

## The Rome II Regulation on the Law Applicable to Non-Contractual Obligations: The European private international law tradition continued

### *Introductory observations, scope, system, and general rules*

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#### 1. Introduction

The establishment of Regulation No 864/2007 on the Law Applicable to Non-Contractual Obligations (Rome II) is remarkable for several reasons.<sup>1</sup> Firstly, the regulation of torts in the European Union has a history of forty years, starting with the preparation of the Rome Convention in 1967. Secondly, as was the case with its thorny counterpart, the Regulation on the Law Applicable to Contractual Obligations (Rome I),<sup>2</sup> negotiations have been difficult. Many amendments to previous texts proved necessary, and notably the Council and the European Parliament – applying the co-procedure to a private international law regulation for the first time – had difficulties reaching an agreement.<sup>3</sup> Thirdly, though a huge number of regulations have meanwhile been established pursuant to Article 61 and 65 EC Treaty, Rome II was the first established community legislation dealing with the applicable law, one year before the adoption of Rome I.<sup>4</sup> Fourthly, for the first time, the efforts to develop European conflict-of-law rules and the negotiations attracted serious cross-Atlantic attention, especially from scholars in the United States (US). Not only have Americans and other non-Europeans bothered to publish on the (draft) Rome II Regulation, they have also interacted in the Brussels negotiations, at the invitation of the European Parliament's *rapporteur* for Rome II, Diana Wallis.<sup>5</sup> Fifthly, even after its establishment, its (problematic) relation to certain conventions, notably the Hague Convention on Traffic Accidents, was immediately reinstated on the Brussels agenda and still causes debates.<sup>6</sup>

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\* Associate Professor (*universitair hoofddocent*) Private International Law & Comparative Law, Erasmus University Rotterdam, Rotterdam Institute of Private Law (Netherlands), kramer@law.eur.nl, <www.xandrakramer.eu>.

<sup>1</sup> Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual obligations (Rome II), *OJ* 2007, L 199/40.

<sup>2</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), *OJ* 2008, L 177/6.

<sup>3</sup> See also the contribution by Michael Wilderspin in this issue of *Nederlands Internationaal Privaatrecht* (2008, no. 4) for more political backgrounds.

<sup>4</sup> Except for some conflict rules in Regulation No 1346/2000 on Insolvency Proceedings, *OJ* 2000, L 160/1.

<sup>5</sup> In the context of a Legal Affairs meeting, on 14 March 2005 she hosted an internal working group entitled 'Rome II – an International Perspective', with (non European) PIL experts responding to a draft report on Rome II, see <www.dianawallismep.org.uk/pages/Rome-II-seminars.html>. See also S.C. Symeonides, 'The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons', *Tulane Law Review* 2008, available at <ssrn.com/abstract=1104284>.

<sup>6</sup> See also the contribution by Thomas Kadner Graziano in this issue of *Nederlands Internationaal Privaatrecht* (2008, no. 4).

The Rome II Regulation shall apply as of 11 January 2009 to events giving rise to damage which occur after the Regulation's entry into force (Arts. 31 and 32). As of this date, it will replace the relevant national conflict-of-law rules in force in the Member States in relation to non-contractual liability, such as the Dutch Conflict of Laws Tort Act of 2001 (*Wet Conflictenrecht onrechtmatige daad*), insofar as it does not regard a matter excluded from the scope of Rome II pursuant to Article 1.

This contribution provides an outline of the background (section 2), scope (section 3), and system of the Regulation (section 4) and an analysis of the two general conflict rules laid down in Article 4 (section 5) and 14 (section 6).<sup>7</sup> The question is whether in methodology and content this Regulation stands in the European tradition, or whether it takes a new direction. Another question is whether it offers a predictable but at the same time a sufficiently flexible system of conflict rules.

## 2. Community background, legislative procedure, and objectives

The establishment of this Regulation should be understood in the context of the communitarisation of private international law. Rome II is one of a series of regulations in the field of private international law and civil procedure that have been established after the Treaty of Amsterdam entered into force in 1999, pursuant to the competence provided for in Title IV of the EC Treaty (Arts. 61-68). According to Article 65, measures in the field of judicial cooperation in civil matters having cross-border implications, and insofar as necessary for the proper functioning of the international market, cover amongst others those promoting compatibility of conflict-of-law rules (sub b). As is the case for several other Regulations brought about pursuant to Article 61 in conjunction with Article 65, the basis and need – in view of subsidiarity and proportionality – for this far-reaching communitarisation of private international law rules may be put into question.<sup>8</sup> It may be argued that the internal market is not strictly affected by differences in the applicable law to tortious actions. The universal scope of the Rome II Regulation pursuant to Article 3, may result in, for example, the applicability of Chinese law and hardly any connection with the EU except for the court [415] having jurisdiction. I consider that in such cases the tie with the interests of the internal market seems very weak. From a practical point of view, however, the universal scope of the Regulation is preferable, since limiting the scope to 'EU-situations' – as was suggested by the Council Legal Service and the United Kingdom – would result in further fragmentation of the conflict rules and it undermines the European private international law system.<sup>9</sup> Since the Member States do go along with most of the Commission proposals, the precise boundaries of the harmonisation of conflict rules in the EU will remain unclear and the European PIL (r)evolution<sup>10</sup> will continue.<sup>11</sup>

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<sup>7</sup> The special rules on specific torts and other non-contractual obligations will not be analyzed. Most of these rules are covered by the other contributions in this issue of *Nederlands Internationaal Privaatrecht* (2008, no. 4).

<sup>8</sup> See for example M. Bogdan, 'General Aspects of the Future Regulation', in: A. Malatesta (ed.), *The Unification of Choice of Law Rules on Torts and Other Non-Contractual Obligations in Europe*, Padova: CEDAM 2006, p. 37; L. De Lima Pinheiro, 'Choice of Law on Non-Contractual Obligations Between Communitarization and Globalization. A First Assessment of EC Regulation Rome II', in: F. Pocar et al. (eds.), *Rivista di Diritto Internazionale Privato e Processuale*, Padova: CEDAM 2008, p. 6. See also Wilderspin 2008, section 2.2 (*supra* n. 3); Wilderspin argues that Rome II does fall within the ambit of Art. 65 EC Treaty, in spite of its universal scope.

<sup>9</sup> Council Document no. 7015/04, 2 March 2004 and no. 9009/04 ADD 15, 26 May 2004. See also Wilderspin 2008, section 2.2 (*supra* n. 3).

<sup>10</sup> The rapid unification and codification of European conflict rules may be called revolutionary. On the contents it is more of an evolution, see also Symeonides 2008, section II.C, pp. 8-9 (*supra* n. 5) and J.

As mentioned in the introduction, the attempts to establish a European system for conflict rules on non-contractual obligations go back to the establishment of the Rome Convention.<sup>12</sup> A first draft for the Rome Convention was presented in 1973.<sup>13</sup> Negotiations were hampered by amongst others the accession of the United Kingdom, Ireland, and Denmark, and in 1978 the decision was taken to confine the Convention to contractual obligations. In 1998, the work on a draft convention (later substituted by a draft regulation) on non-contractual obligations was resumed.<sup>14</sup> After an impressive number of responses as a result of a Commission consultation launched in 2002, the first proposal for a Rome II Regulation was submitted by the Commission in July 2003.<sup>15</sup> This proposal met with considerable criticism, notably from the European Parliament that at first reading proposed many amendments, mostly promoting more flexibility in the conflict-of-law rules. In February 2006, an amended proposal was put forward that to only a small extent incorporated the Parliament's amendments, rejecting the others.<sup>16</sup> The Council and the Commission did not support the Parliament's amendments at second reading either.<sup>17</sup> However, following a series of trialogues, a conciliation Committee managed to reach an agreement on the night of 15 May 2007<sup>18</sup> and on 11 July 2007, the Rome II Regulation was formally established.

Since the Regulation is based on the general community competence provided for in Article 61, it serves the objective of maintaining and developing an area of freedom, security, and justice. The approximation of substantive law in the field of non-contractual liability in the Member States is extremely limited, though at an academic level the work on European tort principles, amongst others in the context of the Draft Common Frame of Reference, considerable progress has been made.<sup>19</sup> In its Explanatory Memorandum, the Commission pointed out that divergences exist primarily in relation to the boundary between strict liability and fault-based liability, compensation for indirect damage and third-party damage, compensation for non-material damage and in excess of actual damage (punitive or exemplary damages), and the liability of minor and limitation periods.<sup>20</sup> Though as regards the conflict-of-law rules, all Member States adhere to the principle of *lex loci delicti commissi*, differences exist in the role and application of this principle, and difficulties arise in the case of complex torts, where the harmful event and the damage take place in different countries. According to the Recitals of the Regulation, the proper functioning of the

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von Hein, 'Something Old and Something Borrowed, but Nothing New? Rome II and the European Choice-of-Law Evolution', *Tulane Law Review* 2008, pp. 1676-1677.

<sup>11</sup> Though it is at least clear that as far as civil procedure is concerned, Regulation introducing European procedures may not be applied in purely national cases, as the faith of the Commission proposals for a European Order for Payment Procedure and the European Small Claims Procedure have demonstrated. See on this issue X.E. Kramer, *Eenvormige procedures voor de inning van vorderingen. De Europese betalingsbevelprocedure en de Europese procedure voor geringe vorderingen*, Deventer: Kluwer 2007, pp. 19-24 and 85-86. Further, the failure of the Rome III-project concerning conflict rules on divorce cases illustrates that in the area of family law community competence is limited.

<sup>12</sup> See the Explanatory Memorandum to the Commission Proposal of 22 July 2003, COM(2003) 427 final, pp. 1-30, at p. 3.

<sup>13</sup> See on this draft amongst others O. Lando, 'The EC-Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations', *RebelsZ* 1974, pp. 6-55.

<sup>14</sup> See for relevant documents the register of the Council at <[www.consilium.europa.eu/](http://www.consilium.europa.eu/)>. COM(2003) 427 final, 22 July 2003.

<sup>15</sup> COM(2006) 83 final, 21 February 2006.

<sup>16</sup> See amongst others Council Documents nos. 8552/07, 17 April 2007 and 8569/07, 19 April 2007.

<sup>17</sup> Council of the European Union, 16 May 2007, 9713/07 (Presse 111).

<sup>18</sup> The European Group on Tort Law (EGTL) presented its Principles of European Tort Law in 2005; for more information see <[www.egtl.org/principles/project.htm](http://www.egtl.org/principles/project.htm)>. The Draft Common Frame of Reference (DCFR), prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), presented in 2008, contains extensive rules on torts in Book VI.

<sup>19</sup> Explanatory Memorandum 2003 Proposal, p. 5 (*supra* n. 12).

internal market creates a need to establish uniform conflict-of-law rules irrespective of the court or tribunal seized, in order to improve the predictability and certainty as to litigation and the applicable law and the free movement of judgments.<sup>21</sup> The requirement of legal certainty and the need to do justice in individual cases are essential elements of an area of justice, and this Regulation aims to provide for connecting factors that are the most appropriate to achieve these objectives.<sup>22</sup>

### 3. Scope of application of the Regulation

#### 3.1 Substantive scope

The substantive scope of Rome II is laid down in Articles 1 and 2. According to Article 1(1), the Regulation shall apply in a situation involving a conflict of laws, to non-contractual obligations in civil and commercial matters. It shall not apply, in particular, to revenue, to customs or administrative matters, or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*). Paragraphs 2 and 3 enlist a number of excluded matters. Article 2 provides further guidance as to what is to be understood by ‘non-contractual obligations’. Hence, four elements are relevant to access the applicability: a situation involving a conflict of laws; a civil and commercial matter; a non-contractual obligation; and a non-excluded matter.

The scope of Rome II is limited to a situation involving a conflict of laws. Though private international law necessarily involves a cross-border element, the international nature of a dispute is not always self-evident. The Explanatory Memorandum states that this is a situation in which one or more elements are alien to the domestic social life of a country, and that entail applying several systems of law.<sup>23</sup> The most obvious case is that the parties involved are domiciled [416] or habitually resident in different countries. Another situation is where the tortious act occurs in a country different from the one in which the parties are habitually resident. As follows from Article 14(2) and (3), a choice for a foreign law in an otherwise domestic case is also covered by the Regulation, though the effect of the choice of law is limited in this case. According to Article 25, where a State comprises several territorial units with their own laws, each territorial unit shall be considered as a country; however, a Member State is not obliged to apply this Regulation to conflicts solely between the laws of such units.<sup>24</sup>

Recital 7 clarifies that the substantive scope and the provisions of this Regulation should be consistent with the Brussels I Regulation<sup>25</sup> as well as with the instruments dealing with the law applicable to contractual obligations, notably the Rome I Regulation. The case law regarding the term ‘civil and commercial matters’ in the Brussels I Regulation (and its predecessor, the Brussels Convention) will thus also be relevant in the context of Rome II. According to the *LTU v. Eurocontrol* case, this concept is to be interpreted autonomously: namely, reference shall not be made to the law of one of the Member States but to the objectives and scheme of the Regulation and to the principles that stem from the corpus of the national legal systems.<sup>26</sup> In several subsequent cases, the European Court of Justice (ECJ) further explained this term and shaped the contours of the community concept of civil and commercial matters.<sup>27</sup> Recital 9 clarifies that claims arising out

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<sup>21</sup> Recitals nos. 6 and 8 Rome II.

<sup>22</sup> Recital no. 14 Rome II.

<sup>23</sup> Explanatory Memorandum 2003 Proposal, p. 8 (*supra* n. 12).

<sup>24</sup> Cf. Art. 19 Rome Convention and 22 Rome I Regulation.

<sup>25</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, *OJ* 2001, L 12/1.

<sup>26</sup> ECJ 14 October 1976, Case 29/76, [1976] *ECR* 1541 (*LTU v. Eurocontrol*).

<sup>27</sup> ECJ 16 December 1980, Case 814/79, [1980] *ECR* 3807 (*Netherlands v. Rüffer*); ECJ 21 April 1993, Case C-172/91, [1993] *ECR* I-1963, *NIPR* 1995, 395 (*Sonntag v. Waidmann*); ECJ 1 October 2002, Case

of *acta iure imperii* include claims against officials who act on behalf of the State and liability of publicly appointed office-holders. These are excluded from the scope of the Regulation.

In relation to the term ‘non-contractual obligation’, Recital 11 sets out that this concept varies from one Member State to another and that for the purpose of this Regulation should be understood to be an autonomous concept. The conflict rules in any case cover non-contractual obligations arising out of strict liability. Article 2 was only included after the amended proposal of 2006, and seeks to further outline the scope of the Regulation. Article 2(1) provides that for the purposes of this Regulation, damage shall cover any consequence arising out of tort/delict, unjust enrichment, *negotiorum gestio*, or *culpa in contrahendo*. Pursuant to Article 2(2), the Regulation also applies to non-contractual obligations that are likely to arise: in other words, to future torts. This corresponds to the jurisdiction rule entailed in Article 5(3) Brussels I Regulation that extends to harmful events that ‘may occur’. Since the scope should be consistent with Brussels I and the instruments dealing with the law applicable to contractual obligations,<sup>28</sup> the case law of the ECJ on the demarcation of contracts under Article 5(1) and torts, delicts, and quasi-delicts under Article 5(3) Brussels I Regulation as well as the scope of Rome I on contracts are significant.<sup>29</sup> The Rome I and Rome II Regulations are complementary instruments and – as is the case under Brussels I – obligations that are not contractual, are non-contractual within the meaning of Rome II. In the case *Kalfelis v. Schröder*, the ECJ ruled that Article 5(3) Brussels I covers all actions that seek to establish the liability of a defendant and that are not related to a contract within the meaning of Article 5(1).<sup>30</sup> In the *Jacob Handte* case, it defined a contract as an obligation that parties entered into by free will.<sup>31</sup> The scope is limited by exclusions laid down in Article 1(2) and Article 1(3).<sup>32</sup> According to the Explanatory Memorandum, the exclusions will have to be interpreted strictly.<sup>33</sup> Most of these coincide with those of the Rome Convention and its successor, the Rome I Regulation. Sub (a) excludes non-contractual obligations arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects including maintenance obligations and sub (b) excludes those arising out of matrimonial property regimes and regimes of comparable relations according to the applicable law, and wills and succession. Sub (c) excludes non-contractual obligations arising under bills of exchange, cheques and promissory notes, and other negotiable instruments to the extent that the obligations under such instruments arise out of their negotiable character; sub (d) excludes those arising out of company law and other bodies regarding creation, registration, capacity, internal organisation, winding-up, personal liability, and sub (e) those arising out of the relations between settlors, trustees, and beneficiaries of a trust created voluntarily. Sub (f) excludes non-contractual obligations arising out of nuclear damage. The most remarkable exclusion, which was only inserted in the amended proposal of 2006, is included in sub (g) and relates to non-contractual obligations arising out of violations of privacy and rights

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C-16700, [2002] ECR I-8111, NIPR 2002, 261 (*VKI v. Henkel*); ECJ 14 November 2002, Case C-271/00, [2002] ECR I-10489, NIPR 2003, 37 (*Gemeente Steenbergen v. Baten*); ECJ 15 May 2003, Case C-266/01, [2003] ECR I-4867, NIPR 2003, 199 (*Tiard*); ECJ 15 January 2004, Case C-433/01, [2004] ECR I-981, NIPR 2004, 143 (*Freistaat Bayern v. Blijdenstein*); ECJ 5 February 2004, Case C-165/02, [2004] ECR I-1543, NIPR 2004, 145 (*Frahuil v. Assitalia*); ECJ 15 February 2007, Case C-292/05, [2007] ECR I-01519, NIPR 2007, 126 (*Lechouritou v. Germany*).

<sup>28</sup> See Recital 7 Rome II Regulation.

<sup>29</sup> See on the point how a unilateral act should be positioned De Lima Pinheiro 2008, pp. 8-9 (*supra* n. 8).

<sup>30</sup> ECJ 27 September 1988, Case 189/87, [1988] ECR 5565, NIPR 1990, 483 (*Kalfelis v. Schröder*).

<sup>31</sup> ECJ 17 June 1992, Case C-26/91, [1992] ECR I-3990, NIPR 1995, 394 (*Jacob Handte*).

<sup>32</sup> See Explanatory Memorandum 2003 Proposal, pp. 8-9 (*supra* n. 12). Further amongst others: P. Stone, ‘The Rome II Regulation on Choice of Law in Tort’, *Ankara Law Review* 2007, pp. 99-100; G. L gier, ‘Le r glement “Rome II” sur la loi applicable aux obligations non contractuelles’, *La semaine juridique. Edition g n rale* 2007, I 207, pp. 15-17; De Lima Pinheiro 2008, pp. 10-11 (*supra* n. 8); G. Wagner, ‘Die neue Rome II-Verordnung’, *IPRax* 2008, pp. 2-3.

<sup>33</sup> Explanatory Memorandum 2003 Proposal, p. 9 (*supra* n. 12).

relating to personality, including defamation. The 2003 proposal even contained a special rule on violations of privacy and rights relating to personality.<sup>34</sup> One of the controversies between the Council and the European Parliament concerned the contents of this rule. Since it was not possible to reconcile the opposing views, the Commission chose to exclude these rights altogether.<sup>35</sup> This issue will receive special attention under the review clause of Article 30, stating that not later than 20 August 2011 the Commission shall submit a report on the application of the Regulation. A Commission's statement attached to the Regulation reads that the Commission, following the invitation by the Parliament and Council, will submit, not later than December 2008, a study on the situation in the field of the law applicable to non-contractual obligations arising out of privacy and rights relating to personality, and will take appropriate measures if nec-[417]essary. Finally, Article 1(3) provides that the Regulation shall not apply to evidence and procedure, without prejudice to Articles 21 and 22.<sup>36</sup> It goes without saying that national conflict rules will remain in force in relation to the excluded matters.

### 3.2 Territorial scope

The territorial scope is laid down in Article 3, which provides that any law specified by this Regulation shall be applied regardless whether or not it is the law of a Member State. This is in conformity with the scope of the Rome Convention and the Rome I Regulation, and somewhat confusingly indicated as 'universal application'. It means that no link to the EU is needed other than that the court of an EU Member State has jurisdiction and is thus dealing with the case. As discussed in section 2 above, in view of the internal market requirement of Article 65 it has been suggested to limit the territorial scope to become involved only when EU law comes into play; however, this suggestion has – fortunately – not been implemented.

Pursuant to the Protocol on the position of Denmark with regard to Title IV EC Treaty, Denmark is not taking part in the Regulation. 'Member State' for the purpose of this Regulation – and all Regulations based on this title for that matter – therefore means any Member State other than Denmark (Art. 1(4)).

### 3.3 Temporal scope

According to Article 31 Rome II, this Regulation shall apply to events giving rise to damage which occur after the Regulation's entry into force. Article 32 provides that this Regulation shall apply from 11 January 2009, except for Article 29 – which obliges the Member States to notify about older conventions dealing with some of the matters of Rome II in which they participate – which shall apply from 11 July 2008.

What is the date of entry into force? Since in the case of Rome II this is not stipulated by the Regulation itself, the date of entry into force of Rome II is twenty days after publication in the *Official Journal*, pursuant to Article 254(1) EC Treaty. The Regulation was published on 31 July 2007 and thus entered into force on 20 August 2007. As has been noted in literature, Article 31 in conjunction with Article 32 seems to result in the remarkable situation that the conflict rules of Rome II are applicable to events occurring after 20 August 2007, but a court will only apply these

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<sup>34</sup> Art. 6 thereof (see n. 12).

<sup>35</sup> Explanatory Memorandum Amended Proposal 2006, p. 6 (*supra* n. 16).

<sup>36</sup> These provisions regard the formal validity of a unilateral act and the burden of proof. Cf. Arts. 9 and 16 Rome Convention and Arts. 11 and 18 Rome I Regulation.



rules as of 11 January 2009.<sup>37</sup> The exact status of events occurring between these dates is not clear. In my view, the Rome II Regulation should not be given a seemingly ‘retrospective’ effect and, in view of the requirements of foreseeability and legal certainty, it should not be mandatory in the situation that the national conflict rules in force before 11 January 2009 lead to a different result. This corresponds to the situation under the Rome I Regulation, where it states that it shall apply to contracts concluded after 17 December 2009, being the date of its application.<sup>38</sup>

### 3.4 Relation to other regulations and conventions

Article 27 and 28 regulate the relation to other community instruments and conventions dealing with matters regulated by Rome II. Both provisions have been debated intensively, since Rome II might interfere either with other community instruments that – probably – include conflict rules or with – primarily – Hague Conventions.

Article 27 provides that this Regulation shall not prejudice the application of provisions of Community law, which, in relation to particular matters, lay down conflict-of-law rules relating to non-contractual obligations. In relation to a more extensive earlier draft of this provision, laid down in Article 23 of the 2003 proposal, a controversy arose, especially in relation to the E-Commerce Directive.<sup>39</sup> This Directive preserves the country of origin principle, and according to some, also implicitly dictates a conflict-of-law rule, even though Article 1(4) provides that it does not establish additional rules of private international law. The controversial paragraph 2 of Article 23 of the proposal, providing that the Regulation does not prejudice instruments which subject the supply of services or goods to the law of the Member State where the service-provider is established, was deleted and transposed in a more neutral wording to Recital 35.<sup>40</sup> It states that a situation should be avoided in which conflict-of-law rules are dispersed among several instruments and where there are differences between those rules, but that this Regulation does not exclude the inclusion of conflict rules in Community law concerning particular matters. Further, it provides that this Regulation should not prejudice the application of another instrument laying down provisions that contribute to the functioning of the internal market, and specifically refers to the E-Commerce Directive. Though this Recital seems valuable as a compromise, I consider it far from elegant, since it still leaves some room for the assumption that the E-Commerce Directive provision does have some kind of interference with private international law.

The relationship towards existing international conventions is provided for in Article 28. This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted. This provision is especially relevant in relation to the Hague Convention on the Law Applicable to Traffic Accidents and the

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<sup>37</sup> See for example Légier 2007, pp. 13-14 (*supra* n. 32); Wilderspin 2008, section 2.3 (*supra* n. 3). Several other authors, however, seem to interpret these provisions without further notice as meaning that it applies to events occurring after its *date of application*, or state that it applies to events occurring *after its entry into force*, i.e. 11 January 2009. It should be noted that for example in the Dutch language version, the heading of Art. 32 is ‘*Inwerkingtreding*’ (Entry into force) and not ‘Date of Application’; the wording of the Article itself, however, indicates that it has to be applied from 11 January 2009 and not that it enters into force on this date.

<sup>38</sup> See Arts. 28 and 29 Rome I.

<sup>39</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’), *OJ* 2000, L 178/1.

<sup>40</sup> I will not focus on this matter in detail, since it is discussed by Wilderspin 2008, section 2.1 (*supra* n. 3). See further on this matter *inter alia* H. Heiss, ‘Die Vergemeinschaftung des Kollisionsrecht der ausservertraglichen Schuldverhältnisse durch Rom I’, *Juristische Blätter* 2007, pp. 616-617.

Hague Convention on the Law Applicable to Products Liability.<sup>41</sup> These Conventions remain to be applicable, though in particular in relation to the Hague Traffic Accident Convention, the last word has not been said on this matter. This results in the situation that Member States [418] that are a party to those Conventions, will apply the rules thereof, whereas the other Member States will apply the rules of Rome II. Paragraph 2 adds that this Regulation shall, however, as between Member States, take precedence over conventions concluded exclusively between two or more of them insofar as such conventions concern matters governed by this Regulation. Since the Hague Conventions mentioned also involve third countries, this addition does not have much practical significance.

#### 4. System of the conflict of law rules

##### 4.1 Overview of the Regulation: conflict rules, scope of the applicable law, terminology, and application of foreign law

The core of the Regulation consists of the conflict-of-law rules laid down in Articles 4-14 of the Regulation. Chapter II (Arts. 4-9) provides rules for torts/delicts. Article 4 lays down the general rule and adheres to the *lex loci damni* rule: namely, application of the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurs.<sup>42</sup> The other Articles provide rules for special torts, relating to product liability (Art. 5), unfair competition (Art. 6), environmental damage (Art. 7), infringements of intellectual property rights (Art. 8), and industrial action (Art. 9). Chapter III (Arts. 10-13) contains rules for other non-contractual obligations: unjust enrichment, *negotiorum gestio*, and *culpa in contrahendo*. Chapter IV (Art. 14) deals with freedom of choice and is the only rule that applies to all non-contractual obligations, except for unfair competition regulated by Article 6 and the infringement of intellectual property rights provided for in Article 8.

Chapter V (Arts. 15-22) contains residual rules that either complement or constitute an exception to the conflict-of-law rules. Article 15 sets out the scope of the applicable law. It determines that the law applicable according to this Regulation governs in particular: (a) the basis and extent of liability, including the persons who might be held liable; (b) the grounds for exemption from liability and any limitation or division of liability; (c) the existence, nature, and assessment of damage or the remedy claimed;<sup>43</sup> (d) within the limits of national procedural law, the measures that a court may take to prevent or terminate injury or damage or to ensure the provision of compensation; (e) the question of whether a right to claim damage or a remedy may be transferred, including by inheritance; (f) persons entitled to compensation for damage sustained personally; (g) liability for the acts of another person; (h) the manner in which an obligation may be extinguished

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<sup>41</sup> Further, it may be relevant in relation to the Hague Convention on the Law Applicable to Agency of 1978 with regard to *negotiorum gestio*; see De Lima Pinheiro 2008, pp. 29 and 38 (*supra* n. 8), as well as in relation to the ship collision conventions; see Heiss 2007, p. 618 (*supra* n. 40). Pursuant to Art. 29, by 11 July 2008 Member States had to notify the Commission of the conventions referred to in Article 28(1); this list will be published within six months thereafter.

<sup>42</sup> See further section 5 below.

<sup>43</sup> Recital 33 somewhat remarkably 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 seized should take into account all relevant actual circumstances of the specific victim. These include the actual losses and costs of after-care and medical attention. According to a Commission Statement attached to the Regulation, the specific problems in these cases as a consequence of different levels of compensation, a study – eventually resulting in a Green Paper – should be made available to the Parliament before the end of 2008.



and rules in relation to prescription and limitation. Article 16 deals with overriding mandatory provisions and Article 17 with rules of safety and conduct. This Chapter further includes rules on direct action against the insurer (Art. 18), subrogation (Art. 19), multiple liability (Art. 20), formal validity (Art. 21), and burden of proof (Art. 22). Most of these rules are also known from the Rome Convention and the Rome I Regulation or the Hague Conventions on Traffic Accidents and Product Liability.

Chapter VI (Arts. 23-28) deals with several general matters. In relation to the conflict rules, the most relevant are Article 23 dealing with the concept of ‘habitual residence’, Article 24 excluding *renvoi*,<sup>44</sup> and Article 26, which includes the public policy exception.<sup>45</sup> Habitual residence plays an important role in several conflict rules of Rome II. The more flexible and factual criterion of habitual residence prevails for the purpose of conflict-of-law rules over the domicile-rule that is employed in the Brussels Regulation for the purpose of jurisdiction.<sup>46</sup> Though this is certainly not a new concept in European private international law, since it is also a primary connecting factor in the Rome Convention, for the purpose of the Rome II Regulation as well as the Rome I Regulation (Art. 19 thereof) an explicit definition is included.<sup>47</sup> Article 23 Rome II provides that the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration, in conformity with the Rome Convention. Where the event giving rise to the damage occurs, or the damage arises, in the course of operation of a branch, agency, or any other establishment, the place where this branch, agency, or establishment is located shall be treated as the place of the habitual residence. The habitual residence of a natural person acting in the course of his or her business activity shall be his or her principal place of business. No definition of the habitual residence of a natural person is provided. A court will need to look at all the circumstances of the case in order to establish where a person is habitually resident.

Another general issue relevant with regard to applying the conflict rules of Rome II is the treatment of foreign law. It is generally known that there is a difference in particular between common law countries on the one hand – where foreign law is to a certain extent on the same footing as the facts – and civil law countries on the other – where the general approach is that the court applies the conflict rules and foreign law *ex officio*.<sup>48</sup> However, there are numerous variations of both approaches. A Commission Statement attached to the Regulation provides that the Commission, being aware of the differences in this regard, will publish at the latest four years after the entry into force of this Regulation a horizontal study on the application of foreign law in civil and commercial matters, and take appropriate measures if necessary. For now, the question remains whether the Rome II Regulation entails an [419] implicit obligation to apply the conflict rules and foreign law as a possible consequence thereof *ex officio* or whether this is still an issue of national civil procedure.

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<sup>44</sup> Application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law (*‘Sachnormverweisung’*). Cf. Art. 15 Rome Convention and Art. 20 Rome I Regulation.

<sup>45</sup> Application of a law specified by this Regulation may be refused if such application is manifestly incompatible with the public policy (*ordre public*) of the forum. Cf. Art. 16 Rome Convention and Art. 21 Rome I Regulation. Since tort law is more ‘sensitive’ than contract law, in practice this provision may play a more important role under Rome II than under the Rome Convention/Rome I Regulation.

<sup>46</sup> See also the Explanatory Memorandum to the 2003 Proposal, p. 27 (*supra* n. 12).

<sup>47</sup> Art. 4(2) Rome Convention only refers to the central administration where the characteristic performer is a company.

<sup>48</sup> See for an extensive comparative analysis: S. Geeroms, *Foreign law in civil litigation: a comparative and functional analysis*, Oxford: Oxford University Press 2004. In relation to common law, see pp. 14-23 (nos. 1.04-1.25) and in relation to civil law pp. 23-25 (nos. 1.26-1.33). In the Netherlands this rule, derived from the Roman maxim *‘Da mihi facta, dabo tibi ius’* (give me the facts and I will give you the law), is based on Art. 25 of the Code of Civil Procedure.

#### 4.2 Legal certainty v. flexibility: general rules, special rules, and exceptions

As Recital 14 points out, the Regulation aims at striking the balance between legal certainty on the one hand and doing justice in individual cases on the other. To this end, it provides a general rule, specific rules for special torts as well as an ‘escape clause’, which allows a departure from these rules where it is clear that the tort is more closely connected with another country. This set of rules thus creates a flexible framework of conflict of law rules, and enables the court seized to treat individual cases in an appropriate manner.

As mentioned above, the general rule in Article 4(1) provides for application of the *lex loci damni*. Articles 5-12 include special rules for specific torts or other non-contractual liability. Some of these rules have a rather complex system of (combined) connecting factors, such as Article 5 on product liability, and Articles 10-12 on other non-contractual obligations. In other rules a further distinction is made as to the type or the effect of the tort is made, such as in Article 6 on unfair competition and acts restricting free competition.

The general escape clause, or exception, in favour of a ‘manifestly more closely connected’ law is inserted in Article 4(3) as an exception to the general rule of Article 4(1) and the specific exception of Article 4(2). This same exception clause is also present in Article 5(2) in relation to product liability; a comparable general exception is included in Article 10(4) on unjust enrichment, Article 11(4) on *negotiorum gestio*, and Article 12(2)(c) on *culpa in contrahendo*.

Besides these general exceptions in relation to several conflict rules, some rules also provide a more specific exception, guaranteeing application of the most closely connected law. The most prominent example is the ‘consequences based’<sup>49</sup> Article 4(2), which refers to the law of the common habitual residence of tortfeasor and victim, as an exception to the *lex loci damni*. By reference to this provision, this rule seems to function as the main rule (or exception?) in Article 5 on product liability and Article 9 on industrial action as well. In several instances, the Rome II Regulation relies on the principle of ubiquity, which may be perceived as a special exception as well. It implies that the victim can choose between two laws (usually that of the country of conduct or the place of the injury), whichever is more favourable to him. This principle is also to be found in several EU countries, such as in Article 40(1) of the German Law of Introduction to the Civil Code (*Einführungsgesetz Bürgerliches Gesetzbuch*, revision 1999) and in Article 62(1) of the Italian Private International Law Statute (*Riforma del sistema italiano di diritto internazionale privato*, 1995) as well as in Article 6 of the Hague Product Liability Convention.<sup>50</sup> This *favour laesi* principle is, in view of the aim of legal certainty, not a general exception in Rome II, but only recognised in relation to unfair competition, regulated by Article 6, and environmental damage, provided in Article 7.<sup>51</sup> Pursuant to Article 6(3)(b), in certain circumstances the person seeking compensation may, instead of the law where the market is likely to be affected, base his or her claim on the law of the court seized, provided this market is substantially affected.<sup>52</sup> According to Article 7, in the case of environmental damage, the *lex loci damni* applies, unless the claimant chooses to base the claim on the law of the country in which the event giving rise to the damage occurred. Other rules contain more specific exceptions as well, such as Article 8 on intellectual property rights that includes a special rule for infringements of a unitary Community intellectual property right.

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<sup>49</sup> See for this term also R.J. Weintraub, ‘The Choice-of-Law Rules of the European Community Regulation on the Law Applicable to Non-Contractual Obligations: Simple and Predictable, Consequences-Based, or Neither?’, *Texas International Law Review* 2008, p. 407.

<sup>50</sup> See also Symeonides 2008, section III.2 (pp. 21-22) (*supra* n. 5).

<sup>51</sup> See further for a ‘facultative’ approach, Art. 18 on direct action.

<sup>52</sup> See further Eva Rohde and Timo Rosenkranz in this issue of *Nederlands Internationaal Privaatrecht* (2008, no. 4).

Further, there are general ‘contents based’ exceptions to all conflict rules, the most important of which are laid down in Article 16 and 17. Article 16 provides that nothing in this Regulation 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. Article 7(2) Rome Convention and Article 9(2) Rome I Regulation provide a similar rule in favour of overriding mandatory rules of the *lex fori*.<sup>53</sup> Pursuant to Article 17, in assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and insofar as is appropriate, of the rules of safety and conduct that were in force at the place and time of the event giving rise to the damage. A similar rule is found in Article 7 of the Hague Traffic Accident Convention and Article 9 of the Hague Product Liability Convention. Also in the national private international law rules, this provision is not a stranger; for example, Article 8 of the Dutch Conflict of Laws Tort Act includes a similar provision. Article 17 Rome II enables the court to take into consideration rules of safety and conduct in force at the place and time of the event giving rise to the liability. These are for example, traffic rules or rules relating to the production, labelling, and packing of goods.

Lastly, a general exception to the application of the foreign law pointed out by the conflict rules is the public policy exception provided in Article 26, which enables a court to disapply certain rules of the foreign law, the application of which would be manifestly incompatible with the public policy of that Member State. According to Recital 32, in particular the case where the designated law allows for non-compensatory exemplary or punitive damages of an excessive nature – depending on the circumstances of the case and the legal order of the Member State of the court seized – may be regarded as being contrary to public policy of the forum.

In the Introduction, it was mentioned that in particular the European Parliament’s *rapporteur* of Rome II made efforts to generate input from academics outside Europe as well, and US scholars in particular have presented papers for this purpose.<sup>54</sup> Symeonides summarises the current US approach to cross-border torts as follows: ‘American courts apply the law of either the state of conduct or the state of injury, whichever prescribes a higher standard for the tortfeasor or financial protection for the victim, provided that, in the latter case, the occurrence of injury was objectively foreseeable.’<sup>55</sup> Borchers explains that in the 1960s with regard to tort law the public [420] policy doctrine ‘changed from being a mere reservation to a sort of policy analysis that allowed a court to substitute the forum’s rule for the injury state’s if that state’s rule was deemed unfair and other practical considerations point to the application of forum law’.<sup>56</sup> The US approach is thus quite flexible and clearly carries elements of the ‘better law approach’ and ‘governmental interest analysis’ inherited from the US conflicts revolution.<sup>57</sup> Though the *rapporteur*, Diana Wallis, was clearly inspired by the US approach and persuaded the European Parliament to adopt amendments sweeping the proposal into more flexible directions, most of these amendments did not end up in

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<sup>53</sup> Art. 7(1) Rome Convention that allows applying overriding mandatory rules of a third country returned in Rome I in a slightly more restrictive form; Rome II does not include this rule. In Article 9(1) Rome I, ‘overriding mandatory provisions’ are defined as ‘provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable’. This definition is derived from ECJ 23 November 1999, C-369/96 and C-376/96, [1999] ECR I-8453 (*Arblade*).

<sup>54</sup> See n. 5.

<sup>55</sup> Symeonides 2008, section III.C.1 (p. 21) (*supra* n. 5).

<sup>56</sup> P.J. Borchers, ‘The Proposed “Rome II” Regulation and the U.S. Experience in Tort Choice of Law’, 2005, p. 1, available at: <[www.dianawallismep.org.uk/pages/Rome-II-seminars.html](http://www.dianawallismep.org.uk/pages/Rome-II-seminars.html)> (*supra* n. 5).

<sup>57</sup> For a recent extensive discussion thereof, see S.C. Symeonides, *The American Choice-of-Law Revolution in the Courts: Past, Present and Future*, Leiden: Martinus Nijhoff Publishers 2006.

the final Regulation.<sup>58</sup> The Savignian paradigm thus prevailed. This caused several US scholars, notably Symeonides<sup>59</sup> and Weintraub<sup>60</sup> to be quite critical. Nevertheless, as was shown above, the Rome II Regulation does include several mechanisms that might be traced back to the US approach and the Hague Conventions.

In my view, therefore, the Rome II Regulation mostly carries on the European private international law tradition, the methodology of which relies primarily on Von Savigny, though a little topping from what may originate from conflict of laws in the US is undeniable. Though indeed the various special rules, general escape clauses, and special exceptions do insert flexibility and maybe result in a greater amount of ‘fairness’, they certainly do not make the system any easier.

## 5. Basic principle I: the place of injury (Article 4)

Article 4 is applicable to torts in general, where Rome II does not include a special rule<sup>61</sup> and where no choice of law has been made pursuant to Article 14.<sup>62</sup> It is pointed out that the general exceptions included in the Regulation, notably Articles 16 and 17 relating to overriding mandatory provisions and rules of safety and conduct as well as the public policy exception of Article 26, may further limit the effect of Article 4.<sup>63</sup>

Article 4 has a triple structure. Firstly, it designates the law of the country in which the damage occurs, the *lex loci damni* (para. 1). Secondly, this rule is set aside where tortfeasor and victim have their habitual residence in the same country in favour of the law of that country (para. 2). Thirdly, both these connecting factors are replaced by the law of the country that is manifestly more closely connected (para. 3). These rules should be read in conjunction with Recitals 15-18. Recital 18 clarifies that Article 4(1) is the general rule, whereas Article 4(2) is an exception and Article 4(3) is to be understood as an escape clause.

### 5.1 Article 4(1): *lex loci damni*

Article 4(1) Rome II states that, 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.

The choice for the content-neutral place of injury, the *lex loci commissi delicti* is not surprising. This rule has been the basis of private international law to torts, particularly in European countries, for centuries, and relies on the Savignian principle of the most closely connected law. As Recital 15 points out, the role of this rule, however, varies and especially in a situation of multiple places of injury, this rule is not applied homogeneously in the Member States. A classical example, derived

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<sup>58</sup> Council Document no. 10812/05, 13 July 2005, Outcome of the European Parliament’s first reading (Strasbourg, 4 to 7 July 2005). For an interesting analyses in this regard, see Von Hein 2008, pp. 1663-1707 (*supra* n. 10).

<sup>59</sup> See S.C. Symeonides, ‘Rome II and Tort Conflicts: A Missed Opportunity’, *The American Journal of Comparative Law* 2008, pp. 173-222. This article is countered by P.J. Kozyris, ‘Rome II: Tort Conflict on the Right Track! A Postscript to Symeon Symeonides’ “Missed Opportunity”’, *The American Journal of Comparative Law* 2008, pp. 471-497.

<sup>60</sup> See Weintraub 2008 (*supra* n. 49).

<sup>61</sup> See primarily Arts. 5-12. See section 4.1 above.

<sup>62</sup> See further section 6.

<sup>63</sup> See section 4, in particular 4.2 for a discussion of these exceptions.

from the famous ECJ case *Bier v. Mines de potasse d'Alsace*<sup>64</sup> under the Brussels Convention/Regulation, is the case where French mines disposed of huge amounts of salts in the Rhine and caused damage to Dutch gardeners who use the Rhinewater to water their crops. Is the place of injury France or the Netherlands? The ECJ ruled that in this situation both the action forum ('*Handlungsort*') and the event forum ('*Erfolgsort*') have jurisdiction, upon the plaintiff's choice. For the applicable law, a choice should be made: either the law of the action or the law of the event (place of damage) is applicable, or the victim-plaintiff is allowed to base his or her claim on either of these laws. As discussed in section 4.2, the *favor laesi* rule is not chosen as the general rule. As the Commission, in my view rightfully, pointed out, this 'would go beyond the victim's legitimate expectations and would reintroduce uncertainty in the law'.<sup>65</sup> From the other two options, the place of damage, or *lex loci damni* was chosen as the rule that best serves the interests involved. This rule is to be found in several EU countries: for example, in Article 3(2) of the Dutch Conflict of Laws Tort Act, which specifies the *lex loci delicti* in favour of the *lex loci damni*. However, in several other countries, the *Handlungsort* (place of the tortious act) is favoured as a starting point, such as is provided in the Austrian Article 48(1) Private International Law Act (*Bundesgesetz über das internationale Privatrecht*, 1978) and to a certain extent in the German Article 40(1) Law of Introduction to the Civil Code.

As Recital 16 clarifies, a connection with the country where the direct damage occurred strikes a fair balance between the interests of the person claimed to be liable and the person sustaining damage, and it also reflects the modern approach to civil liability and the development of systems of strict liability.

Though the argument of the development towards strict liability in some fields is somewhat weak to justify a general rule favouring the law of – in most cases – the victim, it is in my view a satisfactory rule as a starting point. Apart from the shift from fault to strict liability, there has been a shift in liability law from punishment towards compensation. The law of the place where the damage occurs is in general best suited to fulfil this function.<sup>66</sup> Further, this puts the victim in the same position as in a national case.

This solution, however, also has its drawbacks. It only takes to a certain extent into account the interests of the tortfeasor. [421] In general, he or she will be able to foresee where damage might occur, but not in all circumstances. In these situations he or she is confronted with an 'unexpected' law. Article 5(1) on product liability contains an 'unforeseeability clause' to this end, partly derived from Article 7 of the Hague Product Liability Convention. However, a general exception, such as Article 3(2) of the Dutch Conflict of Law Torts act contains in relation to the *lex loci damni*, fails. Maybe in some circumstances the general exception of Article 4(3) can be of use to the tortfeasor. Further, the *lex loci damni* rule is not practical in the case of different places of damages, such as in the *Shevill* case<sup>67</sup> under Article 5(3) Brussels I, since this results in the 'Mosaic principle'. This means that different laws will apply, even if – for example on the basis of Article 2 – the case is pending in the same court.<sup>68</sup>

The last phrase of Article 4(1) clarifies that the *lex loci damni* applies irrespective of the country or countries where the indirect consequences of that event occur. This is in compliance with the situation under Article 5(3) Brussels I, where the ECJ held in the *Marinari* case that the place where

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<sup>64</sup> ECJ 30 November 1976, Case 21/76, [1976] ECR 1553 (*Bier v. Mines de potasse d'Alsace*).

<sup>65</sup> Explanatory Memorandum to the 2003 Proposal, pp. 11-12 (*supra* n. 12).

<sup>66</sup> See also Heiss 2007, p. 625 (*supra* n. 40); G. Hohloch, 'The Rome II Regulation: An Overview', 9 *Yearbook of Private International Law* 2007, p. 8; De Lima Pinheiro 2008, pp. 16-17 (*supra* n. 8).

<sup>67</sup> ECJ 7 March 1995, C-68/93, [1995] ECR I-415, NIPR 1995, 533 (*Shevill v. Presse Alliance*). It must be noted that this case dealt with defamation, which is excluded from the scope of Rome II.

<sup>68</sup> See also Heiss 2007, p. 625 (*supra* n. 40).

the harmful event occurred does not include the place where the victim suffered financial damage following upon initial damage arising and suffered by him in another State.<sup>69</sup>

Lastly, it should be pointed out that pursuant to Article 17, in assessing the conduct of the tortfeasor, account shall be taken, as a matter of fact and insofar as is appropriate, of the rules of safety and conduct at the place and time of the event giving rise to the liability. The rules of the place of the action may thus complement the law of the place of the damage.<sup>70</sup>

### 5.2 Article 4(2): common habitual residence

Article 4(2) includes a ‘consequences based’ or ‘result based’ exception, providing that 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.<sup>71</sup> This exception, which legitimates the expectations of both parties (though maybe not of third parties), is to be found in virtually all Member States.<sup>72</sup> For example, the Netherlands incorporated this exception in Article 3(3) of its Conflict of Laws Tort Act, Germany in Article 40(2) of the Law of Introduction to the Civil Code and Italy in Article 62(2) of its Private International Law Statute (extending to a common nationality). This rule is also accepted outside the EU. In Switzerland, it is formulated as the main rule in the absence of a choice of law, pursuant to Article 133(1) Swiss Private International Law Act (*Bundesgesetz über das Internationale Privatrecht*, 1989). It may have originated in the US, where this rule was adopted in the case *Babcock v. Jackson* and is captured under the principle of the most significant relationship.<sup>73</sup>

The habitual residence is an autonomous concept under Rome II. As discussed in section 4.1 above, Article 23 provides that the habitual residence of companies is the place of the central administration, or the location of the branch, agency, or establishment involved, whereas the habitual residence for a natural person in the course of his or her business activity is its habitual residence. The habitual residence of a natural person is not defined, but should be established upon factual criteria. Relevant is where the person factually and on a more permanent basis has the centre of his or her life (intended residence, family life, work, and so on).<sup>74</sup>

### 5.3 Article 4(3): more closely connected law and accessory attachment

A more complicated exception is provided in Article 4(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 is specified in paragraphs 1 and 2, the law of that other country shall apply. It adds that this 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.

The situation of the ‘accessory attachment’ is an important indication for application of this general ‘more closely connected’ exception. The same construction consists for example in Germany, where Article 41(2)(1) of the Introduction to the Civil Code contains this indication for a more closely connected law, besides other grounds. In several other Member States, the accessory attachment exception occurs as an independent exception, such as in Article 5 of the Dutch Conflict

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<sup>69</sup> ECJ 19 September 1995, C-364/93, [1995] ECR I-2719, NIPR 1995, 538 (*Marinari v. Lloyd's Bank*).

<sup>70</sup> See also section 4.2 above on the role of Art. 17.

<sup>71</sup> See also section 4.2 above for the qualification of this exception.

<sup>72</sup> Explanatory Memorandum to the 2003 Proposal, p. 12 (*supra* n. 12).

<sup>73</sup> Symeonides 2008, pp. 194-195 (*supra* n. 59).

<sup>74</sup> In German ‘*Lebensmittelpunkt*’, see Heiss 2007, p. 626 (*supra* n. 40).



of Laws Tort Act. Also the Swiss Private International Law Statute includes the accessory connection in Article 133(3).

The reference to a ‘pre-existing relationship’ is primarily with regard to the situation that a contract between parties exists that is closely connected to the tort. This rule enables a ‘*Gleichlauf*’ between the law applicable to the contract and the tort. In this case, Rome I indirectly governs the law applicable to the tort.<sup>75</sup> It is not clear to what extent the pre-existence of a relationship is relevant, or even decisive. From a practical point of view, applying the same law to the tort as to the contract – which might very well be in question in the same dispute – is usually preferable. However, it must be noted that paragraph 3 functions as an exception within the structure of Article 4, and this ‘accessory attachment’ is therefore not to be employed as the main rule. The pre-existent relationship, in my view, may also be of a *factual* nature,<sup>76</sup> though a proposal by the European Parliament to refer explicitly to both legal and factual relationships was not accepted.<sup>77</sup> The existence of a factual relationship in general will have less significance than a legal one, and most of these situations will already be caught by either the exception of Article 4(2) or Article 12 on *culpa in contrahendo*.

Further, the vague wording of Article 4(3) does not clarify to what extent this paragraph plays a role where there is no pre-existing relationship between parties.<sup>78</sup> The word ‘manifestly’ as well as the Explanatory Memorandum express that this [422] clause must remain an exception, since it introduces a degree of unforeseeability.<sup>79</sup> According to the Commission, the practice in some Member States in relation to the Rome Convention showed that the presumptions of Article 4(2-4) thereof were mostly ignored in favour of the most closely connected law. This is also why Article 4(1) Rome I formulates these former presumptions as the main rules, adding in Article 4(3) an exception in favour of the ‘manifestly more closely connected law’. In relation to Article 4(3) of the Rome II Regulation, the European Parliament proposed to include a catalogue of factors in addition to the common habitual residence and the pre-existence of a legal or *de facto* relationship.<sup>80</sup> These were the need for certainty, predictability, and uniformity of result; protection of legitimate expectations as well as the policies underlying the foreign law to be applied and the consequences of applying that law. The Commission did not accept these indicators, since it would alter the spirit of the instrument, which is to be applied ‘*by way of exception*’.<sup>81</sup> It did, however, acknowledge the value of the expectations of the parties, though a specific reference in this regard included in the amended proposal was abandoned in the following negotiations.

The European Parliament also made an effort to introduce an issue-by-issue analysis, and therefore probably allowing *dépeçage*.<sup>82</sup> It proposed to add a paragraph stating that in resolving the question of the applicable law ‘the court seized shall, where necessary, subject each specific issue of the dispute to separate analysis’. This, however, was not adopted in the amended Commission proposal, and the text seems intentionally to refer only to the situation that the (entire) tort/delict is manifestly more closely related to another country. In addition, Article 15, which enlists the topics governed by

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<sup>75</sup> It must be pointed out that parties themselves may also establish a parallel between the law applicable to their contract and the tort by choosing the law pursuant to Art. 14 Rome II.

<sup>76</sup> This is clear from the Explanatory Memorandum to the 2003 Proposal, pp. 12-13 (*supra* n. 12). In the literature, this was questioned, see *inter alia* Stone 2007, p. 20 (*supra* n. 32); Wagner 2008, p. 6 (*supra* n. 32).

<sup>77</sup> Outcome of the European Parliament’s first reading, amendment 26 (*supra* n. 58).

<sup>78</sup> See also Stone 2007, pp. 114-115 (*supra* n. 32).

<sup>79</sup> Explanatory Memorandum to the 2003 Proposal, p. 12 (*supra* n. 12).

<sup>80</sup> Outcome of the European Parliament’s first reading, amendment 26 (*supra* n. 58).

<sup>81</sup> Amended Commission proposal 2006, p. 4 (*supra* n. 16).

<sup>82</sup> Outcome of the European Parliament’s first reading, amendment 26 (para. 3a) (*supra* n. 58). See on this issue Symeonides 2008, pp. 185-186 and 200-201 (*supra* n. 59).

the applicable law, indicates that *dépeçage* is in principle not allowed. This makes the system of Article 4 somewhat rigid and sacrifices individual justice in favour of legal certainty.

In conclusion, according to the system of the Regulation, Article 4(3) should be interpreted strictly. In my view, it is preferable that the courts retain a certain degree of discretion in applying this exception under Rome II, as is provided in Recital 16 of the Rome I Regulation in relation to Article 4 thereof. The pre-existence of a legal relationship and – partly in relation to this – the legitimate expectations of parties are for this purpose to be taken into account. In my view, this exception should not be employed to justify applying the *lex fori* as a ‘homeward trend’. The persistence of important policy considerations is already guaranteed by Articles 16, 17 and 26, and should be restricted to the circumstances described therein.

## 6. Basic principle II: choice of law by the parties (Article 14)

### 6.1 *The freedom of choice*

Article 14 enables parties to choose the law applicable to all non-contractual obligations regulated by Rome II, except for unfair competition (Art. 6(4)) and intellectual property rights (Art. 8(3)). In this sense, one could say it constitutes the main rule of the Regulation as it does in the Rome I Regulation, though in practice a choice by the parties in relation to a non-contractual obligation is far less common than it is in contractual matters.

Article 14(1) provides that the parties may agree to submit non-contractual obligations to the law of their choice: (a) by an agreement entered into after the event giving rise to the damage occurred; or (b) where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred. The choice shall be expressed or demonstrated with reasonable certainty by the circumstances of the case and shall not prejudice the rights of third parties. This second sentence is derived from Article 3(1) Rome Convention, which reappears in Article 3(1) Rome I.

The possibility of a choice of law as an expression of the principle of party autonomy was not strongly debated. Though the freedom of choice in relation to torts is not as widely accepted as in relation to contracts, it is in the meantime part of many conflict of law systems. The choice of law on torts is amongst others expressly provided in Article 6 of the Dutch Conflict of Laws Tort Act, Article 42 of the German Law of Introduction to the Civil Code, and outside the EU, for example, in Article 133 of the Swiss Private International Law Act.

### 6.2 *Limitations to the freedom of choice*

Article 14 provides several limitations,<sup>83</sup> which may result in an application stricter than the national rules. Firstly, as Article 14(1) implies, in relation to a non-commercial activity a choice of law may only be entered into after the dispute has arisen. This limitation aims at protecting the weaker party in relation to a future tort. Through Article 4(3), the law applicable to the connected contract may also with regard to weaker parties re-enter the scene, but in relation to this provision the Explanatory Memorandum clarifies that it may not harm weaker parties.<sup>84</sup> In general, the relevant provisions of the Rome I Regulation will offer the necessary protection of consumers, insured parties, and employees, and will thus also influence the law applicable to the tort.

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<sup>83</sup> See for an overview Th.M. de Boer, ‘Party Autonomy and its Limitations in the Rome II Regulation’, 9 *Yearbook of Private International Law* 2007, pp. 22-29.

<sup>84</sup> Explanatory Memorandum to the 2003 Proposal, p. 13 (*supra* n. 12).

Secondly, Articles 6(4) and 8(3) prohibit a choice of law on unfair competition and intellectual property rights, respectively. The obvious reason is that unfair competition involves collective interests and that intellectual property law still relies largely on the principle of territoriality and is of public interest as well. In my view, this restricts party autonomy too much. Not all unfair competition acts affect collective interests. Further, in relation to environmental torts, public interests might as well be involved and Article 7 does not include a limitation.<sup>85</sup> For IP rights, the principle of territoriality is somewhat outdated and an average IP infringement does not differ substantially from any other type of tort. Both limitations could in my view have been omitted. In obvious cases, the general exceptions of Article 16, 17, and 26 suffice to limit the effect of an undesirable chosen law and to protect local and public interests.

Thirdly, Article 14(2) copies the limitation of Article 3(3) Rome Convention and Article 3(2) Rome I with regard to mandatory rules in domestic cases, in order to avoid their circumvention. It provides that where all the elements relevant to the situation at the time when the event giving rise to the damage [423] occurs in a country other than the country whose law has been chosen, the choice shall not prejudice the application of provisions of the law of that other country, which cannot be derogated from by agreement.

Fourthly, Article 14(3) includes a similar limitation in the situation wherein all the elements relevant to the situation are located in one or more of the Member States; parties' choice of law shall not prejudice the application of mandatory Community law, where appropriate as implemented in the forum Member State. Article 3(4) Rome I contains the same exception.

In the literature, different views are defended in relation to the question of whether *dépeçage* is possible.<sup>86</sup> I consider that the possibility of subjecting separable obligations to different laws, as is explicitly allowed under Article 3(1) of the Rome Convention and Article 3(1) of Rome I, is intentionally not included. The discussion in relation to Article 4(3) also shows that *dépeçage* is not favoured in Rome II. This in my view is to be regretted, because in certain circumstances legitimate reasons might exist for parties to subject one obligation arising out of the tort to the law of one country, and to subject another part to the law of another country or to limit the choice to a certain obligation.<sup>87</sup>

## 7. Concluding remarks

The Rome II Regulation proves that it is difficult to reach a satisfactory compromise between legal certainty and flexibility in order to do justice in an individual case, while fulfilling the law and economics criteria of simple and predictable rules. In relation to torts, from a law and economics point of view it has been argued that indeed the place of injury is the best solution.<sup>88</sup> The Regulation, however, provides many special rules as well as general and special exceptions that are occasionally ambiguous and make the outcome sometimes unpredictable. As the overview below shows, the Rome II scheme – presented as a four-step analysis to identify the order of application – is far from simple. This scheme only includes the core rules laid down in Articles 4-14 and not the additional conflict rules on amongst others direct action (Art. 18) and subrogation (Art. 19). Further, it does not indicate the conflict rule per special case, the application of which may be quite

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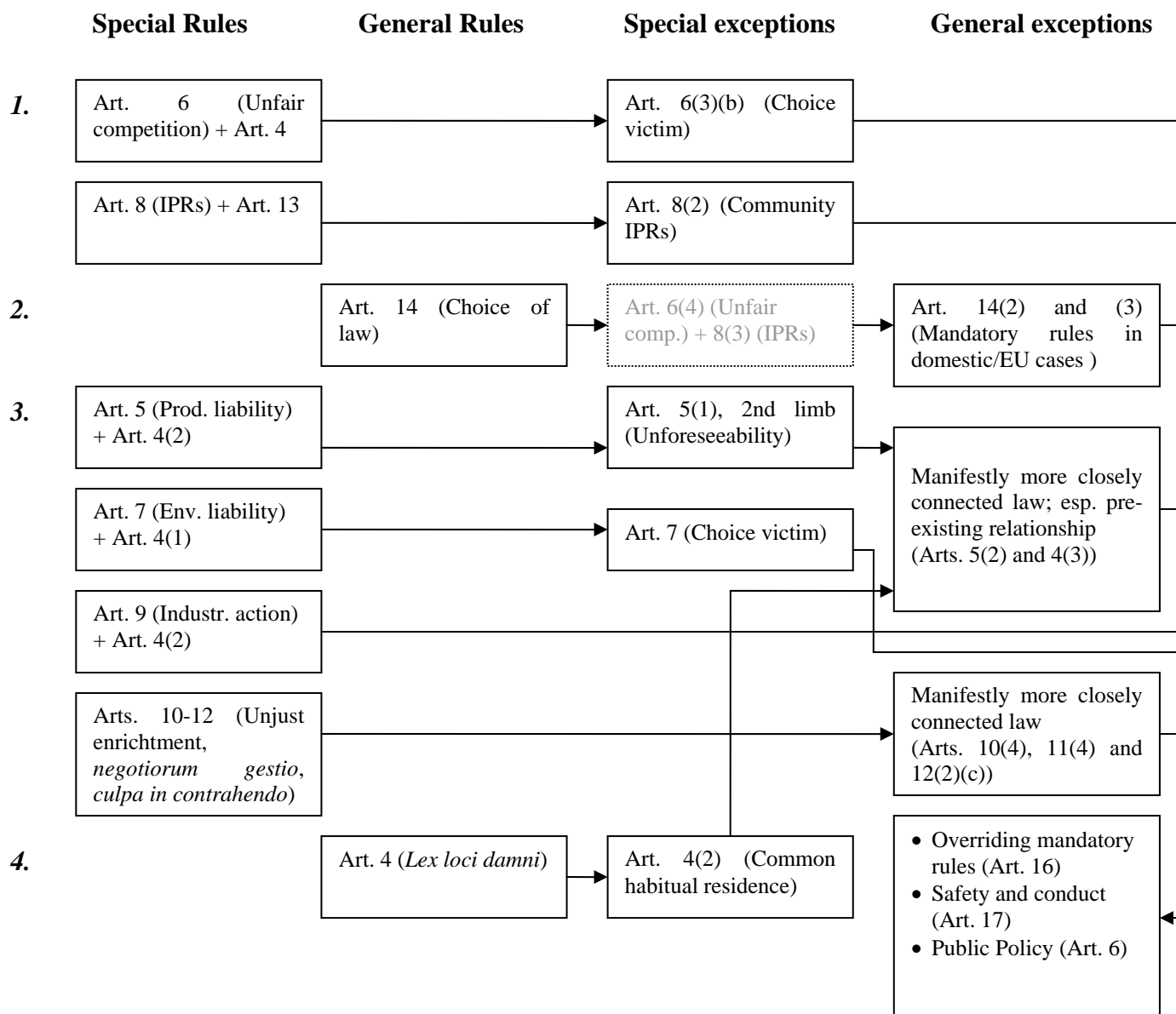
<sup>85</sup> See also De Boer 2007, p. 25 (*supra* n. 83).

<sup>86</sup> For example Symeonides 2008, p. 186 (*supra* n. 59) claims it is possible, whereas De Lima Pinheiro 2008, p. 13 (*supra* n. 8) claims it is not.

<sup>87</sup> In support of this, De Lima Pinheiro 2008, p. 13 (*supra* n. 8).

<sup>88</sup> See *inter alia* G. Rühl, 'Methods and Approaches in Choice of Law: An Economic Perspective', *Berkeley Journal of International Law* 2006, also available in SSRN at <ssrn.com/abstract=920999>, section III.2.a (p. 23). See on this with regard to Rome II, Weintraub 2008, pp. 402-406 (*supra* n. 49).

complicated in itself, using cascades of (combined) connection factors or making a further differentiation of situations.



[424] From the pessimist perspective, one may say that Rome II is a miscarried piece of legislation that neither fulfils the requirements of legal certainty, in view of a diversity of rules and general and special exceptions, nor fulfils the requirements of doing full justice in the individual case, since the exceptions are to be applied restrictively and *dépeçage* is not allowed. From a more optimistic standpoint, however, one may say that a serious attempt is made to reconcile two approaches – certainty and flexibility – that are inherently opposite, but that are both legitimate. It is undeniable that flexibility and the European civil law standard of legal certainty are hard to combine, and this has resulted in attempts to include ‘catch all’ correction mechanisms instead of a general and open exception.

Though the Regulation has certain flaws and lacks a clear methodology, I tend to support the optimist view. To criticise is easy, but one should also be able to propose a better system. I submit that this is difficult. An alternative to the complex Rome II system would be to include the plaintiff ubiquity rule for all torts and delicts. However, in my opinion this would overcompensate

the victim, making the application of the rules even more impractical and the outcome even more unpredictable. Another option would be to include a general rule: for example, in favour of the *lex loci damni*, accompanied by an open-ended exception, which allows a reflection on every interest – both parties’ and state interests – involved. A further option could be a general rule in favour of the most closely connected law, possibly accompanied by presumptions. These have the disadvantage of lacking legal certainty and easy applicability as well. Most importantly, one should take into account the background of Rome II, which is to serve as a harmonisation and integration device in the European Union. From this point of view, the Rome II Regulation is an acceptable instrument. This of course does not take into account that the formulation of several provisions leaves something to be desired, such as Article 4(3), and that the application of several individual rules needs to be evaluated and may require amendment, as is facilitated by Article 30 of the Regulation.