ROME II – AN OVERVIEW

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Some context (1)

- Rome II – Law applicable to non-contractual obligations
- Rome I – Law applicable to contractual obligations
- Brussels I – Jurisdiction and recognition and enforcement of judgments
Some context (2)

Some uniform concepts applicable across the Regulations

• Autonomous interpretation of phraseology used
• Universal application
• Freedom of choice (within limits)

Some context (3)

Replaces different “old” sources of PIL rules, e.g.

• Part III of PIL (Miscellaneous Provisions) Act 1995 – for many torts
• Common law – e.g. for unjust enrichment
Material Scope (1)

Article 1(1)
Chapter II: Torts/Delicts
• General Rule (Article 4)
• Product Liability (Article 5)
• Unfair competition (Article 6)
• Environmental damage (Article 7)
• Infringement of IP rights (Article 8)
• Industrial Action (Article 9)

Chapter III:
• Unjust enrichment (Article 10)
• Negotiorum gestio (Article 11)
• Culpa in contrahendo (Article 12)

Material Scope (2)

Areas expressly excluded (Article 1(2)): e.g.
• revenue, customs and administrative matters
• liability of the state for acts/omissions in the exercise of State authority
• non-contractual obligation arising out of bills of exchange, cheques, promissory notes and other negotiable instruments
• non-contractual obligation arising out of the law of companies
• non-contractual obligations arising out of the relations between settlors, trustees and beneficiaries of a trust created voluntarily
• nuclear damage
• defamation and violation of privacy
• evidence and procedure
General approach (Recitals 14 to 19)

**General rule:**
Place where direct damage occurred (Article 4(1))

**Exceptions and escape clauses:**
Habitual residence of the parties and tort/delict manifestly more closely connected with another country (Article 4(2) and 4(3))

**Special rules for specific torts/delicts:**
Articles 5 to 9

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Some main changes (1)

**Article 4: general rule relating to torts/delicts**

The law of the country where the damage occurred *irrespective of* (i) where event giving rise to damage occurred or (ii) where indirect consequences of event occur.

Easy in case of physical harm, more difficult in case of economic loss incurred in more than one country (tricky area).
Some main changes (2)

**Article 14: Parties’ freedom of choice**
- choice expressed or demonstrated with reasonable certainty
- commercial parties
- agreement “freely negotiated”

Advantages/disadvantages of exercising choice of law?

**Limitations on freedom of choice**
- Not in relation to unfair competition (Article 6(4)) and infringement of IP rights (Article 8(3))
- Application of “mandatory” rules of the forum (Article 16) or where all elements located in another country/the EU (Article 14(2) and (3))
- Rules of safety and conduct (Article 17)
- Public policy of the forum (Article 26)

Some main changes (3)

**Article 15: Scope of the law applicable, e.g.**
- the basis and extent of liability
- the grounds for exemption from liability
- the existence, the nature and the assessment of damage or the remedy claimed
- the transferability of a right to claim damages/pursue a remedy
- liability for the acts of another person
- rules of prescription and limitation
Some tricky areas (1) - Scope

Temporal scope
• Entry into force: 20 August 2007
• Directly binding and applicable: 11 January 2009
• Article 31: “This Regulation shall apply to events giving rise to damage which occur after its entry into force.”

Material scope
• Non-contractual obligations – autonomous concept (Recital 11)
• How about e.g. knowing receipt and negligent misstatement?
• How about concurrent liability?

Some tricky areas (2) – Introduction of civil law concepts

Article 11: Negotiorum gestio
• Non-contractual obligations arising out of an act performed without due authority

Article 12: Culpa in contrahendo
• Non-contractual obligations arising out of dealings prior to conclusion of a contract regardless of whether contract concluded or not
• The law that applies or would have been applicable to the contract
• What claims are covered?
• How to determine the law that would have been applicable?
Some tricky areas (3) – Economic loss (1)

Article 4: the law of the country in which the (direct) damage occurred

- Direct damage/indirect economic loss?
- Economic loss suffered in more than one country?
- Mosaikbetrachtung?

Some tricky areas (4) – Economic loss (2)

Case study

- Mr X (domiciled in England) makes a negligent misstatement over the telephone to Mr Y (domiciled in France)
- Mr Y relying on the misstatement transfers funds from his French bank account to make investments in Germany, Spain and Italy.
- The investments are lost.
Article 5: the law applicable to non-contractual obligations arising out of damage caused by a product.

Different connecting factors apply:
- habitual residence of the party sustaining the damage
- country in which the product was "marketed"
- country in which the product was acquired
- country in which the damage occurred

Escape clauses:
- marketing of the product in the relevant country was not reasonably foreseeable
- tort/delict manifestly more closely connected with another country