [1.5.2009]) (the “**2009 Injunctions Directive**”). Art 2(2) of 2009 Injunctions Directive, following the language of corresponding provision in the original Directive, provides that “[t]his Directive shall be without prejudice to the rules of private international law with respect to the applicable law, that is, normally, either the law of the Member State where the infringement originated or the law of the Member State where the infringement has its effect”. The closing words of this provision, formerly a crude attempt to summarise the Member States’ relevant rules of applicable law, fail to take into account in any way the changes introduced by the Rome II Regulation and seem wholly inappropriate.

- 6.54** **(n 133) Add** Also M Hellner (**6.11** above), 64. Cf T Rosenkranz and E Rohde (**6.31** above), 437.
- 6.62** **(p 419, line 7) Insert footnote 147A after “the EC Treaty”** See, on this point, M Hellner (**6.11** above), 60.
- 6.65** **Add footnote 178A at end of paragraph** Cf M Hellner (**6.11** above), 61-64, speculating that the alteration of the recital in the Common Position was accidental.
- 6.74** **(n 191) Add** Cf T M de Boer (2007) 9 YPIL 19, 24-25.
- 6.75** **(n 193) Add** This view is also taken by T Rosenkranz and E Rohde (**6.31** above), 438. The contrary view is taken by Professor de Boer (**6.74** above), 24 and by the editors of Cheshire, North & Fawcett, 809.
- 6.78** **(n 202) Add** For a comparative survey of collective redress procedures in the Member States, see D Fairgrieve and G Howells, “Collective Redress Procedures – European Debates” (2009) 58 ICLQ 379.

In late 2008, the Commission published its Green Paper on Consumer Collective Redress (COM (2008) 794 final [27.11.2008]), following this with a more detailed

discussion paper for a consultation with stakeholders held on 29 May 2009 (both documents available at http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm).

The discussion paper comments (paras 31-32):

The Brussels I Regulation on jurisdiction and recognition and enforcement of judgements as well as the Rome I/II Regulations on the applicable law for contractual and non-contractual obligations may facilitate to a certain extent the use of the national and EU enforcement and redress instruments in cross-border situations. The Small Claims Regulation foresees that a judgement given in a Member State under the European Small Claims Procedure is automatically recognised and enforced in another Member State.

However, these tools are either not specifically designed with a focus on mass claims (i.e. Commission Recommendations on ADR and the Small Claims Regulation) or do not enable a group of consumers to receive compensation because of an illegal practice of a trader. The existing instruments related to jurisdiction and recognition and enforcement of judgements (i.e. Brussels I Regulation) as well as on applicable law (i.e. Rome I/II Regulations) do not contain specific provisions on mass claims. Therefore, the instruments currently available at EU level do not directly tackle the inefficiency of the current legal framework in compensating consumers in mass claims. The current situation with existing gaps and weaknesses of the existing system leads to uncertainty for consumers and traders and creates a justice gap, i.e. not all consumers and traders in the EU have the same possibilities to solve mass disputes efficiently.

In relation to a possible EC wide judicial collective redress mechanism, the discussion paper suggests as a possible solution (para 61):

Applicable law: in order to facilitate the handling of the case, the applicable law should be the law of the Member State where the market is most affected for the test case and the law of the Member State where the consumers have their habitual residence for the follow-up procedure. An adaptation of EU instruments of private international law would be necessary.

Chapter 7 Environmental Damage

7.04

(n 19) Add Professor Kadner Graziano argues for this interpretation of both the Brussels I and Rome II Regulations (T Kadner Graziano, "The Law Applicable to Cross-Border Damage to the Environment: A Comment

on Article 7 of the Rome II Regulation” (2007) 9 YPIL 71, 80-86, discussed at **7.05A** below).

7.05 (n 30) **Add** For a different view of the effect of this Recital, see T Kadner Graziano (**7.04** above), 84.

Insert new paragraph 7.05A Professor Kadner Graziano, in arguing that the Rome II Regulation applies to actions by public authorities to recover clean up costs relies strongly on the fact that Art 7 draws a distinction between “environmental damage” and “damage sustained by persons and property as a result of such damage”, and submits that (a) currently, individuals can bring claims for pure environmental damage only in certain cases and, on a European-wide level, only to a limited extent, and (b) the Environmental Liability Directive only grants the right to recover damages for pure environmental harm exclusively to public authorities.**[33A]** He infers from this that the Regulation was intended to apply to public authority environmental claims. The Directive, however, does not affect civil liability regimes.**[33B]** Nor does it exclude the possibility of a private action for “pure environmental harm”, for example an action by a landowner to prevent pollution or compensate for loss of enjoyment of his land. Further, Professor Kadner Graziano’s reliance on the content of one of the Regulation’s rules of applicable law in order to define the Regulation’s material scope seems counter intuitive, and contrary to the approach of the ECJ in its case law on the Brussels Convention.**[33C]**

[Footnotes

33A T Kadner Graziano, (**7.04** above), 85-86.

33B Main work, 7.05, text to n 26.

33C Case C-292/05, *Lechouritou v Dimosi tis Omospondiakis Dimokratias tis Germanias* [2007] ECR I-1519, para 42.]

7.17 (n 64) **Add** Also T Kadner Graziano (**7.04** above), 72-73. For the application of Art 7 to injunction cases, see T Kadner Graziano, *ibid*, 76-78.

7.23 (n 74) **Add** Also T Kadner Graziano (**7.04** above), 74-76.

- 7.29** (n 90) **Add** Note, however, that the failure to accord equivalent treatment to a licence granted by another Member State may constitute a violation of EC law, or render a rule objectionable on public policy grounds (Case C-115/08, *Land Oberösterreich v ČEZ*, Opinion of Adv Gen Maduro, 22 April 2009, esp paras 12-19; T Kadner Graziano, **7.04** above, 79-80).

Chapter 8 Intellectual Property

- 8.01** (n 1) **Add** Also E Ulmer, *Intellectual Property Rights and the Conflict of Laws* (Deventer: Kluwer, 1978); N Boschiero, "Infringement of Intellectual Property Rights: A Commentary on Article 8 of the Rome II Regulation" (2007) 9 YPIL 87, 90, n 14.
- 8.05** **Add** N Boschiero (**8.01** above), 94-99.
- 8.12** (n 29) **Add** Also D van Engelen, "Rome II and Intellectual Property Rights: Choice of Law Brought to a Standstill" (2008) 26 *Nederlands internationaal privaatrecht* 440, 441-442.
- 8.18** (n 34) **Add** Cf N Boschiero (**8.01** above), 102-103, suggesting that Art 8(1) of the Rome II Regulation may extend to certain issues of a "proprietary" character.
- 8.21** **Add footnote 60A at end of first sentence** It must be emphasised that the rule does *not* refer to the country "in" which protection is claimed (ie the *lex fori*), although, as Professor Boschiero points out, the commentary in the Commission Proposal (at 20) used this preposition (N Boschiero (**8.01** above), 113).
- 8.22** (n 61) **Add** For criticisms of the approach taken in Art 8(1) of the Regulation, see D van Engelen (**8.12** above), describing Art 8(1) as "a one way street without any crossroads or possibility for detours" (ibid, 444); N Boschiero (**8.01** above), 106-111 referring to "an excessively rigid and oversimplifying generalization".
- (n 62) **Add** N Boschiero (**8.01** above), 99-103.
- 8.54** (n 111) **Add** For criticism of the decision to exclude party autonomy in Art 8(1), see N Boschiero (**8.01** above), 106-111.

(n 114) Add T M de Boer (2007) 9 YPIL 19, 25-26.

Chapter 9 Industrial Action

9.13 **(n 25)** The ECJ's decision in the *Viking Line* case is reported at [2007] ECR I-10779.

9.15 **(n 27)** The ECJ's decision in the *Laval* case is reported at [2007] ECR I-11767.

9.19 **Line 3 – Insert footnote after “autonomous meaning”** For criticism of this approach, see G Palao Moreno, “The Law Applicable to a Non-Contractual Obligation with Respect to an Industrial Action: A Commentary on Article 9 of the Rome II Regulation” (2007) 9 YPIL 115, 118-119.

9.31 **Add at end of paragraph** If the action is taken in more than one country, the law of each of those countries should be applied to determine the consequences of conduct in that country.**[51A]**

[**Footnote 51A** Main work, 3.298-3.301; cf G Palao Moreno (9.19 above), 124-125.]

(n 51) Add within brackets after “above” also G Palao Moreno (9.19 above), 123

Chapter 10 Unjust Enrichment

10.10 **(n 29) Add** S Pitel, “Choice of Law for Unjust Enrichment : Rome II and the Common Law” (2008) 26 *Nederlands internationaal privaatrecht* 456, 456-457.

10.19 **(n 62) Add** For the reasoning of the ECJ in this case, see **10.21A** below.

10.19 **Replace final sentence before quotation (“The authors ...”)** In the 2008 interim outline version of the Draft Common Frame of Reference, the term ‘unjustified enrichment’ was defined as:**[n 66 and quotation remain as set out in the main work]**

Add after quotation In the 2009 final outline version (1.05 above), however, the concept is less expansively, and less helpfully, defined simply as “an enrichment which is not legally justified”. It is necessary, therefore,

to refer in further detail to the provisions of Book VII, which appears consistent in both versions.

10.20 **Replace point 1 as follows** Art 1:101 contains a basic rule that:

(1) A person who obtains an unjustified enrichment which is attributable to another's disadvantage is obliged to that other to reverse the enrichment.

(2) This rule applies only in accordance with the following provisions of this Book.

10.21 **(n 71) Add** Note, however, that the reference in Book VII, Art 4:101(c) to situations "where the enriched person infringes the disadvantaged person's rights or legally protected interests", taken together with Art 5:104 (requiring "reversal" of the fruits and use of an enrichment) tend to support the view that some gain based remedies for wrongdoing can be fitted within the Draft Common Frame of Reference's concept of "unjustified enrichment". Accordingly, the place of gain/based remedies resulting from harmful/unlawful acts within the Draft seems no clearer than its place within the Rome II Regulation.

Insert new paragraph 10.21A In *Masdar (UK) Ltd v Commission***[72A]**, the ECJ considered the potential non-contractual liability of the Commission under Art 288 of the EC Treaty, requiring an assessment of the principles common to the laws of the Member States, in the following terms:**[72B]**

44 According to the principles common to the laws of the Member States, *a person who has suffered a loss which increases the wealth of another person without there being any legal basis for that enrichment* has the right, as a general rule, to restitution from the person enriched, up to the amount of the loss.

45 In that regard, as the Court of First Instance stated, legal redress for undue enrichment, as provided for in the majority of national legal systems, is not necessarily conditional upon unlawfulness or fault with regard to the defendant's conduct.

46 On the other hand, in order for an action for unjust enrichment to be upheld, it is essential that there be no valid legal basis for the enrichment. That condition is not satisfied, in particular, where the enrichment derives from contractual obligations.

...

49 Actions for unjust enrichment do not fall under the rules governing non-contractual liability in the strict sense, which, to be invoked, require a number of conditions to be satisfied, relating to the unlawfulness of the conduct imputed to the Community, the fact of the damage alleged and the existence of a causal link between that conduct and the damage complained of *They differ from actions brought under those rules in that they do not require proof of unlawful conduct – indeed, of any form of conduct at all – on the part of the defendant, but merely proof of enrichment on the part of the defendant for which there is no valid legal basis and of impoverishment on the part of the applicant which is linked to that enrichment.*

The claimant's action was dismissed on the ground that the enriching act consisted of the performance of a contractual obligation towards a third party. Nevertheless, the Court's analysis seems consistent with the model of "unjust enrichment" suggested in this chapter (main work, 10.10-10.21).

[Footnotes

72A (Case C-47/07P) [2008] ECR I-0000 (judgment of 16 December 2008).

72B Ibid, paras 44-46, 49 (emphasis added).]

10.22 (n 73) Add S Pitel (10.10 above), 457-462.

10.29 (n 93) Add Cheshire, North & Fawcett, 829-830.

10.35 **Insert footnote 115A at end of paragraph** Cf Cheshire, North & Fawcett, 830-831.

Chapter 11 *Negotiorum Gestio*

11.06 **(n 36) Add** In the Member States party to the Hague Agency Convention (France, Netherlands, Portugal), the provisions of that convention may apply to claims between an agent and contractual counterparty (**12.10A** below).

11.11 **Add** In its later decision in the same case, the ECJ reserved judgment as to whether the Court of First Instance had correctly classified the legal nature of actions based on *negotiorum gestio*.**[45A]** It rejected the claimant's claim on the ground that (a) the claimant's was not benevolent, having been performed in the belief that it would be paid by the Commission, and (b) the claimant had not proved that the Commission was no longer able to manage the projects in issue.**[45B]**

[Footnotes

45A (Case C-47/07P) [2008] ECR I-0000 (judgment of 16 December 2008), para 66.

45B Ibid, paras 67-69.]

11.22 **Insert new section at end of chapter**

D. THE HAGUE AGENCY CONVENTION

11.23 Although of limited significance, it is also appropriate to consider the Regulation's relationship with the 1978 Hague Agency Convention.**[72]** Only France, the Netherlands and Portugal, among the Member States, are parties to the Convention. Nevertheless, as a non-Member State (Argentina) has also ratified the Convention, it will take precedence over the Regulation's rules in those Member States in accordance with Art 28(1).**[73]**

[Footnotes

72 Convention on the law applicable to agency (The Hague, 14 March 1978), reproduced at http://www.hcch.net/index_en.php?act=conventions.text&cid=89

>. See also the Explanatory Report by I G F Karsten, Acts and Documents of the 13th Session (1973), tome IV, 378-432. The Report is available at <<http://hcch.e-vision.nl/upload/expl27.pdf>>.

For commentary on the Convention, see P Hay and W Müller-Freienfels, "Agency in the Conflict of Laws and the 1978 Hague Convention" (1979) 27 ALCL 1; H L E Verhagen, *Agency in Private International Law* (1995) and the other materials listed on the website of the Hague Conference at <http://www.hcch.net/index_en.php?act=conventions.publications&dtid=1&cid=89>.

73 Main work, 16.36-16.40.]

11.24 The Convention determines the law applicable to relationships of an international character arising where one person (the agent) has the authority to act, acts or purports to act on behalf of another person (the principal) in dealing with a third party, whether in his own name or that of the principal.**[74]** The references to situations in which the agent "acts" or "purports to act" without authority in the Convention were intended to accommodate at least some cases of *negotiorum gestio* otherwise falling within the scope of Art 11 of the Rome II Regulation.**[75]** The Convention applies, however, only to situations in which the agent performs a legal act towards a third party, including cases where the function of the agent is to receive and communicate proposals or to conduct negotiations,**[76]** and does not extend to situations involving what may for convenience be described as "*gestio* of fact"**[77]** (for example, the act of saving a person or property).

[Footnotes

74 Hague Agency Convention, Art 1. Certain matters are excluded from the scope of the Convention by Art 2. Art 3 restricts the concept of "agent" to exclude (a) those acting for corporations and other entities by virtue of an authority conferred by law or the entity's constitutive documents, and (b) trustees.

Under Art 18, Contracting States may exclude the application of the Convention with respect to (1) agency of banks in banking transactions, (2) insurance, and (3) agency of public servants on behalf of private persons. Portugal has entered a reservation with respect to all three categories; the Netherlands only with respect to the second.

75 Explanatory Report on the Hague Agency Convention, n 72 above, paras 28-29, 36, 112-113; P Hay and W Müller-Freienfels, n 72 above, 37, n 190. For the view that the Convention are suited only to *negotiorum gestio* within pre-existing agency relationships,

see H L E Verhagen, n 72 above, 149-150; cf L de Lima Pinheiro (2008) 44 RDIPP 5, 29, n 105.

76 Hague Agency Convention, Art 1, 2nd para; Explanatory Report, n 72 above, para 113.

77 L de Lima Pinheiro, n 75 above, 29.]

11.25 The Convention contains separate rules regulating relations between principal and agent (Chapter II) and relations with the third party (Chapter III). It is the former set of rules that will apply in cases of *negotiorum gestio*. Absent a choice of law by the principal and agent, **[78]** the applicable law will be that of the State where, at the time of formation of the agency relationship, the agent has his business establishment (failing which, his habitual residence), unless the agent is primarily to act in the State in which the principal has his business establishment (failing which, his habitual residence), in which case the law of that State should apply. **[79]** The applicable law will govern, among other matters, the obligations of the parties towards each other and the categories of damage for which compensation may be recovered. **[80]** The application of that law is subject to the overriding effect of public policy (*ordre public*) and to the possible application of the overriding mandatory rules of a State with which the situation has a significant connection. **[81]**

[Footnotes

78 For this possibility, see Hague Agency Convention, Art 5.

79 Ibid, Art 6. The rules in Arts 5 and 6 do not apply where the agreement creating the agency relationship is a contract of employment (Art 10).

80 Ibid, Art 8.

81 Ibid, Arts 16 and 17.]

Chapter 12 *Culpa in Contrahendo*

12.03

(n 10) Add B Volders, “*Culpa in Contrahendo* in the Conflict of Laws: A Commentary on Article 12 of the Rome II Regulation” in (2007) 9 YPIL 127, 130-132 and “*Culpa in Contrahendo* in the Conflict of Laws: A first appraisal of Article 12 of the Rome II Regulation” in (2008) 26 *Nederlands internationaal privaatrecht* 464, 465-466. References in the following paragraphs are to

the second of these articles, a revised version of the first.

12.05 (n 14) **Add** Also Arts 5-8 of Directive (EC) No 2008/48 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ L133, 66 [22.5.2008]).

Line 8 – Insert footnote 14A after “intimidation)”
Claims to enforce unsolicited prize offers may also fall within this category, insofar as they are not characterised as “contractual obligations” (cf Main work, 3.118-3.121 and **3.120-3.121** above).

12.07 (n 20) **Add** For the opposite view, that a claim for breach of warranty against the false procurator falls within Art 12, see T Hartley (2008) 57 ICLQ 899, 907.

12.08 **Insert footnote 23A at end of paragraph** In the Member States party to the Hague Agency Convention (France, Netherlands, Portugal), the provisions of that convention may apply to determine the law applicable to claims between an agent and contractual counterparty (**12.10A** below).

12.09 (n 29) **Add** Cheshire, North & Fawcett, 834.

12.10 **Insert footnote 37A at end of point 2 on p 530** Cf Cheshire, North & Fawcett, 834.

(n 38) **Add** Compare T Hartley (**12.07** above), 907.

Insert new paragraph 12.10A

12.10A In the three Member States party to the Hague Agency Convention (France, Netherlands, Portugal), it will also be necessary for courts to consider that Convention’s relationship with the Rome II Regulation, and its possible application under Art 28(1) of the Regulation.**[40A]** It is evident that the Convention, which refers to situations in which one person (the agent) “has the authority to act, acts or purports to act” on behalf of another (the principal), was intended to bring within its scope the liability of an agent lacking authority as false procurator of a contract (*falsus procurator*).**[40B]** The law applicable to relations between the agent and counterparty in such cases must

be determined in accordance with the rules set out in Chapter III of the Convention.**[40C]** In outline, the Convention favours the law of the State of the agent's business establishment at the time of his relevant acts, subject to possible displacement in favour of the law of the State in which the agent acts if (a) the agent has acted in the name of a principal having his business establishment (failing which, habitual residence) in that State, (b) the counterparty has his business establishment (failing which, habitual residence) in that State, (c) the agent has acted at an exchange or auction, or (d) the agent has no business establishment.**[40D]** The Convention also recognises the right of the principal (but not the agent) and the third party to determine the law applicable by agreement, subject to restrictive conditions.**[40E]**

[Footnotes

40A 11.23 above.

40B Explanatory Report of I G F Karsten on the Hague Agency Convention, available at <http://hcch.e-vision.nl/upload/expl27.pdf>, paras 30, 36, 111-112; P Hay and W Müller-Freienfels, "Agency in the Conflict of Laws and the 1978 Hague Convention" (1979) 27 ALCL 1, 37, text to fn 189; H L E Verhagen, *Agency in Private International Law* (1995), 402-403. The Convention may also apply to certain claims between principal and counterparty that would otherwise fall within Art 12 of the Regulation (H L E Verhagen, above, 401-402).

40C Hague Agency Convention, Art 15.

40D Ibid, Art 11. For refinements of these rules in particular cases, see *ibid* Arts 12-13.

40E Ibid, Art 14; Explanatory Report, paras 222-225.]

12.14 **Line 6 – Insert text after “case of this kind.”**
Although Art 12(1) does not expressly provide for this, it is to be expected that the words “the law that applies to the contract” will be understood as referring, in the case of consumers and employees, not only to the primary law applicable but also to any non-derogable rules which, under the Rome Convention and its successor Regulation, take effect despite the parties' choice of a different law to govern their contract.**[48A]**

[Footnote 48A B Volders (**12.03** above), 467. For discussion of a similar issue arising under Art 4(3), see main work, 4.92-4.93.]

- 12.20** (n 54) **Add** Also Cheshire, North & Fawcett, 835-836; B Volders (12.03 above), 467.

Insert new paragraph 12.20A

According to Art 8(2) of the Rome Convention[**55A**], a party may rely on the law of the country in which he has his habitual residence to establish that he did not consent to a choice of the applicable law if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct under that law. It is unclear whether that rule may be applied by analogy to allow a party otherwise to escape a pre-contractual liability imposed on him by the law applicable under Art 12(1) of the Rome II Regulation.[**55B**]

[Footnotes

55A Rome I Regulation, Art 10(2).

55B For the view that Art 8(2) of the Rome Convention may be extended in this fashion, see B Volders (**12.03** above), 467.]

- 12.22** (n 59) **Add** In contrast to Art 12(2)(b), Art 4(2) assesses the existence of a common habitual residence at the time when the damage occurs.

Chapter 13 Choosing the Law Applicable to Non-Contractual Obligations

- 13.06** **Insert footnote 15A at end of paragraph** For comment on the reasoning underlying Art 14 and its provisions, see T M de Boer, "Party Autonomy and its Limitations in the Rome II Regulation" (2008) 9 YPIL 19.

- 13.13** (n 38) The quotation from the ECJ's judgment in *Hugo Trumpy* is from paras 48-49, 51.

- 13.20** (n 67) **Add** Also L de Lima Pinheiro (2008) 44 RDIPP 5, 13; X Kramer, "The Rome II Regulation on the Law Applicable to Non-Contractual Obligation: the European Private International Law Tradition Continued" (2008) 26 *Nederlands internationaal privaatrecht* 414, 423.

- 13.32** (n 93) **Add** The reference in Art 14(3) to "one or more Member States" creates the possibility that both Art 14(2) and Art 14(3) may apply in the same situation. In such a case, the structure of Art 14 would suggest

that Art 14(3) should be given priority (cf Commission Proposal, 23; L de Lima Pinheiro (**13.20** above), 14).

- 13.34** **Line 2 - Insert footnote 101A after “the parties’ agreement”** For criticism of these provisions as over-elaborate, see T M de Boer (**13.06** above), 27.

Chapter 14 Scope of the Law Applicable under the Regulation

- 14.03** **(n 5) Add** The editors of Cheshire, North & Fawcett also draw attention to the Art 8 of the Hague Products Liability Convention and the accompanying explanatory report (authored by W L M Reese not, as the references suggest, A T von Mehren). See, in particular, Essén report (main work, 4.114, n 337), 27-33; Reese report (main work, 5.49, n 127), 264-268.

- 14.15** **(n 25) Insert text at beginning** Cheshire, North & Fawcett, 843, 866-868.

- 14.19** **(n 41) Add** *Maher v Groupama Grand Est* [2009] EWHC 38 (QB); [2009] 1 All ER 116, [16] (Blair J). Professor Weintraub (2008) 10 JIBFL 537 comments that this aspect of the Regulation “blazes a revolutionary and salutary path”, but others are less impressed (see, eg, J Ramage, “All Roads Lead to Rome” (2009) 153 Solicitors Journal, no 8, 11, suggesting that the Rome II rule is “[a] victory, perhaps, for the lobbyists in the insurance industry”).

(n 42) Add Cf Cheshire, North & Fawcett, 845. For the relevance of foreign damages awards under the pre-existing English rules of applicable law, see *Hulse v Chambers* [2001] 1 WLR 2386, [6]-[9] (Holland J); *Re T & N Ltd* (No 2) [2005] EWHC 2990 (Ch); [2006] 1 WLR 1792, [83]-[84] (David Richards J).

(n 43) Add Also Cheshire, North & Fawcett, 845-846.

- 14.25** **Add** Other language versions of the Regulation, however, use narrower terminology, suggesting a possible restriction in the scope of Art 15(c) to monetary remedies (eg French *réparation*; German *Wiedergutmachung*; Spanish *indemnización*), and it may be that the availability of other forms of redress must be fitted within Art 15(d) or left as one of the matters not

specified by Art 15 but still falling within the vertical material scope of the Regulation.[63A]

[Footnote 63A Main work, 14.04.]

14.32 Insert new paragraph 14.32A

14.32A A detailed report, dated 30 November, prepared by the law firm Demolin Brulard Barthélémy for the European Commission has been published online.[79A] The authors analyse the current law and practice in the Member States regarding compensation, and limitation periods, in road traffic accident cases and suggest possible solutions for the problems identified. Subsequently, on 26 March 2009, the Commission's DG Markt launched a Consultation on the Compensation of Victims of Cross-Border Road Traffic Accidents in the European Union.[79B] The consultation paper presents several possible options for reform, as follows:[79C]

Option 1

Await the results and impact of application of the ROME II Regulation (EC) 864/2007 which came into force on 11 January 2009 and which in recital 29a) calls upon the Member States to apply the "restitutio in integrum" principle ...

Option 2

Provide better information to people in cross-border situations such as a standardised brochure explaining the main reasons for differences in compensation awards between the Member States and the possibilities or options that exist to reduce or eliminate the risk of unexpectedly low compensation. This brochure would be distributed via national channels such as motor insurers' bureaux, automobile clubs and victims' associations.

Option 3

Create European guidelines on the types of recognised compensation items and the way these should be calculated. These guidelines could be used, especially in jurisdictions with a great deal of judicial discretion in relation to assessment of damages, to assist judges in assessing damages and to move towards a more harmonised system in the long term.

Option 4

Set minimum EU standards for the types of recognised compensation items and the way these should be quantified.

This solution would not prevent Member States from continued use of headings not caught by the minimum standards and therefore differences between compensation levels would remain.

Option 5

Create a table at the EU level detailing minimum awards per type of injury (compensation for pain and suffering). Compared to option 4, only one of the many damage award elements would be standardised.

Option 6

Apply the law of the country of the victim's residence "*lex damni*" to claims of visiting victims. This solution would provide the victim with compensation that is based on the practice in the victim's country of residence. However, in cases where several victims with different nationalities are involved in the same accident and the claim is settled collectively in the country of the accident, several foreign laws would have to be applied.

Option 7

Introduce a compulsory driver's insurance (the so-called first-party insurance) covering also passengers travelling in the vehicle. Drivers' policies appear to exist in most Member States and are sometimes even automatically included in third party liability insurance policies. The idea is to make this type of insurance compulsory. In order not to only address victims who are drivers, the scope of cover should be extended to all passengers travelling in the vehicle of the driver.

Option 8

Introduce a system EU wide whereby visiting victims would settle their claims with their own third-party liability motor insurer and, by applying the presumption that the accident took place in the victim's country of residence, receive compensation in accordance with the law of the country of their residence. Such a system would require an agreement between insurers in order to determine apportionment of costs, and to allow effective settling of accounts. Systems for so-called direct settlement of claims already exist in many countries.

The consultation period closes on 29 May 2009.

[Footnotes

79A The Demolin Brulard Barthélémy report is available at <http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/juri_oj_2008_3004_etude_romeii/JURI_OJ_2008_3004_etude_romeII_en.pdf>.

79B The consultation paper is available at <http://ec.europa.eu/internal_market/consultations/docs/2009/cross-border-accidents/rome2study_en.pdf>.

79C DG Markt consultation paper, 2-3. Further policy options are presented with respect to limitation periods on pp 4-5.]

14.34 **Line 11 – Insert footnote 81A after “judge alone”**
Also Cheshire & North, 846. For the view that, there is under English law no legal obstacle to the empanelling of a jury to determine general damages, see *Hulse v Chambers* [2001] 1 WLR 2386, [9]. Section 69(1) of the Supreme Court Act 1969 requires that certain matters ordinarily be tried by jury. Under s 69(3):

An action to be tried in the Queen’s Bench Division which does not by virtue of subsection (1) fall to be tried with a jury shall be tried without a jury unless the court in its discretion orders it to be tried with a jury.

(Also County Courts Act 1984, s 66. Questions of foreign law remain to be determined by a judge alone – Supreme Court Act 1981, s 69(5); County Courts Act 1984, s 68.)

14.35 **(n 83) Replace footnote text** For the position under the pre-existing English rules, see Dicey, Morris & Collins, paras 33-395 to 33-396 (interest), and 36-023 (currency); *Maher v Groupama Grand Est* [2009] EWHC 38 (QB); [2009] 1 All ER 1116, [27]-[34] (Blair J) (interest - discussed at **14.35A** below).

Insert new paragraph 14.35A

Interest

In *Maher v Groupama Grand Est***[85A]**, Blair J concluded that, under the pre-existing English private international law rules, (a) the power to award pre-judgment interest on tortious damages should be determined by the law applicable to the tort under the Private International Law (Miscellaneous Provisions) Act 1995, (b) the rate at which interest should be calculated should be determined in accordance with English law (specifically, s 35A of the Supreme Court Act 1981), as the law of the forum, and (c) in exercising its discretion to fix the rate of interest under the 1981 Act, the court should take a flexible approach to arrive at an

appropriate rate, whether that of the *lex fori* or that of the *lex causae*. Under the Rome II Regulation, however, “the assessment of damage or the remedy claimed” is a matter for the law applicable to the non-contractual obligation in question (Art 15(c))[**85B**], and there would appear to be a very strong argument for applying that law to all questions concerning the availability and calculation of interest.

[**Footnotes**

85A [2009] EWHC 38 (QB); [2009] 1 All ER 1116, [27]-[34]. In reaching this conclusion, his Lordship preferred the reasoning of the editors of Dicey, Morris & Collins, paras 33-395 to 33-396 to that of judges in earlier High Court decisions (*Midland International Trade Services Ltd v Al Sudairy* (1990) Financial Times LR, 2 May (Hobhouse J); *Kuwait Oil Tanker Co SAK v Al Bader* (1998) unreported, 17 December (Moore-Bick J)).

85B Main work, 14.18-14.32]

14.57 (n 141) Also M Illmer, “Neutrality matters – some thoughts about the Rome Regulations and the so-called dichotomy of substance and procedure in European private international law” (2009) 28 Civil Justice Quarterly 237.

(n 148) The cross-reference should be to main work, 14.18-14.32.

14.60 **Add** In similar fashion, Martin Illmer argues for the criterion of “neutrality” to fix the scope of both the Rome I and Rome II Regulations, as follows:[**159A**]

Every issue concerned with the decision on the merits is governed by the *lex causae* as determined by the Regulations. Neutrality is determined by the abstract nature of the matter in question, not by reference to the concrete case. *Concerned with the decision on the merits* is far narrower than *affecting the decision on the merits*. Almost every issue, even the most technical matter, may potentially affect the outcome of the proceedings one way or another. In contrast, only those issues which are *directed* at the decision on the merits reached by the court are concerned with that decision. ... Neutrality in this sense is capable of applying rules of the *lex causae* which are regarded as procedural in a national context but which are nonetheless so closely intertwined with the rules governing the material dispute that non-application would frustrate the rights and remedies under the applicable law. At the same time, the criterion allocates those issues arising from the proceedings independently of the material dispute that forms the subject matter of the claim to the *lex fori*.

[**Footnote 159A** M Illmer (**14.57** above), 246-247.]

- 14.61** **Insert footnote 162A at end of paragraph** For a similar view, see M Illmer (**14.57** above), 247 (procedure) 256-258 (evidence).
- 14.63** **(n 167) Add** In March 2009, the Permanent Bureau presented to the Council on General Affairs a note, "Accessing the Content of Foreign Law and the Need for Development of a Global Instrument in this Area – a Possible Way Ahead" (Preliminary Document No 11A of 2009), available at http://www.hcch.net/upload/wop/genaff_pd11a2009e.pdf, and other documents. At its subsequent meeting, the Council authorised the Permanent Bureau to convene a Working Party consisting of experts from Members to explore further the feasibility of mechanisms, with the understanding at this stage that this will not lead to the development of a binding instrument.
- 14.71** **Insert footnote 199A at end of paragraph** Cf M Illmer (**14.57** above), 258-259; M Illmer, (2009) 73 *Rabels Zeitschrift fur Auslandsches und Internationales Privatrecht* 271, 304-305.
- 14.80** **Insert footnote 221A at end of paragraph** For the view that obligations arising from unilateral acts should mostly be classified as "contractual" within the Rome I Regime, see L de Lima Pinheiro (2008) 44 *RDIPP* 5, 8-9.
- 14.94** **(n 243) Add** Cf *Maher v Groupama Grand Est* [2009] EWHC 38 (QB); [2009] 1 All ER 1116, [17]-[26] (Blair J).
- 14.95** **Add** The ECJ gave a negative answer to this question on 10 February 2009. [**245A**]
- [**Footnote 245A** [2009] ECR I-0000; [2009] 1 All ER (Comm) 435.]
- 14.119** **(n 291) Add** This view is preferred by Cheshire, North & Fawcett, 793.

(p 623, line 22) Replace “contribution claimant’s obligation” with “contribution defendant’s obligation”.¹

Chapter 15 – Public Policy, Mandatory Rules and Rules of Conduct and Safety

15.05 **(n 10)** The ECJ reference number for *Krombach v Bamberski* is C-7/98.

Add Also Case C-394/07, *Gambazzi v Daimler-Chrysler Canada Inc* [2009] ECR I-0000 (Judgment of 2 April 2009), para 26; Case C-420/07, *Apostolides v Orams* [2009] ECR I-0000 (Judgment of 28 April 2009), paras 56-57.

15.06 **(n 12) Also** *Krombach v Bamberski*, main work, 15.05, n 10, para 37; *Gambazzi v Daimler-Chrysler*, **15.05** above, para 27; *Apostolides v Orams*, **15.05** above, para 59.

15.07 **Add** Further, in *Gambazzi v Daimler-Chrysler*, the ECJ emphasised a further restriction on the use of public policy to oppose the enforcement of a judgment under the Brussels I Regime, as follows:**[13A]**

It should, however, be borne in mind that fundamental rights, such as respect for the rights of the defence, do not constitute unfettered prerogatives and may be subject to restrictions. However, such restrictions must in fact correspond to the objectives of public interest pursued by the measure in question and must not constitute, with regard to the aim pursued, a manifest or disproportionate breach of the rights thus guaranteed.

There is no reason to believe that this reasoning will not apply equally to the Rome II Regulation.

[Footnote 13A *Gambazzi v Daimler-Chrysler*, **15.05** above, para 29]

15.09 **Add** For later proceedings in the same case, ruling the claim to be non-justiciable as being founded on UK acts of state, see *Al-Jedda v Secretary of State* [2009] EWHC 397 (QB).

¹ Following this correction, the relevant sentence reads: “The solution may be thought to produce an adequate result if the contribution defendant’s obligation is non-contractual (whether arising from tort/delict, unjust enrichment, *negotiorum gestio*, or *culpa in contrahendo*), but not if it is contractual.”

15.15 (n 41) Add after reference to Dicey, Morris & Collins Also Cheshire, North & Fawcett, 849-850

(n 41) Add at end of note For the view that common law rules may have overriding mandatory effect, see Cheshire, North & Fawcett. The example given (relating to the territorial scope of the tort of passing-off) is , however, unconvincing (**6.25** above).

15.16 The quotation is from Commission Proposal, 24-25.

15.20 (n 59) Add For discussion of the law applicable under the Rome II Regulation to prospectus liability, see T Arons, "All Roads Lead to Rome': Beware of the Consequences! : the Law Applicable to Prospectus Liability Claims Under the Rome II Regulation" (2008) 26 *Nederlands internationaal privaatrecht* 481.

15.33 (n 88) Add For a different approach, see L de Lima Pinheiro (2008) 44 RDIPP 5, 33-34.

Chapter 16 – Relationship with EC Law and International Instruments

16.04 (n 5) Add M Wilderspin, "The Rome II Regulation : Some Policy Observations" (2008) 26 *Nederlands internationaal privaatrecht* 408, 409-410.

16.10 (n 20) Add eg Case C-115/08, *Land Oberösterreich v CEZ*, Opinion of Adv Gen Maduro, 22 April 2009.

16.16 Add In this connection, Professor Lima de Pinheiro (an opponent of the "country of origin principle") comments:**[31A]**

The national laws which, in a more of less fortunate way, tried to transpose this Directive shall be interpreted in conformity with the Directive. Any interpretation in the sense that non-contractual liability of online service providers shall be governed by the law of the 'country of origin' is inconsistent with this maxim as well as inconsistent with the Rome II Regulation which has supremacy over national non-constitutional statutory law.

[**Footnote 31A** L de Lima Pinheiro (2008) 44 RDIPP 5, 38.]

16.31 Add Michael Wilderspin concludes:**[62A]**

It might be premature to conclude that this result marks the demise of the country of origin principle's claim to be a conflict of laws rule but it is certainly true to say that it marks a triumphant resurgence of a more traditional Savignyian conflict of laws approach which the legislature subsequently maintained when concluding the Rome I Regulation on the law applicable to contractual obligations.

[**Footnote 62A** M Wilderspin (**16.04** above), 410.]

16.36 **Add footnote 75A at end of paragraph G** Garriga, "Relationships between 'Rome II' and Other International Instruments: A Commentary on Article 28 of the Rome II Regulation" (2007) 9 YPIL 137.

16.41 (**n 86**) The inter-relationship of the Regulation with the 1978 Hague Agency Convention (to which France, the Netherlands and Portugal are parties, with Argentina) is considered at **11.23-11.25** and **12.10A** above.

16.46 **Replace existing text with the following additional paragraphs:**

16.46 On 23 December 2008, the Commission advanced a proposal for a Regulation establishing a procedure for the negotiation and conclusion of bilateral agreements between Member States and third countries concerning sectoral matters and covering applicable law in contractual and non-contractual obligations.**[100]** As the Commission indicates in its explanatory memorandum, this proposal is foreshadowed not only by Recital (37) of the Rome II Regulation but also by Recital (42) of the Rome I Regulation.

[**Footnote 100** COM (2008) 893 final, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008PC0893:EN:HTML>].]

16.47 Under the proposal, Member States would, subject to certain conditions (**16.50** below) and to the approval and control of the Commission, be able to negotiate and conclude bilateral agreements with third countries relating to sectoral matters falling within the scope of the two Regulations. The proposal sets out detailed procedures governing notification to and approval by the Commission.

16.48 Certain questions may arise concerning the treaty basis for the proposed measure. The Commission

relies on Arts 61 and 65 of the Treaty. As discussed elsewhere in this work, however, Art 65 permits Community action only "insofar as necessary for the proper functioning of the internal market" (main work, 2.04-2.45). With regard to treaties with non-Member States, however, the functioning of the internal market is (apparently) protected by the exclusive internal competence of the Community in accordance with the ECJ's 2006 Opinion on the Lugano Convention.**[101]** The proposed Regulation creates an exception, albeit limited, to that competence by authorising Member States to conclude treaties unilaterally, albeit under restrictive conditions. Accordingly, the measure (insofar as it has any useful effect at all) may be argued to jeopardise achievement of internal market objectives and to give the Commission the power to allow derogation from the EC Treaty, including the procedures established by Arts 300-307.

[Footnote 101] Opinion 01/03 [2006] ECR I-1145.]

16.49 A possible answer to the doubt raised in the preceding paragraph is that the Rome I and Rome II Regulations, by requiring the Commission to produce a proposal of this kind, did not effect an unqualified transfer of external competence and that the implementation of this measure is completing unfinished business, piggybacking on the (supposed) Community competence to adopt these measures. Alternatively, it may be questioned whether a Regulation is necessary or appropriate for these situations at all. Instead, the question should be answered in terms of Community and international law rules governing the waiver and enforcement of Member State's obligations under the EC Treaty.

16.50 On 7 May 2009, the European Parliament approved 46 amendments to the proposed Regulation.**[102]** These amendments follow discussions between the Parliament, Commission and Council with a view to promoting an informal agreement as to the content of the final Regulation. A note prepared by the Council's General Secretariat observes:**[103]**

The amendments adopted correspond to what was agreed between the three institutions and ought therefore to be acceptable to the Council. Consequently, once the legal

linguists have scrutinised the text, the Council should be in a position to adopt the legislative act.

Most significantly, the amendments extend the proposal to include regional agreements between a limited number of Member States and neighbouring third countries[**104**], and fixes the conditions for the grant of approval to a bilateral agreement as follows:[**105**]

The Commission shall, in making this assessment, first check whether any relevant negotiating mandate with a view to a Community agreement with the third country or third countries concerned is specifically envisaged within the next 24 months. If this is not the case, the Commission shall assess whether all of the following conditions are met:

(a) the Member State concerned has provided information that it has a specific interest in concluding the agreement due to economic, geographic, cultural, historical, social or political ties between the Member State and the third country concerned;

(b) on the basis of the information transmitted by the Member State, the envisaged agreement appears not to render Community law ineffective and appears not to undermine the proper functioning of the system established by its rules; and

(c) the envisaged agreement would not undermine the object and purpose of the Community's external relations policy as decided by the Community.

It is contemplated that the Regulation will expire 3 years after the submission by the Commission of a report on its functioning (a report due, initially, 8 years after adoption).[**106**]

[Footnotes

102 P6_TC1-COD(2008)0259 [7.5.2009].

103 Council document 9338/09 [13.5.2009], 2. The note, which incorporates the text of the European Parliament's amendments is available at
<<http://register.consilium.europa.eu/pdf/en/09/st09/st09338.en09.pdf>>

104 Proposed Regulation, as amended, Art 2.

105 Ibid, Art 4(2).

106 Ibid, Arts 10-10a.]

Conc (n 2) Add Professor Briggs puts a more positive spin on

(p665) the Regulation, suggesting that:

Given the variety of possible connecting factors which are available to the law reformer seeking to engineer a new choice of law for torts, it is very hard to find fault with the manner in which the contending rules for choice of law have been used in and balanced by the Rome II Regulation. It is entirely rational. It may not be the only rationality which could be envisaged, but it cannot be seriously argued that there was a plainly better answer which the legislation spurned.

(A Briggs, "When in Rome, choose as the Romans choose" (2009) 125 LQR 191, 193).

App 6 Comment

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