CHOICE OF LAW FOR NON-CONTRACTUAL LIABILITY: SELECTED PROBLEMS UNDER THE ROME II REGULATION

Choice of law in torts (and other kinds of non-contractual liability) will soon be based on the new 'Rome II' Regulation,[1] which applies from 11 January 2009.[2] This comment is not intended to cover all aspects of this complex instrument;[3] a few special problems have been singled out.

I. TORTS: THE GENERAL RULE

The Regulation lays down a general rule, which applies to all torts unless covered by a special rule for the particular kind of tort in question. We first consider this general rule and then look at one of the special rules (that dealing with product liability).

A. The Country in which the Damage Occurs

The general rule for torts laid down by the Regulation in Article 4(1) is that the applicable law is that of the country in which the damage occurs. Article 4(1) reads:

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

The rule refers to the place where the damage occurs, rather than the place where the tort occurs, to cover the situation where the wrongful act of the defendant takes place in one country and the damage occurs in another. In the past, this has caused problems with regard to jurisdiction. The words 'irrespective of the country in which the event giving rise to the damage occurred' are intended to ensure that the rule laid down in *Bier v Mines de Potasse d'Alsace*[4] applies also with regard to choice of law, while the words 'irrespective of the country or countries in which the indirect consequences of that event occur' are intended to ensure that the rule in *Dumez v Hessische Landesbank*[5] and *Marinari v Lloyds Bank*[6] also remains applicable. No attempt has been made to clarify the ambiguities in these rules.

[1] Regulation 864/2007 [2007] OJ L 199/40.

[2] It applies to events giving rise to damage which occur after its entry into force: Article 31. Here 'entry into force' seems to mean 19 August 2007: see Dicey and Morris, *First Supplement to the Fourteenth Edition* (Sweet and Maxwell, London, 2007) (hereinafter, 'Dicey and Morris, *First Supplement*') para S 35–168 (written by Professor CGJ Morse). If correct, this means that the Regulation applies to proceedings brought on or after 11 January 2009 if the event giving rise to the damage occurred on or after 19 August 2007.

[3] See Dicey and Morris, *First Supplement* (above) 183 et seq.

[4] Case 21/76, [1976] ECR 1735.

[5] Case C-220/88, [1990] ECR I-49.

[6] Case 364/93, [1995] ECR I-2719; [1996] 2 WLR 159.

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B. Common Habitual Residence

Article 4(1) is subject to an exception laid down in Article 4(2): if the tortfeasor and victim have their habitual residence in the same country, the law of that country will be the governing law. Article 4(2) reads as follows:

> 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.

The most important situation in which this will apply is where there is a pre-existing relationship between the parties. An example is where two friends (or members of a family) living in England drive to Spain in a car owned by one of them. They have an accident in Spain in which the passenger is injured. In this situation, there are strong arguments for applying English law. Article 4(2) also applies where there is no pre-existing relationship. For example, if an Englishman drives to Spain, has an accident there, and discovers, to his surprise, that the driver of the other car is also English, the applicable law will be English law. This solution is less clearly right, but it is probably better on balance than applying the law of the place where the accident occurs.

1. Rules of the road

In both these examples, English law cannot be applied with regard to the rules of the road. Here Spanish law should apply, even if both parties are English. This is made clear by Article 17, which provides that rules of safety and conduct in force at the time and place of the accident may be applied, in so far as appropriate, in order to assess the conduct of the defendant.

2. Multi-party cases

In a multi-party case, different laws could be applied to different parties. Assume, for example, that an Englishman and his wife go to Spain on holiday and rent a car there. While the English husband is driving, they are involved in an accident with a car driven by a Spanish driver. Both the Spaniard and the English wife sue the English driver. Here, the claim by the Spaniard would be governed by Spanish law, while the claim by the wife would be governed by English law.

3. Meaning of 'country'

Where a State consists of two or more territorial units, each with its own law of tort, each is regarded as a separate country for the purpose of the Regulation. This is laid down in Article 25(1), which provides as follows:

> 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.

This means that England and Scotland are separate countries for the purpose of the Regulation. Consequently, if an Englishman[7] takes his Scottish girlfriend[8] in his car

[7] Having his habitual residence in England.
[8] Having her habitual residence in Scotland.

on a trip to Spain and an accident occurs there, the applicable law if she sues him will be Spanish law (unless there is some reason to apply the third paragraph of Article 4).[9]

The definition of 'country' in Article 25(1) gives rise to difficulty. A territorial unit is a separate country if it has 'its own rules of law in respect of non-contractual obligations'. 'Non-contractual obligations' is wider than 'tort', since it includes unjust enrichment, *negotiorum gestio* and *culpa in contrahendo*.[10] It is not clear what happens if the unit in question has its own rules on some of these matters but not others. The best solution would be to consider whether the particular question in issue is subject to different rules, but the wording of the Regulation provides no support for this view.

On almost any basis, Scotland and England are different countries for the purposes of the Regulation.[11] So are the different US states.[12] On the other hand, German *Länder* and Swiss cantons are not: both Germany and Switzerland have civil codes which apply nationally and cover the law of non-contractual obligations. Australia, however, presents difficulties. Most aspects of the law of tort (and probably other non-contractual obligations) are governed by the common law. Although each state is a separate jurisdiction, with its own legislature, judiciary and executive, there is one system of common law for the whole of Australia.[13] The High Court of Australia, a court with jurisdiction over the whole of Australia, can resolve any differences in the common law that may develop in different states. On the other hand, certain peripheral matters, like limitation periods, are subject to state legislation and, therefore, potentially different in different states.[14]

The following example illustrates the problem. Two Australian friends, habitually resident in different states,[15] come to Europe on holiday. They rent a car in Spain. An accident occurs there and the passenger is injured. If Australian law were applied, all issues in the case would be governed by the common law. Spanish law, on the other hand, would lead to a different result. It would be absurd to apply Spanish law just because the two parties are habitually resident in different Australian states.[16]

In view of this problem, it is unfortunate that the Regulation does not contain a provision stating that if the parties are resident in different countries but the law of those countries is the same as regards the point in issue, they will be treated as if they were resident in the same country. The Louisiana Civil Code has such a provision.[17]

[9] This would not be affected by any decision (under the second paragraph of Article 25) as to whether or not the Regulation will apply as between England and Scotland.

[10] See Articles 10–13 of the Regulation.

[11] England and Wales are not: they constitute one 'country' for the purposes of the Regulation, even though politically and culturally they are different countries.

[12] The common law in each state is a separate legal system. The US Supreme Court has no jurisdiction to interpret it. Subject to minor exceptions, there is no federal common law: *Erie Railroad Company v Thompkins* 304 US 674; 58 S Ct 817; 82 L Ed. 1188 (1938).

[13] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 563.

[14] The position appears to be the same in the common-law provinces of Canada, but Quebec is clearly a separate country.

[15] They attended the same university.

[16] The same problem of definition arises under the third paragraph of Article 4, though it might be possible to use it to apply the law of one particular state.

[17] Article 3544(1).

4. Meaning of 'habitual residence'

Article 23 provides a partial definition of habitual residence. Article 23(1) states that the habitual residence of a company is the place of its central administration. However, it goes on to say that if the event giving rise to the damage, or the damage itself, takes place in the course of the operation of a branch, the company's habitual residence is to be regarded as the place where the branch is located.

There is no definition of the habitual residence of an individual (natural person), but the second paragraph of Article 23 provides that where an individual acts in the course of his business, his principal place of business is to be treated as his habitual residence.

C. Flexibility

The third paragraph of Article 4 provides much-needed flexibility by stating that where it is clear from all the circumstances that the tort is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country applies. A defect, however, is that the tort as a whole must be more closely connected. It is not enough for a particular *issue* to be more closely connected—for example, whether a wife can sue her husband in tort, or whether the victim's claim against the tortfeasor passes to the victim's estate on his death. So, if paragraph 3 is applied, *all* aspects of the tort must be governed by some other system of law.

Paragraph 3 states that a manifestly closer connection might be based on a pre-existing relationship between the parties.[18] If such a relationship exists, the parties will often have their habitual residence in the same country, in which case paragraph 2 would apply. Where this is not the case, paragraph 3 would be applicable. An example of such a relationship is a contract between the parties.

II. SPECIAL RULES FOR PARTICULAR TORTS

The rule in Article 4 is subject to exceptions that apply in five special situations:

- product liability (Article 5);
- unfair competition and acts restricting free competition (Article 6);
- environmental damage (Article 7);
- infringement of intellectual property rights (Article 8); and
- industrial action (Article 9).

We shall consider only the first of these.

A. Product Liability

Choice of law in product liability cases is determined by Article 5 of the Regulation. This provides as follows:

> 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,

[18] The words 'in particular' are EC jargon indicating that this is not intended to exclude other possibilities.

(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.

1. Structure

Article 5(1) is in the form of a 'cascade': it lays down a number of possibilities, but each possibility (other than the first) applies only if the preceding ones are inapplicable. The first possibility—the primary rule—appears to be Article 4(2), since the reference to this comes first. If that is inapplicable, the next possibility is sub-paragraph (a) of Article 5(1); if that is inapplicable, the next possibility is sub-paragraph (b), then sub-paragraph (c).

The last sentence of Article 5(1), which will henceforth be referred to as the 'however' clause, qualifies the rules in sub-paragraphs (a), (b) and (c), but not, it seems, Article 4(2).[19] Article 5(2) qualifies the rules in sub-paragraphs (a), (b) and (c); it also qualifies the rule in Article 4(2) either in its own right or because it is repeated in identical terms in Article 4(3).

2. Primary rule

The primary rule is contained in Article 4(2). It applies where both parties have their habitual residence in the same country at the time of the tort. This rule was discussed above, as was the meaning of 'habitual residence'.

3. Second-ranking rule

The second-ranking rule is that contained in sub-paragraph (a) of Article 5(1). Under this, the governing law is the law of the country of the victim's habitual residence—provided that the product was marketed in that country. This proviso is repeated in sub-paragraphs (b) and (c). Its meaning will be discussed below.

4. Third-ranking rule

The third-ranking rule is that contained in sub-paragraph (b). Under this, the governing law is the law of the country in which the product was acquired—provided that

[19] Since the 'however' clause refers to the law of the producer's habitual residence, it would lead to the same result as Article 4(2); so it does not matter whether it qualifies Article 4(2) or not.

the product was marketed in that country. 'Acquired' presumably means purchased or otherwise obtained—for example, by gift.

5. Fourth-ranking rule

The fourth-ranking rule is that contained in sub-paragraph (c). Under this, the governing law is the law of the country in which the damage occurred. This is the same as the general rule in Article 4(1). It is again subject to the condition that the product has been marketed in that country.

6. Product marketed

Sub-paragraphs (a), (b) and (c) are all subject to the 'product marketed' proviso. This raises two questions: the meaning of 'product' and the meaning of 'marketed'.

The first question is whether 'product' refers to the particular item or good that actually caused the damage, or whether it also covers other goods of the same type. For example, if the harm was caused by contamination in a can of beer, must it be proved that the particular can that was contaminated was marketed in the country in question, or is it enough that other cans of the same kind were marketed there? As a matter of plain English[20] and common sense, the latter should be the answer. If the manufacturer sells the identical product in the country in question, it should not make any difference if the particular can was purchased by the claimant in another country while he was on holiday there. However, the fact that the 'however' clause refers to marketing of the product, 'or a product of the same type', suggests that the common sense answer is not the correct one. If the proviso to sub-paragraphs (a), (b) and (c) was intended to cover products of the same type, those additional words would have been repeated there too.

The next question is the meaning of 'marketed'. This cannot mean the same as 'acquired', since the latter is used in sub-paragraph (b) to mean something different. On the other hand, the product does not have to be marketed by the defendant, since the 'however' clause indicates that the product might be marketed without the knowledge of the defendant. It is suggested that marketing requires the organized, mass selling of a standardized product. This need not be by the defendant or with his consent.

7. No rule applicable

What happens if none of the rules laid down in Article 5(1) is applicable? The 'however' clause does not establish an independent rule, since it is clearly geared to sub-paragraphs (a), (b) and (c): it cannot apply if none of those sub-paragraphs is applicable. The same applies to the rule in Article 5(2): this cannot apply unless one of the provisions of Article 5(1) applies.

In view of this, there are only three possibilities. The first is that no claim can be made. This would constitute a denial of justice and would be contrary to Article 6(1) of the European Convention on Human Rights; so it must be rejected. The second possibility is that national conflict of laws applies. However, it is unlikely that this was

[20] It is thought that the same is true of French.

intended. The third possibility is that the general rule in Article 4 applies.[21] This must be the correct solution.

Though correct, this has strange consequences. Assume that the first three rules are inapplicable and that one has to consider the rule in sub-paragraph (c). This requires the application of the law of the country in which the damage occurred, provided that the product was marketed in that country. If the product was not marketed in that country, you fall back on the general rule and apply the law of the country in which the damage occurred, even if the product was not marketed there.[22] In other words, the 'marketed' proviso is meaningless. However, if the product *was* marketed there, but this could not have been foreseen by the defendant, you then apply the 'however' clause, which leads to the law of the country of the defendant's habitual residence. There is no logic in this.

These rules are extremely complicated, but in practice the answer will usually be fairly obvious. The following examples show how the rules will apply.

Example 1

Assume that a beer manufacturer in Germany markets its product in England through a branch. The claimant, who lives in England, buys it in England and consumes it there. The beer is contaminated and he suffers illness as a result. Here, English law would apply under the rule in Article 4(2). The German company's habitual residence would be regarded as being in England, since the beer would have been marketed through the English branch (Article 23). It would make no difference if the claimant had taken the beer to France on holiday and consumed it there.

Example 2

A German beer manufacturer markets its product in England through an independent distributor. The claimant, who lives in England, buys it in England and consumes it there. The beer is contaminated and he suffers illness as a result. Article 4(2) would not apply here, because the defendant would not be habitually resident in England. However, English law would still apply under Article 5(1)(a), since the claimant would be habitually resident in England and the product would have been marketed there. The 'however' clause would not apply. Again, it would make no difference if the beer were consumed in another country.

Example 3

A French resident comes to England to support his side in a rugby match. While in England, he buys beer manufactured by a German company. One can of the beer is not consumed in England. He takes it back to France and consumes it there. That can is contaminated and he suffers illness as a result. In this situation, Article 4(2) would not

[21] Since we would not have reached the situation we are considering if the second paragraph of Article 4 had been applicable, we are really concerned only with the first and third paragraphs.

[22] This is subject to the escape clause in Article 4(3).

apply: the claimant would be habitually resident in France but not the defendant.[23] If 'product' in the proviso to sub-paragraph (a) means the particular can of beer that caused the problem, it would not have been marketed in France; so sub-paragraph (a) would not apply. However, since the product was acquired in England, sub-paragraph (b) would apply. The governing law would be English law (unless the defendant could not foresee that the product would be marketed in England).[24] It is unlikely that Article 5(2) would apply: the tort is not manifestly more closely connected with France.

Example 4

The defendant is a Korean car manufacturer. It markets its cars throughout the EC. One car is sold to X in France. X sells it in France to Y, who is habitually resident in Belgium. Y takes it to Belgium and is injured in an accident there. He sues the manufacturer in Belgium. Here Article 4(2) will not apply because the defendant would not be habitually resident in Belgium for the purpose of the case.[25] Sub-paragraph (a) will not apply because the product (the particular vehicle in question) was not marketed in Belgium. However, sub-paragraph (b) will apply. The car was acquired by Y in France and the car was marketed there. French law will govern.

Example 5

The facts are as in the previous example, except that X took the car to Belgium and sold it there to Y. In this example, none of the provisions of Article 5(1) would apply. Article 4(2) would not apply because the company would not be habitually resident in Belgium for the purpose of the case and none of the sub-paragraphs would apply because the particular vehicle in question was not marketed in Belgium. If what was said above was correct, one would then fall back on the general rule in Article 4(1) and apply Belgian law because the damage occurred in Belgium. Article 4(3) would not apply because it could not be said that the tort is manifestly more closely connected with France or any other country.

Conclusions

As will be appreciated, Article 5 is complex. This complexity is due to the fact that the consumers' and producers' lobbies are both powerful in the EC, and both fought hard for their respective interests. Whether a simpler, but more flexible, rule would have been better is a matter on which opinions may differ.

[23] The defendant would be habitually resident in either Germany (central administration) or England (if there is a branch there) but not in France. This would be true even if it had a branch in France: a company is not habitually resident where it has a branch unless the event giving rise to the damage, or the damage itself, arises in the course of operation of the branch (Article 23(1)). If the contaminated can was bought in England, the existence of a branch in France would be irrelevant.

[24] If this was the case, German law would apply.

[25] It would make no difference if it had a branch in Belgium, since the vehicle in question would not have been sold through that branch: see previous footnote.

III. *CULPA IN CONTRAHENDO*

The 'Rome II' Regulation applies, not only to torts, but also to forms of liability that are neither contractual nor tortious. *Culpa in contrahendo* (fault in the course of concluding a contract) is one of these. This is a Continental concept, invented by German jurists. We give one example.

Assume that an agent, who claims to be entitled to act on behalf of a principal, concludes a contract (in the name of the principal) with a third party. In fact, the agent had no authority to act for the principal. Under English law, the third party can sue the agent for breach of warranty of authority. This is a claim in contract against the agent for falsely asserting—expressly or by implication—that he was entitled to act on behalf of the principal.

Under German law (and other Continental systems), the agent would be guilty of *culpa in contrahendo.* The third party's action against him would be based on neither contract nor tort, but on the third form of liability that includes matters such as unjust enrichment.

The result is that the same claim would be characterized differently by different systems of law. Since the European Court always likes to have a 'European' characterization, it is unlikely to accept that each Member State can go its own way. Here, the Preamble to the 'Rome II' Regulation has something to say. Recitals 29 and 30 read as follows:

> (29) Provision should be made for special rules where damage is 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.

Although lacking in clarity—a fault all too prevalent in EC legislation—this seems to mean that a 'European' test must be applied to determine what should be characterized as *culpa in contrahendo.* It is likely that the European Court will hold that breach of warranty of authority should be so characterized.

If so, Article 12 of the Regulation will apply. This reads:

> *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.

Paragraph 1 would normally apply to the situation we are considering. Under this, the applicable law is the law that would have applied to the contract between the third party and the principal, if it had been concluded. This is probably not so very different from the law that would be applicable under a common law approach.

IV. CONCLUSIONS

True to Continental traditions, the 'Rome II' Regulation seeks to provide hard-and-fast rules to govern all possibilities. Interest analysis and other American theories are conspicuous by their absence. The reason usually given for this approach is the need for certainty. However, this lack of flexibility can produce unwelcome results in some situations. Moreover, the very complexity of some provisions—Article 5 is an example—means that, in some cases, there is still no certainty. A less rigid approach might have produced better results.

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