

The law applicable to non-contractual relations

Lecture 4

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National rules, EU rules, scope of application

- National conflict rules on non-contractual relations.
- 864/2007 (Rome II) Regulation (entered into force only *pro futuro*).
 - Applicable as from 11 January 2009
- Territorial scope: EU, except Denmark
- Universal application
- Non-contractual relations:
 - tort/delict, unjust enrichment, *negotiorum gestio* (representation without a mandate) or *culpa in contrahendo*.

Excluded matters

- Article 1(2)-(3) of the Rome II Regulation excludes the following from the Regulation's scope:
 - family law matters and civil unions, including maintenance,
 - rights in property arising out of a matrimonial relationship,
 - succession matters,
 - obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations arise out of their negotiable character,
 - questions of company law,
 - trusts,
 - nuclear damage,
 - violations of privacy and rights relating to personality, including defamation,
 - procedural matter as for instance evidence (without prejudice to Article 21 dealing with the formal validity of unilateral acts intended to have legal effect and relating to a non-contractual obligation, and Article 22 dealing with the burden of proof).

Party autonomy

- Article 14(1) of the Rome II Regulation

The parties may agree to submit non-contractual obligations to the law of their choice:

(a) by an agreement entered into after the event giving rise to the damage occurred; or

(b) where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred.

The choice shall be expressed or demonstrated with reasonable certainty by the circumstances of the case and shall not prejudice the rights of third parties.

- Domestic matters

- Purely EU matters

Architecture of Rome II in respect of torts/delicts

- General conflict rules (Article 4)
- Special conflict rules concerning specific matters:
 - product liability (Article 5),
 - unfair competition and acts restricting free competition (Article 6),
 - environmental damage (Article 7),
 - infringement of intellectual property rights (Article 8),
 - industrial action (Article 9).

General rules

- Lex loci damni

„the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.”

- Common habitual residence

- Escape clause

Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a[nother] country (...), the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

Case (1)

- A German and a Hungarian crash in Austria on the highway. The Hungarian, after having received first-aid in Austria, is transported to the Czech Republic where he receives medical treatment for one week (assume that this treatment is not covered by social security).
- Under the Rome II Regulation, which law would be applicable to the non-contractual relationship between the parties?

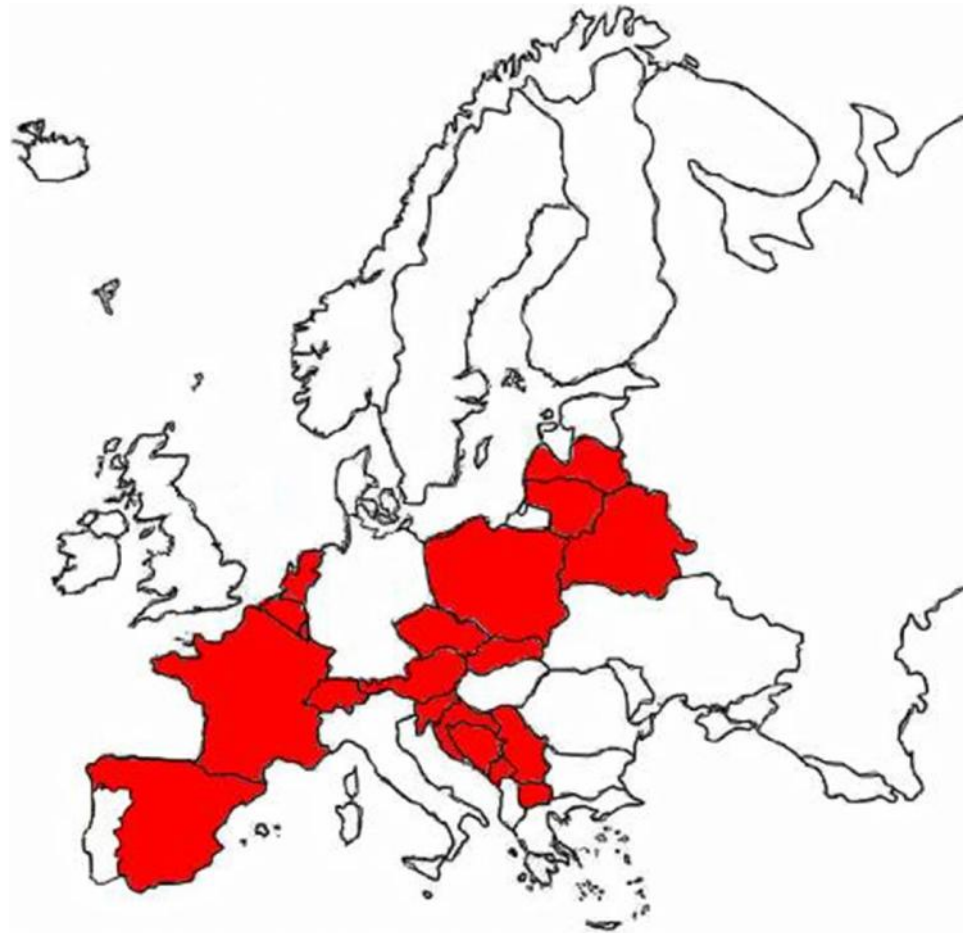
Case (2)

- A law professor from Szeged (Hungary) wants to travel to Brno to hold a lecture on EU Private International Law. He contracts with a bus company, which promises to transport him to Brno. The company is seated in Slovakia but it operates mainly in Hungary and the contract provides that Hungarian law is to be applied. In Austria, the bus runs into a tree and the Hungarian law professor suffers bodily injury.
- Afterwards he claims damages under Austrian law (which is more generous in the field of non-material damages than Hungarian law), arguing that the damages emerged here (*lex loci damni*). The transportation company asserts that the contract concluded with the law professor stipulates Hungarian law.
- Which law is applicable?

Relationship with existing international conventions

- Article 28
- *1. This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to non-contractual obligations.*
- *2. However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation.*

1971 Hague Convention on the law applicable to traffic accidents



Architecture of the 1971 Hague Convention

- General rule: *locus* of the traffic accident (\approx *lex loci delicti commissi*)
- Several exceptions, all related to the vehicle's 'legal domicile' (registration, in the absence of that or if there is more than one place of registration, or if there is no substantive relationship with the place of registration as defined by the Convention, the place where the vehicle is habitually stationed).

Some scenarios of forum shopping (1)

Where only one vehicle is involved in the accident and it is registered in a State other than that where the accident occurred, the internal law of the State of registration is applicable to determine liability

- towards the driver, owner or any other person having control of or an interest in the vehicle, irrespective of their habitual residence,

- towards a victim who is a passenger and whose habitual residence is in a State other than that where the accident occurred,

- towards a victim who is outside the vehicle at the place of the accident and whose habitual residence is in the State of registration.

Where there are two or more victims the applicable law is determined separately for each of them.

- A Slovak company transports a Hungarian high school group in Austria where the bus crashes into a tree or falls into a precipice.
- A Hungarian high-school group is transported by a Hungarian company in Austria, which is, however, leasing the bus from a Slovak company (the Hungarian company being the operator) and the car is driven by the Hungarian company's employee.

Some scenarios of forum shopping (2)

Where two or more vehicles are involved in the accident, the provisions of a) are applicable only if all the vehicles are registered in the same State.

- In Austria a car driven by an Austrian driver crashes with a car driven by a Hungarian driver, and both vehicles are registered in Slovakia (or they are habitually stationed there).
- What if the accident occurs between two Hungarians in Austria, while both vehicles are registered in Slovakia (and perhaps leased from Slovak owners).

Where one or more persons outside the vehicle or vehicles at the place of the accident are involved in the accident and may be liable, the provisions of a) and b) are applicable only if all these persons have their habitual residence in the State of registration. The same is true even though these persons are also victims of the accident.

Forum shopping and regulatory competition!

- Rome II regulation, Article 6(3)

(a) The law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected.

(b) When the market is, or is likely to be, affected in more than one country, the person seeking compensation for damage who sues in the court of the domicile of the defendant, may instead choose to base his or her claim on the law of the court seised, provided that the market in that Member State is amongst those directly and substantially affected by the restriction of competition out of which the non-contractual obligation on which the claim is based arises; where the claimant sues, in accordance with the applicable rules on jurisdiction, more than one defendant in that court, he or she can only choose to base his or her claim on the law of that court if the restriction of competition on which the claim against each of these defendants relies directly and substantially affects also the market in the Member State of that court.

- The Paraffin Cartel Case: the European Commission imposed a total of € 676,011,400 fines on 9 undertakings (ENI, ExxonMobil, Hansen & Rosenthal, Tudapetrol, MOL, Repsol, Sasol, , RWE and Total) for participating, between 1992 and 2005, in a cartel for paraffin wax in the EU/EEC.

Thank You for your attention!

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