Law applicable to Torts/Delicts, implications on Austrian, German Law and Rome II Regulation

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วัตถุประสงค์ของวิทยานิพนธ์ฉบับนี้มีขึ้นเพื่อศึกษาผลผูกพันของบทบัญญัติของ Rome II ต่อบรรดาภาคีสมาชิกของสหภาพยุโรปรวมถึงออสเตรียและเยอรมัน บทบัญญัติ Rome II มุ่งประสงค์ที่จะทำกฎเกณฑ์ของการขัดกันแห่งกฎหมายด้านหนี้ที่ไม่ได้เกิดจากสัญญา (ละเมิด) ตามบทบัญญัติฉบับนี้กฎหมายที่ผลแห่งละเมิดได้เกิดขึ้น (lex loci damni) เป็นหลักพื้นฐาน นอกจากนั้นหลักเกณฑ์เฉพาะของการขัดกันแห่งกฎหมายได้ถูกบัญญัติขึ้นเกี่ยวกับทรัพย์สินทางปัญญา ความเสียหายจากสิ่งแวดล้อม ทางอุตสาหกรรม และการแข่งขันที่ไม่เป็นธรรม ออสเตรียและเยอรมันได้ปฏิบัติตามพันธกรณีดังกล่าว วิทยานิพนธ์ฉบับนี้มุ่งที่จะชี้ให้เห็นถึงผลกระทบต่อออสเตรียและเยอรมัน ผลของวิทยานิพนธ์ฉบับนี้อาจเป็นตัวอย่างของการแก้ไขพัฒนากฎเกณฑ์ว่าด้วยการขัดกันแห่งกฎหมายของประเทศไทยในอนาคต

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The objective of this thesis aims to illustrate the binding effects of the Rome II Regulation to all European Union Members, including Austria and Germany. The Rome II Regulation intends to harmonize conflict of law rules on non-contractual obligations, tort/delict. According to Rome II Regulation, the law of the place where the damage occurred (lex loci damni), became the fundamental principle for tort/delict, while conflict of law rules have been set up for specific performances of tort/delict in the area of intellectual property rights, environmental damage, industrial action and unfair competition. Therefore Austrian and German law should response the new obligations under this Regulation. This thesis aims to present the implications of new conflict of law rules on non-contractual obligations towards the domestic laws of both countries. The outcome of this thesis-findings would be used as example for Thailand in improving her own conflict of law rule in the future.

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Chapter I
INTRODUCTION

1. Background

In every legal system it is possible that cases come into existence, which have such a strong connection to a foreign country that it seems more reasonable to apply the foreign law than the own domestic. For example, a traffic accident in which both parties have a common habitual residence in a country different to the place of the accident. In such a situation it is necessary for a jurisdiction to provide with rules for the possible application of a foreign law, as it is important to foresee and predict which foreign law would be applied. The main objective of conflict of law rules is to determine the applicable law for cases involving a foreign element and the conflict of law rules decide which law must be applied in such a case.[1]

The conflict of law rule establishes a connection between the legal circumstances and the applicable law. Therefore the closest connection of the cases' facts to a legal system is determining. It is at the discretion of the judge to decide if a case involves a foreign element and therefore the conflict of law rules of the court`s jurisdiction have to be applied.

Hence it is important to understand that the conflict of law rule must be seen as domestic law of each jurisdiction. Therefore the judge has to apply first the domestic conflict of law rule of its own jurisdiction and these rules could set the application of the law of a foreign jurisdiction. In 2007, one harmonized conflict of law rule regime concerning non-contractual obligations was introduced in the European Union. It is widely replacing the domestic conflict of law rules of all the Members States and directly applicable in every European country.[2]

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1 Bea Verschraegen, *International Private Law* (Vienna: Manz Publisher- and University-bookstore, 2012), 221. [*Bea Verschraegen*, Internationales Privatrecht (Wien: Manz Verlags- und Universitätsbuchhandlung, 2012), 221.]

2 Ibid., 222.

2. Thesis Relationship to Business Law and Rome II Regulation

This thesis mainly deals with the Rome II Regulation, which is the regulation of the European Parliament and the council of 11 July 2007 on the law applicable to non – contractual obligations in conflict of law situations. The main purpose of this regulation is to harmonize the conflict of law rules in the European Union, which is necessary to promote the growth of the European economy as it also simplifies cross boarder business - investments. As a result of this the thesis shows a strong connection to business law.

The Rome II Regulation furthermore deals with obligations arising out of torts and tort law is part of the curriculum of the business law program at the Chulalongkorn University, which also illustrates the connection of the thesis to business law. In comparison to this, the Rome I Regulation covers contractual obligations and the Rome III Regulation deals with divorce and legal separation.

3. Thesis Hypothesis

Rome II Regulation produces binding effects to all EU member states, including Austria and Germany. Its implications on both countries are accepted in the background of European Integration, but provide only some examples for Thailand.

4. Thesis Objectives

- Study structure and scope of the application of the Rome II Regulation
- Show the implications given to Austria and Germany by the Rome II Regulation
- Show the possible value for the improvement of the Thai conflict of law rules concerning torts

5. Thesis Scope

The scope of this thesis will cover a detailed analysis of the Rome II Regulation, its provisions and jurisdiction. Furthermore the impact of the regulation to Austrian and German conflict of law rules concerning torts will be illustrated.

6. Thesis Procedures

- To conduct a literature review on the Austrian and German Private International Law and collect relevant jurisdiction in this field.
- To conduct an analysis of the provisions of the Rome II Regulation and its relevant jurisdiction through the European database of court cases and relevant articles of law professors.
- To conduct a final documentation of all relevant literature and jurisdiction, which will show the possible value of the Rome II Regulation for the Thai conflict of law rules concerning torts.

7. Benefits of the Thesis

- To diagnose the current Austrian and German conflict of law rules concerning torts.
- To notice the influence of European legislation and jurisdiction on the national laws of Austria and Germany in the field of conflict of law.
- To recognize the current applicable regulations and jurisdiction in case of conflict of tort laws in Europe.
- To have the ability to provide recommendations for the improvement of the Thai conflict of law regime concerning torts.

Chapter II
DEVELOPEMENT OF CONFLICT OF LAW RULES AND EUROPEAN LAW

1. Development of Conflict of Law Rules related to Non-Contractual Obligations

1.1. Statutes Doctrine

The first mentionable development of conflict of law rules concerning non-contractual obligations in Europe are the statues doctrine.

In the 13. Century in Italy, the statues came into existence, which are the decisions of the courts, and the opinions of the jurists.Three different types of statues were developed:[3]

Statuta personalia: These statutes are always connected to the person, meaning wherever this person stays or travels, they personal statues are always ruled under the law of the country of origin. For example, a person which was born and lives in country A travels to country B. In country B the person destroys property, during the compensation claim the question arises if the person had legal capacity. Under the statuta personalila, the legal capacity of the person is going to be judged under the law of country A, even though the tort was committed in country B.[4]

Statuta realia: Rights related to property, rent and sell of an immobile object like a real estate are always ruled under the law of the country where it is located. This has the consequence that a non-contractual obligation connected with a real estate is always governed by the law of the location. For example, a person which lives in country A travels to country B and damages a house located in country B. The law governing the compensation claim of the owner would be the law of country B.[5]

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3 Brigitta, Jud, and Florian Aspöck, *International Private Law* (Vienna: LexisNexis Publisher, 2009), 5. [*Brigitta Jud, Floiran Aspöck*, Internationales Privatrecht (Wien: LexisNexis Verlag, 2009), 5.]; Rauscher, *International Private Law*, 8. [*Rauscher*, Internationales Privatrecht, 8.]

4 Ibid.

5 Ibid.

Statuta mixta: These statutes are the origin of the conflict of law rules concerning torts. The law of the place of acting was seen as the fundamental doctrine. For example, all delicts and torts and the related compensation claims are governed by the law of the place where the act which caused the damaged was set.[6]

The statue doctrine had the obvious weakness inherent, that it`s rules lead to a unpredictable application of foreign laws in each country. For example, in the case of *Statuta personalia,* the country of origin principle could lead to unpredictable and unfair results. In a case with two joint-liable tortfesaors, one could be liable and the other not, because his legal capacity is governed by another countries' law. Therefore the system was reformed in the 18. Century.

From this time on, the statues were connected to each country, meaning the legislator could issue statutes/conflict of law rules for non-contractual obligations in the own country and everybody who travelled and acted in this country had to follow this rules. But even this approach couldn't solve the problems, as the majority of the domestic statues were unclear and not enforced at this time.

The end of the statue doctrines was initiated by an academic work of the famous legal scholar Carl Georg Waechter in 1841. He demonstrated in his work the disadvantages of the statue doctrine. As the main disadvantage can be seen the application of too many different laws in cases of non- contractual obligations. This caused difficulties for the judges who had to be familiar with too many jurisdictions. As a result of this the alternative was going back to the territorial principle, meaning the law of the country where the claim was filed is going to be applied.[7]

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6 Ibid.

7 Rauscher, *International Private Law*, 9. [*Rauscher*, Internationales Privatrecht, 9.]

1.2. Comity Of Nations for non-contractual obligations and Nationality Principle

The final rejection of the statues doctrine happened through the work of Savigny and the comity of nations, which was also very relevant for the conflict of law rules codification for non-contractual obligations.

The Comity of Nations means the mutual recognition of the laws and customs of others countries by all nations. Therefore every country has to respect and accept the jurisdiction of another nation. Savigny had in his major work the opinion that the location of the non-contractual obligation is the origin for determining the applicable law. Meaning the place of the law where the tort or delict was committed ("lex loci deliciti doctrine") is in general applicable. The foreign law can be applicable if the case shows more connection to another country, but in every case the own domestic conflict of law rules order the application of another law and never the foreign law itself like under the statues doctrine.[8]

At the last step of development, before the introduction of the conflict of law acts in the European Countries, can be seen the nationality principle. The nationality of a person was the main connecting factor for the conflict of law rules concerning non-contractual obligations. This approach is called universalism, which leads to the application of the countries` law of a concerned person in contrary to the domicile principle which connects the case to the domicile of a concerned person. In case of commitment of a tort or delict this leads to the result, that the ability of acting of the concerned person must be decided under the law of the nationality and not the place where the person has its domicile.[9]

1.3. Issuing of the Conflict of Law Acts for non-contractual obligations

Since the early law history, Austria and Germany always used the civil law system. As a result of this, only the term "delicts" is used in the matter conflict of laws. In comparison, common law countries like the U.K or U.S. apply the tort system, and therefore include the term "tort" in the conflict of law rules.

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[8] Jud and Aspöck, *International Private Law*, 6. [*Jud, Aspöck*, Internationales Privatrecht, 6.]

[9] Rauscher, *International Private Law*, 10. [*Rauscher*, Internationales Privatrecht, 10.]

After the end of the statutes doctrine the European legislators started to develop codified rules for the conflict of laws, including non-contractual obligations. The first issuing of the conflict of law rules in Germany is in connection with the large civil law codifications at the beginning of the 20th century. The introduction of the EGBGB (General Civil Code) in 1896 created the major legal source for the conflict of law rules in Germany. The special rules for non- contractual obligations are included in the general rules for the conflict of laws.[10]

The second wave of codification began at the later 20th century in Europe. The importance of law comparison for non-contractual obligations increased at this time and the influence of treaties on fundamental principles of the national codifications became more important. During this time the Austrian IPRG (Conflict of Law Rules) was also issued, as a special Act for Private International Law, in 1978. It includes the rules for non-contractual obligations and other specific fields.[11]

1.3.1. Non-contractual obligations and Conflict of Law Rules

During the initial tries to build up a coherent choice of law rule for delict/tort cases involving a foreign element a decision had to be made between using the "**lex fori**" (the domestic law of the court) and "**lex loci delicti commissi**" (the law of the place where a specific tort was committed). On one hand it was necessary to accept the territorial sovereignty of each country which leads to the application of the "lex fori". On the other hand it can be seen as necessary to follow the law where the right was created to satisfy the possibility of determining the extent of any remedy following from it. Finally, the general solution was to give priority to the "lex loci delicti commissi" but the courts kept the right to use the "lex fori" if the foreign law seemed to be unfair or other considerations led to the application of the local law.[12]

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10 Ibid., 11.

11 Ibid., 12.

12 Jolanta Kren Kostkiewicz, *Outline of the Swiss International Private Law* (Bern: Stämpfli Publisher AG Bern, 2012), 585. [*Jolanta Kren Kostkiewicz*, Grundriss des schweizerischen Internationalen Privatrechts (Bern: Stänpfli Verlag AG Bern, 2012), 585.]

1.3.2. Specific Approach on Germany and Austria

Austria:

Austria has different to Germany a special act addressing the PIL named "IPRG" (International Private Law Act of Austria).

The provisions of the "IPRG" concerning non-contractual obligations were widely replaced by the Rome II regulation in 2007. Before this, Article 48 of the IPRG established a rule for delicts (non-contractual damages) which followed the "**lex loci delicit commissi"** (the law of the place of acting) doctrine. However, if in a present case this doctrine led to an inappropriate result, the Austrian jurisdiction instead changed to the application of the "**lex loci damni**" (Law of the place where the injury occurs) doctrine.[13]

Germany:

Art 40 EGBGB applies the "**lex loci delicti commissi**" doctrine:

"(1) Tort claims are governed by the law of the country in which the liable party has acted. The injured party can demand that instead of this law, the law of the country in which the injury occurred is to be applied. The option can be used only in the first instance court until the conclusion of the pretrial hearing or until the end of the written preliminary procedure."

EGBGB[14] is the introduction act for the general German civil code, which has implemented general conflict of law rules in Art 38-42 EGBGB. Within these general rules, specific rules, like Art 40 for the law applicable on tort/derelict, unjust enrichment law and actions performed without due, can be found.

After the implementation of the Rome II regulation in 2009, the remaining area of application for Art 38 ff EGBGB have been cases which came into existence before the date of 10.1.2009.[15]

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13 Verschraegen, *International Private Law, 122. [Verschraegen,* Internationales Privatrecht*, 122.]*

14 Einführungsgesetze zum Bürgerlichen Gesetzbuch.

15 Rauscher, *International Private Law*, 328. [*Rauscher*, Internationales Privatrecht, 328.]

1.3.3. Specific Approach on Thailand

Existing legislation on Delict under Thai Act of Conflict of Laws Buddhist Area 2481 (1938)

Art 15 of the Thai Act of Conflict of Laws:

"An obligation arising out of a tort shall be governed by the law of the **place where the facts Grounding** such tort come to pass."

The Thai Act has only implemented this general rule for conflict of laws concerning torts and generally applies the "lex loci delicti" doctrine".

2. Unification of Conflict of Law Rules of non-contractual obligations in Europe including The Hague Programme

2.1. History of the Rome II Regulation

The European Communities first try to unify the conflict of law rules on delict and tort dates back to 1968. The European Commission built up a working group to discuss the possibility of unifying the conflict of law rules in the field of non-contractual obligations. Then long time no progress was reached and the working group was nearly dissolved. But after the treaty of Amsterdam went into force in 1999 the Commission presented the first draft of a Regulation on the law applicable to non-contractual obligations in 2002. This draft was quite similar to the actual Regulations already, and had specific rules for torts like product liability, industrial action and infringement of property rights included.[16]

In general must be explained, that the Rome II Regulation as an instrument for unification is part of the politics of judicial and police cooperation in the European Union, which was also called the third pillar. In the next chapter of this thesis the so called, but already outdated, pillar system of the law of the European Union will be explained. The following chapter will illustrate the historical development of the politics of judicial and police cooperation, which is the base of the Rome II Regulation.

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16 Huber, *Rome II Regulation Pocket Commentary*, 26.

The Hague Programme is one of the main steps forward to harmonize domestic laws in the Europe Union. The main purpose of the Hague Programme is to strengthening freedom, security and justice in the European Union.[17] Furthermore it is base for all Rome Regulations. Rome II in detail states that it tries to fulfil The Hague Programme, which called for work to be pursued actively on the rules of conflict of laws regarding non – contractual obligations.

2.2. The Maastricht Treaty

The Maastricht Treaty was the first step of the foundation of the politics of judicial and police cooperation in the European Union, which was also called the third pillar and went in force in 1993. In the light of the existing rules at this time, the main improvement of this treaty was to bring about coherent action involving all the European actors, for example the introduction of a unified police investigation system. But the treaty had significant weakness from the beginning. The legal instruments were not appropriate, as the rules introduced through the treaty couldn´t be enforced, because of the lack of an executive body. Furthermore the objectives illustrated in the treaty like "matters of common interest" have not been clearly worked out and the working structure in the council was pretty cumbersome. As a result of this the following Amsterdam Treaty brought much more improvement.[18]

2.3. The Amsterdam Treaty

This treaty went into force, in the year of 1999. One of the major changes caused by this treaty, was the moving of immigration, asylum and frontiers from the third to the first pillar in the structure of the law of the European Union. This change led to the strengthening of the role of the European Parliament and the European court of justice, because the Parliament and the European court of justice were only allowed to act within the scope of the first pillar. Furthermore the new legal instruments of "framework decision" which were binding for

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17 Official Journal of the European Union 3.2.2005, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2005:053:0001:0014:EN:PDF (accessed August 17,2013).

18 Charles Elsen, *From Maastricht to The Hague: the politics of judicial and police cooperation* (Vienna: Springer Publisher Era Forum, 2007), 15.

all Member States detached the "Joint-Actions" and conventions of the Maastricht Treaty.[19] An example for a framework decision is the Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings. This decision is not directly applicable in the member states, but the state are obliged to transmit the decision into domestic law within a specified period.

Important to mention is also, that the Amsterdam Treaty introduced a new objective to the European Union, called "Area of Freedom, Security and Justice". "Police and judicial cooperation" became a main objectives of the European Union, and not remained a "common interest" anymore. Through the Amsterdam treaty the Schengen Protocol was also integrated into the European Union, therefore the Schengen agreement, addressing free movement of private persons within the EU, was not depending on the individual decisions of the member states anymore, furthermore it was now a matter of the whole European Union and all member states.[20]

2.4. The Tampere Programme

The concept of "Area of Freedom, Security and Justice" came into existence through the Amsterdam Treaty. Article 29 of the Amsterdam Treaty mentions "The police and judicial cooperation in criminal matters" and Article 61 to 69 of the treaty tries to regulate questions of immigration, asylum and frontiers, and the cooperation in civil matters. But these Articles still hadn´t enough details concerning actions, deadlines and priorities. To bring more details and security in these fields the Tampere summit was convened.[21]

Main purpose of the programme was to set up a unit called EUROJUST, to fight against strong organized crime. EUROJUST should have had the task to promote proper coordination of national prosecution authorities, and push cooperate criminal investigations in organized crime issues. Other concrete objectives were the

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19 Rudolf Streinz, *European Law* (Heidelberg: C.F. Mueller Publisher, 2008), 16. [*Rudolf Streinz*, Europaecht (Heildelberg: C.F. Müller Verlag, 2008), 16.]

20 Elsen, *From Maastricht to The Hague: the politics of judicial and police cooperation,* 16.

21 Ibid.

improvement of mutual recognition of judicial decisions and judgement and a certain degree of harmonization of law like definitions of main elements of crime. Hence it can be seen that the main goal was the strengthening of the security in the whole Union.[22]

2.4.1. Examination of the Tampere Programme

The Tampere programme expired at the end of the year 2004, and clearly not all objectives have been fulfilled, mainly because of the events like the terrorist attacks of 11th September 2001, which led to new objectives concerning the fight against terrorism. In conclusion, many of the instruments adopted through the programme are only characterized as "soft law", meaning they still need to be implemented into the national law of the member states. For example, a special force of the European Union should have been introduced, but not all Member states implemented the necessary laws in their jurisdictions, and as a result of this, the special force unit never came into existence.[23]

2.5. The Hague Programme and the Hague Action Plan

The following is an extract of the Hague Programme[24], which is crucial for the Rome II Regulation:

3. Strengthening justice

3.4. Judicial cooperation in civil matters

3.4.1. Facilitating civil law procedures across boarders:

"Civil law, including family law, concerns citizens in their everyday lives. The European Council therefore attaches great importance to the continued development of judicial cooperation in civil matters and full completion of the program of mutual recognition adopted in 2000. The main policy objective in this area is

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22 Streinz, *European Law*, 386. [*Streinz*, Europarecht, 386.]

23 Elsen, *From Maastricht to The Hague: the politics of judicial and police cooperation,* 19.

24 Official Journal of the European Union 3.2.2005, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2005:053:0001:0014:EN:PDF (accessed August 17,2013).

that borders between countries in Europe should no longer constitute an obstacle to the settlement of civil law matters or to the bringing of court proceedings and the enforcement of decisions in civil matters."

3.4.2. Mutual recognition of decision

"Mutual recognition of decisions is an effective means of protecting citizens' rights and securing the enforcement of such rights across European borders."

"Continued implementation of the program of measures on mutual recognition must therefore be a main priority in the coming years to ensure its completion by 2011. Work concerning the following projects should be actively pursued: the conflict of laws regarding non-contractual obligations ('Rome II') and contractual obligations ('Rome I'), a European Payment Order and instruments concerning alternative dispute resolution and concerning small claims. In timing the completion of these projects, due regard should be given to current work in related areas."

The main purpose of The Hague program is evolution not revolution, meaning that the plan is based on the Tampere principles and goals like: Developing actions in fields of harmonization or mutual recognition; completing the Tampere program in so far as it has not been completed; strengthening actions in the field of monitoring the implementation of European instruments in the Member States.[25]

On the other hand there are also new approaches, which can be seen as revolution through the Hague Programme. Great policy emphasis was put on the need for stronger operational cooperation, because of the weak national implementation of agencies like EUROJUST, which never really came into existence. Secondly the programme promotes the new "principle of availability" which has its focus on the improvement of information exchange in criminal matters. In detail, information should always be able to be exchanged between member-states. Finally, the ideas in judicial cooperation remain poor in comparison to police cooperation. There was no

[25] Elsen, *From Maastricht to The Hague: the politics of judicial and police cooperation,* 23.

real political intention to go further than the already existing system of approximation and mutual recognition of criminal law, because the Member States are traditionally focused on keeping their autonomy in these fields.[26]

A conclusive observation of the historical development of the politics of "judicial and police cooperation" in the European Union leads to the outcome that only the Hague Program initially started specific legislation in the area of cross boarder - civil law matters, like the Rome II Regulation. The previous treaties all couldn't come to a detailed solution and just remained guidelines for further politics. This shows the difficulties of finding a consensus between many Member States with different law systems and interests.

3. General Rules of the European Union Law

3.1. Introduction

The main purpose for founding the European Union, after the Second World War, was to prevent Europe from future war conflicts between the countries. The first step was to establish an economic community based on free trade and free movement between the central European countries in 1960. In the following decades the European Union was more and more developed to a community which also tries to harmonize and unify the law of the member states.

The term "European Law" is another expression for the law of the European community. There is a primary and secondary community law. The primary law covers the founding-contracts of the European Union, like the treaty negotiated between the European countries for establishing a free trade community. The secondary law is enacted by the organs of the European Union on the base of the founding contracts, like regulations and directives.[27]

The former structure of the European Union law was based on pillars. The first pillar included the founding contracts of the European Community. The second pillar covered the common foreign and security

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[26] Ibid., 24.

[27] Streinz, *European Law*, 14. [*Streinz*, Europarecht, 14.]

policy (CFSP) and the third pillar included the politics of judicial and police cooperation (PJCC). This pillar system was significant, because only in the first pillar the organs of the European Union like the European Parliament could enact European Law, which was binding for all member-states. The second and third pillar remained intergovernmental, meaning the member-states only had to follow the policies of the EU and enact laws to fulfill these policies. Through the Lisbon Treaty in 2009, the pillar system was abolished and the majority of the matters of the second and third pillar are now also part of the European legislation and not only policies anymore. As a result of this, the European legislator was able to enact the Rome II Regulation which is part of the politics of judicial and police cooperation.[28]

3.2. Legal nature of European Law and the European Union

The general opinion of the legal scholars classifies the European law as public international law with some specialities, because the European Union is originated from contracts made under public international law.

There are four different types of European law:

- Treaties (Primary Legislation, meaning they apply in all member states and automatically become law of each member state without any transmission)

- Regulations (Directly applicable, even though the member-state enacted a law which conflicts with the regulation)

- Directives (Not directly applicable, they have to be transmitted into domestic law, like traditional public international law, within a specific time period. Even though a member state is failing to do so, an individual can rely on the directive)

- Decisions (Generally passed by the European court of justice, which are binding for individuals, companies or member states)

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[28] Michael, Schweitzer, and Waldemar Hummer and Walter Obwexer, *European Law* (Vienna: Manz Publisher, 2007), 21. [*Michael Schweitzer and Waldemar Hummer and Walter Obwexer*, Europrecht (Wien: Manz Verlag, 2007), 21.]

The European Union itself is more than just an international organization, because it is a supranational union which negotiated power is delegated by the governments of the member-states, usually international organizations are not supranational. The criteria of supra nationality means, that the community has the possibility to eanct binding resolutions, which must be followed by the member-states without any exception. The European Union has two independent organs which can bind the member states and also directly the citizens of the union with their decisions. These two organs are the European Commission, which can enact regulations and directives, and the European Court of Justice, which can pass verdicts.[29]

In comparison to a state/nation, the European Union has no authority to establish new competences. Meaning the European Union always relies on the decision and intention of the member states to increase its competences in every matter.

3.3. Relationship between European Law and Domestic Law

Basically the European law has priority to the domestic law of each member state. The European court of justice explained this priority in one specific verdict: "The European Union contract created an own legislation/legal system, which was adopted by the legislation of the member states and had to be applied. The member states restricted their jurisdiction in some areas through the founding of the Union and their organs, and the delegation of sovereign rights to the Union. Therefore the member states have to accept in a restricted area all European law before their own domestic law."[30]

Consequently, if a national rule is contrary to a European provision, the authorities of each Member State must apply the European provision instead of the national norm, but the domestic norm is neither cancelled nor repealed, but its mandatory force is suspended.[31]

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29 Streinz, *European Law*, 50. [*Streinz*, Europarecht, 50.]

30 Ibid., 78.

31 Michael, Schweitzer, and Waldemar Hummer and Walter Obwexer, *European Law,* 25. [*Michael Schweitzer and Waldemar Hummer and Walter Obwexer*, Europrecht, 25.]

3.4. Nature of a European Regulation

It is important to illustrate, that European Regulations like the Rome II Regulation do not need any transmission into domestic law, different to traditional public international law.

According to Article 249 EC (European Contract) all regulations are direct applicable and have direct effect. A European regulation is in all its parts binding and fulfils all the requirements of a substantive law. Direct applicable means, the regulation must be applied in each member state without any order of a legislative organ of the member state. The regulation has to be applied even if domestic law conflicts with it, and therefore the domestic law must be ignored. As a result of this, regulations can be seen as a part of the legislation of each member state, but still remain characterized as European Law. The member states have the obligation to enforce the regulation through their authorities and courts and have to omit any action which endangers the enforcement of the regulation in the member-state.[32]

In conclusion, the Rome II Regulation must be seen in Austria and Germany as own domestic law which is directly applicable and has direct effect.

3.5. Judicial cooperation in civil matters

The former third pillar of the European Union "cooperation in the area of justice and home affairs" or "politics of judicial and police cooperation", which is now implemented into the European contract, also includes judicial cooperation in civil matters.

According to Article 65 EC (European Contract) "judicial cooperation in civil matters" covers actions with cross boarder connection, which are necessary for the functionality of the European Single Market. The EU enacted a clutch of regulations, based on the Article 65 EC: Competence and recognition of verdicts in civil and commercial matters; insolvency proceedings; European order for payment procedure; European title of execution

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[32] Streinz, *European Law*, 148. [*Streinz*, Europarecht, 148.]

and also the Rome II Regulation for non-contractual obligations, which is part of the judicial cooperation in civil matters.[33]

[33] Ibid., 394.

Chapter III
ANALYSES OF THE ROME II REGULATION

1. Objective, Principles and Legal Framework of the Regulation

It is necessary to illustrate, that the regulation only deals with conflict of law rules and not the substantive law of the member states.

The differences in the substantive matters lead to the need for harmonisation of the conflict of law rules in Europe. This harmonisations aims to provide with the same principles in the whole European Union, as it is not suitable for the proper function of the European Market to allow the application of each´s countries conflict of law rules.

The following objectives and principles of the Rome II Regulation illustrate the reasons for the harmonisation and its instruments.

1.1. Objectives of the Rome II Regulation[34]

One of the main leading objective of the Rome II Regulation is maintaining and developing an area of freedom, security and justice in the European Union. This is the most important European Policy and therefore the majority of all regulations follow it. The Rome II Regulation can be seen as a main tool for this objective, therefore the Regulation is a measure to support judicial cooperation in civil matters with cross boarder impacts and promote the compatibility of the rules applicable to conflict of laws in the Member States. As security and justice is a leading objectives in every community like the European Union, it is necessary to provide the same conflict of law rules in every member state to guarantee justice and security for all citizens of the Member States in the same way.

The European Union, as an economic community, mainly aims for the proper function of the European Market. To guarantee stable economic growth in Europe and to be able to compete with the American and Asian

34 Objectives are enumerated in the preamble of the Rome II Regulation.

market it is necessary to provide with a legal system which promotes the market. In an economy, the need of predictability of the outcome of litigation is very important for the entrepreneur and therefore the Rome II Regulation was introduced to unify the conflict of law rules to make the designation of the specific untouched national tort/delict laws predictable. For example, to support cross boarder investment within the European Union it is necessary to give the companies the possibility to foresee the outcome of any legal disputes to calculate all risks.

Finally, the need for legal certainty and to do justice in individual cases in the European Union lead to the introduction of the Rome II Regulation. This objective is going to be satisfied as the Regulation includes a general rule but also specific rules and in certain provisions an escape clause. The wide range of different rules with the basis of a general rule provides a flexible structure of conflict of law rules which allow specific ruling in individual cases. The European legislator used its power to enact new conflict of law rules to improve the rules for the whole community.

1.2. Principle of the Rome II Regulation[35]

The general principle of the regulation is to only harmonize the conflict of law rules, without toughing the substantive domestic law.

Facilitating the mutual recognition of decisions in civil and commercial matters is a leading principle of the Rome II Regulation. Even though a foreign court decision is based on the same law principles as the domestic law it won`t be automatically recognized and accepted by the own court and jurisdiction. A foreign decision is first subject to a sort of recognition process, which leads to refusal of recognition of the judgement if the own choice-of-law rule would designate another law to be applied. Therefore the Rome II Regulation, with its harmonized conflict of law rules, supports the mutual recognition of court decision which is important for the proper function of the European Market and to guarantee security and justice in the community. Accepting and recognizing a foreign court decision is an important step ahead to create a single market with free movement and prober function.[36]

The Rome II Regulation implements the principle of the *lex loci damni* (law of the country where the damage occurred) which supports "the foreseeability of court decisions and ensure a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage." It follows the modern approach to civil liability and leads to a fair balance between claimant and tortfeasor. The main reason for the introduction of this rule is to provide with a suitable regulation for long distance delicts. For example, if the acting of a person in country A causes damages in country B, the law applicable in the dispute will be the law of the country B. Further details to the general principle will be illustrated in the following chapters.

Lex loci damni constitutes the general principle, but the Regulation allows two exemptions like habitual residence of the parties (both parties have their residence in the same country) and manifestly closer connection

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35 Principles are enumerated in the preamble of the Rome II Regulation.

36 Th.M. de Boer, "The Purpose of Uniform Choice-Of-Law-Rules: The Rome II Regulation", 308.

to the law of another country (all important characteristics of the case lead to another law). The reason for implementing exemptions is to keep the rules flexible and make it possible to adopt to different situations, where the general rule wouldn't lead to an adequate result. For example, if a traffic accident happens in country A, but both parties have their residence in country B, it is more reasonable to apply the law of country B in this dispute.

Additionally to the general principle, the regulation implements specific rules for non-contractual obligations like product liability, unfair competition and acts restricting free competition, environmental damage and infringement of property right are part of the regulation. The reason for implementing special rules is to make the regulation applicable in every situation and satisfy the need for rules in special cases. For example, in the matter of product liability the consumer protection is a high concern and therefore a specific rule is necessary, which connects to the law of the habitual residence of the consumer instead of the law where the damage occurred. The connection to the habitual residence supports the interest of the consumer as he can file a claim in his own country under own law.

1.3. Legal Framework and Concept of non-contractual obligations under the Rome II Regulation

Scope Art 1 Rome II Regulation:

"This Regulation shall apply, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters."

The scope of non-contractual obligations under the Rome II Regulation generally covers: - Tort/Delict, - Unjust Enrichment, - Negotiorum Gestio, - Culpa in contrahendo

This Thesis will only focus on Tort/Delict under the Rome II Regulation.

Tort/Delict as part of non-contractual obligations include all claims which are based on a wrongdoing by the defendant. The concept of a non-contractual obligation varies from each Member State to another. Therefore

the term “non-contractual obligations” used in the Rome II Regulation should be understood as an autonomous concept. The Rome II Regulation uses the term “torts/delicts” without any connection to the legal tradition of any member state.[37]

The reason for this handling is that in the European Union only England uses the tort-law system. All other member states use a civil law jurisdiction which is based on a delict related compensation regime for non-contractual obligations.

In common law countries the law is developed by judges through decisions. In comparison to civil law countries, where the law is based on provisions enacted by the legislator (parliament) and the judges are only allowed to apply this law, not create it.[38]

Tort-Law System:

The tort law system is used in common law jurisdictions. A tort is defined as a wrongful behavior (civil wrong) which causes damage to another person and results in a legal liability of the actor (tortfeasor). The system enumerates specific types of torts, for example assault, battery, product liability and fraud. These torts are subdivided in categories like intentional torts, property torts, defenses, negligence, liability torts and economic torts. The tortfeasor is only liable if his wrongful behavior (civil wrong) can be subsumed under a specific tort. Therefore the judge has to examine if all criteria of a specific tort are fulfilled to find the tortfeasor guilty.[39]

37 Peter Huber, *Rome II Regulation Pocket Commentary* (Munich: Sellier European law pubishers, 2011), 66.

38 http://en.wikipedia.org/wiki/Common law.

39 http://en.wikipedia.org/wiki/Tort.

Delict- Law System:

In civil law countries the law of delicts is usually based on a general statute issued by the legislature (parliament). For example, the Austrian civil code in Art 1295 ABGB, is the general provision applied if somebody damage property or endangers health or life. Furthermore a delict is defined abstractly in terms of infringement of rights different to common law which implements many specific types of torts. Delicts can be committed either intentionally or negligently and the claim can be based on an infringement of an object protected by law like property, health and life.

The main difference between both systems is that in delict law it is not necessary to subsume the wrongful act under a specific delict like in the tort law systems. "Delict" usually is a general term relating to any wrongful act of the defendant which leads to liability. In difference to torts which are categorized for specific wrongful acts.[40]

Austria and Germany follows the same concept of delict based compensation and only implemented a distinction between contractual and non-contractual obligations in its legal systems.[41]

To find a suitable definition for tort/delict in the European Law, the interpretation of the Brussels I regime could help. The Brussels I regulation is a set of rules regulating which courts have jurisdiction in legal disputes, of a civil or commercial nature, between individuals residents of different EU member states. According to decisions based on the Brussels I regulation, the European court of justice was hereby defining the term "non-contractual" under which tort and delict falls, as an independent system which covers all actions that try to

40 http://en.wikipedia.org/wiki/Delict.

41 Daphne Beig, *ROM II-RE* (Vienna: Manz University-Publisher, 2008), 39. [*Daphne Beig*, ROM II-VO (Wien: Manz Universitätsbuchhandlung, 2008), 39.]

establish the liability of a defendant and which are not related to a contract. The interpretation is negatively, meaning that a damage is non-contractual if it cannot be categorized as contractual.[42]

The definition for contractual obligations of the ECJ is: "The phrase: Matters relating to a contract is not to be understood as covering a situation in which there is no obligation freely assumed by one party towards another"[43]. This finally leads to the definition: **any obligation that the obligor has not freely assumed must be considered a non-contractual obligation**.[44]

2. Conflict of Law Rules under the Rome II Regulation

2.1. General Rule on Tort/Delict under the Rome II Regulation

Art 4 Rome II Regulation:

"1. Unless otherwise provided for in this Regulation, the law applicable to a non - contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

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

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

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42 Andrew Dickinson, *The Rome II Regulation* (Oxford: University Press, 2008), 164.

43 ECJ, Case C-26/91 – Handte, [1992] ECR I-3967 para. 15.

44 Huber, *Rome II Regulation Pocket Commentary*, 37.

Article 4 Rome II Regulation establishes in paragraph 1 the general rule "lex loci damni" (the law of the country in which the damage occurs). Paragraph 2 and 3 set the exemptions from the general rule.

The rules in Article 4 relate to Article 1 and can only be applied within the scope of the Rome II Regulation, stated in Article 1. Therefore the general rule and the exceptions only apply in situations involving a conflict of laws to tort/delict in civil and commercial matters. For example, if there is only a connection to a single country and no conflict of laws, the rules of Article 4 cannot be applied in a case.[45]

The criteria of application of the general rule in Article 4 (1) require, that the claim is not for any of the other torts, which fall under the specific rules of Arts. 5 to 9. These rules are "lex specialis" to the general rule and therefore override the general rule in Article 4. Furthermore the parties must not have made a valid contract for a choice of law agreement, as the freedom of choice is an overruling principle throughout the whole regulation. For example, if the parties agreed that the law of country A is going to be applied in the dispute, the general rule cannot designate the law of country B to be applicable.

2.1.2. Lex Loci Damni and Reasons for this Rule

Article 4 (1) wants the courts to apply the "lex loci damni" rule (the law of the country in which the damage occurs). Many national approaches follow also this approach. The article explicitly determines the rule so far that the court should neither consider the place where consequential damage occurs nor the type of the tortfeasor`s actions to designate the applicable law.[46]

The most practical advantage of this new principle can be seen in multi-media torts. In cases of internet delicts it often happens, that the place of acting and the place where the damage occurs are different. For example, a hacker in country A illegally enters the database of a company and steals passwords, which has its servers and headquarter located in country B. The place of acting would be country A, but the damages

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45 Ibid., 44.

46 Ibid., 70.

occurs in country B. In this situation it is more reasonable and protects the victim, through allowing the claimant (company in country B) to file a claim for the damage under its own domestic law. It is not appropriate if the claimant has to deal with the foreign law of the place of acting, as this would bring many disadvantages. For example, the costs for the claim would be higher as it is more difficult to deal with a foreign law as the majority of lawyers have lack of expertise in foreign laws. Furthermore the former lex loci delciti rule (law of the place of acting) would allow the tortfesor to influence the applicable law on an upcoming claim, as he can choose the place of acting.

The main reason for the implementation of the general rule "lex loci damni" instead of "lex loci delicti" is that the place of action often cannot be foreseen and can easily be manipulated by the tortfeasor and has no importance for the victim. For example, a company which suffers damage from hacking of their databank, cannot foresee from which country the hacker will act and want to protect its interests in the county of the head quarter's and database`s location.[47]

Basically all Member States used the "lex loci delicti" doctrine as general rule, which was interpreted differently by the courts and have resulted in legal uncertainty, because each member state`s court decisions vary in their opinions. For example, in cases of torts with more than one acting, the French court had the opinion that the location of the first act is crucial for the applicable law, on the other hand the English court applied the law of last action´s place.[48]

[47] Commission of the European Communities. "A proposal for a Regulation of the European Parliament and the Council of the law applicable to non-contractual obligations ("Rome II")." *COM(2003) 427*, http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0427:FIN:EN:PDF (accessed October 21, 2013).

[48] Recital 16, Amended proposal for a European Parliament and Council Regulation on the Law Applicable to Non-contractual Obligations ("Rome II"), 21.2.2006, *COM (2006),* 83 final, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0083:FIN:EN:PDF (accessed October 25, 2013).

An additional argument for the "lex loci damni" doctrine is that the tortfeasor should expect his wrongful behavior to cause also damage in another country and on the other hand the victim should be able to base the claim on the legal system of the environment which he/she is used to.[49]

Another important reason for choosing the place of injury instead the place of acting to determine the applicable law is the basic economic rationale which underlines the structure of the Rome II Regulation. The expenses for the claim and for gaining legal information would have been much higher for the victim if he had to file a suit in another country.[50]

On the other hand, the European legislator explicitly didn't implemented the general possibility for the victim to choose any law other than the designated law by the general rule "lex loci damni", because this seemed to be too much advantage and the victim has no legitimate interest in the application of the most favorable law. To promote environmental protection, only Article 7 concerning environmental damages allows the victim to choose the law and take every possibility of the tortfesor away to influence the applicable law.[51]

2.1.3. Exemptions Habitual Residence and Escape Clause

Article 4 Paragraph 2 establishes a habitual residence exemption from the general rule.

If the victim and the tortfeasor have their habitual residence in the same country, this country´s law is applicable under Art 4 (2). This rule is also called "lex domicile communis", which is a widely known principle in the majority of different conflict of law rules.[52]

"Habitual Residence" for a natural person means the settled domicile, or the place where this person usually spends most time of the year.

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49 Jan von Hein, *Of Older Siblings and Distance Cousins: The Contribution of the Rome II Regulation to the Communitarisation of Private International Law,* RablesZ (Tübingen: Mohr Siebeck Publisher, 2009), 475.

50 Ibid.

51 Th.M. de Boer, "The Purpose of Uniform Choice-Of-Law-Rules: The Rome II Regulation," *Netherlands International Law Review* (2009): 315.

52 Ibid., 92.

The following case illustrates the practical relevance of this exemption. Two persons have their habitual residence in country A and travel together to country B. These persons injure each other while traveling in country B. It is obvious that a claim between these parties is more reasonable to be ruled under the law of country A, because there is a closer connection to their home country than to the place of traveling. Another example would be a traffic accident taking place in country A, while both parties have their habitual residence in country B. The application of the law of the country B seems to be more reasonable in this case as the defendant would probably prefer to file a claim in his home-country with the application of the domestic law.[53]

Art 4 (2) includes the requirement that the tortfeasor and the victim have their habitual residence in the same country. A question arises if a case involves a multitude of tortfeasors and victims. In general the majority of legal scholars have the opinion, that paragraph 2 should be restricted to cases involving one tortfeasor and one victim. The main reason is that in the cases of two contributing tortfeasors, every tortfeasor could be held liable under a different law, because only one could have a common habitual residence with the victim. This legal uncertainty should be avoided and therefore paragraph 2 not be applied in multitude cases.[54]

According to Article 23 (1) Rome II Regulation the “habitual residence” of a natural person, who is running a business, is the person´s principal place of business. There is no definition of habitual residence for a natural person without a business. Usually it will be self-explaining where the person has residence, for example the place official house registration. If the natural person has more than one residence, then its non-principal residence can be seen as “habitual residence” if the damage occurred while staying at this residence.[55]

53 John, Ahern, and William Binchy, *The Rome II Regulation on the Law Applicable to Non- Contractual Obligations* (Leiden: Nijhoff Publisher, 2009), 245.

54 Graziano, Succession and Wills in the Conflict of Laws on the Eve of Europeanisation, 19.

55 Huber, *Rome II Regulation Pocket Commentary*, 97.

Article 4 Paragraph 3 establishes an escape clause exemption from the general rule.

The main idea behind this provision is to allow flexibility in individual cases to handle the disadvantages which can arise through the application of paragraph (1) and (2), but the escape clause has to be applied restrictively. For example, a dispute between two people, according to the general rule, is governed by the law of country A. But in fact these persons had negotiated a contract before which is governed by the law of country B, and the only reason why the persons came in touch was the contract. Therefore it seems more reasonable to apply the law of country B also on the dispute arising between them.[56]

It is likely that this paragraph could be interpreted differently by every member state´s national courts. To reach more certainty the guidance must be followed that the escape clause does not encompass an application of the "lex loci damni", because it´s the doctrine of the general rule anyway.[57]

Paragraph (3) mentions a pre-existing relationship as an example for a more closely connection to the law of another country, in detail the paragraph states "a contract" as a specific example. In case of existence of a contractual relationship between the parties the most comprehensible consideration is, to apply the law governing this contract also to the dispute between these parties. Even though paragraph (3) only mentions "a contract" as an example, also non-contractual legal relationships could constitute an accessory connection.

For example, a delict is going to be committed between parents and their children, who live in country A. The children suffer damage in country B as they travel together with their parents in this country at that time. Under the general rule of paragraph (1) the law of country B would be applied. But the escape clause could lead to the application of the law under which the parents-child-relationship is ruled, country A, as there seem to be a

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56 Heinz, Bamberger, and Herbert Bamberger, *Commentary to the German Civil Code (*Leinen: C.H. Beck Publisher, 2007), 37. [*Bamberger/Roth*, Kommentar zum Bürgerlichen Gesetzbuch (Leinen: C.H. Beck Verlag, 2007), 37.]

57 Dickinson, *The Rome II Regulation*, 4.89.

much closer connection. Another example is that the law applicable to a corporation may also cover the torts between the shareholders of this company.[58]

2.2. Specific Rules on Tort/Delict under the Rome II Regulation

2.2.1. Product Liability

Conflict of Law rule on product liability is stated in Article 5 Rome II Regulation:

"1. The law applicable to tort/delict arising out of damage caused by a product shall be: (a) the law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred, if the product was marketed in that country; or, failing that, (b) the law of the country in which the product was acquired, if the product was marketed in that country; or, failing that, (c) the law of the country in which the damage occurred, if the product was marketed in that country."

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

"2. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraph 1, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question."

Product Liability in general covers the responsibility of a producer for damages caused to a consumer by its products. This provision does not define what a "product" is, but through the explanatory memorandum it can be understood that a product must be produced more than one time by the same manufacturer, and not

[58] Huber, *Rome II Regulation Pocket Commentary*, 103.

only one specific item which was custom made in private matters.[59] The conflict of law rules on product liability are "lex specialis" to the general rule of Article (4) and are mainly implemented into the regulation to provide the consumer with more protection than he would get through the application of the general "lex loc damni" rule of Article 4.

The conflict of law rules on product liability are divided into three levels in Article 5 and each of it has a common marketing element and a varying connection factor. These factors are, the habitual residence of the person suffering the damage, secondly the place of acquisition of the product and third the place where the damage occurred. For all three levels it is necessary that the product must be market in the respective country.

Therefore this conflict of law rule gives the victim (the consumer) the advantage of filing a claim under the law of his habitual residence and if the product is not marketed there, the place where he acquired it.

For example, a person who lives in country A buys a product in country B, which is marketed in country A and B. The consumer then suffered damage from the product in country B. Under the general rule of Article 4 the law of country B would be applicable, but the specific conflict of law rule on product liability leads to the application country A´s law. This is in favor for the victim (the consumer) as he can file the claim under the home-country law.[60]

The main reasons for implementing a special product liability rule and the main purpose of Article 5 is to ensure foreseeability and spread the risk of a modern high-technology society by achieving a balance between the costumer´s interests who suffered damage and the person potentially liable. Consumer production is a high concern in the European Union and therefore the European legislator found it necessary to establish a rule which is favours the victim (the consumer) over the producer.[61]

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59 Commission of the European Communities. " A proposal for a Regulation of the European Parliament and the Council of the law applicable to non-contractual obligations ("Rome II")." *COM(2003) 427*, 14.

60 Huber, *Rome II Regulation Pocket Commentary*, 128.

61 Ibid., 116.

2.2.2. Unfair competition and acts restricting free competition (Art 6)

Conflict of law rule on unfair competition and acts restricting free competition

Art 6 Rome II Regulation:

"1. The law applicable to tort/delict arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected.

2. Where an act of unfair competition affects exclusively the interests of a specific competitor, Article 4 shall apply.

3. (a) The law applicable to a tort/delict arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected.

(b) When the market is, or is likely to be, affected in more than one country, the person seeking compensation for damage who sues in the court of the domicile of the defendant, may instead choose to base his or her claim on the law of the court seised, provided that the market in that Member State is amongst those directly and substantially affected by the restriction of competition out of which the tort/delict on which the claim is based arises; where the claimant sues, in accordance with the applicable rules on jurisdiction, more than one defendant in that court, he or she can only choose to base his or her claim on the law of that court if the restriction of competition on which the claim against each of these defendants relies directly and substantially affects also the market in the Member State of that court.

4. The law applicable under this Article may not be derogated from by an agreement pursuant to Article 14.

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- **Conflict of Law Rule on Unfair Competition Article 6 (1) and (2)**

Article 6 is "lex specialis" to the general Rule Article 4.

The regulation has no definition of "unfair", as a result of this the term must be determined by the guidance given by the Unfair Commercial Practices Directive, which the Rome II proposal referred to.[62] The Commission's explanatory memorandum could also give an inspiration. Taking this materials as guideline, a competition is unfair if the entrepreneur uses practices like misleading advertisement, forced sales or acts that exploit a competitor´s value, disclosure of business/trade secrets and industrial espionage.[63]

For example, if a company tries in an advertisement to blame a product of a competitor to be dangerous and unhealthy, then it is an unfair competition.

There are two different types of unfair competition covered by the conflict rule of Article 6: Competitor-related and market-related acts. As a market-related act can be seen, if the public like competitors and consumers at large are affected, for example misleading advertisement. In this case paragraph (1) can be applied and leads to the application of the law of the country where the interests protected by the unfair competition law are violated. On the other hand, if only the interest of one specific competitor is violated, e.g. acts of sabotage or espionage, then paragraph (2) leads to the application of the general rule of Article 4.[64]

Article 6 (1) is only a clarification of the general rule Article 4 (1) , but the common habitual residence rule of Article 4 (2) neither the escape clause of Article 4 (3) are applicable to market-related acts of unfair

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62 Recital 13 Amended proposal for a European Parliament and Council Regulation on the Law Applicable to Non-contractual Obligations ("Rome II"), 21.2.2006, *COM (2006),* 83 final, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0083:FIN:EN:PDF (accessed October 25, 2013).

63 Huber, *Rome II Regulation Pocket Commentary*, 150.

64 Jürgen, Basow, and Josef Drexl, *Intellectual Property in the Conflict of Laws* (Tübingen: J.C.B. Mohr Publisher, 2005), 137.

competition. The reason for this handling is that the protection function of this provision, to promote the market, leaves no space for exceptions for serving the parties' interests.[65]

- **Conflict of Law Rule on Acts Restricting Free Competition Article 6 (3)**

The term "acts restricting free competition" of Article 6 (3) must be interpreted through Recital 23, because there is no definition in the regulation. The Recital states that prohibitions on agreements between companies, cartels, concerted practices and the abuse of a dominant position are acts restricting free competition.[66]

According to Article 6 (3) (a) the law of the country where the market is affected should be applied in the matter of acts restricting free competition. Lit (b) just gives the plaintiff an additional possibility to choose the law of its home-country instead of the law of the country where the market is affected. The main reason for this handling is to avoid disadvantages for the victim and provide with a rule for multi-state constellations.

For example, a company abuses its dominant position in country A, which affects the market of country A and B, as a result of this competitors in country B are also concerned. In this situation, according to lit (b), the competitors in country B can choose to file a claim in country B instead of A, based on the law of country B, which could be favourable for them, if their head-quarters are located in country B.

The geographical concept of the market under Art 6 (3) pursues the general market effects principle. In detail Article 6 (3) covers any violation of the competitive conditions on a market in the European Union. The defendant's anti-competitive behaviour which effects or violates the free market could be indicated easily because Article 6 (3) is neutral and therefore very wide. For example, if the defendant abuses his dominant position and therefore causes a turnover on a market, this market was already potentially affected.

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65 Ibid., 165.

66 Richard, Plender, and Michael Wilderspin, *The European Private International Law of Obligations* (London: Sweet & Maxwell Publisher, 2009), para 20-039.

The main reason for implementing Article 6 into the Rome II Regulation as a lex specialis rule to Article 4 is to ensure that the market is working properly and to protect consumers` and competitors` interests. The main purpose of the European Union and the Rome II Regulation is to maintain the proper function of the market, and therefore it seemed to be necessary for the legislator to enact a special rule for competition to increases the legal certainty in this field.[67]

2.2.3. Environmental damage (Art7)

Conflict of law rule on environmental damage Art 7 Rome II Regulations:

"The law applicable to a tort/delict arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred."

Recital 24 of the Regulation provides with a definition of "environmental damage": "Adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms." Nuclear damage is excluded from the Regulation, because there are already existing international scheme of nuclear liability and the importance of economic and state interests in this matter is so high, that it has to be covered by a specific regulation.[68]

Two types of damages are covered by Article 7, the damage to the environment itself and the damage to persons and property arising from damage to the environment. The damage to property is only covered if it is caused by environmental damage. For example, a factory owner causes strong pollution of the ground water in

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67 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) [2007] OJ L 199/40, rectial 21.

68 Commission of the European Communities. " A proposal for a Regulation of the European Parliament and the Council of the law applicable to non-contractual obligations ("Rome II")." *COM(2003) 427*, 10.

an area. As a result of this, a neighbouring water producer suffer damage as he cannot sell clean water to their customers. This damage would also be covered by the regulation. Furthermore it is important to mention that noise emissions are not covered by this provision, because they are not seen as environmental damage under the guidelines of the ECJ.[69]

The law designated through Article 7 covers the issues of causation, strict or fault-based liability and limitation of liability. Furthermore the compensation, prevention or termination of damage and remedies such as injunctive relief, prohibitory and mandatory injunctions are covered.[70]

Only in this provision the Rome II Regulation allows an unrestricted choice of the applicable law by the victim. In general the "lex loci damni" rule will apply, unless the claimant chooses the law of the country in which the event giving rise to damage occurred. As the claimant can choose which law is going to be applied, the most favourable law to the injured party is likely to be chosen, but the parties are also allowed to mutually designate a law according to Article 14. (Freedom of choice)

In the European Union environmental protection is a high concern, as it is seems to be necessary for a modern society to secure the future cleanliness of the earth. The main purpose of allowing the claimant to choose the place of acting instead of the place where the damaged occurred, is to raise the general level of environmental protection. For example, there should not be any possibility for the operator of a factory to benefit from the lower damage awards in a neighbouring country, if he establishes his facilities at the border and discharge or pollute waste to the neighbouring country.[71]

2.2.4. Infringement of intellectual property rights (Art 8)

Conflict of law rule on Infringement of intellectual property rights Art 8 Rome II Regulations:

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69 Junker, *Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations* (Munich: Munich Commentary BGB Art 7, 2003), 14.

70 Huber, *Rome II Regulation Pocket Commentary*, 216.

71 Commission of the European Communities. "A proposal for a Regulation of the European Parliament and the Council of the law applicable to non-contractual obligations ("Rome II")." *COM(2003) 427*, 19.

"1. The law applicable to a tort/delict arising from an infringement of an intellectual property right shall be the law of the country for which protection is claimed.

2. In the case of a tort/delict arising from an infringement of a unitary Community intellectual property right, the law applicable shall, for any question that is not governed by the relevant Community instrument, be the law of the country in which the act of infringement was committed.

3. The law applicable under this Article may not be derogated from by an agreement pursuant to Article 14."

The wide range of different national intellectual property concepts and their different scope of protected rights was a challenge for the European legislator, therefore this provision connects to other intellectual property rights - treaties and conventions to clarify the definitions. The Recital 26 Rome II Regulation, which gives guidance for the interpretation of the term "intellectual property rights", must be interpreted flexible and wide.[72] Recital 26 gives examples of intellectual property rights like copyrights, industrial property rights, trade secrets, unitary community intellectual property rights, whereby this enumeration is not exhaustive. Also the TRIPS agreement, the Berne Convention and the WIPO Copyright Treaty, to which all Member states have contracted, can give guidance for interpretation.[73] Taking all these materials in consideration, copyrights, trademark, patents, trade secrets and unitary community intellectual property rights can be seen as "intellectual property rights" under this regulation.

[72] Plender and Wilderspin, *The European Private International Law of Obligations,* para 22-011.

[73] Michael Grünenberger, *Journal for comparative law* (Frankfurt: Law and Economy Limited Publisher, 2009), 134. [Michael Grünenberger, Zeitschrift für vergleichende Rechtswissenschaft (Frankfurt: Recht und Wirtschaft GmbH, 2009), 134.]

The provision of Article 8 is a “lex specialis” to the general rule of Article 4. Article 8 (1) establishes the rule “lex loci protectionis” (the law of the place for which protection is claimed) for every intellectual property right, no matter if is registered or not.[74]

To determine the applicable law it is necessary to assign, in accordance with Article 8 (1), for witch territory protection is claimed, then Article 8 (1) directly leads to the application of the substantive law, if the base of an action is a national intellectual property right.[75] For example, a musician from country A want to protect his copyright in country B, as his rights are infringed by a music producer form country C. The protection claim will be ruled under the substantive law of country B.

Unitary Community intellectual property rights, are protected in all European Union´s member states, for example patents which can be registered at the European patent office. For these unitary rights it is not needed to claim protection for the specific patent in every single member stat, in fact it is enough to just file the claim in one Member state to seek protection in the whole EU.

If a dispute between a member of the community instrument and a third state (not Member States) arises, Article 8 (1) remains applicable, because Article 8 (2) only is going to be applied within the members of the community instrument. The only purpose of Article 8 (2) is to address cases in which the applicable law between Member States is not regulated by the community instrument. In fact the majority of matters of the substantive law concerning infringement of unitary community intellectual property rights are covered by the community instruments, as a result of this there is no need for any conflict of law rule and therefore the practical relevance of this paragraph is minor.[76]

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74 Plender and Wilderspin, *The European Private International Law of Obligations,* para 22-003.

75 Ibid., 239.

76 Huber, *Rome II Regulation Pocket Commentary*, 231.

If the claim is a based on a unitary community intellectual property right, priority is always given to the remedies provided by the instrument. In case of a respective Community instrument directly providing for the protection, it`s not necessary to resort to any conflict of law rules, because the protection directly comes from this instrument. For example, Article 9 of the Community Trademark Regulation includes the possibility of a claim to prohibit undue trademark´s use. But this regulation has a lack of provisions on damages, which is the only field where Art 8 (2) could be applied as the treaty doesn't provide for any remedies. Consequently Article 8 (2) is applicable only in the scope of damages concerning Article 9 of the Community Trademark Regulation and leads to the application "lex loci delicti" doctrine.[77]

The main purpose of implementing a special rule on infringement of intellectual property rights could be seen in underlining and strengthening the regime of intellectual property protection. The law of the place where protection is claimed, supports the application of the substantive law in every state and follows the main leading principle of territoriality in the field of intellectual property. Nevertheless the necessity of this whole provision can be questioned as paragraph (1) won´t usually lead to different results than the general rule of Article 4 and paragraph (2) has little of practical relevance. In fact, the only real impact of this provision is the exclusion of a choice of law agreement (Article 14). The main reason for this exclusion is to strengthen the substantive law regimes of each countries and protect them from foreign influence, as a foreign law could be made applicable through an agreement.

2.2.5. Industrial Action (Art 9)

Conflict of law rule on industrial action Art 9 Rome II Regulations:

"Without prejudice to Article 4(2), the law applicable to a tort/delict in respect of the liability of a person in the capacity of a worker or an employer or the organisations representing their professional interests for

77 Ibid., 240.

damages caused by an industrial action, pending or carried out, shall be the law of the country where the action is to be, or has been, taken."

This provision doesn't have a predecessor in the conflict of law rules of any Member State. Article 6 is a "lex specialis" provison to the general rule of Article 4, but can be overruled by two different factors, which are a choice of law made by the parties pursuant to Article 14 and the common habitual residence of the parties according to Article 4 (2).[78]

Recital 27 of the Rome II Regulation states that the term "industrial action" should be defined by the national rules of each Member State. Furthermore the industrial action concept must be interpreted by the country´s law where the industrial action took place, because there are very strong differences in the concepts of each Member State. Lock-out (on the side of employer´s associations and employers), strike action (on the side of unions and workers), work-to-rule, go-slow-action and solidary strikes are enumerated by Recital 27 as typical examples of incidents emerging from industrial actions.[79] The liability according to Article 9 is limited, as only a worker, an employer or an individual who is representing organizations for their professional interests can be liable. For example, any politician who is just generally promoting the lock out, but not officially a represented of an organization, cannot be liable.[80]

A choice of law according to Article 14 Rome II Regulation can be negotiated for an industrial action, but this has not much of practical relevance. On one hand, a choice prior to the industrial action according to Article 14 (1) lit (b) is not allowed because workers or unions don't perform commercial activities and on the other hand a subsequent choice under lit (a) is not likely to happen, because the law of the country where the

78 Dickinson, *The Rome II Regulation*, para 9.17.

79 Dicey, Morris and Lawrence Collins, *on The Conflict of Laws*(London: Sweet & Maxwell, 2006), 238.

80 Dickinson, *The Rome II Regulation*, para 9.25.

action was taken will be obviously govern the dispute. Generally Article 9 applies the law of the place where the industrial action is to be, or has been taken, in detail where the interests of the parties of the industrial dispute collide. Furthermore it doesn't fall into account where the action was coordinated, planned or approved.[81]

It`s important to mention that Article 9 only covers the matter of liability and not the legality (the conditions for the legal exercise) of the industrial action itself. This issue is ruled by the national law of each Member State, meaning the national conflict of law rules determine which law must be applied to the question of legality.[82]

The main reason for implementing this provision into the regulation are the strong differences of the member state´s domestic rules and concepts for industrial action. For example, in France the exercise of a strike has nearly no restrictions and just needs to be signed in. On the other hand in Austria the handling is very restrictive and many requirements to exercise a legal strike must be fulfilled. Therefore this provision choose the law of the country "where the industrial action was taken" as a general harmonized principle to protect the rights and obligations of workers in every specific country and clarify the rules throughout European Union.[83]

3. Freedom of Choice and its condition for adopting applicable law on Torts/Delicts

Conflict of law rule on freedom of choice Art 14 Rome II Regulations:

"1. The parties may agree to submit obligations arising out of tort/delict 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.

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81 Liber Fausto Pocar, *New Instruments of Private International Law* (Rome: Giuffrè Publisher, 2009), 728.

82 Junker, *Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations* (Munich: Munich Commentary BGB Art 9, 2003), 20.

83 Amended proposal for a European Parliament and Council Regulation on the Law Applicable to Non-contractual Obligations ("Rome II"), 21.2.2006, COM (2006) 83 final.

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.

2. Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.

3. Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in one or more of the Member States, the parties' choice of the law applicable other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement."

3.1. Scope of Application

As a prevailing principle, the conflict of law rules under Rome II Regulation allow a choice of the applicable law according to Article 14. This choice can be made **ex ante (before)** or **ex post (after)** the "event giving raise to damage" occurred, by a contract negotiated between the parties.[84]

The application of this provision is explicitly excluded only for two types of torts, unfair competition (Art 6) and infringement of intellectual property rights (Art 8), because a choice of law would weaken the intention of these provisions to establish a compulsory consumer protection regime. Furthermore overruling mandatory provisions (Art 16), the public policy of the court (Art 26) and the rules of safety and contact at the place of acting (Art 17) cannot be influenced by the choice of the parties. For example, the choice is invalid if the

[84] Junker, *Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations* (Munich: Munich Commentary BGB Art 14, 2003), 11.

designated law violates mandatory provisions, like dumping regulations, in the country where the claim was filed.[85]

The parties are allowed to choose any domestic law of a country around the world, but it`s not possible to demand the application of an international convention through a choice of law agreement. The reason for this handing is that international convention generally have priority to the Rome II Regulation and therefore cannot be circumvented through a choice of law contract.[86]

3.2. Condition for Application

To conduct an ex ante choice of law according to lit (b), the parties must pursue commercial activities, because as consumers they can only negotiate an ex post choice agreement according to lit (a). A court can rule that a valid choice of law before the dispute is present, if the choice was made during the course of business ("in pursuance of commercial activity") of both parties and a connection between the tort and the business is apparent.[87] For example, a choice is invalid if the owner of a company conduct an agreement, prior to the dispute, with another entrepreneur, but this choice of law only addresses a private matter between the parties, which has no connection to the business.

The reason for allowing a prior choice only for parties pursuing commercial activity must be analysed in the light of consumer protection. The European legislator wanted to take away the possibility of an entrepreneur to outsmart a consumer with a choice of law contract made before the dispute, because the consumer couldn't foresee the impacts of such a choice, as an average consumer is assumed not to have special legal knowledge.

Another requirement of lit (b) is that the agreement was freely negotiated. Even though both parties are professionals as they are running a business, there can be a disparity in bargaining power, which only can be

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85 Huber, *Rome II Regulation Pocket Commentary*, 327.

86 Ibid., 329.

87 Rolf Wagner, *The new Rome II Regulation* (Berlin: IPRax 2008), 13. [*Rolf Wagner,* Die neue Rom II Verordnung (Berlin: IPRax 2008), 13.]

asserted if the weaker party shows evidence that the stronger party used its power to force the weaker to negotiate this agreement.[88]

To make a valid choice of law, a mutual agreement with "reasonable certainty" between the parties is necessary. The agreement usually must be explicitly made through a contract because a forum clause or a reference to a legal provision would not be enough.[89] Furthermore it's required that the parties may mutually agree to change their choice of law agreement any time, because of the principle of party autonomy.[90]

3.3. Limitation of Freedom of Choice

According to paragraph (2) of Article 14, the parties are not able to depart from mandatory provisions of a country´s law that would be applicable if they haven't made their choice. In detail this means any provision in domestic context which the parties could not exclude from application, like dumping regulations.[91]

Paragraph (2) overrules the law chosen by the parties only if "all relevant elements" of an action occur in another country. This means, all relevant factors which connect a country´s law to a particular dispute, have to be in another country than the chosen one. For example, person A injured person B in country C, whereas both parties have their habitual residence in country C. Then the parties conduct a choice of law agreement to apply the law of country D on the dispute. This agreement would be invalid because of paragraph (2), as all relevant elements are located in country C.

Paragraph (3) of Article 14 deals with the mandatory rules concerning European Law. In general it states that parties cannot derogate from mandatory rules of European Law through choosing the law of a non-Member-

88 Huber, *Rome II Regulation Pocket Commentary*, 331.

89 Ibid.

90 Junker, *Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations* (Munich: Munich Commentary BGB Art 9, 2003), 24.

91 Plender and Wilderspin, *The European Private International Law of Obligations,* para 29-033.

State, for example European directives to protect the market from price dumping through cheap third world products.[92]

As main reason of implementing a strong choice of law rule in the Rome II Regulation could be seen the intention of the European Legislator to follow the general approach in the majority of the member state´s conflict of law rules. Party autonomy is undisputed a prevailing principle in the majority of the conflict of law rules and therefore also important for the Rome II Regulation.

4. Scope, Definition and Exclusion on the applicable law of Torts/Delicts

4.1. Scope of the Applicable Law

Art 1 Rome II Regulation:

"This Regulation shall apply, in situations involving a conflict of laws to tort/delict in civil and commercial matters."

Art 15 Rome II Regulation:

"The scope of the conflict of law rules arising out of tort/delict under this Regulation shall govern in particular:

(a) The basis and extent of liability, including the determination of persons who may be held liable for acts performed by them;

(b) The grounds for exemption from liability, any limitation of liability and any division of liability;

(c) The existence, the nature and the assessment of damage or the remedy claimed;

(d) Within the limits of powers conferred on the court by its procedural law, the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation;

(e) The question whether a right to claim damages or a remedy may be transferred, including by inheritance;

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92 Huber, *Rome II Regulation Pocket Commentary*, 339, 341.

(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 and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation."

Generally issues like the burden of proof, the measure of damages and limitation periods are not covered by the domestic conflict of law rules of the member states, because they are procedural issues which usually governed only by the substantive law of the court. This handling invites litigants to start "forum shopping" as they would try to apply specific more favorable procedural regulations of a foreign jurisdiction, which leads to legal uncertainty as this could result in an application of two different domestic procedural laws in one case.

For example, a party could try to benefit from the more advantageous burden of proof rules in a neighbor country and chose this law in an agreement. If on the other hand the conflict of law rules didn´t cover the measure of damage, this issue would still be ruled by the maybe more advantageous domestic law, which leads to an application of two different procedural laws in one case. As a result of this the Rome II regulation tries to cover as many issues as possible, which have a relationship to obligations arising out of tort/delict.[93]

- **Basis and Extent of Liability, lit (a)**

The applicable foreign law should govern the extend of the tort-feasor`s liability like intrinsic factors and all positive requirements. In detail, the general question if a delict liability is fault based, the question of causality and the criteria for fault. Concerning which persons may be held liable, both legal and natural persons are included. If there are two or more persons liable to a plaintiff, the designated law can decide if partial payment

93 Dickinson, *The Rome II Regulation*, 573.

or other ways of compensation can be demanded. For example, if a person is injured by two offender, the designated law has to decide from who the plaintiff can seek compensation. Overall, the Rome II Regulation wants all factors relevant for the liability to be governed by the designated law to reach legal certainty and prevent an application of two different law regimes on one case.[94]

- **Exemption, Limitation, Division of Liability, lit (b)**

The exemptions and limitations from liability under the scope of lit (b) cover: Necessity, third party fault, force majeure, fault by the victim. For example, if a tortfeasor opposes that he couldn't prevent the damage to the victim, because of force majeure like a natural disaster, the applicable law should govern the decision about the lawfulness of this objection.[95]

In the matter of limitation, a mutual agreement between the parties has the most practical relevance. The parties are allowed to limit their liability by a contract, but lit (b) does not explain how such an agreement could be reached. For example, such a contract could limit the liability, but in matters of validity and construction the contract is more likely to be determined under the Rome I regulation for contractual obligations and only the effectiveness of the agreement will be covered by the law which is designated the Rome II regulation. This leads to obvious practical difficulties as it needs high legal expertise to apply the correct regulations, which finally causes less practical relevance of this provision. Concerning division of liability, the applicable law under Rome II covers the question if the tortfeasors are jointly or severally liable or if their liability is merely several.[96]

94 Ibid., 346.

95 Dickinson, *The Rome II Regulation*, 573.

96 Huber, *Rome II Regulation Pocket Commentary*, 344.

- **The nature of damage or the remedy claimed, lit (c)**

In lit (c) the question which damages are compensable is covered. Damages of property, moral damage, purely economic loss or environmental damage and the determination of a monetary award are included. The designated law also decides which specific facts are relevant for the assessment of the damage. For example, the specific rules of calculating the amount of damage and compensation. The main purpose of this provision is to ensure that all damage related legal questions are governed by the designated law to prevent the application of the domestic law in case of lacks of provisions.[97]

- **Prevention of Injury, lit (d)**

The applicable law also should govern actions to be taken against further injury like disclosure and injunctive relief.[98] But the court must not order actions which exceed the competence given by the procedural rules of the domestic law. As a result of this, generally the law of the forum-court decides how and to which extend measures can be taken. The main reason for this handling is that, procedural domestic rules for injunctive relief can be seen as mandatory provisions of this country and the designated law therefore cannot overrule them.[99]

- **Transfer of Remedies, lit (e)**

The question if a right to claim damages may be transferred from one plaintiff to another is covered by the applicable foreign law. Furthermore, the possibility of a rights transfer between debtor and assignor is also

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97 Dickinson, *The Rome II Regulation*, 576.

98 Richard, Plender, and Michael Wilderspin, *The European Private International Law of Obligations* (London: Sweet & Maxwell Limited, 2009), para 16-067.

99 Huber, *Rome II Regulation Pocket Commentary*, 349.

ruled by the designated law. But the applicable foreign law only decides the general possibility of a transfer, not how such an assignment could be made. The specific regulation of the way of transferring is considered to be a procedural matter and therefore not in the scope of the Rome II Regulation,[100]

- **Persons Entitled to Compensation for Damage, lit (f)**

The designated law by the Rome II Regulation should govern the question whether a person other than the direct victim can claim for compensation of the damage. In detail, indirect damages which are suffered by a third person who is not the direct victim. If the financial damage indirectly suffered by a third person is caused by its relationship to the victim then the compensation of this damage is also covered by the designated law. For example, the tortfesaor is also liable for the hospital bill of the victim, and the compensation claim of the hospital against the tortfeasor is also governed by the designated law.[101]

- **Liability for Acts of another Person, lit (g)**

The applicable law has to decide the question whether a person different to the tortfeasor can be liable. For example, liability of parents for children or principals for their agents and employers for employees.[102]

The character of the relationship and the required connection of the third person to the defendant's act giving rise to liability are governed by the designated law. For example, the question if parents have violated their responsibility of taking care of their children, while they damaged property of the plaintiff, is covered. But the issue if a specific relationship at all exist (e.g. employer and employee, principal and agent, parent and child) is usually connected to a contract or status, which creates this relationship, and is governed by the domestic law

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100 Plender, and Wilderspin, *The European Private International Law of Obligations,* para 16-072.

101 Dickinson, *The Rome II Regulation*, 586.

102 Dicey, Morris and Lawrence Collins, *on The Conflict of Laws* (London: Sweet & Maxwell, 2006), 261.

and not by the Rome II regulation. The reason why the Rome II Regulation does not cover the pre-existing relationship, is that these matters are not part of tort/delict law and ruled by family-law and contract-law regimes.[103]

- **Defences, lit (h)**

The law designated by the Rome II regulation also covers the decision when a claim becomes ineffective for lapse of time. As a result of this, limitation periods do not constitute a procedural question ruled by the law of the court and are in the scope of this regulation. This led to quite a lot of criticism of the legal scholars, because the limitation periods in the domestic laws of the Member State (e.g. from 1 year in Spain to 10 years in France) have big differences. For example, the plaintiff files a claim in Spain, and the conflict of law rules of Rome II lead to the application of French law in the case. As a result of this the limitation period for the claim is 10 years instead of the usual 1 year in Spain, which has a big impact and therefore constitutes legal uncertainty.[104]

The purpose of Article 14 Rome II regulation is to cover as many questions, related to liability, as possible to prevent an application of two laws in one case, which would lead to legal uncertainty. Usually procedural matters are not covered by the conflict of law regimes, but the European legislator decides to include some matters to reach more legal certainty on one hand. But it is obvious that there are many different opinions throughout the member states and not all legal scholars are content with categorization made by the European legislator, because especially the categorization of limitation periods as non-procedural seems to be unreasonable as it has a too strong impact on the substantive laws of the member states.

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103 Dickinson, *The Rome II Regulation*, 587.

104 Huber, *Rome II Regulation Pocket Commentary*, 349.

4.2. Definition of specific Aspects

4.2.1. Multiple Liability

Conflict of law rule on Multiple Liability Article 20 Rome II Regulation:

"If a creditor has a claim against several debtors who are liable for the same claim, and one of the debtors has already satisfied the claim in whole or in part, the question of that debtor`s right to demand compensation from the other debtors shall be governed by the law applicable to that debtor`s obligation arising out of tort/delict towards the creditor."

In case of more than one tortfeasor being responsible for the same injury, the victim cannot expect full compensation by any of the tortfeasors, because this would lead to overcompensation. As a result of this, there are two different ways to solve this problem:

Each tortfeasor is only paying partially to its fault (several liability), for example each tortfesaor only has to compensate the specific amount of damage who was caused to the plaintiff by him. The more common approach is the joint liability of all tortfeasors, meaning each tortfeasor is liable for the whole damage. In this case, the tortfeasor who compensated the whole damage can file a contribution claim against the other tortfesors. For example, person A was injured by B and C in a fight, whereby B injured A´s leg and C injured A´s arm. A is fully compensated by B for all his injuries, as under the joint liability system B is obliged to do so. Then B files a contribution claim against C to get the part of damaged caused by this person. In this case, Article 20 states that the law applicable to this contribution claim will be the same law as which is applicable to the obligation between the tortfeasor and the victim in this case.[105]

The main purpose of this provision is to reach uniformity of applicable laws for claims which relate to the same facts and circumstances and have their grounding in the similar act. It could lead to unfairness and legal

[105] Ibid., 349.

uncertainty if a contribution claim is ruled under a different law than the basic claim for compensation, as it could lead to different amounts of compensation.

4.2.2. Formal Validity

Conflict of law rule on Formal Validity Article 21 Rome II Regulation:

"A unilateral act intended to have legal effect and relating to an obligation arising out of tort/delict shall be formally valid if it satisfies the formal requirements of the law governing the tort/delict obligation in question or the law of the country in which the act is performed."

This Article has not much of practical relevance, but applies in theory to unilateral acts which cause transfer, change or creation of an obligation arising out of tort/delict. For example, the acknowledgement and remission of a debt could be seen as such a unilateral act and its formal validity is then ruled under the law which is applicable to the debtor – creditor relationship.[106] In fact, there are no indications of different handlings of this situation in the majority of the member state´s domestic laws and therefore the provision seems to be unnecessary.[107]

4.2.3. State with more than one legal system

Conflict of law rule on States with more than one legal system Article 25 Rome II Regulation:

"1. Where a State comprises several territorial units, each of which has its own rules of law in respect of non-contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation.

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106 Dicey, Morris and Lawrence Collins, *on The Conflict of Laws* (London: Sweet & Maxwell, 2006), 427.

107 Huber, *Rome II Regulation Pocket Commentary*, 402.

2. A Member State within which different territorial units have their own rules of law in respect of non-contractual obligations shall not be required to apply this Regulation to conflicts solely between the laws of such units."

In general there are two different approaches to identify the applicable law in countries like the U.S., United Kingdom and Canada, which have more than one legal system. The first possibility is to use the connecting factor, like the place of acting, to determine which territorial unit´s law could apply. The second method is to leave it to the law of the united territory to decide which specific law within this country should apply. Article 25 follows the first approach, the Rome II - provisions and their connecting factors decide which territorial´s unit law must apply. The regulation considers each territorial unit as a separate country, and designates its law to be applicable, if the connecting factor leads to this territorial unit. For example, a tort was committed in the territory of Wales, which is part of the United Kingdom. Therefore the Rome II Regulation designates the specific laws of wales to be applicable on the dispute and doesn't leave it to the provisions of the U.K. to decide if general English or specific Welsh law has to be applied.[108] The main purpose of implementing this provision is to clarify the application of the law within in the United Kingdom

4.2.4. Exclusion of Renovi

Conflict of law rules on Exlcusion on Renovi Article 24 Rome II Regulation:

"The 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."

If a provision of the Rome II Regulation designates the law of the country A to be applicable, the court must apply the substantive law of country A. It´s not allowed to apply the private international law of the country A, which rules might refer the court to the law of country B. This means that the doctrine of renovi is

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108 Ibid., 421.

excluded. The main reason for the exclusion of renovi is to ensure legal certainty and predictability, as the application of each member state´s private international law would lead to inconsistent outcomes.[109]

4.2.5. Subrogation

Conflict of law rules on Subrogation Article 19 Rome II Regulation:

"Where a person (the creditor) has a tort/delict claim upon another (the debtor), and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person´s duty to satisfy the creditor shall determine whether, and the extent to which, the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship."

This Article covers the rights of a third person, for example an insurance, against the tortfeasor. In detail, the issue if the third person had a duty to compensate the victim and if the third party is subrogated to the creditor´s claim. This article determines the applicable law for two different issues: According to this provision, the right of the third person to claim reimbursement is covered by the law which obliged this person to compensate the creditor, for example the insurance contract. The question of the content of the third person´s claim against the tortfeasor is ruled by the law applicable to the obligation arising out of tort/delict between the tortfeasor and the victim.[110]

The main reason of implementing this provision is the high frequency of traffic accidents with foreign elements, where the insurance instead of the defendant is satisfying the creditor.

For example, a traffic accident is taking place in Austria, between a German driver A and an English driver B. The insurance contract between A and his insurance company is based on German law, therefore the conflict of law rules of Article 19 designate the German law to answer the question if the insurance can claim

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109 Ibid., 418.

110 Ibid., 385.

reimbursement from A. According to the general rule of Article 4, the accident itself is ruled under Austrian law, therefore the law applicable to the content of the insurance´s claim against A would be Austrian law.

4.3. Exclusion of the Law applicable on Tort/Delict

4.3.1. Matters of Tort/Delict non covered by the Regulation

Art 1 (1) Rome II Regulation:

"The regulation shall not apply, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority."

Art 1 (2) Rome II Regulation:

"The following matters are excluded from the Regulation:

(a) Tort/Delict - obligations arising out of **family relationships** and **relationships deemed by the law applicable** to such relationships to have comparable effects including maintenance Obligations.

(b) Tort/Delict - obligations arising out of **matrimonial property regimes, property regimes of relationships** deemed by the law applicable to such relationships to have comparable effects to **marriage**, and wills and succession.

(c) Tort/Delict - obligations arising under **bills of exchange, cheques and promissory** notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character.

(d) Tort/Delict - obligations arising out of the law of companies and other bodies corporate or unincorporated regarding matters such as the creation, by **registration or otherwise, legal capacity, internal organisation or winding-up** of companies and other bodies corporate or unincorporated, the personal liability of officers and members as such for the obligations of the company or body and the personal liability of auditors to a company or to its members in the statutory audits of accounting documents;

(e) Tort/Delict - obligations arising out of the relations between the **settlors, trustees** and beneficiaries of a trust created voluntarily.

(f) Tort/Delict - obligations arising out of **nuclear damage**.

(g) Tort/Delict - obligations arising out of violations of **privacy** and rights relating to personality, including defamation."

According to Article 1, the regulation shall not apply "in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority" For example, if a policeman in exercise of his authority injures a criminal, the applicable law to the claim of the victim against the policeman is not covered by the Regulation. The main reason is that in every substantive law specific provisions for state liability and administrative law are implemented, which are not wanted to be part of any harmonization, as the member states aim to secure their autonomy in the area of public and administrative law.

- **Family Relationships, lit (a)**

According to Recital 10 of the regulation, family relationships are: Parentage, marriage, affinity and collateral relatives. Also relationships which have "comparable effects" to a family relationship are excluded from the regulation. For example, a life partnership, which is under many member state´s laws equivalent to an official marriage. All obligations arising out of tort and delict between family members regarding family law are not covered by the Rome II Regulation[111]

For tort/delict obligations to be excluded it is necessary that they have their legal grounding in specific rules that govern the familial relationship. Furthermore this relationship must provide the basis for the obligation in dispute. For example, a mother don't fulfil her duty to take care of her child and as a result of this, the child

111 Ibid., 45.

becomes sick. The claim of the child against her mother is excluded from the Rome II Regulation. On the other hand if the child steals property of the mother, then the compensation claim of the mother is not excluded from the regulation, as the tort has no connection to the family relationship.

The reason for excluding family relationships is to avoid a conflict with the Rome III Regulations for the law applicable to divorce and legal separation.

- **Matrimonial Property Regimes, Wills, Succession, lit (b)**

Tort/delict-obligations arising out of matrimonial property regimes, succession and wills are excluded from the regulation. Also "comparable" property regimes, which must be defined by the substantive law of each member state, are also excluded. For example, the law of legacy which is a comparable property regime is not covered by the regulation. The average opinion of the legal scholars is that this provision has only little of practical relevance, as it is difficult to imagine situations where the obligation specifically arises out of the matrimonial regime itself and not out of the wrongful act itself. For example, a claim against a lawyer who negligently drafted a will is not excluded because the obligation has its grounding in the relationship between the lawyer and client and not in the will.[112]

The reason for the exclusion is that the Rome III Regulation covers matrimonial property regimes, wills and succession.

112 Huber, *Rome II Regulation Pocket Commentary*, 46.

- **Negotiable Financial Instruments, lit (c)**

Tort/Delict - obligations which have their grounding in financial instruments are not in the scope of the regulation. Examples are: Bills of exchange, promissory notes, cheques, bills of lading, bonds, debentures, guarantees, certificates of deposit and letters of indemnity.[113]

The reason for implementing this exclusion was to avoid the excessive complexity of regulating the law applicable on financial instruments. The drafters of the regulation did not like the idea of involving complicated special rules, which would have been necessary in case of expanding the scope to financial instruments.[114]

- **Company Law, lit (d)**

A tort/delict - obligation which has its grounding in the law of a company or other bothies corporate, is excluded from the regulation. But this provisions addresses only delicts which specifically arise out of company law, any other torts committed by a company remain in the scope of the regulation. The practical relevance of this provision is minor, as in the majority of company law cases, the obligation in dispute will be of contractual nature rather than arising out of a delict. For example, a company damages competitors through misleading advertisements. In this case the regulation is applicable on the compensation claim, as there is no connection to company law. On the other hand, if a company is not correctly paying dividends to their shareholder, there is a connection to company law, but this is a breach of the contract between the shareholders and the company and not an obligations arising out of tort/delict.[115] The main reason for this exclusion is the complexity of cooperate law and the huge difference between the substantive laws throughout the member states, and therefore the European legislator didn't want to apply the regulation in this field.

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113 Mario, Giuliano, and Paul Lagarde, *Report on the Convention on the law applicable to contractual obligaitons OJ 1980 C 282/11* (Brussels: Official Journal of the European Communitites, 1980), 12.

114 Huber, *Rome II Regulation Pocket Commentary*, 48.

115 Ibid.

- **Trusts, lit (e)**

Tort/Delict - obligations, which have their grounding in relations between the trustees, beneficiaries and settlors of a trust, are not in the scope of the regulation. It is important to mention, that only trusts which have been "created voluntarily" are excluded. This leads too very little of practical relevance of this provision, as the majority of trusts are created voluntarily and therefore are contracts. The obligations arising out of breach of such a contract are not of delict- nature and are generally ruled by the Rome I regulation for contractual obligations. The reason for the exclusion of trusts can be seen in the huge range of already existing international treaties and provisions dealing with trusts.[116]

- **Privacy and Rights Relating to Personality, lit (g)**

The exclusion of privacy and rights relating to personality has the most practical relevance and caused a long-lasting quarrel between the European Parliament and the European Commission. Tort/Delict - obligations grounding in violations of rights relating to personality, privacy sphere and defamation are excluded from the scope of the Rome II Regulation. Examples for Privacy and Rights Relating to Personialty are: Right to one´s own picture, right of one´s honour – libel, right of protection of one´s own data and right to prevent disclosure of confidential data.

The main reason for this exclusion is the following: Initially the Commission wanted to implement a special rule for this matter which would have led to the application of the "lex damni doctrine". But this was strongly criticized by the English politicians and also the European Parliament preferred the application of the "lex loci delicti" doctrine instead. In England`s point of view, it was necessary that the law of the country of acting is going to be applied, because in cases of violation of privacy right it could often be unreasonable to apply the law of the place of damage. For example, a newspaper in England uses someone´s picture without

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116 Alfred E. Von Overbeck "Explanatory report on the 1985 Hague Convention." *HccH*, (1985) http://www.hcch.net/index_en.php?act=publications.details&pid=2949 (accessed September 13, 2013).

permission. This picture was taken in Germany and the person lives in Germany also. In England´s view, it is unreasonable to apply German law on the dispute as the picture was used by an English newspaper in England. As a result of this, to avoid further political arguments, the European organs jointly decided to just exclude this matter from the regulation.[117]

This exclusion leads to some uncertainties:

The disclosure and theft of confidential data is a major concern of intellectual property and unfair competition law. Both of these fields of law are explicitly covered by Rome II, therefore the exclusion of claims for disclosure of data, which is part of this provision, weakens the regulations itself. It leads to strong legal uncertainty in two matters, Art 6 and Art 8, of the Rome II Regulation.[118]

For example, the victim of an infringement of intellectual property rights files a claim for compensation and protection in country A. Art 8 is going to be applied and designates the law of the country A to be applicable. The theft of confidential data, which made the infringement of the intellectual property right possible was also part of the acting. As this matter is excluded from the Rome II Regulation, the law applicable to the data theft could be different to the infringement, even though there is an inseparable connection between both, therefore the exclusion leads to legal uncertainty.

In the opinion of the legal scholar Ivo Bach[119] it necessary to exercise a restrictive interpretation of this exclusion, because of the relationship to unfair competition and intellectual property provisions in the regulation. In his opinion the Rome II regulation should at least cover any case of "privacy and rights relating to personality" which is in relation to unfair competition or intellectual property.

117 Ibid., 53.

118 Dickinson, *The Rome II Regulation*, 3.227.

119 In Huber, *Rome II Regulation Pocket Commentary*, 55.

4.3.2. Overriding mandatory provisions

Conflict of law rule on overriding mandatory provisions Article 16 Rome II Regulation:

"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 to the obligation arising out of tort/delict."

This article doesn't address all rules which cannot be derogated from, only overriding mandatory provisions which must be applied in any case. The decisions, if a provision is mandatory overruling must be made by the court in every special case, and usually covers provisions which has been deemed to be so crucial for the protection of social, economic or the political order of a Member State. Mandatory overriding rules generally relate to civil law and are rules which address the protection of embargos, competition and exchange control of a country.[120] For example, two parties negotiate a contract to promote dumping in the market of country A. It is not possible to derogate from the mandatory overriding rules of country A, which protect the market from such dumping, and therefore the contract probably would be invalid.

Overruling mandatory provisions have to fulfil two cumulative elements:

- The overriding criterion ("without tolerance for the law otherwise applicable"): Meaning the mandatory provision itself explicitly states the priority to any other provision.
- The interest criterion ("the respect for which is regarded as crucial by a country to ensure public interests"): meaning a provision which is of highly public and state interest.[121]

When the court decides if a mandatory rule is in hand, it will rely to a large extent on the interpretation and wording of the relevant provision. Furthermore the intention of the domestic legislature and the surrounding circumstances will be taken into consideration.

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120 Ibid., 334.

121 Ibid., 355.

The main purpose of this Article is to prevent the Rome II Regulation from conflicting with fundamental provisions in every member state, as it is impossible to take any kind of public interests of each Member States in consideration, while drafting this regulation.

4.3.3. Public Policy of the Forum

Conflict of law rules on public policy of the forum Art 26 Rome II Regulation:

"The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (odre public) of the forum."

One of the general principles of conflict of law rules is to prevent the application of a foreign law which violates fundamental principles of the public policy of the country. Public policy always relates to the public law of the country instead of mandatory overruling provisions (Art 16), which relate to civil law.[122]

"Manifestly incompatibility" in this Article means not only a difference in the content of the domestic and the foreign law, furthermore there must be a violation of fundamental principles of basic ideas of public policy or of justice. It is also important to mention, that the concept of public policy remains a national one.[123]

Punitive damage is the most practical example, where the public policies of countries could conflict. In the United States it often occurs, that punitive damage awards are excessive and of an unreasonable amount. In Germany, England, France punitive damage awards are only allowed in cases of defamation within a strict limitation, to punish beyond the compensation. As a result of this, a country´s law which allows excessive punitive damages could violet the public policy of a court and therefore is able to be applied.[124]

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122 Abbo Junker, *Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations* (Munich: Munich Commentary BGB Art 26, 2003), 28.

123 Huber, *Rome II Regulation Pocket Commentary*, 429.

124 Ibid., 433.

4.3.4. Relationship with other provisions of Community Law

Conflict of law rules on relationship with other provisions of community law Article 27 Rome II Regulation:

"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."

This provision establishes a lex-specialis rule, meaning special conflict rules of the Eruopean Union overrule the provisions of the Rome II Regulation in a particular matter. This lex-specialis rule stands in conflict with the primary goal of the regulation to reach legal simplicity and certainty throughout a single comprehensive conflict regime for obligations arising out of tort/delict. The operation of this provision will lead to an application of the special community rule instead of the Rome II Regulation.[125]

The main practical relevance occurs in the matter of the "free movement of goods" and "E-commerce" directive of the community, which both are using the country of origin-principle, contrary to the Rome II Regulation. This principle leads to the application of the law of the tortfeasor`s residence and therefore conflicts with the Rome II Regulation, which generally designates the law of the country where the damage occurred. As a result of this, the legal certainty and foreseeability in cases involving the E-commerce directive is not ensured and different outcomes are possible.[126]

4.3.5. Relationship with Existing International Conventions

Conflict of law rules on relationship with existing international conventions Art 28 Rome II Regulations:

"1. 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 and which lay down conflict-of-law rules relating to obligations arising out of tort/delict.

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125 Ibid., 436

126 Ibid., 438.

2. However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation."

In the scope of Art 28 sub 1 are falling convention, which already existed at the date of introduction of the Rome II Regulation, 11 July 2007. This Article only applies on conventions which have been ratified before this date by the specific Member State, in which the claim is filed. It is enough that the convention only implemented one conflict of law rule to be covered by this provision.[127]

The purpose of Art 28 is to handle the conflict between the Rome II Regulation and international conventions dealing with conflict of law rules. The main issue for introducing this provision is the conflict between Rome II and the two Hague Conventions on the law applicable to products liability of 1973 and on the law applicable to traffic accidents of 1971.[128]

The main purpose of the Rome II regulation is to found a single Union-wide conflict of law regime which mainly aims for certainty of the applicable law. The European legislator decided to generally give preference to the Hague Convention over the Rome II Regulation to satisfy the need of clarity and legal certainty. For the European legislator international harmony has priority, which results in the drawback of splitting up the conflict of law rules in cases of existing international conventions. For example, in case of traffic accidents, The Hague Conventions will be applied first, but the matters which are not covered by the convention, are ruled by Rome II, which leads to an application of two regimes.[129]

Art 28 sub 2 gives an exceptional rule for international conventions concluded exclusively between Member States. In these international conventions only member states are contracting parties. Therefore the

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127 Junker, *Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations* (Munich: Munich Commentary BGB Art 28, 2003), 22.

128 Ibid., 441.

129 Dickinson, *The Rome II Regulation*, 16.40.

European Legislator was able to give priority to the Rome II Regulation. However Art 28 sub 2 has little of practical relevance, since there is a lack of conventions being already in force only between Member States.[130]

130 Von Heim, "Succession and Wills in the Conflict of Laws on the Eve of Europeanisation," *RablesZ*, no. 73 (2009): 473.

Chapter IV
IMPLICATIONS OF ROME II REGULATION TOWARDS AUSTRIAN AND GERMAN LAW

1. General Rule on Torts/Delicts of Austrian and German Law

1.1. Germany

Article 40 (1)[131] EGBGB (Introduction Acts to the German Civil Code) in general applies the law of the country where the event giving raise to the damage occurred ("lex loci delicit") ("Handlungsort").[132] Article 40 (1) EGBGB, also allows the victim to choose the law of the place where the damage comes to pass ("Erfolgsort") rather than the place of acting, but this choice is limited to the pre-trail proceedings of the first instance. With the beginning of trail this possibility ends. For example, the defendant A hacked into the database of the claimant B. The server and the headquarter of B are located in England but the defendant illegally accessed the databank with a computer in Germany. According to Article 40 (1), German law has to be applied to the case, but B could instead choose the English law before the trail begins, as the damaged occurred in England.[133]

The German law obviously favoured the victim, by providing with the possibility to choose the applicable law. This handling is unique in the European Union, but has the strong drawback that it invites to "forum shopping", meaning the victim could choose the law most favourable, which doesn't strike a fair balance between claimant and defendant.

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131 (1) Ansprüche aus unerlaubter Handlung unterliegen dem Recht des Staates, in dem der Ersatzpflichtige gehandelt hat. Der Verletzte kann verlangen, daß anstelle dieses Rechts das Recht des Staates angewandt wird, in dem der Erfolg eingetreten ist. Das Bestimmungsrecht kann nur im ersten Rechtszug bis zum Ende des frühen ersten Termins oder dem Ende des schriftlichen Vorverfahrens ausgeübt werden.

132 Jan Kropholler, *Internatioanl Private Law* (Tübingen: J.C.B. Mohr Publisher, 2006), 525. [*Jan Kropholler*, Internationales Privatrecht (Tübingen: J.C.B. Mohr Verlag, 2006), 525.]

133 Rauscher, *International Private Law*, 334. [*Rauscher*, Internationales Privatrecht, 334.]

1.2. Austria

Article 48 (1)[134] IPRG[135] (International Private Law Act) states that obligations arising out of delicts must be ruled by the law of the country where the event giving raise to the damage occurred. ("lex loci deliciti"). But if there is a closer connection for all participators to the law of another country, then the law of this country should apply. For example, both the defendant and claimant are English citizens and the damage occurred in England, only the place of acting is in Austria, then the escape clause would apply and led to the application of English law.

As can be seen from this provision Austria follows in general the "lex loci delicit rule", but implemented an escape clause, similar to the one in Article 4 (3) Rome II Regulation. The Austrian approach concerning the general rule is outdated, but the implementation of the escape clause because of a manifestly closer connection is remarkable, as the Rome II legislator followed this approach.

After the introduction of the Rome II Regulation, the Austrian legislator adopted Article 48 IPRG: "Obligations arising out of tort/delict, which aren't covered by the Rome II Regulation have to be judged under the law, chosen by the parties." The Austrian legislator didn't want to set up a new doctrine beside the Rome II Regulation to cover the few cases which are not in the scope of the regulation, because it would have led to legal uncertainty and therefore it reasonable to give the parties the possibility to choose the applicable law.

1.3. System of obligations arising out of tort/delict in Austria and Germany

The Austrian and German civil code doesn't include an enumeration of specific torts like in common law countries. Instead of the term torts the legislator uses the term delict. A delict in the context of civil law is a

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134 § 48 IPRG. (1) Außervertragliche Schadenersatzansprüche sind nach dem Recht des Staates zu beurteilen, in dem das den Schaden verursachende Verhalten gesetzt worden ist. Besteht jedoch für die Beteiligten eine stärkere Beziehung zum Recht ein und desselben anderen Staates, so ist dieses Recht maßgebend.

(2) Schadenersatz- und andere Ansprüche aus unlauterem Wettbewerb sind nach dem Recht des Staates zu beurteilen, auf dessen Markt sich der Wettbewerb auswirkt.

135 In the version of the year 2003, before the introduction of the Rome II Regulation.

violation of general behavior-responsibilities. Usually it's a violation of an absolute right like right of life, freedom or property. The infringement of the right creates a delict which leads to a non-contractual obligation and gives the victim the right to ask for compensation.[136]

2. Rome II Regulation and its impact on General Rules

2.1. General Rule on Torts/Delicts

According to the German rule, the claimant has the possibility of "forum shopping", because he can choose between place of injury and place of acting, which could lead to a disadvantage for the defendant, as the claimant could choose the law more favourable for him in a case. For example, the English law has much longer limitation periods than the German law, therefore the claimant could choose the English law to make a claim possible again.[137] The Rome II Regulation doesn't allow this practice anymore, because there can`t be seen any reason, why the claimant should have an advantage only because the place of injury and the place of acting are not in the same country. This possibility for the victim causes legal uncertainty, which is not in accordance to the main objective of the Rome II Regulation to promote legal certainty[138]

In conclusion, the German choice of law rules on delict/tort experience a modernization through the Rome II Regulation. But in fact the practice of the German courts already tends to mainly apply the "lex loci damni" through implying that the victim made a choice of law for it, because the German jurisprudence recognized the advantages of this rule.[139]

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136 Koziol Welser, *Civil Law* (Vienna: Manz Publisher, 2001), 318.

137 Kadner Graziano, *European International Tort-Law* (Geneva: Mohr Siebeck Publisher, 2003), 48. [*Kadner Graziano*, Europäisches Internationales Deliktsrecht (Genf: Mohr Siebeck Verlag, 2003), 48.]

138 Commission of the European Communities. " A proposal for a Regulation of the European Parliament and the Council of the law applicable to non-contractual obligations ("Rome II")." *COM(2003) 427*, 11.

139 Peter Hein, *Journal for comparative law* (Frankfurt: Law and Economy Limited Publisher, 2003), 528. [*Peter Hein*, Zeitschrift für vergleichende Rechtswissenschaft (Frankfurt: Recht und Wirtschaft GmbH, 2003), 528.]

2.2. The Law of Common Habitual Residence

In case of common habitual residence of the parties, according to German Article 40 (2)[140] EGBGB, the law of this country will always apply instead of the law designated by the general rule of paragraph (1), which follows the Rome II approach.[141] For example, a traffic accident happens in England, but both parties live in Germany, therefore German law is going to be applied on the dispute.

The Austrian law instead, didn't implement a provision for common habitual residence at all, which can be seen as a lack of regulation, because under the Rome II Regulation (Art 4 (2)) the connection factor "common habitual residence" has priority to the general rule and is therefore an important principle. As a result of this, Rome II causes a change in the Austrian conflict of law rules through the implementation of the "common habitual residence" rule.

2.3. Escape Clause/ Manifestly Closer Connection

The German law implemented a provision, Article 41 (1)[142] EGBGB, similar to Article 4 (3) Rome II Regulation, which leads to the application of the law being manifestly closer connected than the one designated by the general rule. Furthermore it`s the task of the court to clarify if the requirements of the escape clause are fulfilled and it must be evident that the law designated by the general rule, leads to an inappropriate result. For example, both parties are German citizens and the place of acting was Germany, only the damage occurred in

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140 (2) Hatten der Ersatzpflichtige und der Verletzte zur Zeit des Haftungsereignisses ihren gewöhnlichen Aufenthalt in demselben Staat, so ist das Recht dieses Staates anzuwenden. Handelt es sich um Gesellschaften, Vereine oder juristische Personen, so steht dem gewöhnlichen Aufenthalt der Ort gleich, an dem sich die Hauptverwaltung oder, wenn eine Niederlassung beteiligt ist, an dem sich diese befindet.

141 Bernd, Hoffmann, and Carsten Thorn, *International Private Law* 493. [Bernd Hoffmann and Carsten Thorn, Internationales Privatrecht, 493.]

142 (1) Besteht mit dem Recht eines Staates eine wesentlich engere Verbindung als mit dem Recht, das nach den Artikeln 38 bis 40 Abs. 2 maßgebend wäre, so ist jenes Recht anzuwenden.

England. In this situation it is obvious that the German court tends to apply German law, because there is a strong connection to Germany.[143]

Under Austrian law, the escape clause is directly implemented in the general provision Article 48 (1) IPRG which also leads to similar result as in the Rome II Regulation and can be seen as a prevailing principle in the Austrian law. In comparison to Rome II and to the German Law, the Austrian provision does not include any example for a closer connection, like a pre-existing contract. Therefore the Rome II Regulation can be seen as an improvement for the Austrian law, because it leads to more certainty.

In conclusion, all three laws have an escape clause implemented, which can therefore be seen as a very important principle.

2.4. Freedom of Choice

2.4.1. Germany

According to Article 42 EGBGB[144] the parties have, similar to the Rome II Regulation, the right to choose the applicable law after a dispute came into existence. An implied choice of law is allowed and there are no further specific requirements concerning the form. For example, the parties don't have to draft a written contract, the obvious census about the applicable law is sufficient.[145]

A significant difference to Rome II arises out of the German legislator´s opinion not to allow the choice of law before the dispute, because of the inherent principle of protection of the victim in delict/tort law. This

143 Ibid., 246.

144 „Nach Eintritt des Ereignisses, durch das ein außervertragliches Schuldverhältnis entstanden ist, können die Parteien das Recht wählen, dem es unterliegen soll. Rechte Dritter bleiben unberührt."

145 Julius, Staudinger, and Bernd Hoffmann, *Commentary to the Civil Code and Supplementary Law Art 38-42 EGBGB* (Berlin: De Gruyter Publisher 2001), 672. [*Julius Staudinger/Bernd Hoffmann*, Kommentar zum Bürgerlichen Gesetzbuch mit Nebengesetzen Art 38-42 EGBGB (Berlin: De Gruyter Verlag 2001), 672.]

regulation is obviously excessive, because the freedom of choice must be seen as a prevailing principle and too much protection for the victim is not reasonable.[146]

Under the German law, as well as under the Rome II Regulation, an indirect choice of law is allowed. If the choice of law occurs within a factual relationship or a contract between the parties, then a prior indirect choice of law is possible, because the law ruling the relationship is also going to be applied to the delict/torts obviously closely connected to the dispute.[147]

According to Article 42 EGBGB, similar to the Art 14 (2) Rome II Regulation, in the case all elements are situated in another country than the chosen one, the mandatory provisions of the law of that country still have to be applied. There are also other provisions like Article 29, 30 (1) EGBGB for consumer and employee protection, which designate the law of habitual residence to be applicable, regardless of any choice of law.[148] The choice of law rule of Article 42 EGBGB is also influenced by the public policy of a country. If the choice of law leads to an application of a provision of a foreign law which is manifestly incompatible with the public policy of a country, then this choice is not valid.[149]

2.4.2. Austria

Under Austrian law, Section 11 IPRG[150] regulates the choice of law. Generally an implied/indirect choice of law is allowed like under German law and the Rome II Regulation.

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146 Ibid., 668.

147 Bernd, Hoffmann, and Carsten Thorn, *International Private Law* 498. [Bernd Hoffmann and Carsten Thorn, Internationales Privatrecht, 498.]

148 Julius, Staudinger, and Bernd Hoffmann, *Commentary to the Civil Code and Supplementary Law Art 38-42 EGBGB*, 667. [*Julius Staudinger/Bernd Hoffmann*, Kommentar zum Bürgerlichen Gesetzbuch mit Nebengesetzen Art 38-42 EGBGB, 667.]

149 Miro Müko and Abbo Junker, *Civil Code-International Private Law* (Munich: Munich Commentary EGBGB Art 42, 2006), 2469. [*Miro Müko and Abbo Junker*, Bürgerliches Gesetzbuch – Internationales Privatrecht (München: Münchner Kommentar EGBGB Art 42, 2006), 2469.]

150 (1) Eine Rechtswahl der Parteien (§§ 19, 35 Abs. 1) bezieht sich im Zweifel nicht auf die Verweisungsnormen der gewählten Rechtsordnung

(2) Eine in einem anhängigen Verfahren bloß schlüssig getroffene Rechtswahl ist unbeachtlich.

The Austrian provision contains a speciality in Section 11 (2) IPRG, stating that an implied choice of law is not valid if it is a post choice. This leads to the conclusion that an implied choice of law is only allowed if it was made before the dispute. For example, it can be only assumed that the parties want to apply a foreign law without drafting a written contract, if this intention was obvious before the dispute arose.

As a result of this can be seen, that the Austrian legislator in comparison to the German legislator allows an ex-ante choice of law in general. The Austrian law also didn´t implement any limitation for the ex-ante choice, like "pursuing commercial activity" in the Rome II Regulation.

According to the Rome II Regulation a choice of law agreement cannot influence the rights of third parties. The Austrian approach is quite different as only a post choice cannot influence the legal position of a third party. This is a reasonable decision of the Austrian legislator, as an ex-ante choice could be foreseen by a third party and therefore is also binding for the third party.

2.4.3. Conclusion

The Austrian law, as the only one, allows a choice of law option before the dispute arises, without any limitation. As the delict/tort regime is going to be applied in disputes of individuals, it is obvious that there is an interest to foresee or calculate the risk of liability according to the applicable law and therefore an ex-ante choice of law could be seen as helpful and necessary to promote the foreseeability.[151] As a result of this, from the perspective of the Austrian legislator, the introduction of the Rome II Regulation is a step backwards and brings a disadvantage in this matter.

Overall the Austrian legislator attaches high importance to the choice of law, as also third parties can be influenced and the ex-ante choice is allowed. The European Legislator didn't want to give too much value to the choice of law rule and therefore created many restrictions in its application. As the main reason can be seen,

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(3) Die Rechtsstellung Dritter wird durch eine nachträgliche Rechtswahl nicht beeinträchtigt.

151 Julius, Staudinger, and Bernd Hoffmann, *Commentary to the Civil Code and Supplementary Law Art 38-42 EGBGB*, 669. [*Julius Staudinger/Bernd Hoffmann*, Kommentar zum Bürgerlichen Gesetzbuch mit Nebengesetzen Art 38-42 EGBGB, 669.]

from the proposal, the protection of the weaker party,[152] but in fact this argument is not expedient, because the restriction of the ex-ante doesn't really protect. In practice it is unlikely that the weaker party is going to be outsmarted, because the stronger party won´t use the choice of law in conflict of law matter to gain advantage. Only in cases of choice of court agreements, the stronger party could take advantage, but this is not covered by the Rome II Regulation. In fact more legal certainty can be reached if the parties are able to negotiate about the applicable law without any restrictions.

In conclusion, Art 14 of the Rome II Regulation is one of the provisions which have, especially from the point of view of the Austrian legislator, disadvantages and can be seen as a step back rather than an improvement.

3. Rome II Regulation and its impact on specific Rules on Tort/Delicts

3.1. Product Liability

3.1.1. Germany

The general rule Article 40 EGBGB of the German law is used to designate the law applicable to cases of product liability. In every special situation, the court will adopt this general rule.[153] According to German law, the main office of the producer is usually the place of action, because the construction, production, sale and marketing of the product is coordinated there and therefore it`s the origin of the product. The place of injury, is the location where the consumer bought the product. Therefore the consumer could either choose the law of the country of the producer´s main office or the law of the country in which he bought the product.[154]

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152 Commission of the European Communities. "A proposal for a Regulation of the European Parliament and the Council of the law applicable to non-contractual obligations ("Rome II")." *COM(2003) 427*, 25

153 Kadner Graziano, *European International Tort-Law* (Geneva: Mohr Siebeck Publisher, 2003), 64. [*Kadner Graziano*, Europäisches Internationales Deliktsrecht (Genf: Mohr Siebeck Verlag, 2003), 64.]

154 Rauscher, *International Private Law*, 337. [*Rauscher*, Internationales Privatrecht, 337.]

3.1.2. Austria

Under Austrian law, the law applicable on cases of product liability is determined by the general rule of Art 48 IPRG. Product liability is considered to be a delict, but in presence of direct contractual relationships between the producer (defendant) and the costumer (plaintiff) the liability is connected to the contract and therefore a contractual obligation. For example, a supermarket owner, which bought the product to resell it, can claim compensation for damages caused by the product only on a breach of contract, between him and the producer. For damages of the ultimate buyer, who has no direct contract with the producer, only the law of the distribution place is applicable to the dispute under Austrian law.[155]

3.1.3. Conclusion

In conclusion, the Austrian and German approaches are in general similar. As a result of this, the Rome II Regulation brings a change in the matter of product liability for both countries. The defendant/consumer, under Austrian and German law, could be compelled to lodge a claim in a foreign country under foreign law, which would lead to uncertainty and take the option of a legal action in the home-country away.[156] For example, an Austrian buys a product in Germany and while using the product in Austria he suffers damage from it. Under the former German and Austrian provision, the German law would be applicable, if he files the claim in Austria, or he is compelled to file a claim in Germany under German law. This is not compatible with the intention of the Rome II Regulation to facilitate trade, protect the consumers` health and stimulate innovation and therefore the Rome II Regulation changed the rule to the priority of habitual residence of the consumer.[157]

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155 Verschraegen, *International Private Law, 134. [Verschraegen,* Internationales Privatrecht*, 134.]*

156 Peter Stone, *The Rome II Proposal on the Law Applicable to Non-Contractual Obligations*, The European Legal Forum (EuLF) 2004, 213.

157 Commission of the European Communities. "A proposal for a Regulation of the European Parliament and the Council of the law applicable to non-contractual obligations ("Rome II")." *COM(2003) 427*, 10.

3.2. Unfair Competition and acts restricting free competition

3.2.1. Germany

Under German law, Article 41 EGBGB is going to be applied in cases of unfair competition or restricting free competition. Article 41 EGBGB is the German escape clause which is generally used in cases of manifestly closer connection to another country. However in this matter this provision can be applied, because in the field of unfair competition third party interests are in the main focus and therefore the general rule of Article 40 EGBGB, only dealing with the dispute between tortfeasor and victim, is not appropriate. This reflects the general approach of the German legislator of applying the escape clause in situation where the general obviously lead to unsatisfactory results.[158]

According to Article 41 EGBGB, the law of the country where the market was affected by the defendant is applicable. Unfair commercial practice, the violation of the interests of the public or competitors in this market can cause liability. Therefore the law of the country where the market was affected has to be applied, but in cases of only one competitor´s interests being affected, instead the general rule of Article 40 EGBGB applies, which leads to the law of the place of acting, because no third party interests are influenced.[159]

3.2.2. Austria

The Austrian legislator implemented a specific paragraph in the general rule of Article 48 IPRG. Article 48 (2) IPRG states that compensation claims as a result of unfair competition, have to be ruled under the law of the country in which the market was affected by the unfair behaviour. Therefore, according to Austrian law, no differentiations between a single affected competitor and more affected claimants is made and the law of the

158 Kropholler, *Internatioanl Private Law*, 543. [*Kropholler*, Internationales Privatrecht, 543.]

159 Hoffmann and Thorn, *International Private Law*, 501. [Hoffmann and Thorn, Internationales Privatrecht, 501.]

place where the market was affected always applies. A choice of law in this field is not allowed, like under German Law and the Rome II Regulation.[160]

3.2.3. Conclusion

German law, Austrian law and the Rome II Regulation follow the same principle of applying the law of the place where the market is affected. This is in line with the main approaches in nearly all Member States; it also seems to be the better choice than just applying the general rule, because it leads to higher legal certainty and also deals with the interests of third parties. In practice it is more reasonable to apply the law of the country where the competitors and consumers within a market suffer damage, than any other place where the act was set.[161]

As a result of this, the unification through the Rome II Regulation didn't bring any change in the field of unfair competition for the most of the member states, including Germany and Austria. But it was indeed important to include a special provision into the Rome II Regulation for unfair commercial practice and restriction of free competition, as in this field of law many cross boarders disputed between the several European markets can arise, and therefore unification is helpful and increases legal certainty.

3.3. Environmental damage

Under German law, the general provision of Article 40 EGBGB applies in cases of environmental damage. This leads to the result that the law of the place where the event giving raise to the damage occurred ("lex loci delicit") is going to be applied. But the claimant has a right to choose the law of the country where the damage occurred instead, before the beginning of the trail in the first instance. The reason for the opting out possibility of

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160 Michael Schwimann, *International Private Law* (Vienna: Manz Publisher 2001), 80. [*Michael Schwimann*, Internationales Privatrecht (Wien: Manz Verlag 2001), 80.]

161 Graziano, *European International Tort-Law*, 95. [*Graziano*, Europäisches Internationales Deliktsrecht, 95.]

the claimant is to take the chance of the tortfreasor away to choose the country with the most favourable law.[162] (Detailed explanation in the previous Chapter III.)

The Austrian law has no special provision for environmental damage at all and also applies the general rule of Article 48 IPRG, which lead to the application of the "lex loci deliciti doctrine". Same as in Germany, the jurisdiction gave the claimant the right to choose the law of the country where the damage occurred.

In conclusion, the Rome II Regulation doesn't change anything for Austria and Germany in general in the matter of environmental damage. The only difference in the new provision is the explicit implementation of the claimant`s right to choose. In Austria and Germany the right to choose was only developed by the courts and not explicitly mentioned in the provision. As a result of this the introduction of the Rome II Regulation supports the legal certainty and helps to clarify the rules.

3.4. Infringement of intellectual property rights

The territoriality principle in all Member States is the main leading approach in the field of intellectual property rights. Therefore the Rome II Regulation didn't change much and followed this principle

3.4.1. Germany

Under German law the claim resulting from an infringement of intellectual property rights is ruled under the law of the country for which protection is claimed. The protection of an intellectual property rights can only be claimed in a country where the right was given to the victim, therefore Germany follows the same approach as the Rome II Regulation.[163]

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162 Hoffmann, and Thorn, *International Private Law* 504. [Bernd Hoffmann and Carsten Thorn, Internationales Privatrecht, 504.]

163 Rauscher, *International Private Law*, 350. [*Rauscher*, Internationales Privatrecht, 350.]

3.4.2. Austria

According to Austrian law, Article 34 IPRG[164] has to be applied in cases of infringement of intellectual property rights. Paragraph (1) of the provision is stating: "The occurrence, the content and the expiration of intellectual property rights have to be ruled under the law of the country in which the act of infringement occurred". Therefore it is obvious that the Austrian legislator didn't explicitly include the "lex loci portectionis" in the provision, furthermore the "lex loci delciti" doctrine is implemented.

In fact the Austrian regulation leads to the same result as the Rome II Regulation, because in the majority of cases, the place of infringement is similar to the place where protection is sought. But the implementation of the "lex loci portectionis" supports the legal certainty and follows the main principle of territoriality in the field of intellectual property and therefore Article 8 Rome II Regulation can be seen as an improvement.[165]

3.4.3. Conclusion/Choice of Law

In general the Austrian, German and European rule lead to the same result, but the Rome II Regulation implemented a specific rule for intellectual property rights, which is not really different to the general rule, but helps to clarify and supports legal certainty.

The Rome II Regulation also doesn't allow the choice of law, same as in Austria and Germany and therefore followed the main approach in the majority of the Member States in the field of intellectual property rights.

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164 (1) Das Entstehen, der Inhalt und das Erlöschen von Immaterialgüterrechten sind nach dem Recht des Staates zu beurteilen, in dem eine Benützungs- oder Verletzungshandlung gesetzt wird.
(2) Für Immaterialgüterrechte, die mit der Tätigkeit eines Arbeitnehmers im Rahmen seines Arbeitsverhältnisses zusammenhängen, ist für das Verhältnis zwischen dem Arbeitgeber und dem Arbeitnehmer die für das Arbeitsverhältnis geltende Verweisungsnorm maßgebend.

165 Verschraegen, *International Private Law, 215 [Verschraegen,* Internationales Privatrecht*, 215.]*

3.5. Industrial Actions

According to German law, the escape clause Article 41 (1) EGBGB has to be applied in cases of industrial action. This provision applies instead of the general rule, because the parties, employers and employees, of an industrial action have a legal relationship, which shows a manifestly close connection to the country´s law under which the contract between employers and employees is ruled.[166]

Under Austrian law, probably the general rule of Article 48 IPRG is going to be applied. But it`s necessary to mention, that neither the Austrian legislator nor the courts ever really dealt with the issue of damages arising out of industrial actions with foreign elements. As a result of this, Art 9 of the Rome II Regulation can be seen as a big improvement for the clarification of the Austrian law.

In conclusion, the main purpose of the European legislator to introduce a special provision for industrial action was the huge amount different provisions and approaches throughout all Member States. As a result of this the Rome II Regulation founded a new rule to unify all provisions in this matter and made the law of the place applicable where the industrial action occurred.[167]

Especially in the case of Austria it can be seen that a higher amount of provisions supports the need of clarification and certainty, as the Austrian law didn't know a provision for this matter at all before the introduction of the Rome II Regulation.

166 Julius, Staudinger, and Bernd Hoffmann, *Commentary to the Civil Code and Supplementary Law Art 40 EGBGB*, 535. [*Julius Staudinger/Bernd Hoffmann*, Kommentar zum Bürgerlichen Gesetzbuch mit Nebengesetzen Art 40 EGBGB, 535.]

167 Recital 27, Amended proposal for a European Parliament and Council Regulation on the Law Applicable to Non-contractual Obligations ("Rome II"), 21.2.2006, *COM (2006),* 83 final, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0083:FIN:EN:PDF (accessed October 25, 2013).

4. Table of illustration

	Rome II Regulation	Germany	Austria
General Rule	Lex loci damni	Gernerally “lex loci delicit commissi” but the option to choose “lex loci damni”	“lex loci delicit commissi” + escape clause
Common Habitual Residence	Prevailing principle	Prevailing principle	----
Specific Rules			
Freedom of choice	post-choice, prior choice only if parties pursuing commercial activities	Only post-choice	post-choice, prior-choice without limitations
Product Liability	Law of habitual residence of the costumer	Law of place where the product was bought (Place of distribution)	Law of place where the product was bought (Place of distribution)
Unfair competition and acts restricting free competition	Place of consumers interests, Law of the marketplace applicable	Law of the marketplace, if more than one competitor affected	Law of the marketplace
Environmental Damage	Lex loci damni, opting out to law of the place where the damage occurred for claimant	Lex loci delicit commissi, right to choose for the claimant	Lex loci delicit commissi, right to choose for the claimant
Infringement of intellectual property rights	Lex loci protectionis	Lex loci protectionis	lex loci delicti
Industrial Action	Law of the country where the action was performed	Escape Clause/manifestly closer connection to place of action	-----

Chapter V
CONLUSION, OUTCOME

1. Critical resume of the European Unification

1.1. Introduction

The Rome II Regulation is the first step of the European harmonization of conflict of law rules concerning obligations arising out of tort/delict. The scope of Rome II covers many but not all question in this field, and the European legislator implemented an examination clause (Art 30 Rome II convention) into the treaty, to make an adoption of the convention possible. The European countries are also waiting for a report, explaining why the infringement of privacy is not part of the convention.[168]

In general, the Rome II regulation tries to find an appropriate interest balance between persons who´s liability is claimed and the claimant. The reasoning for preferring the "lex loci damni" to the "lex loci deliciti" is that the connection to the state where the damages occurs creates a better balance between the interests of the parties. And furthermore it accords to the modern concept of civil law compensation and the strict liability in tort.[169]

The final composure of the Rome II convention shows the difficulties of the process of law making in a multinational democracy society. Very often the anxiety for consensus disturbs the coherence and consistency of the final draft, which also holds true for the Rome II Regulation. Rome II is going to unify and thus equalize the private international law of the member-states of the European Union. Although for some of these states this

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168 Verschraegen, *International Private Law, 123. [Verschraegen,* Internationales Privatrecht*, 123.]*

169 Recital 16, Amended proposal for a European Parliament and Council Regulation on the Law Applicable to Non-contractual Obligations ("Rome II"), 21.2.2006, *COM (2006),* 83 final, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0083:FIN:EN:PDF (accessed October 25, 2013).

equalization is a step backwards, for many more states it will be clear advantage. This unification or Europeanization cannot be worse than the complete lack of common direction.[170]

On the other hand it is not clear if the intention of the Rome II Regulation will be fulfilled. Anyway, it seems that it will not completely eliminate parties shopping for domestic law. The most significant example is that the Regulation does not have a rule for the situation if the damage occurs in more than one jurisdiction. This could result in parties trying to argue that the damage was suffered in the jurisdiction whose law brings the most advantage to them.[171]

1.2. Challenge: Certainty vs. Flexibility – The Escape Clause

While defining an escape clause, the legislator is usually facing the problem of finding a balance between "the requirement of legal certainty" and "the need to justice in individual cases".[172] For the creators of the Rome II Regulation it was always clear that an escape clause in necessarily needed but there was a lot of disagreement during the drafting concerning the content.[173] This can be seen, as the final draft of the escape clause still seems to be problematic because it doesn't permit an issue by issue evaluation and there is not an overarching principle for geographical or quantitative terms.[174]

The majority of the choices under the Rome II Regulation depend on geographical matters, like where the event occurred. The problem is that different courts in different countries would interpret the terms in their

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170 Symeon C Symeonides, "Rome II and Tort Conflicts: A Missed Opportunity" *56 American Journal of Comparative Law* (2008), 46, http://papers.ssrn.com/ sol3/ papers.cfm ?abstract_id= 1031803 (accessed July 5,2013).

171 Oonagh Sands, SJ Berwin, "European conflict of law rules for non-contractual liability: the Rome II Regulation." *The In-House Lawyer.co.uk* (March 18, 2009), http://www.inhouselawyer.co.uk/index. php/litigation-a-dispute-resolution/7172-european-conflict-of-law-rules-for-non-contractual-liability-the-rome-ii-regulation (accessed August 8, 2013).

172 Recital 14, Amended proposal for a European Parliament and Council Regulation on the Law Applicable to Non-contractual Obligations ("Rome II"), 21.2.2006, *COM (2006),* 83 final, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri= COM:2006:0083:FIN:EN:PDF (accessed October 25, 2013).

173 Jan von Hein, *Of Older Siblings and Distance Cousins: The Contribution of the Rome II Regulation to the Communitarisation of Private International Law,* RablesZ (Tübingen: Mohr Siebeck Publisher, 2009), 484.

174 Symeon C Symeonides, "Rome II and Tort Conflicts: A Missed Opportunity" *56 American Journal of Comparative Law* (2008) 26, http://papers.ssrn.com/ sol3/ papers.cfm ?abstract_id= 1031803 (accessed July 5,2013).

own way as there is no real guidance in the Regulation. If it turns out that the geographically chosen place of the common residence of the parties has not a significant connection, it is necessary to find another "closer" connection.[175]

As a result of this the next questions what "closer" under this circumstances mean arises. Should it be understood as a geographical "closer" in the terms of boarders of countries and locations or in the terms of facts and legal nature? The Recital 14 gives in this matter a wide guidance as the courts have to decide "in the need of justice in individual cases". Meaning it is necessary to find a reasonable and equitable solution rather than sticking on the correct and detailed interpretation of legal terms.

1.3. Will of the Parties: Freedom of choice

Party autonomy is the fundamental principle of conflict of law rules and has therefore also a high degree of importance in the Rome II Regulation, but the approach used by the Regulation is quite limited. As a result of this the question arises if it was necessary to implement all this limitations. In detail the limitation of the ex-ante choice only for parties pursuing commercial activity can be most criticized.[176]

It is not understandable, as the party autonomy is the leading principle, that the ex-ante choice is limited. There is no obvious reason why any of the parties should be protected or an ex-ante choice has a negative influence at all.

As the Rome II Regulation follows the trend of the national conflict of law rules to make the choice of law to the prevailing principle, someone has to first ask the question if a choice of law agreement between the parties was concluded. There are enough reasonable arguments supporting the priority of the choice law to other provisions. First the injured party should have the possibility to determine the applicable law through an agreement. Secondly the choice of law agreement supports the legal certainty and eliminates any insecurity as

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175 Ibid.

176 Kadner Graziano, *Freedom to choose the law applicable in tort*, in: The Rome II Regulation on the Law Applicable to Non-Contractual Obligations (Leiden: Martinus Nijhoff Publisher, 2009), 16.

the applicable law. Thirdly the parties are in the best position to know which the most suitable law for the dispute is.[177]

1.4. Difficulties with multi-state-torts

Article 4 (1) doesn't provide for the situation where a single event or acting has the result of damages in different countries. Explicitly only Article 6 (3) (b) Rome II Regulation for disputes arising out of cartel damages deals with this situation. A different type of tort cases like defamation by mass media in which a single act causes damages in more than one country is not covered by the regulation, because Article 1 (2) g excludes this matter. In other situations where several injuries occur in more than one country like pure economic loss, the law of the country where the injury occurred is going to be applied, which is the mosaic principle.[178]

As a result of this can be seen that the European Legislator didn't foresee all possibility of injury occurrence. This in fact leads to more legal uncertainty and leaves it up to the national conflict of law rules to decide cases like this, which produces unforeseeable result as the national laws differ a lot in this matter.

The "lex loci damni rule" produces bad results in cross-border cases, in which the country of acting provides higher standards of conduct for the tortfeasor than the country where the injury occurs. Article 7 dealing with environmental damages allows the victim to opt out of this law and choose the law of the place of injury. But the European legislator expected this to be, as a general rule, too much in favour for the victim and therefore didn't allow it.[179]

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177 Ibid., 3.

178 Jan von Hein, *Of Older Siblings and Distance Cousins: The Contribution of the Rome II Regulation to the Communitarisation of Private International Law,* RablesZ (Tübingen: Mohr Siebeck Publisher, 2009), 475.

179 Symeon C Symeonides, "Rome II and Tort Conflicts: A Missed Opportunity" *56 American Journal of Comparative Law* (2008), 19, http://papers.ssrn.com/ sol3/ papers.cfm ?abstract_id= 1031803 (accessed July 5,2013).

1.5. Conclusion

First it`s important to keep in mind that the Rome II Regulation is the first European law at all enacted for conflict of laws. This should not be seen as an excuse for mistakes and disadvantages but the European legislator must get some space for improvements and judicial development by the courts will also help to clarify some uncertainties.

1.5.1. Positive Review

The Rome II Regulation offers modern, carefully thought through provisions which produce a significant amount of legal certainty and on the other hand allow freedom and flexibility. The majority of its rules correspond with modern European standards and others are innovative like the provisions for product liability. Remaining gaps like personality rights and violation of privacy sphere must be closed in the following years. The discussion about the applicable law in matters of non-contractual obligations arising out of torts was moved from the national level to the European level. Overall the Rome II Regulation increases the discussion about obligations arising out of tort/delict and lead to big development in this field of law.[180]

Even though the Rome II Regulation has many disadvantages and obscurities, Europe is better off with it than without, because the regulation led to unification and equalization, which is the main purpose of the European Union. For some of the European countries the regulation is development for other its regress, but overall it must be seen as a step forwards concerning the unification of Europe.[181]

In my opinion the whole project of all Rome Regulations must be seen in a very broad point of view. These Regulations are part of the long unification process in Europe since the existence of the European Union. Especially conflict of law rules are very important because they deal with cross-border conflicts, which has a strong connection to the idea of unification. The Rome II Regulation not only fulfilled its main purpose to unify

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180 Kadner Graziano, *The law applicable on non-contractual obligations after introduction of the Rome II Regulation,* RabelsZ (Tübingen: Mohr Siebeck Publisher, 2009), 75. [*Kadner Graziano*, Das auf außervertragliche Schuldverhältnisse anzuwendende Recht nach Inkrafttreten der Rome II Verordnung, RabelsZ (Tübingen: Mohr Siebeck Verlag, 2009), 75.]

181 Symeon C Symeonides, "Rome II and Tort Conflicts: A Missed Opportunity" *56 American Journal of Comparative Law* (2008), 46, http://papers.ssrn.com/ sol3/ papers.cfm ?abstract_id= 1031803 (accessed July 5,2013).

the conflict of law rules in Europe, furthermore there are also many developments in the detailed rules of conflict of laws.

It must also be mentioned that the majority of the national conflict of law rules are outdated. These acts usually came into existence between 1950 and 1970, so usually more than fifty years ago. Only this fact shows that the national legislators didn't put much focus on this field of law and only the courts could interpret the law in a modern way through their decisions. But as all European countries except, the United Kingdom are civil law and not common law countries, it is the obligation of the legislator and not the courts to modernize the law. Already this reason alone satisfies any ambitions to codify a new conflict of law regime, which was done by the European legislator.

Maybe once in the future, the process of unification in Europe reached its goal so far that there are no unified conflict of law rules needed anymore, because the substantive law is already unified to one similar act of Europe.

1.5.2. Negative Review

In the case, a choice of law rule has their main purpose in stopping forum shopping and reaching decisional harmony, it can only fulfil its purpose if the rules are all similar in the countries involved in the case. The Rome II Regulation unifies the rules within the European Union, but as long as the plaintiff has still access to courts of non-member states, predictability and certainty cannot be guaranteed. But there are also other problems like that the Rome II Regulation is always connected to different legal concepts in every member state, which could still lead to different verdicts.[182]

If taking the first draft of the Rome II Regulation made by the European Commission in consideration, the final version could have been worse but also much better. The amendments of the European Parliament proposed more flexibility and more detailed provisions. The Rome II Regulation can be seen as a missed

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182 Anatol Dutta, "Succession and Wills in the Conflict of Laws on the Eve of Europeanisation," *RablesZ*, no. 73 (2009): 553.

opportunity to improve the law in this filed, because the European lawyers always had experience in drafting Private International law acts as Europe is the birthplace of Private International law. The obviously biggest problem the Rome II Regulation had to face during the process of law making was to find a consensus through the huge numbers of different Member State`s interests. This probably explains the reason for the majority of mistakes and difficulties and shows that the main aim was to simplify and uniform the law than strongly change and improve it.[183]

In my opinion the European legislator should have focused much more on practicability of the regulation than on the theoretical approach. For example, the outcome of the application of many provisions is unclear and it cannot be foreseen if there will be any practical relevance for some provisions at all. From the objectives in the Recital can be seen that the legislator first had a different idea of the regulation, but couldn't implement it. The European commission should have stronger stuck on the initial plan and not allowed so much influence from all the Member States. It`s too early to say how the regulation will really affect the jurisdiction of each Member State, but it is obviously that there will arise problems and the European legislator probably has to adopt the regulation many times in the future.

2. Impact on Thai Legislation and Suggestions for Thailand

2.1. Existing legislation on Delict under Thai Act of Conflict of Laws Buddhist Area 2481 (1938)

Article 15 of the Thai Act of Conflict of Laws:

"An obligation arising out of a tort shall be governed by the law of the **place where the facts grounding** such tort come to pass. The provision of the preceding paragraph shall not apply to all facts occurring in a foreign state and not constituting a tort under Thai laws. In any event whatsoever, no victim may claim compensation or remedy which is not permitted by Siamese laws".

183 Ibid.

2.2. Necessity to improve Thai Law on this matter

As the Thai law concerning conflict of laws is quite outdated and old, it seems to be necessary to be reformed. The Rome II Regulations and its impact on the Austrian and German law can be maybe seen as a paragon for Thailand. The Thai Act lacks details for conflict of law rules on obligations arising out of delict/tort. Only the general rule is implemented and there is a need for more clarification, especially detailed rules for specific torts/delicts, like in the Rome II Regulation, should be implemented into the Thai Act.

It can be seen from Article 15 that the Thai act in general follows the "lex loci deliciti" doctrine, like the majority of the European countries did before the introduction of the Rome II Regulation. The weakness of this provision can be illustrated by the following example: Imagine a dispute between two people with Thai Nationality taking place in Vietnam, but the damage occurs later in Thailand. Under the Thai Act, if the victim is filing a claim in Thailand, the law applicable would be Vietnamese law, if the acting constitutes a delict also under Thai Law because the dispute was taking place in Vietnam. This wouldn't be a satisfying result, as all connections in this case lead to Thailand and Thai law.

The second sentence of Article 15 makes the application of a foreign law in practice difficult. The limitation of the application "all facts occurring in a foreign state and constituting not a tort under Thai law" is nothing than an implementation of the "odre public" rule, which is unnecessary as this is a general principle in Private International law anyway and only makes the provision more complicated.

2.3. Suggestion for Thailand

From the perspective of Thailand, the unification in Europe provide some examples to improve the Thai Act. The Thai legislator is able to observe and assess the process of law making in Europe and can use it for its own benefit. The main advantage of Thailand is not to be bound to the European legislation like a Member State. In detail this means that Thailand can choose the most suitable provisions of the Rome II Regulation for its own favour as it has not to compromise with the interests of other member states. On the other hand the Rome II

Regulation is a collection of the best and most suitable provisions of the conflict of law rules of each Member State. This makes is comfortable for Thailand as the legislator only has to focus on the Rom II Regulation and not to analyse all different conflict of law regimes throughout the Member States.

2.3.1. General Rule

As can be seen, the Thai Act also applies the "lex loci deliciti" like Austria and Germany did it before. The change of the general rule from "lex loci deliciti" to lex loci damni" supports the interest of the claimant. This new doctrine forces the potential tortfeasor to adjust his behaviour to avoid liability in countries where his acting could have effects. As it is a general accepted approach which reflects the modernization of conflict of law regimes, it would be highly recommended for Thailand to adopt its rules and implement the new doctrine.

Significant relevance has this new rule for Internet offences and in cases of difference between fault and strict liability in several countries. Meaning that, the new rule could lead to a much stronger liability for the claimant. This would be also an improvement for Thailand, because it would strengthen the possibilities and the position of the claimant/ damaged party.[184]

2.3.2. Escape Clause/ Habitual Residence

As the Thai Act lacks a variety of different provisions it would lead to much more clarification and certainty if an escape clause and Habitual Residence clause would be added to the general rule.

The escape clause is important to handle special situations where the general rule leads to an impropriate result and it is a necessary part of every conflict of law regime. The Austrian Act had implemented and escape clause already before the Rome II Regulation. But this clause had a lack of details like enumerations of closer connections which is useful to determine the applicable law. This improvement of the Austrian law is a paragon for Thailand, as the Thai legislator could from the beginning implement a detailed escape clause and didn't have to go through a development of the provision.

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184 Rauscher, *International Private Law*, 334. [*Rauscher*, Internationales Privatrecht, 334.]

The habitual residence clause is also a modern approach of all new conflict of law regimes. In some way it replaces the outdated nationality principle implemented into the Thai Act. It is more reasonable to connect to the habitual residence than to the habitual nationality as the nationality often has no reasonable connection to the place of acting or the place where the damage occurs.

2.3.3. Choice of Law

The choice of law is the prevailing principle of the Rome II Regulation and is also very important in the national conflict of law regimes. Therefore it is beside the general rule the most important provision to be implemented into the Thai Act. The party autonomy should always have priority, because it is in the parties interests to choose the law applicable on their dispute. This leads to the most certainty and foreseeability as the parties already know which law will be applied.

In the matter of party autonomy Thailand has to focus on its benefits getting from the new rules and should not implement the whole choice of law regime of the Rome II Regulation and change it in some way. As mentioned before the Rome II Regulation only allows ex-ante choice for parties pursuing commercial activity. This limitation is often criticized and not understandable, and also a step backwards in the case of Austria. As a result if this, the Thai legislator should implement the choice of law regime of the Rome II Regulation, but allowing the ex-ante choice without limitations. This would lead to a good overall choice of law provision in the Thai Act.

2.3.4. Provisions for Specific Torts

Overall it is a reasonable idea of the European legislator to establish specific provisions for specific torts, which the majority of national conflict of law regimes don't do.

As a result of this the Thai legislator could also implement provisions for specific torts. While doing this he should take care not to make the same mistakes as the European legislator, caused by the big gap between the interests of the Member States. In the light of legal certainty and practicability it's important that these provisions are not too complicated and really lead to a different result than the general rule, otherwise they are expandable.

In the case of Art 5 Rome II Regulation for product liability, the provision seems to be too complicated. It would be a better idea to just focus on the main principle of applying the law of the country where the market is affected. Therefore it is not necessary to implement a habitual residence and escape clause in the provision. The Thai Act could just state that the law of the country where the product was marked should be applied.

Article 6 Rome II Regulation dealing with unfair competition and acts restricting free competition is a special rule to the general highly appreciated by the European legal scholars. It was always difficult to determine the law through the general rule in this matter and therefore it is can be recommended for the Thai legislator to implement this provision.

Article 7 Rome II Regulation is an example for long developed jurisdiction of courts which finally was implemented into a provision to satisfy the need of legal certainty. This provision differs from the general rule as it gives the victim the additional right to choose the applicable law. The Thai legislator could gain advantage out of implementing this rule, as it is based on long developed court jurisprudence and therefore a benefit for the Thai Act.

2.4. Conclusion

However the Thai legislator will decide, if some example of the Rome II Regualtion are going to be adopted or not, it seems to be necessary to modernize the conflict of law rules on tort/delict. The ASEAN countries are going to cooperate in some matters and build up a unit in the foreseeable future. As Thailand will be one of the most important countries in this union it is an advantage to have modern rules dealing with cross-border issues and as a result of this, the Thai Act could be a paragon for the other ASEAN countries in the future. In the case of future ambitions to unify the conflict of law rules throughout the ASEAN countries, like it happened in Europe, the Thai Act could become a leading paragon for the whole unification in Asia.

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APPENDIX

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)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 61(c) and 67 thereof, Having regard to the proposal from the Commission, Having regard to the opinion of the European Economic and Social Committee (1), Acting in accordance with the procedure laid down in Article 251 of the Treaty in the light of the joint text approved by the Conciliation Committee on 25 June 2007 (2),

Whereas:

(1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice. For the progressive establishment of such an area, the Community is to adopt measures relating to judicial cooperation in civil matters with a cross-border impact to the extent necessary for the proper functioning of the internal market.

(2) According to Article 65(b) of the Treaty, these measures are to include those promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction.

(3) The European Council meeting in Tampere on 15 and 16 October 1999 endorsed the principle of mutual recognition of judgments and other decisions of judicial authorities as the cornerstone of judicial cooperation in civil matters and invited the Council and the Commission to adopt a programme of measures to implement the principle of mutual recognition.

(4) On 30 November 2000, the Council adopted a joint Commission and Council programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters (3). The programme identifies measures relating to the harmonization of conflict-of-law rules as those facilitating the mutual recognition of judgments.

(5) The Hague Programme (4), adopted by the European Council on 5 November 2004, called for work to be pursued actively on the rules of conflict of laws regarding non-contractual obligations (Rome II).

(6) The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought.

(7) The substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (5) (Brussels I) and the instruments dealing with the law applicable to contractual obligations.

(8) This Regulation should apply irrespective of the nature of the court or tribunal seised.

(9) Claims arising out of *acta iure imperii* should include claims against officials who act on behalf of the State and liability for acts of public authorities, including liability of publicly appointed office-holders. Therefore, these matters should be excluded from the scope of this Regulation.

(10) Family relationships should cover parentage, marriage, affinity and collateral relatives. The reference in Article 1(2) to relationships having comparable effects to marriage and other family relationships should be interpreted in accordance with the law of the Member State in which the court is seised.

(11) The concept of a non-contractual obligation varies from one Member State to another. Therefore for the purposes of this Regulation non-contractual obligation should be understood as an autonomous concept. The conflict-oflaw rules set out in this Regulation should also cover noncontractual obligations arising out of strict liability.

(12) The law applicable should also govern the question of the capacity to incur liability in tort/delict. (1) OJ C 241, 28.9.2004, p. 1. (2) Opinion of the European Parliament of 6 July 2005 (OJ C 157 E, 6.7.2006, p. 371), Council Common Position of 25 September 2006 (OJ C 289 E, 28.11.2006, p. 68) and Position of the European Parliament of 18 January 2007 (not yet published in the Official Journal). European Parliament Legislative Resolution of 10 July 2007 and Council Decision of 28 June 2007. (3) OJ C 12, 15.1.2001, p. 1. (4) OJ C 53, 3.3.2005, p. 1. (5) OJ L 12, 16.1.2001, p. 1. Regulation as last amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1). L 199/40 EN Official Journal of the European Union 31.7.2007

(13) Uniform rules applied irrespective of the law they designate may avert the risk of distortions of competition between Community litigants.

(14) The requirement of legal certainty and the need to do justice in individual cases are essential elements of an area of justice. This Regulation provides for the connecting factors which are the most appropriate to achieve these objectives. Therefore, this Regulation provides for a general rule but also for specific rules and, in certain provisions, for an 'escape clause' which allows a departure from these rules where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country. This set of rules thus creates a flexible framework of conflict-of-law rules. Equally, it enables the court seised to treat individual cases in an appropriate manner.

(15) The principle of the *lex loci delicti commissi* is the basic solution for non-contractual obligations in virtually all the Member States, but the practical application of the principle where the component factors of the case are spread over several countries varies. This situation engenders uncertainty as to the law applicable.

(16) Uniform rules should enhance the foreseeability of court decisions and ensure a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage. A connection with the country where the direct damage occurred (*lex loci damni*) strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage, and also reflects the modern approach to civil liability and the development of systems of strict liability.

(17) The law applicable should be determined on the basis of where the damage occurs, regardless of the country or countries in which the indirect consequences could occur. Accordingly, in cases of personal injury or

damage to property, the country in which the damage occurs should be the country where the injury was sustained or the property was damaged respectively.

(18) The general rule in this Regulation should be the *lex loci damni* provided for in Article 4(1). Article 4(2) should be seen as an exception to this general principle, creating a special connection where the parties have their habitual residence in the same country. Article 4(3) should be understood as an 'escape clause' from Article 4(1) and (2), where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country.

(19) Specific rules should be laid down for special torts/delicts where the general rule does not allow a reasonable balance to be struck between the interests at stake.

(20) The conflict-of-law rule in matters of product liability should meet the objectives of fairly spreading the risks inherent in a modern high-technology society, protecting consumers' health, stimulating innovation, securing undistorted competition and facilitating trade. Creation of a cascade system of connecting factors, together with a foreseeability clause, is a balanced solution in regard to these objectives. The first element to be taken into account is the law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred, if the product was marketed in that country. The other elements of the cascade are triggered if the product was not marketed in that country, without prejudice to Article 4(2) and to the possibility of a manifestly closer connection to another country.

(21) The special rule in Article 6 is not an exception to the general rule in Article 4(1) but rather a clarification of it. In matters of unfair competition, the conflict-of-law rule should protect competitors, consumers and the general public and ensure that the market economy functions properly. The connection to the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected generally satisfies these objectives.

(22) The non-contractual obligations arising out of restrictions of competition in Article 6(3) should cover infringements of both national and Community competition law. The law applicable to such non-contractual obligations should be the law of the country where the market is, or is likely to be, affected. In cases where the market is, or is likely to be, affected in more than one country, the claimant should be able in certain circumstances to choose to base his or her claim on the law of the court seised.

(23) For the purposes of this Regulation, the concept of restriction of competition should cover prohibitions on agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition within a Member State or within the internal market, as well as prohibitions on the abuse of a dominant position within a Member State or within the internal market, where such agreements, decisions, concerted practices or abuses are prohibited by Articles 81 and 82 of the Treaty or by the law of a Member State.

(24) 'Environmental damage' should be understood as meaning adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms. 31.7.2007 EN Official Journal of the European Union L 199/41

(25) Regarding environmental damage, Article 174 of the Treaty, which provides that there should be a high level of protection based on the precautionary principle and the principle that preventive action should be taken, the principle of priority for corrective action at source and the principle that the polluter pays, fully justifies the use of the principle of discriminating in favour of the person sustaining the damage. The question of when the person seeking compensation can make the choice of the law applicable should be determined in accordance with the law of the Member State in which the court is seised.

(26) Regarding infringements of intellectual property rights, the universally acknowledged principle of the *lex loci protectionis* should be preserved. For the purposes of this Regulation, the term 'intellectual property rights' should be interpreted as meaning, for instance, copyright, related rights, the *sui generis* right for the protection of databases and industrial property rights.

(27) The exact concept of industrial action, such as strike actionor lock-out, varies from one Member State to another and is governed by each Member State's internal rules. Therefore, this Regulation assumes as a general principle that the law of the country where the industrial action was taken should apply, with the aim of protecting the rights and obligations of workers and employers.

(28) The special rule on industrial action in Article 9 is without prejudice to the conditions relating to the exercise of such action in accordance with national law and without prejudice to the legal status of trade unions or of the representative organisations of workers as provided for in the law of the Member States.

(29) Provision should be made for special rules where damageis caused by an act other than a tort/delict, such as unjust enrichment, *negotiorum gestio* and *culpa in contrahendo*.

(30) *Culpa in contrahendo* for the purposes of this 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. Article 12 covers only non-contractual obligations presenting a direct link with the dealings prior to the conclusion of a contract. This means that if, while a contract is being negotiated, a person suffers personal injury, Article 4 or other relevant provisions of this Regulation should apply.

(31) To respect the principle of party autonomy and to enhance legal certainty, the parties should be allowed to make a choice as to the law applicable to a non-contractual obligation.

This choice should be expressed or demonstrated with reasonable certainty by the circumstances of the case. Where establishing the existence of the agreement, the court has to respect the intentions of the parties. Protection should be given to weaker parties by imposing certain conditions on the choice.

(32) Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. In particular, the application of a provision of the law designated by this Regulation which would have the effect of causing noncompensatory exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the court seised, be regarded as being contrary to the public policy (*ordre public*) of the forum.

(33) According to the current national rules on compensation awarded to victims of road traffic accidents, when quantifying damages for personal injury in cases in which the accident takes place in a State other than that of the habitual residence of the victim, the court seised should take into account all the relevant actual circumstances of the specific victim, including in particular the actual losses and costs of after-care and medical attention.

(34) In order to strike a reasonable balance between the parties, account must be taken, in so far as appropriate, of the rules of safety and conduct in operation in the country in which the harmful act was committed, even where the non-contractual obligation is governed by the law of another country. The term 'rules of safety and conduct' should be interpreted as referring to all regulations having any relation to safety and conduct, including, for example, road safety rules in the case of an accident.

(35) A situation where conflict-of-law rules are dispersed among several instruments and where there are differences between those rules should be avoided. This Regulation, however, does not exclude the possibility of inclusion of conflict-of-law rules relating to non-contractual obligations in provisions of Community law with regard to particular matters. This Regulation should not prejudice the application of other instruments laying down provisions designed to contribute to the proper functioning of the internal market in so far as they cannot be applied in conjunction with the law designated by the rules of this Regulation. The application of provisions of the applicable law designated by the rules of this Regulation should not restrict the free movement of goods and services as regulated by Community instruments, such as 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) (1). (1) OJ L 178, 17.7.2000, p. 1. L 199/42 EN Official Journal of the European Union 31.7.2007

(36) Respect for international commitments entered into by the Member States means that this Regulation should not affect international conventions to which one or more Member States are parties at the time this Regulation is adopted. To make the rules more accessible, the Commission should publish the list of the relevant conventions in the *Official Journal of the European Union* on the basis of information supplied by the Member States.

(37) The Commission will make a proposal to the European Parliament and the Council concerning the procedures and conditions according to which Member States would be entitled to negotiate and conclude on their own behalf agreements with third countries in individual and exceptional cases, concerning sectoral matters, containing provisions on the law applicable to non-contractual obligations.

(38) Since the objective of this Regulation cannot be sufficiently achieved by the Member States, and can therefore, by reason of the scale and effects of this Regulation, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity set out in Article 5 of the Treaty. In accordance with the principle of proportionality set out in that Article, this Regulation does not go beyond what is necessary to attain that objective.

(39) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom and Ireland are taking part in the adoption and application of this Regulation.

(40) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark does not take part in the adoption of this Regulation, and is not bound by it or subject to its application,

HAVE ADOPTED THIS REGULATION:

CHAPTER I

SCOPE

Article 1

Scope

1. This Regulation shall apply, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters. It shall not apply, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*).

2. The following shall be excluded from the scope of this Regulation:

(a) 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;

(b) non-contractual obligations arising out of matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage, and wills and succession;

(c) non-contractual obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character; (d) non-contractual obligations arising out of the law of companies and other bodies corporate or unincorporated regarding matters such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies corporate or unincorporated, the personal liability of officers and members as such for the obligations of the company or body and the personal liability of auditors to a company or to its members in the statutory audits of accounting documents; (e) non-contractual obligations arising out of the relations between the settlors, trustees and beneficiaries of a trust created voluntarily; (f) non-contractual obligations arising out of nuclear damage;

(g) non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.

3. This Regulation shall not apply to evidence and procedure, without prejudice to Articles 21 and 22.

4. For the purposes of this Regulation, 'Member State' shall mean any Member State other than Denmark.

Article 2

Non-contractual obligations

1. For the purposes of this Regulation, damage shall cover any consequence arising out of tort/delict, unjust enrichment, *negotiorum gestio* or *culpa in contrahendo*.

2. This Regulation shall apply also to non-contractual obligations that are likely to arise. 31.7.2007 EN Official Journal of the European Union L 199/43

3. Any reference in this Regulation to:

(a) an event giving rise to damage shall include events giving rise to damage that are likely to occur; and

(b) damage shall include damage that is likely to occur.

Article 3

Universal application

Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.

CHAPTER II

TORTS/DELICTS

Article 4

General rule

1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

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

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

Article 5

Product liability

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

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

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

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

2. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraph 1, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

Article 6

Unfair competition and acts restricting free competition

1. The law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected.

2. Where an act of unfair competition affects exclusively the interests of a specific competitor, Article 4 shall apply.

3. (a) The law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected.

(b) When the market is, or is likely to be, affected in more than one country, the person seeking compensation for damage who sues in the court of the domicile of the defendant, may instead choose to base his or her claim on the law of the court seised, provided that the market in that Member State is amongst those directly

and substantially affected by the restriction of competition out of which the non-contractual obligation on which the claim is based arises; where the claimant sues, in accordance with the applicable rules on jurisdiction, more than one defendant in that court, he or she can only choose to base his or her claim on the law of that court if the restriction of competition on which the claim against each of these defendants relies directly and substantially affects also the market in the Member State of that court.

4. The law applicable under this Article may not be derogated from by an agreement pursuant to Article 14. L 199/44 EN Official Journal of the European Union 31.7.2007

Article 7

Environmental damage

The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.

Article 8

Infringement of intellectual property rights

1. The law applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the country for which protection is claimed.

2. In the case of a non-contractual obligation arising from an infringement of a unitary Community intellectual property right, the law applicable shall, for any question that is not governed by the relevant Community instrument, be the law of the country in which the act of infringement was committed.

3. The law applicable under this Article may not be derogated from by an agreement pursuant to Article 14.

Article 9

Industrial action

Without prejudice to Article 4(2), the law applicable to a noncontractual obligation in respect of the liability of a person in the capacity of a worker or an employer or the organisations representing their professional interests for damages caused by an industrial action, pending or carried out, shall be the law of the country where the action is to be, or has been, taken.

CHAPTER III

UNJUST ENRICHMENT, *NEGOTIORUM GESTIO* AND *CULPA IN CONTRAHENDO*

Article 10

Unjust enrichment

1. If a non-contractual obligation arising out of unjust enrichment, including payment of amounts wrongly received, concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict, that is closely connected with that unjust enrichment, it shall be governed by the law that governs that relationship.

2. Where the law applicable cannot be determined on the basis of paragraph 1 and the parties have their habitual residence in the same country when the event giving rise to unjust enrichment occurs, the law of that country shall apply.

3. Where the law applicable cannot be determined on the basis of paragraphs 1 or 2, it shall be the law of the country in which the unjust enrichment took place.

4. Where it is clear from all the circumstances of the case that the non-contractual obligation arising out of unjust enrichment is manifestly more closely connected with a country other than that indicated in paragraphs 1, 2 and 3, the law of that other country shall apply.

Article 11

Negotiorum gestio

1. If a non-contractual obligation arising out of an act performed without due authority in connection with the affairs of another person concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict, that is closely connected with that non-contractual obligation, it shall be governed by the law that governs that relationship.

2. Where the law applicable cannot be determined on the basis of paragraph 1, and the parties have their habitual residence in the same country when the event giving rise to the damage occurs, the law of that country shall apply.

3. Where the law applicable cannot be determined on the basis of paragraphs 1 or 2, it shall be the law of the country in which the act was performed.

4. Where it is clear from all the circumstances of the case that the non-contractual obligation arising out of an act performed without due authority in connection with the affairs of another person is manifestly more closely connected with a country other than that indicated in paragraphs 1, 2 and 3, the law of that other country shall apply.

Article 12

Culpa in contrahendo

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. 31.7.2007 EN Official Journal of the European Union L 199/45

Article 13

Applicability of Article 8

For the purposes of this Chapter, Article 8 shall apply to noncontractual obligations arising from an infringement of an intellectual property right.

CHAPTER IV

FREEDOM OF CHOICE

Article 14

Freedom of choice

1. 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.

2. Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.

3. Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in one or more of the Member States, the parties' choice of the law applicable other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.

CHAPTER V

COMMON RULES

Article 15

Scope of the law applicable

The law applicable to non-contractual obligations under this

Regulation shall govern in particular:

(a) the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them;

(b) the grounds for exemption from liability, any limitation of liability and any division of liability;

(c) the existence, the nature and the assessment of damage or the remedy claimed;

(d) within the limits of powers conferred on the court by its procedural law, the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation;

(e) the question whether a right to claim damages 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 and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation.

Article 16

Overriding mandatory provisions

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 to the non-contractual obligation.

Article 17

Rules of safety and conduct

In assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability.

Article 18

Direct action against the insurer of the person liable

The person having suffered damage may bring his or her claim directly against the insurer of the person liable to provide compensation if the law applicable to the non-contractual obligation or the law applicable to the insurance contract so provides.

Article 19

Subrogation

Where a person (the creditor) has a non-contractual claim upon another (the debtor), and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether, and the extent to which, the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship. L 199/46 EN Official Journal of the European Union 31.7.2007

Article 20

Multiple liability

If a creditor has a claim against several debtors who are liable for the same claim, and one of the debtors has already satisfied the claim in whole or in part, the question of that debtor's right to demand compensation from the other debtors shall be governed by the law applicable to that debtor's non-contractual obligation towards the creditor.

Article 21

Formal validity

A unilateral act intended to have legal effect and relating to a non-contractual obligation shall be formally valid if it satisfies the formal requirements of the law governing the noncontractual obligation in question or the law of the country in which the act is performed.

Article 22

Burden of proof

1. The law governing a non-contractual obligation under this

Regulation shall apply to the extent that, in matters of noncontractual obligations, it contains rules which raise presumptions of law or determine the burden of proof.

2. Acts intended to have legal effect may be proved by any mode of proof recognised by the law of the forum or by any of the laws referred to in Article 21 under which that act is formally valid, provided that such mode of proof can be administered by the forum.

CHAPTER VI

OTHER PROVISIONS

Article 23

Habitual residence

1. For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration.

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 the branch, agency or any other establishment is located shall be treated as the place of habitual residence.

2. For the purposes of this Regulation, 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.

Article 24

Exclusion of renvoi

The 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.

Article 25

States with more than one legal system

1. Where a State comprises several territorial units, each of which has its own rules of law in respect of non-contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation.

2. A Member State within which different territorial units have their own rules of law in respect of non-contractual obligations shall not be required to apply this Regulation to conflicts solely between the laws of such units.

Article 26

Public policy of the forum

The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.

Article 27

Relationship with other provisions of Community law

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.

Article 28

Relationship with existing international conventions

1. 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 and which lay down conflict-of-law rules relating to non-contractual obligations.

2. However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation. 31.7.2007 EN Official Journal of the European Union L 199/47

CHAPTER VII

FINAL PROVISIONS

Article 29

List of conventions

1. By 11 July 2008, Member States shall notify the Commission of the conventions referred to in Article 28(1). After that date, Member States shall notify the Commission of all denunciations of such conventions.

2. The Commission shall publish in the *Official Journal of the European Union* within six months of receipt:

(i) a list of the conventions referred to in paragraph 1;

(ii) the denunciations referred to in paragraph 1.

Article 30

Review clause

1. Not later than 20 August 2011, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation. If necessary, the report shall be accompanied by proposals to adapt this Regulation. The report shall include:

(i) a study on the effects of the way in which foreign law is treated in the different jurisdictions and on the extent to which courts in the Member States apply foreign law in practice pursuant to this Regulation;

(ii) a study on the effects of Article 28 of this Regulation with respect to the Hague Convention of 4 May 1971 on the law applicable to traffic accidents.

2. Not later than 31 December 2008, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, taking into account rules relating to freedom of the press and freedom of expression in the media, and conflict-of-law issues related to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of ndividuals with regard to the processing of personal data and on the free movement of such data (1).

Article 31

Application in time

This Regulation shall apply to events giving rise to damage which occur after its entry into force.

Article 32

Date of application

This Regulation shall apply from 11 January 2009, except for Article 29, which shall apply from 11 July 2008. This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Strasbourg, 11 July 2007.

German Law:

BGBG

"Einführungagesetz zum Bürgerlichen Gesetzbuche in der Fassung der Bekanntmachung vom 21. September 1994 (BGBL. I S. 2494; 1997 I S. 1061), zuletzt geändert durch Artikel 5 Abs, 2 des Gesetzes vom 19. Dezember 2006 (BGBl I S. 3230)"

Artikel 40

Unerlaubte Handlung

(1) Ansprüche aus unerlaubter Handlung unterliegen dem Recht des Staates, in dem der Ersatzpflichtige gehandelt hat. Der Verletzte kann verlangen, daß anstelle dieses Rechts das Recht des Staates angewandt wird, in dem der Erfolg eingetreten ist. Das Bestimmungsrecht kann nur im ersten Rechtszug bis zum Ende des frühen ersten Termins oder dem Ende des schriftlichen Vorverfahrens ausgeübt werden.

(2) Hatten der Ersatzpflichtige und der Verletzte zur Zeit des Haftungsereignisses ihren gewöhnlichen Aufenthalt in demselben Staat, so ist das Recht dieses Staates anzuwenden. Handelt es sich um Gesellschaften, Vereine oder juristische Personen, so steht dem gewöhnlichen Aufenthalt der Ort gleich, an dem sich die Hauptverwaltung oder, wenn eine Niederlassung beteiligt ist, an dem sich diese befindet.

(3) Ansprüche, die dem Recht eines anderen Staates unterliegen, können nicht geltend gemacht werden, soweit sie

1. wesentlich weiter gehen als zur angemessenen Entschädigung des Verletzten erforderlich,
2. offensichtlich anderen Zwecken als einer angemessenen Entschädigung des Verletzten dienen oder
3. haftungsrechtlichen Regelungen eines für die Bundesrepublik Deutschland verbindlichen Übereinkommens widersprechen.

(4) Der Verletzte kann seinen Anspruch unmittelbar gegen einen Versicherer des Ersatzpflichtigen geltend machen, wenn das auf die unerlaubte Handlung anzuwendende Recht oder das Recht, dem der Versicherungsvertrag unterliegt, dies vorsieht.

Artikel 41

Wesentlich engere Verbindung

(1) Besteht mit dem Recht eines Staates eine wesentlich engere Verbindung als mit dem Recht, das nach den Artikeln 38 bis 40 Abs. 2 maßgebend wäre, so ist jenes Recht anzuwenden.

(2) Eine wesentlich engere Verbindung kann sich insbesondere ergeben

1. aus einer besonderen rechtlichen oder tatsächlichen Beziehung zwischen den Beteiligten im Zusammenhang mit dem Schuldverhältnis oder
2. in den Fällen des Artikels 38 Abs. 2 und 3 und des Artikels 39 aus dem gewöhnlichen Aufenthalt der Beteiligten in demselben Staat im Zeitpunkt des rechtserheblichen Geschehens; Artikel 40 Abs. 2 Satz 2 gilt entsprechend.

Artikel 42

Rechtswahl

Nach Eintritt des Ereignisses, durch das ein außervertragliches Schuldverhältnis entstanden ist, können die Parteien das Recht wählen, dem es unterliegen soll. Rechte Dritter bleiben unberührt.

Austrian Law:

IPRG

„Internationales Privatrechtsgesetz

Bundesgesetz vom 15. Juli 1987 über das internationale Privatrecht Bundesgestzbatt (BGBl. Nr. 304/1978), zuletzt geändert am 13. Juli 2013 durch (BGBl. I Nr. 158/2013)"

Rechtswahl

§ 11. (1) Eine Rechtswahl der Parteien (§§ 19, 35 Abs. 1) bezieht sich im Zweifel nicht auf die Verweisungsnormen der gewählten Rechtsordnung.

(2) Eine in einem anhängigen Verfahren bloß schlüssig getroffene Rechtswahl ist unbeachtlich.

(3) Die Rechtsstellung Dritter wird durch eine nachträgliche Rechtswahl nicht beeinträchtigt.

Immaterialgüterrechte

§ 34. (1) Das Entstehen, der Inhalt und das Erlöschen von Immaterialgüterrechten sind nach dem Recht des Staates zu beurteilen, in dem eine Benützungs- oder Verletzungshandlung gesetzt wird.

(2) Für Immaterialgüterrechte, die mit der Tätigkeit eines Arbeitnehmers im Rahmen seines Arbeitsverhältnisses zusammenhängen, ist für das Verhältnis zwischen dem Arbeitgeber und dem Arbeitnehmer die für das Arbeitsverhältnis geltende Verweisungsnorm maßgebend.

Außervertragliche Schadenersatzansprüche

§ 48. (1) Außervertragliche Schadenersatzansprüche, die nicht in den Anwendungsbereich der Verordnung (EG) Nr. 864/2007 über das auf außervertragliche Schuldverhältnisse anzuwendende Recht (Rom II), ABl. Nr. L 199 vom 31. Juli 2007, S. 40, fallen, sind nach dem Recht zu beurteilen, das die Parteien ausdrücklich oder schlüssig bestimmen (§ 11).

(2) Ist für ein solches Schuldverhältnis eine Rechtswahl nicht wirksam getroffen, so ist es nach dem Recht des Staates zu beurteilen, in dem das den Schaden verursachende Verhalten gesetzt worden ist. Besteht für die Beteiligten jedoch eine stärkere Beziehung zum Recht ein und desselben Staates, so ist dieses Recht maßgebend.

Außervertragliche Schadenersatzansprüche

(Before adoption of the Rome II Regulation)

§ 48. (1) Außervertragliche Schadenersatzansprüche sind nach dem Recht des Staates zu beurteilen, in dem das den Schaden verursachende Verhalten gesetzt worden ist. Besteht jedoch für die Beteiligten eine stärkere Beziehung zum Recht ein und desselben anderen Staates, so ist dieses Recht maßgebend.

(2) Schadenersatz- und andere Ansprüche aus unlauterem Wettbewerb sind nach dem Recht des Staates zu beurteilen, auf dessen Markt sich der Wettbewerb auswirkt.

VITA

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