Rome II: Which law applies to cross-border torts

EJTN – Judicial Training “Conflict of laws in contractual and non-contractual matters – Rome I & II”

Webinar 22-23 July 2020
Applicable Law in Tort Law Disputes - Rome II Regulation

1. Introduction  a) Functions

- Cases of tort / delict law
  with contacts to more than one legal system (“cross-border” / “international” cases):
  Need to determine the applicable substantive law via conflict [of laws] rules
  usually found within the domestic private international law (PIL)
  -> courts in different states could declare different national laws as applicable

- For the proper functioning of the internal market throughout the EU legal certainty is necessary and a unification of PIL rules is helpful
  -> regardless which court has jurisdiction the same law should be applied

- Courts in the EU should apply the same conflict norms and therefore
  the same (foreign) substantive law on tort disputes  -> predictability for parties
  Where the forum is within the EU  -> should have no influence on the applicable law

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1. Introduction – b) Legal Nature

  on the law applicable to non-contractual obligations (Rome II)
  under the competence in the field of “judicial co-operation in civil matters”
  (Art 61 lit c Amsterdam TEC -> now Art 81 (1) TFEU)
  for measures to promote the compatibility of Member States’ conflict of law rules
  (Art 65 lit b Amsterdam TEC -> now Art 81 (2) lit c TFEU)

• Rome II as secondary EU law
  - directly applicable in every Member State (Art 288 (2) TFEU / except DK - rec 40 Rome II)
  - autonomous interpretation (out of the Regulation itself)
  - preliminary rulings of the ECJ (Art 267 TFEU)
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2. Scope of Application I

• Temporal scope
  - on events giving rise to damage which occurred since 11 January 2009
    (Art 31, 32 Rome II)

• Territorial scope
  - in every MS where a court has jurisdiction (see Brussels Ibis)
    -> except DK (rec 40 Rome II)
    -> without any additional connecting factor (even for extra-Union cases)
    -> with universal application, even if non-MS law has to be applied (Art 3 Rome II)

• Internationality
  - only cases with a link to foreign legal systems (as seen from the forum)
    -> “in situations involving a conflict of laws” (Art 1 (1) s 1 Rome II)
  - typical foreign elements: nationality / domicile of the parties; place where the damage arises / where the event causing the damage occurs; context of a contract governed by a foreign law

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2. Scope of Application II

• Material scope

- “non contractual obligations” (Art 1 (1) s 1 Rome II)
  -> residual category: all claims that are not related to contractual matters
    (ECJ C-189/87 – Kalfelis / ECJ C-147/12 – ÖFAB on Brussels I)
  -> any consequence arising out of tort/delict (Art 4-9 Rome II), Art 2 (1) Rom II
  -> even possible damage, via preventive actions (Art 2 (3) Rome II)

- “in civil and commercial matters” (Art 1 (1) s 1 Rome II)
  -> regarding the legal relationship (not the court, rec 8 Rome II)
  -> not, if a state is exercising his public authority (Art 1 (1) s 2 Rome II)
    e.g. government liability not under Rome II (OGH 1 Ob 33/19p, unalex AT-1220)
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2. Scope of Application III

• Material scope – Exceptions
  
  excluded are (Art 1 (2) Rome II)
  
  - family relations (rec 10 Rome II), matrimonial property regimes,
    wills / succession (Art 1 (2) lit a, b Rome II) -> covered by other specific regulations
  
  - negotiable instruments (-> partly international unification),
    the law of companies / trusts (Art 1 (2) lit c, d, e Rome II)
  
  - nuclear damages (Art 1 (2) lit f Rome II)
  
  - violation of personality rights (Art 1 (2) lit g Rome II) -> big gap (Art 30 (2) Rome II)
  
  - evidence and procedure, but Art 21, 22 Rome II (Art 1 (3) Rome II)
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2. Scope of Application IV

- Material scope – other non-contractual obligations

- Art 2 (1) Rome II: any consequence arising out of

  -- unjust enrichment         (Art 10 Rome II)

  -- negotiorum gestio (= acting on behalf of others without a contract - Art 11 Rome II)

  -- culpa in contrahendo (= fault in negotiating - Art 12 Rome II)

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2. Scope of Application V

- Relation to other Union instruments and to international conventions
  - superiority of other conflict-of-law provisions of Community (now: Union) law (Art 27 Rome II)
  - priority of international conflict-of-law conventions if at least one MS and one third state are parties (Art 28 Rome II)
      AT, BE, CZ, ES, FR, HR, LI, LV, LU, NL, PL, SK, SI (13 MS)
    - (Hague) Convention on the Law Applicable to Products Liability (1973)
      ES, FI, FR, HR, LU, NL, SI (7 MS)

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3. Choice of Law

• Party Autonomy

Full party autonomy **ex post**: parties can decide freely

-> after the event giving rise to the damage occurred (Art 14 (1) lit a Rome II)

Restricted party autonomy **ex ante**: only in B2B relationships / not by standard forms

-> before the event giving rise to the damage occurred (Art 14 (1) lit b Rome II)

  (to protect presumably weaker parties, rec 31 s 3 Rome II)

- no connection of chosen law to the event required

- how: expressly / implicitly if clearly demonstrated (Art 14 (1) s 2 Rome II)

• Exceptions

- if **purely national**: no escape from (national) mandatory provisions (Art. 14 (2) Rome II)

- if **purely EU**: no escape to the law of a third country (Art 14 (3) Rome II)

- not under **Art 6** (Competition) and **Art 8** (Intellectual Property) Rome II
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4. General Rule (no choice of law)

- if the parties have not (validly) agreed on a choice of law (see Art 14 Rome II)
  - law of the place where the damage occurred (Art. 4 (1) Rome II)
    - \( \text{lex loci damni} \) (place of injury)

- not where the event giving rise to the damage occurred (place of conduct)
- not where the indirect consequences of that event occur

  damage related to the death of a person in one Member State sustained by the close relatives of that person in another Member State are ‘indirect consequences’ (ECJ C-350/14 – Lazar)

  but: special exception

if tortfeasor and injured party have common habitual residence
  - law of this state  - Art 4 (2) Rome II

and: general exception

(manifestly) closer connection (“escape clause”, rec 18 s 3 Rome II)  - Art 4 (3) Rome II
  - in particular a pre-existing relationship of the parties (e.g.: a contract)
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5. Special Rules (no choice of law) I

• Five categories of torts (Art 5 – 9 Rome II)

• Unfair competition and acts restricting free competition (Art. 6 Rome II)
  no choice of law allowed (Art 6 (4) Rome II)
  -> law of the place where competitors / consumers / market relations are affected
    (like general rule, Art 4 (1) Rome II)

• Environmental damage (Art 7 Rome II)
  -> general rule (Art. 4 (1) Rome II): place where the damage occurred,
    but option of the injured party to choose the law of the place
    where the event giving rise to the damage occurred (place of conduct)
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5. Special Rules (no choice of law) II

- Five categories of torts (Art 5 – 9 Rome II)

- Infringement of intellectual property rights (Art 8 Rome II)
  
  no choice of law allowed (Art 8 (3) Rome II)

  -> law of the place where protection is claimed (Art 8 (1) Rome II)
  
  various acts of infringement in various Member States: no partial (‘mosaic’) view;
  determine the place where the initial act of infringement was committed (ECJ C-24,25/16 – Nintendo)

Special rule for unitary EU property right (Art 8 (2) Rome II): place of infringement

- Industrial action – e.g. strikes or lockouts (Art 9 Rome II)
  
  - special exception: if tortfeasor and injured party have common habitual residence
  
  -> law of this state (reference to Art 4 (2) Rome II)

  if not: place of conduct (where the action is to be, or have been, taken)
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5. Special Rules (no choice of law) III

• Five categories of torts (Art 5 – 9 Rome II)

• **Product liability** (Art 5 Rome II)
  - special exception: if tortfeasor and injured party have common habitual residence
    -> law of this state (reference to Art 4 (2) Rome II)

1. habitual residence of the *injured person* (if the product was not marketed in that country ->)

2. place where the *product* has been *acquired* (if the product was not marketed in that country ->)

3. place where the *damage occurred* (like general rule Art 4 (1) Rome II)

-> not if the tortfeasor / *producer* could not reasonably foresee the marketing of the product in the country: law of his *habitual residence* (Art 5 s 2 Rome II)

but (general) *exception*: (manifestly) *closer connection* ("escape clause", rec 18 Rome II)
  – like Art. 4 (3) Rome II particular a pre-existing relationship of the parties (e.g.: a contract)
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6. Scope of the Applicable Law

• **List of problems covered** (not exhaustive) Art 15 Rome II
  
  e.g. delictual capacity (under lit a) / *force majeure* (under lit b) / compensation for immaterial damage (under lit c) / limitation rules (under lit h)

• **Rules of safety and conduct** (Art 17 Rome II)
  
  shall be taken into account (in so far as is appropriate) as local data (e.g. traffic rules) even rules of conduct in insolvency law (OGH 6 Ob 57/14x, unalex AT-962)

• **Direct action against insurer** (Art 18 Rome II)
  
  even if the law applicable to the insurance so provides (additional connection)
  the law applicable to the insurance contract concerned cannot be a bar to a direct action being brought on the basis of the law applicable to the non-contractual obligation *(ECJ C-359/14 – ERGO)*
  but: action for indemnity between one insurer against another: Art 7 Rome I *(ECJ C-240/14 – Prüller-Frey)*

• **Subrogation** (Art 19 Rome II)
  
  third party (e.g. insurer) entitlement to exercise the rights of the victim --> *lex contractus*

• **Multiple Liability** (Art 20 Rome II)
  
  compensation from co-debtors in joint liability --> *lex delicti commissi*

• **Burden of Proof** (Art 22 (1) Rome II)
  
  rules which raise presumptions of law / determine the burden of proof --> *lex delicti commissi*

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7. Protecting Public Interests

- **Overriding mandatory provisions** (Art 16 Rome II)
  
  defined in Art 9 (1) Rome I (!) - not all “simple“ provisions which cannot be derogated
  
  only those “safeguarding public interests“
  
  usually not a specific limitation period (here: 3 years instead of 1 year) - ECJ C-149/18 – Da Silva Martins
  
  -> may be applied if from the law of the forum

- **Ordre public** (Art 26 Rome II)
  
  if result of the application of foreign law is “manifestly incompatible” with the public policy
  
  - e.g. may be punitive damages, depending on the legal order of the forum (rec 32 s 2 Rome II)
  
  -> basic principles of the forum (eg constitutional requirements, human rights)
  
  foreign rule is not applied -> usually *lex fori* is applied
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8. Scheme of Case Analysis in Tort Cases

• Internationality (Art 1 (1) s 1 Rome II)
• Applicability of Rome II (Art 1 (1), (2), 31, 31 Rome II)
• Choice of Law (Art 14 Rome II)
• Specific Provisions (Art 5 – 9 Rome II)
• Special Exception (Art 4 (2) Rome II)
• Basic Rule (Art 4 (1) Rome II)
• Escape Clause (Art 4 (3) Rome II)
• Scope of Applicable Law (Art 15, 17 Rome II)
• Limits of Applicable Law (Art 16, 26 Rome II)