

## THE ROME II REGULATION ON CHOICE OF LAW IN TORT

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### ABSTRACT

*The adoption on 11th July 2007 of EC Regulation 864/2007 on the Law Applicable to Non-contractual Obligations, also known as the Rome II Regulation, marks a major advance in the harmonization of private international law at European Community level. The Regulation complements the Rome Convention on the Law Applicable to Contractual Obligations (1980) by specifying harmonized choice of law rules for torts and restitutionary obligations. The present article attempts a critical analysis of the provisions of the Rome II Regulation in a comparative context. Reference is also made to relevant provisions of the recent Turkish Act on Private International Law (Act 5718 of 27th November 2007)*

### ÖZET

*Roma II Tüzüğü olarak da bilinen “Sözleşme Dışı Borç İlişkilerine Uygulanacak Hukuk Hakkındaki 11 Temmuz 2007 tarihli ve 864/2007sayılı AT Tüzüğü”nün kabul edilmesi, Milletlerarası Özel Hukukun Avrupa Topluluğu düzeyinde uyumlaştırılması yönünde büyük bir gelişmeye işaret eder. Tüzük, haksız fiilden ve sebepsiz zenginleşmeden doğan borçlara ilişkin uyumlaştırılmış bağlama kurallarını ortaya koymakla Sözleşmeden Doğan Borç İlişkilerine Uygulanacak Hukuk Hakkındaki Roma Sözleşmesini (1980) tamamlamaktadır. Bu makalede, Roma II Tüzüğü hükümlerinin eleştirel bir yaklaşımla mukayeseli bağlamda analizi yapılmaktadır. Çalışmada ayrıca, Türkiye'nin 27 Kasım 2007 tarih ve 5718 sayılı yeni Milletlerarası Özel Hukuk ve Usul Hukuku Hakkında Kanununun ilgili hükümlerine de yer verilmiştir.*

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**KEYWORDS:** *Private international law, Choice of the applicable law, Non-contractual obligations, Torts, European Community Law, EC Regulation 864/2007, Rome II Regulation.*

**ANAHTAR KELİMELEER:** *Milletlerarası Özel Hukuk, Uygulanacak Hukuk, Sözleşme Dışı Borçlar, Haksız Fiiller, Avrupa Topluluğu Hukuku, 864/2007 AT Tüzüğü, Roma II Tüzüğü.*

## INTRODUCTION

### The Rome II Regulation

On 11th July 2007 EC Regulation 864/2007 (the Rome II Regulation) on the Law Applicable to Non-contractual Obligations<sup>1</sup> was adopted by the EC Parliament and Council. By Articles 31 and 32, the Regulation will become applicable on 11th January 2009, and will apply to events giving rise to damage which occur after that date.

The Rome II Regulation lays down choice of law rules for torts and restitutionary obligations. It is designed to complement the Rome Convention of 19th June 1980 on the Law Applicable to Contractual Obligations.<sup>2</sup> It is based on the provisions of Title IV of the EC Treaty authorising the adoption of measures in the field of judicial co-operation in civil matters having cross-border implications, including measures promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws.<sup>3</sup> Thus it was adopted by means of the co-decision procedure specified by Article 251. Since the United Kingdom and Ireland elected to participate in the adoption and application of the Regulation, it will apply to all the Member States except Denmark.<sup>4</sup>

The general purposes underlying the harmonisation of choice of law rules effected by the Rome II Regulation are disclosed by various recitals. In

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<sup>1</sup> For its text, *see* 2007 OJ (L199) 40.

<sup>2</sup> For the text of the Rome Convention, *see* 1998 OJ (C27)34.

<sup>3</sup> *See especially* Articles 61, 65 and 67-69 of the Treaty. As its Recitals 3-5 indicate, the Regulation also takes account the conclusions of the European Council meeting in Tampere on 15-16th October 1999; the Mutual Recognition Programme of 30th November 2000, 2001 OJ (C12) 1; and the Hague Programme, adopted by the European Council on 5th November 2004, 2005 OJ (C53) 1.

<sup>4</sup> *See* Article 69 of the Treaty, and the associated Protocols. *See also* Recitals 39-40 to and Article 1(4) of the Regulation.

substance these relate to the achievement of certainty, predictability and uniformity of result, regardless of forum; the achievement of justice in individual cases; and the achievement of a reasonable balance between the interests of the parties involved.

Thus Recital 6 explains that the proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation and certainty as to the law applicable and the free movement of judgments, for the conflict rules in the Member States to designate the same national law, irrespective of the country of the court in which an action is brought. Recital 13 adds that uniform rules applied irrespective of the law they designate may avert the risk of distortions of competition between Community litigants. Recital 14 emphasises that the requirement of legal certainty and the need to do justice in individual cases are essential elements of an area of justice, and asserts that the Regulation provides for the connecting factors which are the most appropriate to achieve these objectives. Recital 16 explains that uniform rules should enhance the foreseeability of court decisions and ensure a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage. Recital 19 adds that specific rules should be laid down for special torts where the general rule does not allow a reasonable balance to be struck between the interests at stake.

The Rome II Regulation contains 32 Articles arranged under seven Chapters. Chapter I (Articles 1-3) deals with the scope of the Regulation. Chapter II (Articles 4-9) defines the uniform rules applicable to torts. Chapter III (Articles 10-13) defines the uniform rules applicable to restitutionary obligations. Chapter IV (Article 14) enables the parties by agreement to choose the applicable law. Chapters V and VI (Articles 15-22 and 23-28) lay down rules applicable to both torts and restitutionary obligations. Chapter VI (Articles 29-32) deals with such matters as the commencement date.

### **Material Scope**

By Article 1(1), the Rome II Regulation applies, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters. It does not apply, in particular, to revenue, customs or administrative matters, nor the liability of the State for acts and omissions in the exercise of State authority ("acta iure imperii"). Recital 8 adds that the Regulation applies irrespective of the nature of the court or tribunal seised. Recital 9 explains that claims arising out of "acta iure imperii" includes claims against officials who act on behalf of the State, and liability for acts of public authorities, including liability of publicly appointed office-holders.

Recital 7 recognises that the substantive scope and the provisions of the Regulation should be consistent with the Brussels I Regulation<sup>5</sup> and the instruments dealing with the law applicable to contractual obligations (such as the Rome Convention 1980). Recital 11 adds that the concept of a non-contractual obligation varies from one Member State to another, and therefore for the purposes of the Regulation "non-contractual obligation" should be understood as an autonomous concept. Accordingly the Rome II Regulation will be confined to claims which are governed by private law, and will not apply to a disputes between a private person and a public authority which arise out of acts done by the public authority in the exercise of its powers as such, or which involve a relationship entailing the exercise by the State of powers going beyond those existing under the rules applicable to relations between private persons.<sup>6</sup>

The Regulation deals with two classes of non-contractual obligation: torts, which are dealt with by Chapter II (Articles 4-9); and restitutionary obligations, which are dealt with by Chapter III (Articles 10-13). Further rules, applicable to both torts and restitutionary obligations, are laid down by Chapters IV-VI (Articles 14-28). For reasons of space, this paper confines its attention to torts, and does not examine the provisions dealing with restitutionary obligations.

Recital 11 declares that, since the concept of a non-contractual obligation varies from one Member State to another, for the purposes of the Regulation "non-contractual obligation" should be understood as an autonomous concept. It also explains that the conflict rules set out in the Regulation extend to non-contractual obligations arising out of strict liability. Recital 12 adds that the law applicable should also govern the question of the capacity to incur liability in tort. Otherwise the Regulation does not seek to define a tort, but it seems clear that the concept refers to an act which is wrongful, other than by reason of its being a breach of contract or trust, and which therefore gives rise to liability to pay compensation for loss arising therefrom. In contrast, a restitutionary obligation does not require a wrongful act, but a situation involving unjust enrichment, unauthorised agency, or pre-contractual dealings.

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<sup>5</sup> Regulation 44/2001, on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 OJ (L12) 1.

<sup>6</sup> See Case 29/76: *LTU v. Eurocontrol*, 1976 E.C.R. 1541; Case 814/79: *Netherlands v. Rüffer*, 1980 E.C.R. 3807; Case C-172/91: *Sonntag v. Waidmann*, 1993 E.C.R. I-1963; Case C-167/00: *VKI v. Henkel*, 2002 E.C.R. I-8111; Case C-271/00: *Gemeente Steenbergen v. Baten*, 2002 E.C.R. I-10489; Case C-266/01: *Tiard* 2003 E.C.R. I-4867; Case C-433/01: *Freistaat Bayern v. Blijdenstein*, 2004 ECR I-981; Case C-265/02: *Frahuil v. Assitalia*, 2004 E.C.R. I-1543; and Case C-292/05: *Lechouritou v. Germany*, 15 February 2007.

Article 2 contains some definitions, designed to ensure that the Regulation extends to threatened torts, and that references to "damage" extend to a corresponding result in the case of restitutionary claims. Thus Article 2(1) specifies that, for the purposes of the Regulation, damage covers any consequence arising out of tort, unjust enrichment, negotiorum gestio or culpa in contrahendo. By Article 2(2), the Regulation extends to non-contractual obligations which are likely to arise. By Article 2(3), any reference in the Regulation to an event giving rise to damage includes events giving rise to damage which are likely to occur, and any reference to damage includes damage which is likely to occur.

Various matters are excluded from the scope of the Regulation by Article 1(2) and (3). Many of these exclusions echo the Rome Convention 1980. Thus there are exclusions in respect of obligations arising out of family relationships, and relationships having comparable effects, including maintenance obligations;<sup>7</sup> obligations arising out of matrimonial property regimes, property regimes of relationships having comparable effects to marriage, wills and succession;<sup>8</sup> obligations arising under negotiable instruments;<sup>9</sup> obligations governed by company law<sup>10</sup> or relating to trusts voluntarily created;<sup>11</sup> and (subject to certain exceptions) evidence and procedure.<sup>12</sup> Another exclusion, specified by Article 1(2)(f), is for obligations arising out of nuclear damage. This reflects the liability of States under the international scheme of nuclear liability established by various treaties.<sup>13</sup>

A more surprising exclusion, specified by Article 1(2)(g), refers to obligations arising out of violations of privacy and rights relating to personality, including defamation. Although this provision is clearly motivated by

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<sup>7</sup> See Article 1(2)(a) and Recital 10.

<sup>8</sup> See Article 1(2)(b) and Recital 10.

<sup>9</sup> See Article 1(2)(c).

<sup>10</sup> See Article 1(2)(d).

<sup>11</sup> See Article 1(2)(e).

<sup>12</sup> See Article 1(3), which makes a saving for Articles 21 and 22, which deal with the formal validity of unilateral acts, the burden of proof, and modes of proof.

<sup>13</sup> See the Explanatory Memorandum accompanying the Original Proposal by the EC Commission of 22 July 2003, COM (2003) 427 final, at 9, referring to Paris Convention of 29 July 1960, the Additional Convention of Brussels of 31 January 1963, the Vienna Convention of 21 May 1963, the Convention on Supplementary Compensation of 12 September 1997, and the Protocol of 21 September 1988.

sensitivity relating to freedom of speech, the exclusion is not confined to claims against the media.<sup>14</sup>

### **Territorial Scope**

By Article 3, any law specified by the Regulation must be applied, whether or not it is the law of a Member State. This echoes the Rome Convention, and avoids the entirely perverse complexity which would arise from any attempt to distinguish between intra-Community and extra-Community disputes.

Also echoing the Rome Convention, Article 25(1) of the Regulation specifies that where a State comprises several territorial units, each of which has its own rules of law in respect of non-contractual obligations, each territorial unit must be considered as a country for the purposes of identifying the law applicable under the Regulation. Similarly Article 25(2) adds that a Member State within which different territorial units have their own rules of law in respect of non-contractual obligations is not required to apply the Regulation to conflicts solely between the laws of such units. No doubt, as in the case of the Rome Convention, the United Kingdom will decline to utilise the latter invitation to pointless complexity and confusion.

Unlike the Original Proposal presented by the EC Commission in 2003, the Regulation as adopted contains no specific provision as to the notional location of installations on the continental shelf, ships on the high seas, and aircraft in the airspace.<sup>15</sup>

### **Relationship with Other Community Legislation**

Article 27 specifies that the Regulation is not to prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict rules relating to non-contractual obligations. Recital 35 emphasises that a situation where conflict rules are dispersed among several

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<sup>14</sup> Article 30(2) requires that, by the end of 2008, the EC Commission must submit a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, taking into account rules relating to freedom of the press and freedom of expression in the media, and conflict issues related to EC Directive 95/46 on Data Protection. For the new Turkish rule on defamation and privacy, *see* Article 35 of the recently adopted Act on Private International Law and International Civil Procedure, Law Nr. 5718, 27 November 2007, promulgated in Official Gazette Nr. 26728, 12 December 2007][hereinafter “Law 5718”].

<sup>15</sup> *See*, under the Brussels I Regulation, Case C-37/00: Weber v. Universal Ogden Services, 2002 E.C.R. I-2013, and Case C-18/02: DFDS Torline v. SEKO, 2004 E.C.R. I-1417.

instruments, and where there are differences between those rules, should be avoided, but adds that the Regulation does not exclude the possibility of inclusion of conflict rules relating to non-contractual obligations in provisions of Community law with regard to particular matters. The Recital also declares that the Regulation should not prejudice the application of other instruments laying down provisions designed to contribute to the proper functioning of the internal market, insofar as they cannot be applied in conjunction with the law designated by the rules of the Regulation; and that the application of provisions of the applicable law designated by the rules of the Regulation should not restrict the free movement of goods and services as regulated by Community instruments, such as Directive 2000/31 on Electronic Commerce.<sup>16</sup> It is worth noting that EC Directive 2006/123, on Services in the Internal Market,<sup>17</sup> is careful to avoid interfering with rules of private international law.<sup>18</sup>

### **Relationship with Existing International Conventions**

Article 28(1) provides that the Regulation is not to prejudice the application of international conventions to which one or more Member States are parties at the time when the Regulation is adopted, and which lay down conflict rules relating to non-contractual obligations. But, by Article 28(2), as between Member States, the Regulation takes precedence over conventions concluded exclusively between two or more of them, insofar as such conventions concern matters governed by the Regulation. By Article 29(1), the Member States are to notify the Commission, within 12 months after the adoption of the Regulation, of the conventions referred to in Article 28(1). Thereafter the Member States are to notify the Commission of all denunciations of such conventions. By Article 29(2), the Commission is to publish in the Official Journal of the European Union, within six months of receipt, a list of the notified conventions, and the notified denunciations.<sup>19</sup>

Relevant conventions include the Hague Convention on the Law Applicable to Traffic Accidents (1971), and the Hague Convention on the Law Applicable to Products Liability (1973). Parties to the 1971 Convention include

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<sup>16</sup> 2000 OJ (L178) 1.

<sup>17</sup> [2006] OJ (L376) 36.

<sup>18</sup> See Articles 3(2) and 17(15), and Recital 90, of the Directive.

<sup>19</sup> See also Recital 36. Recital 37 adds that the Commission will make a proposal to the European Parliament and the Council concerning the procedures and conditions according to which Member States would be entitled to negotiate and conclude on their own behalf agreements with third countries in individual and exceptional cases, concerning sectoral matters, containing provisions on the law applicable to non-contractual obligations.

France, Belgium, the Netherlands, Luxembourg, Spain, Austria, Poland, the Czech Republic, Slovakia, Slovenia, Latvia, and Lithuania.<sup>20</sup> Parties to the 1973 Convention include France, the Netherlands, Luxembourg, Spain, Finland, and Slovenia.<sup>21</sup> Since neither of the Hague Conventions is in force between EC Member States only, the effect of Article 28 is that, in the Member States which are already party to them, and in the absence of denunciation, the Hague Conventions will prevail over the Regulation. But Article 30(1) requires that the report on the application of the Regulation, which must be submitted by the Commission within four years after its entry into force, and is to be accompanied if necessary by proposals for its adaptation, must include a study on the effects of Article 28 with respect to the Hague Convention 1971 on Traffic Accidents.

## **THE MAIN RULES**

### **Introduction**

The main rules on the law applicable to a tort claim are laid down by Article 4 of the Rome II Regulation. These rules apply to most types of tort. Exceptional rules applicable to certain particular torts (product liability; unfair competition; environmental damage; infringement of intellectual property; and industrial action) are specified by Articles 5-9.

Article 4 of the Regulation specifies:

"1. Unless otherwise provided for in this Regulation, 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.

2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.

3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular

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<sup>20</sup> Other parties are Switzerland, Bosnia-Herzegovina, Croatia, Macedonia, Serbia, Montenegro, and Belarus.

<sup>21</sup> Other parties are Norway, Croatia, Macedonia, Serbia, and Montenegro.

on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question."

Despite its triple structure, in substance Article 4 lays down a single general rule, containing two limbs, and a single exception thereto. Thus the combined effect of Article 4(1) and (2) is to establish a general rule whose operation depends on the existence or otherwise of an habitual residence common to the parties. If both parties were habitually resident in the same country, the tort is governed by the law of that country. If no such common habitual residence existed, the tort is governed by the law of the place of injury. Then Article 4(3) provides an exception, described by Recital 18 as an "escape clause," in favour of the law of another country which has a manifestly closer connection with the tort. The general rule laid down by Article 4(1) and (2) is definite in content, and probably rather firm in effect. In contrast the exception specified by Article 4(3) is vague or flexible in content, but probably rather limited in scope.

Article 4 envisages that a single law will govern the various issues which may arise in the context of a tort claim between a given plaintiff and a given defendant. This approach is reinforced by Article 15, which subjects a long (but non-definitive) list of broad issues to the law which is applicable under Article 4. Accordingly the law which is applicable by virtue of Article 4 may conveniently be referred to as "the proper law of the tort". On the other hand, Article 4 also envisages that different laws may apply as between different pairs of party, even though the claims arise out of the same incident.

The rules laid down by Article 4 are neutral as between the parties and as regards the content and purposes of the conflicting laws. They seem to require the application of the substantive rules contained in a law whose identity is determined solely by reference to connecting-factors. No account is taken of whether the substantive rules so chosen favour the plaintiff or the defendant; of whether their purpose is deterrence or compensation; or of whether the country whose law is chosen, or any other country, may be regarded as having a substantial interest in the application of its substantive rules (in preference to the different substantive rules of another connected country) in the circumstances of the case. These choice of law rules are country-selecting, rather than rule-selecting, in character.

To this content-neutrality a rather minor qualification is made by Article 17, which specifies that, in assessing the conduct of the person claimed to be liable, account must be taken, as a matter of fact and insofar as is appropriate, of the rules of safety and conduct which were in force at the place and time of the

event giving rise to the liability.<sup>22</sup> Recital 34 indicates that this refers to the rules of safety and conduct in operation in the country in which the harmful act was committed, such as road safety rules in the case of an accident. As an obvious example of the operation of Article 17, one may envisage a claim between persons habitually resident in England, arising from a road accident in France. Although under Article 4 liability will be governed by English law, as that of the common habitual residence, in determining whether a driver has acted with reasonable care, as his duty under English law requires, one must take account of the French rule of the road which specifies that normally the correct course is to keep to the right, rather than (as in England) to the left, side of the road.<sup>23</sup>

The reference made by Article 4 is always to the internal law of the relevant country. Renvoi is excluded by Article 24, which declares that the application of the law of any country specified by the Regulation means the application of the rules of law in force in that country other than its rules of private international law.<sup>24</sup>

### **The Law of the Common Habitual Residence**

Article 4(2) of the Rome II Regulation ensures that the law of the country in which both parties were habitually resident will normally prevail over the law of the country in which the events constituting the tort occurred. But it will remain possible, under Article 4(3), for the law of the country in which the events constituting the tort occurred, or even that of a third country, to prevail over the law of the common residence, on the basis that it is the country with which the tort has a manifestly closer connection.

Ancillary rules on the habitual residence of companies and other bodies, and of self-employed individuals, are laid down by Article 23. As regards a

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<sup>22</sup> Article 17 accords with both the traditional English law and the Hague Conventions. *See* The Halley 1868 LR 2 PC 193; *Kuwait Airways v Iraqi Airways* (Nos 4 and 5) 2002 2 AC 883; Article 7 of the Hague Convention on Traffic Accidents (1971); and Article 9 of the Hague Convention on Products Liability (1973).

<sup>23</sup> *See also* *Ellis v Parto*, 918 P.2d 540 (Washington, 1996), applying the law of the place of the accident to "rules governing vehicle turnarounds," despite a common residence elsewhere. *See also* *Douglas v Hello! Ltd*, 2006 QB 125, where the English Court of Appeal accepted that, in the context of a claim for breach of confidence or invasion of privacy by way of publication of personal information, which was governed by English law as that of the place of publication, the law of the place where the events to which the information related took place (New York) could be relevant to whether there was a reasonable expectation that the events would remain private.

<sup>24</sup> This accords with traditional English law. *See* Sec. 9(5) of the Private International Law (Miscellaneous Provisions) Act 1995.

company or other body, corporate or unincorporated, Article 23(1) specifies that its place of central administration must be treated as its habitual residence; but that where the event giving rise to the damage occurs, or the damage arises, in the course of operation of a branch, agency or other establishment, the location of that establishment must be treated as its habitual residence. Probably the place of central administration of a company is the place at which its principal managerial organ (in English terms, its board of directors) usually meets, rather than the office from which its main trading activities are conducted.<sup>25</sup> As regards an individual acting in the course of business activity on his own account, Article 23(2) specifies that his principal place of business must be treated as his habitual residence. Unfortunately the Regulation offers no definition of habitual residence for an individual who is not, or not relevantly, engaged in a business activity on his own account.

The preference given by Article 4 to the common habitual residence over the place of the events constituting the tort reflects a general international trend in recent decades. Thus, as regards the measure of damages to be awarded in respect of road accidents, both at common law and under the Private International Law (Miscellaneous Provisions) Act 1995, the English courts have usually awarded higher damages in accordance with the law of the common residence than would have been available under the law of the place of the accident.<sup>26</sup> In the United States, ever since *Babcock v Jackson*<sup>27</sup> the plaintiff has usually been given the benefit of the law of the common residence where it favours him in respect of a wide variety of issues;<sup>28</sup> and, after earlier rulings to the contrary,<sup>29</sup> the current trend in American courts is also to apply that law

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<sup>25</sup> See *The Rewia*, 1991 2 Lloyd's Rep 325 (CA); and *King v. Crown Energy*, 2003 ILPr 28.

<sup>26</sup> See *Boys v. Chaplin*, 1971 AC 356, decided under an interest-based exception to the double actionability rule at common law; *Edmunds v. Simmonds*, 2001 1 WLR 1003, decided under the exception to the law of the place of injury in favour of a substantially more significant connection, specified by Section 12 of the 1995 Act; and *Harding v. Wealands*, 2006 UKHL 32, decided on the basis of procedural characterisation. See also *Johnson v. Coventry Churchill*, 1992 3 All ER 14, applying the law of the common residence of the employer and the employee so as to avoid the employer's social-security-related immunity existing under the law of the place where the construction accident occurred.

<sup>27</sup> 191 N.E.2d 279 (N. Y. 1963).

<sup>28</sup> See, for example, *Tooker v. Lpes*, 249 N.E.2d. 394 (N.Y., 1969); *Thompson v. Thompson*, 193 A.2d 439 (N.H., 1963); *Reich v. Purcell*, 432 P.2d 727 (California, 1967); and *Sexton v. Ryder*, 320 N.W.2d 843 (Michigan, 1982).

<sup>29</sup> See, for example, *Milkovitch v. Saari*, 203 N.W.2d 408 (Minnesota, 1973); *Zelinger v. State Sand & Gravel Co.* 156 N.W.2d 466 (Wisconsin, 1968); and *Fu v. Fu*, 733 A.2d 1133 (New Jersey 1999).

where it favours the defendant.<sup>30</sup> Enactments closely resembling Article 4(2) of the Rome II Regulation have been adopted in Germany,<sup>31</sup> Switzerland,<sup>32</sup> and Quebec.<sup>33</sup> Moreover results similar to those envisaged by Article 4(2) may often be reached under the Hague Convention on Traffic Accidents (1971), and in Turkey under Article 34(3) of the recently adopted Act on Private International Law and International Civil Procedure.<sup>34</sup>

In contrast France has retained a rigid rule in favour of the law of the place of injury, even where the parties are both habitually resident in the same other country, except where the Hague Conventions on Traffic Accidents or Products Liability apply.<sup>35</sup> Moreover a rigid rule in favour of the law of the country in which the tort occurred has recently been adopted in both Canada<sup>36</sup> and Australia.<sup>37</sup> In the United States a rigid rule in favour of the law of the place of injury has been retained by ten of the States.<sup>38</sup>

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<sup>30</sup> See, for example, *Schultz v. Boy Scouts of America*, 480 N.E.2d 679 (N.Y., 1985); *Collins v. Trius*, 663 A.2d 570 (Maine, 1995); *Myers v. Langlois*, 721 A.2d 129 (Vermont, 1998); *Lessard v. Clarke*, 736 A.2d 1226 (New Hampshire, 1999); and *Oyola v. Burgos*, 864 A.2d 624 (Rhode Island, 2005). See also Symeon Symeonides, *Choice Of Law in the American Courts in 1999: One More Year*, 48 AMERICAN JOURNAL OF COMPARATIVE LAW (AJCL) 143 (2000).

<sup>31</sup> See the EGBGB (as amended in 1999), Article 40(2).

<sup>32</sup> See the Federal Statute on Private International Law 1987, Article 133.

<sup>33</sup> See Civil Code 1991, Article 3126. See also the Louisiana Civil Code, Article 3544(1), which applies the law of the country in which both parties were domiciled at the time of the injury to issues pertaining to loss distribution and financial protection.

<sup>34</sup> Law 5718.

<sup>35</sup> See Pierre Mayer, *DROIT INTERNATIONAL PRIVÉ* 443-51 (5th ed, 1994).

<sup>36</sup> See *Tolofson v. Jensen* (1994) 120 DLR4th 289 (Supreme Court of Canada). The rule in favour of the place where the tort occurred is absolutely rigid in inter-provincial cases; see *Bezan v Vander Hooft* 2004 ABCA 44 (Alberta CA). But in international cases there is a very limited exception which occasionally permits application of the law of the common residence. See *Hanlan v. Sernesky*, (1998) 38 OR (3d) 479 (Ontario CA), affirming (1997) 35 OR(3d) 603; *Wong v. Wei*, (1999) 87 ACWS(3d) 465 (British Columbia); *Wong v. Lee*, (2002) 58 OR(3d) 398 (Ontario CA); and *Roy v. North American Leisure Group*, (2004) 246 DLR(4th) 306 (Ontario CA).

<sup>37</sup> See *Pfeiffer v. Rogerson*, (2000) 203 CLR 503 (High Court of Australia), and *Renault v. Zhang* (2002) 187 ALR 1 (High Court of Australia). The rule in favour of the place where the tort occurred is absolutely rigid in inter-provincial cases. But in international cases it may be possible to treat certain questions of assessment of damages as procedural.

<sup>38</sup> See Symeon Symeonides, in his *Annual Survey of American Choice-of-Law Cases*, 4 AJCL 181 (1996); 45 AJCL 447 (1997); 46 AJCL 233 (1998); 47 AJCL 327 (1999); 48 AJCL 143

The merit of a systematic preference for the law of the common residence over that of the place where the tort occurred, as adopted by Article 4(2) of the Rome II Regulation, is open to doubt. Certainly there are some situations in which it seems clear that the law of the common residence should prevail. In particular, in the case of most issues relating to a road accident, it seems desirable to apply the law of the common residence where it requires higher standards of conduct, or provides higher levels of compensation, than the law of the place of the accident. For the law of the common residence has a substantial interest in protecting its resident plaintiff, both in respect of his physical safety and his financial position, and (at least in the usual case where the defendant's residence coincides with the place of registration of his vehicle) its application can hardly defeat the legitimate expectations of its resident defendant and his insurer. Even so, it is suggested that, in order to avoid injustice to the liability insurer, a person involved in a road accident as a driver, a driver's employer, or a vehicle-owner, should be treated for this purpose as habitually resident in the country where his vehicle is registered.<sup>39</sup> Moreover the law of the place of the accident lacks any substantial conflicting interest, since its rules on road accidents are not intended to encourage dangerous or risk-taking activity, but to protect the financial position of resident defendants and their insurers.

Thus it seems proper to apply the law of the common residence to a road accident, where its rules are more favourable to the plaintiff than those of the place of injury, in relation to such issues as the duty and standard of care owed by a driver to a gratuitous passenger; the possibility of liability between members of a family; the possible immunity from liability of a charitable body; the admissible heads of damage, and other questions affecting the measure of damages; the period within which proceedings must be commenced; and the existence of vicarious liability (including that of a vehicle-owner for the negligence of a driver to whom he has hired the vehicle; and that of a tavern-keeper for the negligent driving of a customer who has left the tavern). The same approach seems justified in respect of other kinds of accident giving rise to physical injuries, unless it is apparent that the lower standards of conduct or compensation accepted by the law of the place of the accident are designed to encourage risk-taking activity.

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(2000); 49 AJCL 1 (2001); 50 AJCL 1 (2002); 51 AJCL 1 (2003); 52 AJCL 9 (2004); 53 AJCL 559 (2006) and 54 AJCL 697 (2007).

<sup>39</sup> This problem seems most likely to arise in Europe in cases where a tourist hires a car in the country which he is visiting (as happened in *Edmunds v. Simmonds*, (2001) 1 WLR 1003), or where a person changes his habitual residence but his car remains registered in the country from which he moved (as appears to have happened in *Harding v. Wealands*, 2006 UKHL 32).

It is submitted, however, that preference for the law of the common residence is not justified in converse situations - where, in respect of the same issues arising in relation to a road or similar accident, the law of the common residence accepts lower standards of conduct, or provides lower levels of compensation, than the law of the place of the accident. Certainly the law of the common residence has an interest in protecting its resident defendant (and his insurer) from possibly excessive financial burdens. But the law of the place of the accident has a substantial conflicting interest in maintaining the deterrent effect of its rules in respect of all conduct within its borders, and also in protecting the financial security of persons who are physically injured within its borders, even if they reside elsewhere. Since each country has a substantial interest in the application of its own substantive rules, it is submitted that the law of the place of the accident should apply, as it would have done between parties not having a common residence.

Displacement of the law of the place of the accident in cases where that country has a substantial interest in applying its rules seems to the present writer to involve an unjustifiable disregard for the territorial sovereignty of that country, and for the normal expectations of most private persons (who tend to envisage the application of law on a territorial basis), without any sufficient countervailing advantage. Where substantial interests of different legal orders conflict, judicial weighing to determine the greater interest cannot be done on a principled basis, and in practice is likely to lead to preference for the law of the forum. The desirable solution to such conflicting interests is therefore to adhere to the law of the place of the accident. Thus, in accident cases involving the issues presently under discussion, the preferable solution is not, as under Article 4(2) of the Regulation, to prefer the law of the common residence regardless of its content, but to apply either the law of the common residence or that of the place of injury, whichever is more favourable to the plaintiff. Unfortunately it seems clear that the Regulation intends that the law of the common residence should be applied in accident cases even when it favours the defendant, and that the exception provided by Article 4(3) cannot properly be used to substitute a rule for accident cases which gives the plaintiff the benefit of either the law of the common residence or the law of the place of the accident, whichever is more favourable to him.

The operation of Article 4(2) in cases of intentional physical interference with person or property also seems open to criticism. It is submitted that it would have been better to have adhered to the law of the place where the tort occurred, despite a common residence elsewhere, for all issues arising in respect of torts (such as battery; false imprisonment; and trespass to land or chattels) which involve deliberate interference with the plaintiff's person or tangible property. The case is perhaps clearest where the intentional interference involves the purported exercise of police powers, a situation which admittedly

is excluded from the scope of the Rome II Regulation by Article 1 as a public rather than a civil matter. Thus if, for example, an arrest takes place in France, respect for French sovereignty, as well as the need for certainty, requires that the grounds which justify arrest, the manner in which an arrest should be effected, the amount of force which may properly be used in effecting an arrest, and the remedies open to a person unlawfully arrested, should be referred to French law - even if, for example, the person arrested is an Englishman and the person who makes the arrest is an English policeman who has been summoned through Interpol or Europol to assist the French police.<sup>40</sup> But even where no public authority is involved, the interest of any country in regulating the deliberate use of force within its borders is so strong that it should only be overridden by a stringent public policy against scandalous or unconscionable rules. Thus, for example, Spanish law should govern all aspects of a tort claim between English football supporters arising from a fight in a bar near the Real Madrid ground before or after a match which the parties were visiting Spain in order to attend. Unfortunately it seems clear that the Regulation intends that the law of the common residence should be applied even in cases of intentional interference, and that the exception provided by Article 4(3) cannot properly be used to confine Article 4(2) to accident cases.

On the other hand, in one respect Article 4(2) is too narrowly written, since it does not extend to cases where the parties are habitually resident in different countries, but (so far as relevant) the laws of those countries are identical to each other and different from that of the country where the tort occurred. Where it would be appropriate to apply, in preference to the law of the country where the tort occurred, that of the country in which both parties were habitually resident, it will be equally appropriate to apply the law common to the different countries in each of which one of the parties was habitually resident. For example, if English and Irish laws both admit the award of damages for pain and suffering in personal injury cases, but Maltese law does not, such an award should be possible in favour of an Irish plaintiff against an English defendant in respect of injuries arising from a road accident in Malta.<sup>41</sup> Despite the narrow wording of Article 4(2) in this respect, it seems probable that the exception in favour of a manifestly closer connection, provided for by Article 4(3), will usually be invoked to achieve this result.

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<sup>40</sup> See *District of Columbia v. Coleman*, 667 A.2d 811 (D.C. 1995), applying the law of the place of the incident in favor of a foreign police officer in respect of the permissible degree of force.

<sup>41</sup> See *Reich v Purcell*, 432 P.2d 727 (California, 1967); *Pfau v Trent Aluminium Co*, 263 A.2d 129 (N.J. 1970); *Chila v. Owens*, 348 F.Supp. 1207 (D.C.N.Y. 1972); and *Gross v. McDonald*, 354 F.Supp. 378 (D.C. Pa. 1973).

It has been noted that Article 4 envisages that different laws may apply as between different pairs of party even though the claims arise out of the same incident. Thus, for example, a plaintiff who has a common residence with the defendant will see his claim governed the law of the common residence under Article 4(2), while another plaintiff who suffers similar injuries as a result of the same conduct but who is resident in the country where the events occurred will see his claim subjected to the law of the place of injury under Article 4(1). There is no doubt that this can lead to strange results, perhaps amounting to arbitrary discrimination. The facts of an American case, *Tooker v. Lopes*,<sup>42</sup> provide a useful illustration. Two gratuitous passengers in the same car were injured in Michigan as a result of the ordinarily, but not grossly, negligent driving by their driver, who was habitually resident in New York, where the car was registered. Under New York law a driver was liable to his gratuitous passenger for ordinary negligence, but under Michigan law a driver was not liable to his gratuitous passenger in the absence of gross negligence. The driver and one of the passengers were habitually resident in New York, but the other passenger was habitually resident in Michigan. Under the Rome II Regulation, as indeed under New York conflict rules,<sup>43</sup> the New York passenger's claim succeeds and the Michigan passenger's claim fails. To the present writer it is hard to accept this result. Thus it is suggested that the exception under Article 4(3) should be invoked so as to apply the law of the place of the tort to all the claims in multi-party situations where the application of the law of the common residence between some of the parties would produce an unjustifiable discrimination between parties who were otherwise involved in the same way in the same incident.

### **The Law of the Place of Direct Injury**

Under the general rule laid down by the Rome II Regulation, in the absence of a common habitual residence, the law applicable to a tort is that of the place of direct injury. Article 4(1) makes applicable "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." Recital 17 adds that in cases of personal injury or damage to property, the country in which the damage occurs is the country where the injury was sustained or the property was damaged respectively. Thus, where the various events constituting the tort have occurred in more than one country, the reference is to the country in which the plaintiff incurred his direct or initial injury; and not to that of the country in which the

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<sup>42</sup> 249 N.E.2d 394 (N.Y., 1969).

<sup>43</sup> See *Tooker v. Lopes*, 249 NE2d 394 (N.Y. 1969), and *Neumeier v. Kuehner*, 286 N.E.2d 454 (N.Y., 1972).

defendant's wrongful conduct occurred, nor to that of the country in which the plaintiff suffered further loss, consequential on his initial injury.

It is clear that the decisions of the European Court, distinguishing between the direct injury and consequential loss for the purpose of jurisdiction under Article 5(3) of the Brussels I Regulation, will also be relevant to the application of Article 4(1) of the Rome II Regulation. Thus where a bank is sued for wrongful cancellation of credit in connection with a building project, the direct injury arises in the country where the project is suspended and the plaintiff's subsidiary is rendered insolvent, and only consequential loss is incurred at the plaintiff's residence in another country.<sup>44</sup> Similarly, where a person is wrongfully arrested and his tangible property is wrongfully seized, the direct injury arises in the country where the arrest and the seizure take place, and only consequential financial loss is incurred at his residence in another country.<sup>45</sup> Again, where a consignee of goods which have been damaged in the course of a transport operation comprising carriage by sea and then by land sues the maritime carrier, the direct injury arises at the place where the maritime carrier had to deliver the goods, and not at the consignee's residence, where it received the goods at the conclusion of the transport operation and discovered the damage to them.<sup>46</sup> Similarly, in the case of a claim against a financial advisor for a loss sustained as a result of a speculative investment, the direct injury arises in the country where the loss of the plaintiff's assets is incurred, and not in another country where the plaintiff is resident and his assets are concentrated and in which he suffers consequential financial loss.<sup>47</sup> But where direct injury is sustained in several countries, the laws of all these countries will have to be applied on a distributive basis, each law applying to the injury sustained in its territory.<sup>48</sup>

As regards the tort of inducing a breach of contract, it seems that the country of the direct injury under Article 4(1) is the country in which the breach induced occurred and the plaintiff suffered direct financial loss (for example, by failing to receive a benefit contracted for), even if the defendant's act of inducement took place elsewhere.<sup>49</sup> As regards liability for false statements

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<sup>44</sup> See Case 220/88: *Dumez v. Hessische Landesbank*, 1990 E.C.R. I-49.

<sup>45</sup> See Case C-364/93: *Marinari v. Lloyd's Bank*, 1995 E.C.R. I-2719.

<sup>46</sup> See Case C-51/97: *Réunion Européenne v. Spliethoff's Bevrachtingskantoor*, 1998 E.C.R. I-6511.

<sup>47</sup> Case C-168/02: *Kronhofer v. Maier*, 2004 E.C.R. I-6009.

<sup>48</sup> See the Explanatory Memorandum, COM (2003) 427 final, at 11. See also Case C-68/93: *Shevill v Presse Alliance*, 1995 E.C.R. I-415.

<sup>49</sup> See *Metall und Rohstoff v Donaldson Lufkin & Jenrette*, 1990 QB 391 (CA).

made by the defendant and relied on by the plaintiff, it seems that the country of the direct injury is the country in which goods were delivered or money was paid as a result of the plaintiff's reliance on the statement; rather than the country where the statement was issued by the defendant, or the country where the plaintiff received the statement and acted in reliance on it by taking decisions or giving instructions leading to the delivery or payment elsewhere.<sup>50</sup>

The preference under Article 4(1) for the place of direct injury over the place of the defendant's conduct accords with the solution adopted in the United Kingdom by Section 11 of the Private International Law (Miscellaneous Provisions) Act 1995 for cases of physical injury to person or property. It also accords with the existing laws of France, the Netherlands, Switzerland<sup>51</sup>, and Turkey;<sup>52</sup> and with the approach adopted in the United States in the minority of States which still adhere rigidly to the law of the place where the tort occurred.<sup>53</sup> On the other hand in Germany, Article 40(1) of the Introductory Law to the Civil Code (as amended in 1999) gives the plaintiff an option between the law of the place of the defendant's conduct and the law of the place of injury. The plaintiff is also given an option in Italy and Poland.<sup>54</sup>

The rationale of Article 4(1) is addressed by Recital 16, which explains that the rule strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage, and also reflects the modern approach to civil liability and the development of systems of strict liability. Further justifications for a rule in favour of the law of the place of injury, rather than that of the defendant's conduct, or whichever of those two laws is more favourable to the plaintiff, are that it promotes certainty; that the place of injury is easily determined, at least in cases of physical injury; that it will rarely defeat any legitimate expectation of the defendant; and that a plaintiff who is injured in his own country will have little ground for complaint if he is denied the benefit of more favourable rules laid down in the country where the defendant resided and acted.

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<sup>50</sup> See *Domicrest v. Swiss Bank Corp*, 1999 QB 548 (Rix J); *Dunhill v. Diffusion Internationale de Maroquinerie de Prestige*, 2002 ILPr 13 (Rokison QC); *Raiffeisen Zentralbank v. National Bank of Greece*, (1999) 1 Lloyd's Rep 408 (Tuckey J); and *ABCI v. Banque Franco-Tunisienne*, (2003) 2 Lloyd's Rep 146 (CA).

<sup>51</sup> See the Explanatory Memorandum, COM (2003) 427 final, at p 11.

<sup>52</sup> See Article 34(1) and (2) of Law 5718.

<sup>53</sup> See *Laboratory Corp of America v Hood*, 911 A.2d 841(Maryland, 2006). Cf *Fanning v. Dianon Systems*, Civil No. 05-cv-01899-LTB-CBS. 2006 WL 2385210 (D Colorado, Aug. 16, 2006).

<sup>54</sup> See the Explanatory Memorandum, COM (2003) 427 final, at 11.

### **The Law of the Manifestly Closer Connection**

By way of exception to the general rule laid down by Article 4(1)-(2) of the Rome II Regulation in favour of the law of the common residence or the place of injury, Article 4(3) gives preference to a manifestly closer connection. The first sentence of Article 4(3) specifies: "Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply." Its second sentence adds: "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." Recital 18 describes Article 4(3) as an "escape clause" from Article 4(1) and (2), applicable where it is clear from all the circumstances of the case that the tort is manifestly more closely connected with another country.

Little guidance is given by the Regulation as to the scope of the exception, or to the meaning of the concept of a manifestly closer connection, other than by reference to a pre-existing relationship between the parties, as mentioned in the second sentence of the provision. In its vagueness as to its central concept Article 4(3) resembles the current English rule laid down by Section 12 of the Private International Law (Miscellaneous Provisions) Act 1995, which provides for displacement of the law of the country in which the events constituting the tort occurred, and which is therefore applicable under the general rule laid down by Section 11. The displacement is in favour of the law of another country with which the tort has a more significant connection, and which is therefore in all the circumstances substantially more appropriate for determining the relevant issue. Section 12 requires a comparison of the significance of the various connecting factors with the two countries, and specifies that the relevant factors include ones relating to the parties, to any of the events which constitute the tort, or to any of the circumstances or consequences of those events. But no guidelines are offered to assist in evaluating the significance of a connection or group of connections, in itself or in comparison with that of another connection or group, or in otherwise evaluating the substantial appropriateness of a solution. This extraordinary vagueness reflects the Law Commissions' earlier Consultation Paper,<sup>55</sup> which had considered and specifically rejected every known principle by which relative significance could be ascribed to various connections. The resulting English case-law has adopted a restrictive approach to Section 12, so that its ultimate effect is essentially to make applicable in accident cases the law of the habitual residence of both parties at the time of the accident where that law is more favourable to the plaintiff than that of the

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<sup>55</sup> Working Paper 87, Consultative Memorandum 62 (1984).

country in which the accident occurred.<sup>56</sup> In Turkey an escape device similar to Article 4(3) of the Rome II Regulation, and to Section 12 of the 1995 Act, is provided for by Article 34(3) of the recently adopted Act on Private International Law and International Civil Procedure.<sup>57</sup>

The essentially meaningless formulas adopted by Article 4(3) of the Rome II Regulation and Section 12 of the 1995 Act may be contrasted with the serious attempt at definition or at least guidance adopted in the United States by the American Law Institute's Restatement, Second, Conflict of Laws (1971), §§ 6 and 145.<sup>58</sup> This adopts a rule subjecting the rights and liabilities of the parties with respect to an issue in tort to the internal law of the country which, with respect to that issue, has the most significant relationship to the occurrence and the parties. It specifies that relevant contacts include: (a) the place where the injury occurred; (b) the place where the conduct causing the injury occurred; (c) the domicile, residence, nationality, place of incorporation and place of business of the parties; and (d) the place where the relationship, if any, between the parties is centred. It also attempts to give meaning to the concept of significance, by requiring that the significance of the contacts should be evaluated with respect to the particular issue, and in the light of the following factors: (a) the needs of the inter-state and international systems; (b) the relevant policies of the forum; (c) the relevant policies of other interested countries, and the relative interests of those countries in the determination of the particular issue; (d) the protection of justified expectations; (e) the basic policies underlying the particular field of law; (f) certainty, predictability and uniformity of result; and (g) ease in the determination and application of the law to be applied.

It is very obscure how far the exception provided by Article 4(3) of the Rome II Regulation can be utilised where there is no pre-existing relationship between the parties, as referred to in the second sentence. The wording suggests

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<sup>56</sup> See *Edmunds v. Simmonds*, (2001) 1 WLR 1003; and *Roerig v. Valiant Trawlers*, (2002) 1 All ER 961 (CA). See also *Harding v Wealands*, 2006 UKHL 32, using procedural characterization to achieve a similar result.

<sup>57</sup> Law 5718.

<sup>58</sup> In the United States, the largest group of states now follow either the "most significant relationship" approach advocated by the Restatement Second, or a similar approach involving "significant contacts." Twenty-six states (or equivalent) in this category. Symeon Symeonides, *Annual Survey of American Choice-of-Law Cases*, 54 AJCL 697 (2006). See also *Huynh v. Chase Manhattan Bank*, 465 F3d 992 (9th Cir., 2006), applying Restatement Second to time-limitation in actions brought in federal courts under federal-question jurisdiction. A similar approach has been adopted in Ireland; see *Grehan v Medical Inc*, 1988 ECC 6, and *McKenna v. Best Travel*, 17 December 1996 (Lavan J).

that such application is in principle possible, albeit in rare circumstances. Perhaps the clearest case for such application is where the parties reside in different countries whose laws are in relevant respects identical to each other but different from the law of the place of injury. In that situation the application under Article 4(3) of the law common to the parties' residences will rectify a drafting defect in Article 4(2). It also seems arguable that Article 4(3) may properly be used to make the law of the place of injury prevail over the law of the common residence where there would otherwise be an unacceptable discrimination between plaintiffs who are resident in different countries but are injured in the same incident. But beyond these cases it seems unlikely that Article 4(3) can properly be used to overcome the arguably excessive width of Article 4(2), so as to apply the law of the place of injury, despite a common residence of the parties, whenever it seems clear that the law of the place of injury has a substantial interest in the application of its rules which favour recovery in accident cases, or which regulate the deliberate use of physical force within its borders.

The second sentence of Article 4(3) of the Rome II Regulation specifies that a manifestly closer connection with a country may be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort in question. The Explanatory Memorandum<sup>59</sup> indicates that the pre-existing relationship need not consist of an actual contract. It may take the form of a contractual relationship which is only contemplated, as in the case of the breakdown of negotiations or of annulment of a contract, or it may be a family relationship. But it is considered implicit that where the pre-existing relationship consists of a consumer or employment contract, and the contract contains a choice-of-law clause, Article 4(3) of the Rome II Regulation cannot have the effect, in relation to torts, of depriving the weaker party of the protection of the law which protects him, as regards contracts, under Articles 5 and 6 of the Rome Convention 1980. In enabling a tort claim to be subjected to the law which governs a pre-existing contract between the same parties, Article 4(3) accords with the existing English law, which uses Section 12 of the 1995 Act in a similar way.<sup>60</sup>

### **Agreements choosing the Applicable Law**

It has been seen that, under Article 4(3) of the Rome II Regulation, a tort claim may in some cases be governed by the law which applies to a contract

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<sup>59</sup> COM (2003) 427 final, at 12-13.

<sup>60</sup> See *Johnson v. Coventry Churchill International*, (1992) 3 All ER 14; *Glencore v. Metro*, (2001) 1 Lloyd's Rep 284; *Base Metal Trading Ltd v. Shamurin*, (2005) 1 All ER (Comm) 17 (CA); and *Trafigura Beheer v. Kookmin Bank*, (2006) 2 Lloyd's Rep 455 (Aikens J).

between the same parties, concluded before the events constituting the tort occurred, on the basis that the tort claim is manifestly most closely connected with the country whose law governs the contract.

In addition Article 14 of the Regulation enables parties to make an agreement, choosing the law applicable to a tort claim between them.<sup>61</sup> This does not apply to claims for unfair competition, restriction of competition, or infringement of an intellectual property right.<sup>62</sup> By Article 14(1), the agreement may be entered into after the event giving rise to the damage has occurred. Where all the parties are pursuing a commercial activity, and the agreement is freely negotiated, the agreement may also be entered into before the event giving rise to the damage has occurred.<sup>63</sup> The requirement of commercial activity appears to exclude agreements with a consumer or an employee. As under Article 3 of the Rome Convention 1980, the choice must be expressed or demonstrated with reasonable certainty by the circumstances of the case, and is not to prejudice the rights of third parties (such as liability insurers). Again under the influence of the Rome Convention, Article 14(2) specifies that where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in a country other than the country whose law has been chosen, the choice of the parties is not to prejudice the application of provisions of the law of that country which cannot be derogated from by agreement. Article 14(3) adds that where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in one or more of the EC Member States, the parties' choice of a law other than that of a Member State is not to prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.

### **Public Policy and Overriding Rules**

Echoing Article 16 of the Rome Convention, Article 26 of the Rome II Regulation makes a classic saving for the stringent public policy of the law of the forum. It specifies that the application of a provision of the law of any country specified by the Regulation may be refused if such application is manifestly incompatible with the public policy ("*ordre public*") of the forum. Recital 32 adds that, in particular, the application of a provision of the law designated by the Regulation which would have the effect of causing non-

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<sup>61</sup> See also Recital 31.

<sup>62</sup> See Articles 6(4) and 8(3).

<sup>63</sup> In contrast, Article 34(5) of the recently adopted Turkish Act on Private International Law and International Civil Procedure (Law 5718) enables parties explicitly to choose the law applicable to a tort, but only after the tort has been committed.

compensatory, exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the forum State, be regarded as being contrary to the public policy ("ordre public") of the forum.

In addition, Article 16 of the Regulation makes provision for overriding mandatory rules contained in the *lex fori*. Echoing Article 7(2) of the Rome Convention, Article 16 of the Regulation specifies that nothing therein shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the tort. This corresponds to the saving by Section 14(4) of the (UK) Private International Law (Miscellaneous Provisions) Act 1995 for any rule of law which has effect notwithstanding the rules of private international law applicable in the particular circumstances. But the Regulation contains no provision resembling Article 7(1) of the Rome Convention, in favour of overriding mandatory rules of a country other than the forum. In the context of tort, it is difficult to discern any need for provisions dealing with overriding mandatory rules, even ones contained in the *lex fori*.

### **SOME PARTICULAR TORTS**

Particular rules for certain torts are laid down by Articles 5-9 of the Rome II Regulation. The relevant torts are product liability; unfair competition; environmental damage; infringement of intellectual property; and industrial action. The particular rules derogate to a varying extent from the main rules laid down by Article 4. This approach contrasts with the traditional English law, under which these torts are governed, along with other torts, by the normal rules specified in ss 11 and 12 of the 1995 Act.

#### **Product Liability**

Article 5 of the Regulation is entitled "product liability". It provides:

"1. Without prejudice to Article 4(2), the law applicable to a non-contractual obligation arising out of damage caused by a product shall be:

(a) the law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred, if the product was marketed in that country; or, failing that,

(b) the law of the country in which the product was acquired, if the product was marketed in that country; or, failing that,

(c) the law of the country in which the damage occurred, if the product was marketed in that country.

However, the law applicable shall be the law of the country in which the person claimed to be liable is habitually resident if he or she could not reasonably foresee the marketing of the product, or a product of the same type, in the country the law of which is applicable under (a), (b) or (c).

2. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraph 1, 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."

Recital 18 explains that the conflict rule in matters of product liability should meet the objectives of fairly spreading the risks inherent in a modern high-technology society, protecting consumers' health, stimulating innovation, securing undistorted competition and facilitating trade. It declares that the creation of a cascade system of connecting factors, together with a foreseeability clause, is a balanced solution in regard to these objectives.

Article 5 of the Regulation as adopted departs very substantially from the version contained in the original proposal presented by the EC Commission. It would scarcely be unfair to suggest that the adopted provision merits a prize for maximum ambiguity! In the circumstances it seems proper to proceed, but with some caution, in seeking guidance on the scope of Article 5 from the EC Commission's Explanatory Memorandum which accompanied its Original Proposal of 22nd July 2003,<sup>64</sup> and from the Hague Convention on the Law Applicable to Products Liability (1973).

As regards the concept of a product, it seems proper to follow the suggestion in the Explanatory Memorandum<sup>65</sup> that this has the same meaning in Article 5 of the Regulation as in EC Directive 85/374 (as amended),<sup>66</sup> which has partially harmonised the substantive laws of the Member States in respect of product liability. Thus, as specified by Article 2 of the Directive, "product" means any movable, even if incorporated into another movable or into an

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<sup>64</sup> See COM (2003) 427 final, especially at 13-15.

<sup>65</sup> COM (2003) 427 final, at 13.

<sup>66</sup> Directive 85/374 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, 1985 OJ (L210) 29; as amended by Directive 1999/34, 1999 OJ (L141) 20.

immovable, and includes electricity. Accordingly the concept extends to a raw material or a component which has been used or incorporated in a finished product, as well as to the finished product itself,<sup>67</sup> and also extends to an agricultural product (whether primary or processed).<sup>68</sup>

The Explanatory Memorandum indicates that in other respects the scope of Article 5 of the Regulation is wider than that of the Directive. In particular, Article 5 applies whether the claim is based on strict liability or on fault.<sup>69</sup> But, although (unlike the Original Proposal) the Regulation as adopted does not refer to a "defective" product, the analogy of the Directive indicates that the focus is on safety,<sup>70</sup> and this consideration is supported slightly by the reference in Recital 18 of the Regulation to the protection of consumers' health. Thus Article 5 should probably be construed as limited to claims in respect of physical injury to (or death of) a person, or of physical damage to property other than the product itself; and as not extending to claims for purely economic loss, not arising from physical injury or damage.<sup>71</sup> On the other hand there is no obvious reason to limit Article 5 to claims made by a purchaser or a consumer of the product, or even by an individual. It seems designed to extend, for example, to a claim against the manufacturer of an unsafe car by a corporate owner of a lorry damaged in a collision with the car.<sup>72</sup>

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<sup>67</sup> See also the Explanatory Memorandum, COM (2003) 427 final, at 15; Directive 85/374, Article 3(1); and the Hague Convention 1973, Articles 2(a) and 3(1).

<sup>68</sup> See Directive 1999/34, Article 1 (amending Directive 85/374, Article 2). See also the Hague Convention 1973, Articles 2(a) and 3(2).

<sup>69</sup> See the Explanatory Memorandum, COM (2003) 427 final, at 13.

<sup>70</sup> Article 6 of Directive 85/374 specifies that a product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including: (a) the presentation of the product; (b) the use to which it could reasonably be expected that the product would be put; (c) the time when the product was put into circulation.

<sup>71</sup> Somewhat similarly, Article 9 of Directive 85/374 limits the damage for which the Directive imposes liability to (a) damage caused by death or by personal injuries; (b) damage to, or destruction of, any item of property other than the defective product itself, with a lower threshold of €500 ECU, provided that the item of property: (i) is of a type ordinarily intended for private use or consumption, and (ii) was used by the injured person mainly for his own private use or consumption. It adds that this is without prejudice to national provisions relating to non-material damage. In contrast, Article 2(b) of the Hague Convention 1973 defines "damage" as injury to the person or damage to property as well as economic loss; but excluding damage to the product itself and economic loss consequential thereon, unless associated with other damage.

<sup>72</sup> This solution contrasts with Article 9 of Directive 85/374, but accords with the Hague Convention 1973. See *Id.*

In contrast with Directive 85/374, Article 5 of the Regulation is silent as to the character of the defendants to whose liability it applies. It seems clear, in view especially of the emphasis placed by its provisions on the marketing of the product, that Article 5 does not apply to claims against a current user or possessor of a product at the time of the incident from which the claim arises. Similarly it does not extend to claims against the employer of such a person, or anyone else who is vicariously liable for his conduct as user or possessor. Thus where a car is involved in a traffic accident, Article 5 does not extend to claims by injured pedestrians against the driver or his employer, even if the car was unsafe owing to a defect which existed when it left the manufacturer. On the other hand, it seems proper to construe Article 5 as extending to claims based on the unsafe condition of a product against any other defendant than the current user or possessor of the product (or his employer or other principal). Accordingly Article 5 applies to claims against a manufacturer or producer of a finished product, or of a raw material used or a component incorporated in a product.<sup>73</sup> It extends also to claims against an importer<sup>74</sup> or a supplier of a product,<sup>75</sup> or against other persons, such as designers, repairers and warehousemen, involved in the commercial chain of preparation or distribution of a product.<sup>76</sup> It further extends to claims against agents or employees of persons to whose liabilities it applies.<sup>77</sup>

In any event it is clear from the inclusion of Article 5 in Chapter II of the Regulation that the liability must be in tort. On the other hand, even where there is a contract between the parties for the supply of the product, Article 5 will apply to a tort claim between them,<sup>78</sup> but in this situation the exception specified by Article 5(2) will usually mean that the tort claim will be governed by the law which governs the contract, or (where relevant) by the law which provides mandatory protection to the plaintiff as consumer, under the Rome Convention 1980.

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<sup>73</sup> See the Explanatory Memorandum, COM (2003) 427 final, at 15; Directive 85/374, Article 3(1); and the Hague Convention 1973, Article 3(1) and (2).

<sup>74</sup> See the Explanatory Memorandum, COM (2003) 427 final, at 15; Directive 85/374, Article 3(2); and the Hague Convention 1973, Article 3(3) and (4).

<sup>75</sup> See the Explanatory Memorandum, COM (2003) 427 final, at 15; Directive 85/374, Article 3(3); and the Hague Convention 1973, Article 3(3).

<sup>76</sup> See the Hague Convention 1973, Article 3(4).

<sup>77</sup> See the Hague Convention 1973, Article 3, final clause.

<sup>78</sup> This contrasts with the Hague Convention 1973, whose application to a claim is excluded by Article 1(2) where the property in, or the right to use, the product was transferred to the claimant by the defendant.

Article 5(1) lays down a cascade of five choice of law rules, which are applied in order. If the first rule fails to supply an applicable law, one moves to the second, and so on. All five rules are subject to the exception made by Article 5(2) in favour of the law of a manifestly more closely connected country.

The five rules and the exception may be restated as follows:

**Rule 1** - If both the victim and the defendant were habitually resident in the same country at the time when the injury occurred, the applicable law is that of the common habitual residence.<sup>79</sup>

**Rule 2** - Otherwise the applicable law is that of the country in which the victim was habitually resident when the injury occurred, if the product was marketed in that country, and unless the defendant could not reasonably have foreseen the marketing of the product, or a product of the same type, in that country.<sup>80</sup>

**Rule 3** - Otherwise the applicable law is that of the country in which the product was acquired, if the product was marketed in that country, and unless the defendant could not reasonably have foreseen the marketing of the product, or a product of the same type, in that country.<sup>81</sup>

**Rule 4** - Otherwise the applicable law is that of the country in which the injury occurred, if the product was marketed in that country, and unless the defendant could not reasonably have foreseen the marketing of the product, or a product of the same type, in that country.<sup>82</sup>

**Rule 5** - Otherwise the applicable law is that of the country in which the defendant was habitually resident.<sup>83</sup>

**Exception** - But, by way of exception to the foregoing rules, where it is clear from all the circumstances of the case that the tort is manifestly more

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<sup>79</sup> See the opening phrase of Article 5(1).

<sup>80</sup> See Article 5(1)(a), and the last clause of Article 5(1).

<sup>81</sup> See Article 5(1)(b), and the last clause of Article 5(1).

<sup>82</sup> See Article 5(1)(c), and the last clause of Article 5(1).

<sup>83</sup> See the last clause of Article 5(1).

closely connected with a country other than the country whose law would be applicable under those rules, the law of that other country applies.<sup>84</sup>

It seems proper to refer to "the victim", rather than "the plaintiff", as a synonym for "the person sustaining the damage", since the analogy of Article 4(1) indicates that the relevant person, on the claimant's side, is the person who suffers the immediate injury, rather than an associated person who claims for a consequential loss. Thus in the case of a fatal accident, the relevant person is the deceased, rather than the family members who claim for their grief or loss of financial support. On the defendant's side, the relevant person is the one whose liability is in question.

The definitions of habitual residence provided by Article 23<sup>85</sup> extend to product liability. In this context they give rise to particular difficulty in situations where several establishments of a defendant manufacturer have been involved in the manufacture and marketing of the product. It seems arguable that one should focus on the defendant's establishment by which the product was sold to an independent purchaser.

Difficulties may also arise in relation to the concept of marketing. It seems reasonably clear that marketing refers to the supply of a product by a supplier who is acting for commercial purposes, and that the supply may be by way of sale, hire or similar contract, or probably by way of a gift (for example, of a sample) made for promotional purposes. It also seems clear that the marketing need not be effected by the defendant itself; any actual and foreseeable supply through normal commercial channels will do, however many resales have intervened between the sale by the defendant and the ultimate supply in question. It also seems clear that the reference is to the final supply to the end-user (the final acquirer, who acquires for use, rather than resale). But it is much less clear whether the marketing is to be regarded as occurring at the place where the goods were delivered to the end-user, or at the establishment of the supplier which contracted with the end-user.

Further difficulties may arise in relation to the concept of acquisition, used in Article 5(1)(b) (restated as Rule 3 above). It is suggested that acquisition has the same meaning as marketing, except that acquisition is confined to a marketing which has a real connection with the victim. Thus Article 5(1)(b) should apply only where the marketing is to, and the acquisition is by, an end-user who is either the victim himself, or a person associated with the victim (such as a member of the victim's family; or his employer; or in the case of a

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<sup>84</sup> See Article 5(2).

<sup>85</sup> See the paragraph containing *supra* note 25.

corporate victim, another company belonging to the same group). But not where the victim is unconnected with the acquirer, as where a pedestrian is injured in a road accident caused by brake-failure in a defective car.

In Turkey a simpler rule on product liability is laid down by Article 36 of the recently adopted Act on Private International Law and International Civil Procedure.<sup>86</sup> The plaintiff may choose between the law of the habitual residence or place of business of the defendant, and the law of the country of acquisition. But the law of the place of acquisition is excluded if the defendant proves that the product entered that country without his consent.

### Unfair Competition

Article 6(1) and (2) of the Rome II Regulation deal with torts "arising out of an act of unfair competition."<sup>87</sup> According to the Explanatory Memorandum,<sup>88</sup> this covers rules prohibiting acts calculated to influence demand (such as misleading advertising or forced sales), acts which impede competing supplies (such as disruption of deliveries by competitors, enticing away a competitor's staff, or boycotts), and acts which exploit a competitor's value (such as passing off). But Article 6 does not apply to claims for infringement of an intellectual property right, since this matter is definitively regulated by Article 8. By Article 6(4), the law applicable under Article 6 may not be derogated from by an agreement under Article 14.

By Article 6(1), the law applicable to a tort arising out of an act of unfair competition is that of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected. The reference is effectively to the law of the location of the market which is directly affected. This law will also govern liability for consequential losses sustained elsewhere. But, as the Memorandum recognises,<sup>89</sup> there may be direct effects in more than one market, resulting in the distributive application of the laws involved. In substance Article 6(1) replaces the test of direct injury, applicable under Article 4(1) to torts in general, by a test of direct effect on the market, regarded as better suited to torts involving unfair competition. Recital 21 explains that the special rule in Article 6(1) is not an exception to the general rule in Article 4(1), but rather a clarification of it in the light of the objectives of protecting

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<sup>86</sup> Law 5718.

<sup>87</sup> In Turkey a provision on unfair competition, which has some similarity to Article 6 of the Rome II Regulation, is adopted by Article 37 of Law 5718.

<sup>88</sup> COM (2003) 427 final, at 15.

<sup>89</sup> *Id.*, at 16.

competitors, consumers and the general public, and ensuring that the market economy functions properly.

Where an act of unfair competition affects exclusively the interests of a specific competitor, Article 6(2) removes the claim from the special rule laid down by Article 6(1), and subjects it to the main rules laid down by Article 4 (referring to the place of injury, common residence, and manifestly closer connection). According to the Explanatory Memorandum,<sup>90</sup> Article 6(2) applies to cases of enticing away a competitor's staff, corruption, industrial espionage, disclosure of business secrets, or inducing a breach of contract.

### **Restrictions of Competition**

Article 6(3) of the Rome II Regulation deals with torts arising out of a restriction of competition.<sup>91</sup> Recital 22 explains that this covers infringements of both national and Community competition law. Recital 23 adds that it covers prohibitions on agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition within a Member State or within the internal market, as well as prohibitions on the abuse of a dominant position within a Member State or within the internal market, where such agreements, decisions, concerted practices or abuses are prohibited by Articles 81 and 82 of the EC Treaty or by the law of a Member State.

Article 6(3)(a) lays down the basic rule that the law applicable to a tort arising out of a restriction of competition is that of the country where the market is, or is likely to be, affected. Article 6(3)(b) applies where the market is, or is likely to be, affected in more than one country. In such a case, a person seeking compensation for damage who sues in the court of the defendant's domicile may instead choose to base his claim on the law of the forum, provided that the market in that Member State is amongst those directly and substantially affected by the restriction of competition out of which the tort on which the claim is based arises. But where the claimant sues, in accordance with the applicable rules on jurisdiction, more than one defendant in that court, he can only choose to base his claim on the law of the forum if the restriction of competition, on which the claim against each of the defendants relies, directly and substantially affects (among others) the market of the forum country.

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<sup>90</sup> *Id.*

<sup>91</sup> In Turkey a provision on restrictions of competition, which has some similarity to Article 6 of the Rome II Regulation, is adopted by Article 38 of Law 5718.

In cases governed by Article 6(3), there is no saving for the law of the common residence, or the law of a manifestly more closely connected country. By Article 6(4), the law applicable under Article 6 may not be derogated from by an agreement under Article 14.

### **Intellectual Property**

Article 8 deals with infringements of intellectual property rights. As Recital 26 indicates, this refers to such matters as copyright (author's rights, neighbouring rights, and *sui generis* rights in databases) and industrial property rights (such as patents, registered trade marks, and design rights).

Article 8(1) specifies that the law applicable to a non-contractual obligation arising from an infringement of an intellectual property right is that of the country for which protection is claimed. As Recital 26 indicates, this preserves the universally acknowledged principle in favour of the *lex loci protectionis*, and respects the independent and territorial character of an intellectual property right granted or recognised in a given country. No exception is admitted in favour of the law of a common residence or a manifestly closer connection.

The same principle is applied by Article 8(2) in the case of infringements of a unitary Community intellectual property right. Such Community-wide rights now exist for plant varieties,<sup>92</sup> registered trade marks,<sup>93</sup> and designs,<sup>94</sup> and have been proposed for patents.<sup>95</sup> The relevant Community legislation applies; and for any question not governed by such legislation, the applicable law is that of the country in which the act of infringement was committed.

By Article 8(3), the law applicable under Article 8 may not be derogated from by an agreement under Article 14. By Article 13, Article 8 extends to restitutionary obligations arising from an infringement of an intellectual property right, so as to override Articles 10-12.

### **Environmental Damage**

Article 7 of the Rome II Regulation lays down a special rule for torts "arising out of environmental damage or damage sustained by persons or property as a result of such damage". Recital 24 provides a definition of

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<sup>92</sup> See EC Regulation 2100/94, 1994 OJ (L227) 1.

<sup>93</sup> See EC Regulation 40/94, 1994 OJ (L11) 1.

<sup>94</sup> See EC Regulation 6/2002, 2002 OJ (L3) 1.

<sup>95</sup> See the Commission Proposal for a Council Regulation on the Community Patent, 2000 OJ (C337E) 278.

"environmental damage" as referring to adverse change in a natural resource, such as water, land or air, impairment of a function performed by such a resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms.

By Article 7, the law applicable to a tort arising out of environmental damage or damage sustained by persons or property as a result of such damage is the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his claim on the law of the country in which the event giving rise to the damage occurred. This amounts in substance to a rule of alternative reference, in favour of the law of the place of direct injury, or the law of the place of the defendant's conduct, whichever is more favourable to the plaintiff.<sup>96</sup> But the plaintiff has to elect between the two laws, at a stage in the proceedings determined by the law of the forum.<sup>97</sup> In any event the normal rules laid down by Article 4(2) and (3) giving priority to the law of the common residence or the law of a manifestly closer connection are excluded.

As regards the rationale for Article 7, Recital 25 refers to Article 174 of the EC Treaty, which provides that there should be a high level of protection based on the precautionary principle and the principle that preventive action should be taken, the principle of priority for corrective action at source, and the principle that the polluter pays. It asserts that this fully justifies the use of the principle of discriminating in favour of the person sustaining the damage.

### **Industrial Disputes**

Article 9 of the Regulation specifies that, without prejudice to Article 4(2) (on the law of a common habitual residence), the law applicable to a tort in respect of the liability of a person in the capacity of a worker or an employer or the organisations representing their professional interests, for damages caused by an industrial action, pending or carried out, is the law of the country where the action is to be, or has been, taken.

Recital 27 explains that the exact concept of industrial action, such as strike action or lock-out, varies from Member State to Member State and is

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<sup>96</sup> *Cf* *Ware v. Ciba-Geigy Corp* 2005, No. ATL-L-243-04, 2005 WL 1563245 (N.J.Super. May 20, 2005) which involved a claim by Alabama residents against New York corporations relating to the deposit in Alabama of toxic waste which had been generated in and shipped from New Jersey. A New Jersey court rejected the claim in accordance with Alabama law, since that was the place of injury and the plaintiffs' residence.

<sup>97</sup> *See* Recital 25.

governed by each Member States' internal rules. Recital 28 adds that the special rule on industrial action in Article 9 is without prejudice to the conditions relating to the exercise of such action in accordance with national law, and without prejudice to the legal status of trade unions or of the representative organisations of workers as provided for in the law of the Member States.

## **VARIOUS ISSUES**

### **The Scope of the Proper Law**

Article 15 of the Rome II Regulation provides a wide, but non-exhaustive, definition of the issues which are governed by the proper law of the tort, determined in accordance with Articles 4-9. Thus the issues listed in Article 15 must be treated as substantive and referred to the proper law, but other issues may be treated as procedural and referred to the law of the forum.<sup>98</sup> Under Article 15 the proper law of the tort applies both to issues relating to liability, and to issues relating to damages. Its control extends to time limitation and to the burden of proof, and it has some effect on the availability of injunctions.

As regards issues relating to liability, Article 15 expressly subjects to the proper law: (a) the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them; (b) the grounds for exemption from liability, any limitation of liability and any division of liability; (c) the question whether a right to claim damages or a remedy may be transferred, including by inheritance; (d) persons entitled to compensation for damage sustained personally; (e) liability for the acts of another person; (f) the manner in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation. In addition, Article 22(1) specifies that the proper law applies to the extent that, in matters of non-contractual obligations, it contains rules which raise presumptions of law or determine the burden of proof.

The proper law also governs the admissibility and assessment of damages. By Article 15(c) it determines the existence, the nature and the assessment of damage or the remedy claimed. Thus the proper law must be applied to all issues concerning the assessment of the damages to be awarded, including mere quantification, except insofar as the proper law lacks any rule on the issue which is sufficiently definite to enable a court elsewhere to apply it with reasonable confidence and accuracy.

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<sup>98</sup> See also Articles 21 and 22(2), on the laws governing the formal validity and mode of proof of a unilateral act intended to have legal effect and relating to a non-contractual obligation.

This accords with the approach which was recently adopted by the English Court of Appeal in *Harding v. Wealands*,<sup>99</sup> where it abandoned the previously accepted view that the quantification of damages (as distinct from the admissibility of heads of damage) was governed by the *lex fori* as a matter of procedure.<sup>100</sup> Unfortunately the House of Lords<sup>101</sup> reversed the decision and reaffirmed that all aspects of the quantification of damages are procedural, including the application of a statutory maximum amount awardable for a claim or for a head of damage. It conceded, however, that questions of causation, remoteness and mitigation, as well as the admissibility of a head of damage, are substantive. In the English context, it may be considered that the most significant (and welcome) effect of the Rome II Regulation is the overruling by Article 15(c) of the decision by the Lords in *Harding v. Wealands* on the characterisation of issues relating to the assessment of damages.

By way of a curious concession to pressure from the European Parliament, Recital 33 asserts that, according to the current national rules on compensation awarded to victims of road traffic accidents, when quantifying damages for personal injury in cases in which the accident takes place in a State other than that of the habitual residence of the victim, the court seised should take into account all the relevant actual circumstances of the specific victim, including in particular the actual losses and costs of after-care and medical attention. It is not clear what effect, if any, this declaration will have.

By Article 15(d) of the Regulation, the proper law applies, within the limits of powers conferred on the court by its procedural law, to the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation. This appears to require the application of the proper law to some extent in the grant of both permanent and interlocutory injunctions, though without actually obliging the court to order measures which are unknown in the procedural law of the forum.<sup>102</sup> A more cautious provision might have been wiser, in view of the undesirability of encouraging a court to make non-monetary orders which it would have difficulty or reluctance in enforcing.

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<sup>99</sup> (2005) 1 All ER 415 (CA).

<sup>100</sup> See *Boys v. Chaplin*, 1971 AC 356; *Coupland v. Arabian Gulf Petroleum Co*, (1983) 2 All ER 434 (Hodgson J), affirmed without consideration of this point, (1983) 3 All ER 226 (CA); *Edmunds v. Simmonds*, (2001) 1 WLR 1003 (Garland J); *Hulse v. Chambers*, (2001) 1 WLR 2386 (Holland J); and *Roerig v. Valiant Trawlers*, (2002) 1 All ER 961 (CA).

<sup>101</sup> 2006 UKHL 32.

<sup>102</sup> See the Explanatory Memorandum, COM (2003) 427 final, at 24.

### Some Special Issues

Special rules are established by Articles 18-20 in respect of the admissibility of direct actions against liability insurers, subrogation, and multiple liability.

Article 18 provides a special rule governing the availability to a tort victim of a direct action against the tortfeasor's liability insurer. It enables a tort victim to bring his claim directly against the insurer of the person liable to provide compensation, if either the law applicable to the tort or the law applicable to the insurance contract so provides. But the option is limited to the admissibility of the direct action, for the scope of the insurer's obligations is determined by the law governing the insurance contract.<sup>103</sup> In any event Article 18 is more favourable to the victim than the current English rule, which probably refers the admissibility of a direct action to the proper law of the insurance contract.<sup>104</sup> In Turkey a rule similar to Article 18 of the Regulation is laid down by Article 34(4) of the recently adopted Act on Private International Law and International Civil Procedure.<sup>105</sup>

Article 19 deals with subrogation. It applies where a person ("the creditor") has a non-contractual claim upon another ("the debtor"), and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of such a duty. It then refers to the law which governs the third person's duty to satisfy the creditor the determination of whether, and to what extent, the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship. This applies to subrogation by a loss insurer to a claim in tort belonging to its insured.<sup>106</sup> Its effect appears to accord with the existing English rules, as explained by Colman J in *The Front Comor*.<sup>107</sup> Thus it is for the law which governs the insurance contract to determine whether the insurer has a right of subrogation to the claim. But if such a right exists under the law governing the insurance contract, its scope is limited to the rights of the insured which are available for subrogation under the law which governs the tort.

Article 20 deals with multiple liability. It applies where a creditor has a claim against several debtors who are liable for the same claim, and one of the

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<sup>103</sup> See the Explanatory Memorandum, COM (2003) 427 final, at 25-26.

<sup>104</sup> See *The Hari Bhum* (2005) 1 Lloyd's Rep 67 (CA), affirming (2004) 1 Lloyd's Rep 206 (Moore-Bick J).

<sup>105</sup> Law 5718.

<sup>106</sup> See the Explanatory Memorandum, COM (2003) 427 final, at 26.

<sup>107</sup> 2005 EWHC 454 (Comm).

debtors has already satisfied the claim in whole or in part. It then subjects the question of that debtor's right to demand compensation from the other debtors to the law applicable to that debtor's non-contractual obligation towards the creditor. This applies where one of several tortfeasors has made a payment to the victim satisfying his claim, and deals with a claim by the payer for contribution or indemnity from another tortfeasor who is also liable for the same injury. Its effect is to subject the existence of the payer's claim for contribution or indemnity to the law which governs the victim's claim against the payer.

### **Pleading and Establishment of Foreign Law**

As a result of pressure by the European Parliament, the way in which foreign law is treated is mentioned in Article 30(1) of the Regulation. This requires that, within four years after the entry into force of the Regulation, the Commission must submit a report on its application, accompanied if necessary by proposals for its adaptation. The Report must include a study on the effects of the way in which foreign law is treated in the different jurisdictions, and on the extent to which courts in the Member States apply foreign law in practice pursuant to the Regulation.

Thus it is contemplated that eventually some attempt may be made to harmonise by means of an EC regulation the rules of the Member States on the pleading and the proof or other establishment of the content of foreign law. At present the matter is governed in each of the Member States by its own rules. Thus, where a matter is in principle governed by foreign law by virtue of a conflict rule, an English court will normally determine the matter in accordance with English internal law unless the foreign law is properly invoked by a party who relies on it. In English litigation a party who relies on foreign law must plead the content of the relevant foreign rule, and prove such content by means of an expert witness. The need for harmonisation on such procedural matters is open to serious doubt.