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# **The Rome I and Rome II Regulations in Practice: The Treatment of Pre-Contractual Liability (*Culpa in Contrahendo*)**

*Cristina M. Mariottini*

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contractual and non-contractual matters - Rome I. & II.  
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## Outline

- The question of characterization of pre-contractual liability in EUIPL: Article 12 of the Rome II Regulation
- The autonomous notion of pre-contractual liability: Arguments in support of the non-contractual characterization of pre-contractual liability
- The interface between the Rome I and Rome II Regulations vis-à-vis pre-contractual liability



# Characterization of pre-contractual liability in EU PIL: Article 12 of the Rome II Regulation

1. The law applicable to a non-contractual obligation arising out of dealings prior to the conclusion of a contract, regardless of whether the contract was actually concluded or not, shall be the law that applies to the contract or that would have been applicable to it had it been entered into.

2. Where the law applicable cannot be determined on the basis of paragraph 1, it shall be:

(a) 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 occurred; or

(b) where the parties have their habitual residence in the same country at the time when the event giving rise to the damage occurs, the law of that country; or

(c) where it is clear from all the circumstances of the case that the non-contractual obligation arising out of dealings prior to the conclusion of a contract is manifestly more closely connected with a country other than that indicated in points (a) and (b), the law of that other country.



## Characterization of pre-contractual liability in EU PIL: Article 12 of the Rome II Regulation... and Recital 30

*Culpa in contrahendo* for the purposes of the Rome II Regulation is “an **autonomous concept** and should not necessarily be interpreted within the meaning of national law. It should include the violation of the duty of disclosure and the breakdown of contractual negotiations [...]”.



# Characterization of pre-contractual liability in EU PIL: Article 12 of the Rome II Regulation

1. The law applicable to a non-contractual obligation arising out of dealings prior to the conclusion of a contract, regardless of whether the contract was actually concluded or not, shall be the law that applies to the contract or that would have been applicable to it had it been entered into.

## Autonomous notion of pre-contractual liability:

- Non-contractual characterization of pre-contractual liability whilst
- adopting a contractual connecting factor to determine the law that governs pre-contractual liability in the EU (except DK)



# The autonomous notion of pre-contractual liability

## Arguments in support of the non-contractual characterization of pre-contractual liability

### Jurisdiction over pre-contractual liability claims

[CJEU, \*Fonderie Tacconi\*, Case C-334/00](#), esp. para 27

The CJEU expressly characterized pre-contractual liability arising out of the unjustified breaking off of negotiations as a non-contractual type of liability.

According to the CJEU, the claim to recover the damage allegedly caused by the unjustified breaking off of negotiations is, **in the absence of obligations freely assumed by one party towards another on the occasion of negotiations** with a view to the formation of a contract, a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the [1968] Brussels Convention.



# The autonomous notion of pre-contractual liability

## Arguments in support of the non-contractual characterization of pre-contractual liability

### Reasons to maintain a parallelism between the Brussels regime and the Rome I & II Regulations:

- Recital 7 of both the Rome I & II Regulations state that the substantive scope and the provisions of each Regulation should be consistent with the Brussels regime ;
- In line with the *Tacconi* judgment, Article 12(1) Rome II suggests that there are two types of obligations at the negotiation stage: contractual and non-contractual. Only the latter fall in the scope of the Rome II Regulation;
- The Rome I Regulation has excluded, at Article 1(2)(i), obligations only insofar as they fall in the material scope of the Rome II Regulations



# The interface between the Rome I and Rome II Regulations vis-à-vis pre-contractual liability

Question:

If the autonomous notion of pre-contractual liability under the Rome I & Rome II Regulations is to be understood in keeping with the CJEU interpretation in accordance with its judgment in Tacconi and if the material scope of application of the Rome I & II Regulations is to be understood as mutually exclusive,

→ which claims fall in the scope of the Rome II Regulation and which in that of the Rome I Regulation?



# The interface between the Rome I and Rome II Regulations vis-à-vis pre-contractual liability

Rome II Regulation

**Absence** of obligations freely assumed by one party towards another on the occasion of negotiations

Examples:

- *Culpa in contrahendo* provokes the conclusion of an invalid contract: the contract was formed through duress, misrepresentations or in breach of a duty to disclose.
- Breach of pre-contractual duty to disclose; of pre-contractual duty of confidentiality; pre-contractual duty of good faith
- See also Recital 30 stating that the scope of Article 12 “should include the violation of the duty of disclosure and the breakdown of contractual negotiations”

**Existence** of obligations freely assumed by one party towards another on the occasion of negotiations

Examples:

- Preliminary agreements
- Pollicitation

Rome I Regulation



## Selected readings

- U. MAGNUS and P. MANKOWSKI (eds), *Rome I Regulation. Commentary*, Otto Schmidt, 2017
- U. MAGNUS and P. MANKOWSKI (eds), *Rome II Regulation. Commentary*, Otto Schmidt, 2019
- A. DICKINSON (ed.), *The Rome II Regulation. The Law Applicable to Non-Contractual Obligations*, Oxford, 2010 and supplements
- R. PLENDER and M. WILDERSPIN, *The European Private International Law of Obligations*, 5<sup>th</sup> ed., Sweet and Maxwell, 2019
- F. FERRARI (ed.), *Concise Commentary on the Rome I Regulation*, Cambridge, 2020
- G.-P. CALLIES (ed.), *Rome Regulations. Commentary*, Wolters Kluwer, 2011





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Thank you for your attention!

[cristina.mariottini@mpi.lu](mailto:cristina.mariottini@mpi.lu)

