Co-funded by the Justice Programme 2014-2020 of the European Union.

Topic 3 *Conflict of laws*

Case study on 'Applicable law to service contracts relating to holidays and torts'[1]

Case study

2014 has been a terrible year for Mr. and Mrs. Schmidt, who live in Düsseldorf (Germany). Mr. Schmidt is working for a company that has decided to reduce costs, which is just a nice way of saying "work more for less", and Mrs. Schmidt has had to help her daughter Gudrun, who just got divorced, with the care of her sweet three children.

Now it is the Schmidt's turn! They are going to have a wonderful summer holiday in a nice hotel by the seaside in Marbella (Spain). They book plane tickets on the web page of Dylan- Air, a low cost company domiciled in La Valetta (Malta), that operates a direct flight between Düsseldorf and Malaga. They agree, by clicking the "I agree" button on the web, to a choice of law clause in favour of the law of Ruritania, a non-EU state that has outrageous rules that do not afford any protection to airline passengers (which they, of course, are not aware of). The Schmidts pay by credit card.

The Schmidts also manage to find a very nice hotel on the Internet. The hotel's website attracts their attention because it contains lots of information in German. Mr. and Mrs. Schmidt are convinced by the photos posted on the web and the description of the hotel's facilities contained therein. They also like the idea of getting "Kaffee und Kuchen" ("coffee and cake") at 3 p.m. They book the hotel online and pay with their credit card. The hotel is located in Marbella but owned by a company that has its place of central administration on the Isle of Man.

They are very much looking forward to a much needed ten days' rest!

But events unfold differently...

Their flight is cancelled and they are stranded at the airport. The French controllers are on strike again - at least that is what the low cost company says, although it looks like an excuse. They arrive in Malaga twelve hours later than scheduled, at three o'clock in the morning, without their luggage.

And the hotel is terrible: the room is much smaller than it appeared on the web, the air-conditioning does not work, "Kaffee und Kuchen" is not served punctually and they cannot sleep at night, because of these "lively" Spaniards sitting at the hotel bar under their window until three o'clock in the morning.

And on the very last day Mrs. Schmidt slips over in an oil puddle at the hotel entrance and breaks her wrist. The doctors and nurses at the Spanish hospital are very nice but still- once back at home she continues to suffer from a lot of pain; needs to undergo surgery and rehab and to hire a housekeeper (the only positive side is that she is not able to look after Gudrun's children).

[1]Developed by Prof. Cristina González Beilfuss, Head of External and Institutional Relations of the Spanish Judicial School, Barcelona; Professor of Private International Law at the University of Barcelona

The Schmidts are not only disappointed but furious and take action:

a) They sue the low cost company for compensation for moral and material damage. Which is the law applying to this claim? Please consider as well whether the law applicable would change if Dylan-Air had its place of central administration in Ruritania.

b) They sue the hotel for reimbursement of the sum they had paid on the grounds that the description on the web did not correspond to the real conditions offered. Which is the law applying to this claim? Please examine alternatively which would be the applicable law if they had rented an apartment also located in Marbella owned by Mr. and Mrs. Müller, a German couple domiciled in Mannheim.

c) In the case at hand Mr. and Mrs. Schmidt book their flights and hotel rooms separately. Please examine which would be the applicable law if they had booked the flights from Düsseldorf to Malaga and return, and the hotel rooms from a tour operator called "Happy Holidays", a company with its place of central administration in Rotterdam (The Netherlands), and were to sue Happy Holidays for compensation because the transport and accommodation did not correspond to the conditions offered by the tour operator. Happy Holiday's website contains information in German and mentions a telephone number with the Dutch International prefix. It does as well contain reviews from lots of German customers praising the fact that all the hotels offered serve " Kaffee und Kuchen".

d) Mrs. Schmidt sues the hotel for compensation for the moral and material damage suffered as a consequence of the accident. Mrs. Schmidt puts forward that she broke her wrist and has had to undergo surgery and rehab in Germany and to hire a housekeeper since she was not able to pursue her daily activities for a period of six months. Which is the law applying to this claim? Please consider alternatively if the result would change in case Mrs. Schmidt had fallen on the street and were suing the municipality of Marbella. Consider as well whether the law applicable also applies to an issue such as expert evidence.

I. Introduction

In order to increase interactivity and "learn by doing" the group should be divided into three smaller groups, each dealing with the different claims under a), b), c) and d). Ideally each sub-group should have a trainer, whose function is only to ensure that discussions do not go off-topic and to assist participants if the discussion goes terribly wrong, but it might also be feasible to have only one trainer who walks around the three different groups.

II. The claim against the low-cost airline

1. Preliminary issue: jurisdiction

The proposed case-study is not about jurisdiction but it is still necessary to recall the interdependence between jurisdiction and the applicable law. Jurisdiction and choice of

law provisions have different objectives and should be sharply distinguished from each other.

A jurisdiction rule aims at establishing whether a court can solve a dispute. Only if this is the case will the competent court have to determine the law that applies to this dispute. The examination of jurisdiction therefore always comes first.

The situation described falls under the new Regulation Brussels I. Regulation 1215/2012 of 12 December 2012 (OJ 20.12.2012) becomes applicable on 10 January 2015 (art. 81) to legal proceedings instituted after this date falling within its scope (art. 66.1). We will assume that Mr. and Mrs. Schmidt have filed their claim against Dylan Air after this date and that the Regulation applies.

The Regulation contains a special section on Consumer Contracts which does however not apply to contracts of transport unless they provide for a combination of travel and accommodation for an inclusive price (see art. 17.3). This means that the general provisions apply. Failing a valid prorogation of jurisdiction in accordance to articles 25 or 26, the Schmidts would have the choice between suing Dylan Air under art. 4 (defendant's domicile, in our case Malta) or relying on art. 7.1 (place where the services were provided). There is case-law by the ECJ establishing that in air transport cases both the place of departure and the place of destination would qualify as places where the service was provided[2]. This would mean that the Schmidts would also be able to sue in Germany and Spain.

The Schmidts have therefore different choice as regards jurisdiction, but this is not relevant to our purpose since the aim of any choice of law unification is to apply the same law, no matter where the case is heard. The courts in Malta, Spain or Germany would be bound to analyze the issue of the applicable law as developed hereinafter.

2. The Applicable law

The first step in any private international question is to determine the sources that apply. There are two EU Regulations on the law applicable to contractual and non-contractual obligations:

- Regulation 864/2007 of 11 July 2007- non-contractual obligations (ROME II);
- Regulation 593/2008 of 17 June 2008- contract (ROME I).

Regulation Rome I replaces the Convention on the law applicable to contractual obligations concluded in 1980 (art. 24.1 Rome I Regulation), which has to be mentioned because CJEU case-law on the Rome Convention is still relevant for the interpretation of the Regulation. The Explanatory Report on the Rome Convention[3] might as well provide useful insights as to the interpretation of the European choice of law rules on contractual matters.

European Union sources always supersede national sources on the basis of the principle of supremacy. The national choice of law provisions are in principle not applicable anymore because the choice of law provisions contained in Regulations Rome I and Rome II are "so-called" universal choice of law rules. The law specified by the Regulation applies whether or not it is the law of a Member State, (see arts. 2 Rome I and art. 3 Rome II).

[2] See ECJ, Case C-204/08, *Peter Rehder v. Air Baltic,* ECR 2009 I-6073.

[3] The so-called Guiliano-Lagarde report published in the OJ C 282 of 31.10.1980

To determine whether the Regulations apply, two preliminary questions must be answered, namely:

(i) whether the facts fall within the *subject matter scope* of the instrument
(ii) whether the facts fall within the *temporal scope* of the instrument

Since in the case at hand the claim arises out of contract between two private parties, it is appropriate to examine whether it falls under the Rome I Regulation.

2.1 Scope of the Rome I Regulation

2.1.1 Subject Matter Scope

On the basis of Article 1, the Regulation applies to situations involving a conflict of laws, that is, in cases that are international and have contacts with more than one legal system. This is not an issue in our case; there can be no doubt that the case is international.

The Regulation applies in civil and commercial matters and does not apply, in particular, to revenue, customs or administrative matters (art.1.1 Rome I). There is case law of the ECJ dealing with borderline cases in which it is doubtful whether the claim is about a civil or commercial matter. This is not a problem in connection to the claim of a private person against a private company as our but might be worthwhile mentioning in order to illustrate that case-law on Brussels I might be relevant in interpreting Rome I and II-principle of consistency or harmonious interpretation of EU PrIL instruments.

Regulation Rome I excludes certain civil and commercial issues by way of a negative list contained in arts. 1. 2. None of these exclusions is relevant to the case, but the list in art. 1.3 should be systematically checked in every case. The Regulations does in principle not apply to evidence and procedure either (art. 1.3 Rome I).

2.1.2 Temporal Scope

EU PrIL instruments distinguish between the date of entry into force and the date of application. Such a procedure is intended to allow Member States or the European Union institutions to perform all prior obligations which are necessary for the subsequent full application of the legislation to all persons concerned.

Rome I entered into force twenty days after its publication in the OJ (which occurred on 4 July 2008) and applies from 17 December 2009 to contracts concluded after that date (arts. 31 and 32). In our case the contract was concluded in July 2014. The case falls under the temporal scope of application of Regulation Rome I.

3. 2nd Characterization: Which are the relevant provisions in Rome I?

3.1 Special or general rules

Chapter II of Regulation Rome I contains uniform choice-of-law provisions. There are so-called general rules, articles 3 and 4, applying to all contracts, and special rules governing specific types of contracts. Special rules apply with priority over general rules. Participants should therefore try to determine whether there are any special rules which apply to the present case.

3.2. Consumer contract or contract of carriage

There are two special rules of Rome I that might be relevant- article 6 about consumer contracts and article 5 about contracts of carriage. At first sight the contract concluded between the Schmidts and the low cost company seems to fall under the category of consumer contracts, but article 6.4 expressly excludes contracts of carriage other than package travels and refers to article 5 dealing with contracts of carriage. Article 5 distinguishes between contracts for the carriage of goods and contracts for the carriage of persons. The case at hand is clearly a contract for the carriage of passengers.

4. Party autonomy

The Schmidts agreed to a choice of law clause in favour of the law of Ruritania. The fact that the law of Ruritania has no connection to the facts of the case is irrelevant- RRI grants unlimited party autonomy when it comes to choosing the applicable law- any law can be chosen.

Participants have been told to consider two scenarios, in the first the airline has its headquarters in La Valetta (Malta); in the second the central administration of the company is located outside the EU, in Ruritania.

According to article 5.2, second paragraph of the Rome I Regulation, the parties may choose as the law applicable to a contract for the carriage of passengers, in accordance with article 3 only the law of the country where:

(a) the passenger has his habitual residence; or
(b) the carrier has his habitual residence; or
(c) the carrier has his place of central administration; or
(d) the place of departure is situated; or
(e) the place of destination is situated.

If, as in the first scenario, the airline has its place of central administration in La Valetta the choice of the law of Ruritania is not permissible. This means that the first paragraph of article 5.2 comes into play. It will be dealt with under 5.

If, as in the second scenario, the airline has its headquarters in Ruritania, then the choice of the law of Ruritania is permissible, because the law of Ruritania is one of the laws referred to in point (c) of the second paragraph of article 5.2. Under 6 we will examine what would happen if the law of Ruritania contained outrageous provisions not affording any protection to airline passengers.

5. The applicable law in the absence of a permissible choice of the applicable law

If the airline has its headquarters in La Valetta the choice of the law of Ruritania is not permissible. The law that governs is determined according to art. 5.2 first paragraph which establishes that the applicable law is the law of the country where the passenger has his or her habitual residence, provided that either the place of departure or the place of destination is situated in that country. The Schmidts are habitually resident in Germany and their flight departed from Germany. German law is the applicable law.

Art. 5.3 contains a so-called escape clause that allows to apply a law manifestly more closely connected to the case than that applicable according to art. 5.2 first paragraph,

This escape clause should, however, be used restrictively, only when it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country. This clause therefore hardly applies in the case at hand.

6. Other provisions of European Union law

Depending on the scenario German law or the law of Ruritania is applicable. Art. 23 of Rome I however provides that the Regulation does not prejudice the application of provisions of Community law, which in relation to particular matters lay down conflict-of-law- rules. Regulation 261/2004 (OJ 1991, L. 36 5) is of relevance in the case at hand and applies regardless of the fact that the law of Ruritania does not afford any protection to airline passengers. Regulation 261/2004 establishes minimum rights on compensation and assistance to passengers in the event of *inter alia* long delays of flights and applies to passengers departing from an airport located in the territory of a Member State (art. 3.1 a) of Regulation 261/2004). Even if the law of Ruritania applies in principle, the Regulation offers the Schmidts a minimum of protection, since their flight departed from Düsseldorf.

III. The claim against the hotel

1. Jurisdiction

The Schmidts would in this case be able to rely on the special section of the Brussels I Regulation dealing with consumer contracts, provided it could be established that the hotel directed its commercial or professional activities to Germany (see art. 17.1 c)). In consequence they would as plaintiffs have the possibility of suing at their place of habitual residence or alternatively to sue at the defendant's domicile (see art. 18.1).

Participants are also asked to consider an alternative scenario in which the Schmidts would rent an apartment from another couple also domiciled in Germany. In this case they would as well be able be able to sue in Germany under the second paragraph of article. 24.1 of the Brussels i Regulation or sue in Spain as the Member State where the immovable is located.

2. Applicable law: Scope of Application of Regulation Rome I

The first part of the analysis is the same that applied to the former claim. It is necessary to determine whether the claim falls under the scope of application of Regulation Rome I, which should not pose any difficulties as regards the material or the temporal scope.

3. 2nd Characterization: Which are the relevant provisions in Rome I?

3.1. Special or general rules

According to the principle of speciality, special rules apply with priority over general rules. Participants should therefore try to determine whether there are any special rules applying to the present case.

3. 2. Consumer contract?

Participants will probably argue that this claim pertains to the realm of consumer contracts. The Regulation defines consumer contracts in art. 6 as contracts concluded by a natural person for a purpose which can be regarded as being outside his trade or

profession (the consumer) with another person acting in the exercise of his trade or profession (the professional). This definition takes precedence over any other definition that may exist in national law- legal concepts used in EU Regulations should be given an autonomous interpretation in order to guarantee a uniform application of the common rules.

At first sight the case at hand falls under this definition. It is not one of the excluded contracts by virtue of the reference to articles 5 (contracts of carriage) and 7 (insurance contracts). The special consumer rules however do not apply either, if the consumer contract falls under one of the categories listed under art. 6.4. The hotel contract concluded by Mr. and Mrs. Schmidt actually falls under art. 6.4 a)- It is a contract for the provision of services where the services are to be supplied to the consumer exclusively in a country other than that in which the consumer has his habitual residence. It does not qualify as meriting special protection. Therefore in this case the general rules enshrined in arts. 3 and 4 RRI apply.

3. 3. Back to the general rules

The special protection rules contained in articles 6. 2 and 3 of the Rome I Regulation do not apply in the present case. This means that the contract is governed by article 4 because the parties did not enter into a choice of law agreement according to article 3.

Article 4 has the following structure.

- Art.4.1 contains hard and fast rules for different types of contracts.
- If a contract is not in the list in art. 4.1, or has elements that pertain to different types of contracts (mixed contract) the law of the habitual residence of the party required to effect the characteristic performance applies (art. 4.2). In this context it might be relevant to deal briefly with the concept of characteristic performance- it is the obligation that distinguishes one type of contract from the other. The issue will be analyzed more in-depth in case 3 of this training module.
- Art. 4.3 contains an escape clause that allows to apply a law more closely connected if it is clear from all the circumstances that the contract is more closely connected to that law. It is only to be used exceptionally.
- Article 4.4 finally establishes that if the law applicable cannot be determined according to arts. 4.1 and. 4.2 (because the connecting factor used in 1 is not workable in a particular case or it is not possible to determine the characteristic performance) then the law of the closest connection applies.

In the present case it is not likely that there will be disagreement about which is the provision that applies. The contract is a contract for the provision of services and therefore art. 4. 1 (b) is the provision that applies. It establishes that a contract for the provision of services shall be governed by the law of the country were the service provider has his habitual residence (not where the service was performed). According to article 19, the habitual residence of a company is the place of its central administration. This would actually mean that in the present case Manx law (law of the Isle of Man) would apply. Its application could be refused only if it is manifestly incompatible with the public policy of the forum (see public policy clause in art. 21).

3. 4. Temporary tenancy of an immovable

Participants have been asked to consider an alternative scenario- whether the law applicable would change had the Schmidts rented an apartment in Marbella owned by Mr. and Mrs. Müller who are domiciled in Mannheim (Germany). The rest of the facts

remain unaltered: the Schmidts found the apartment and booked it on the Internet and they rented it for 10 days.

In this case the consumer provisions of article 6 Rome I Regulation do not apply either; art. 6.4 (c) excludes contracts relating to a right *in rem* in immovable property or contracts of tenancy of immovable property from the special consumer protection rules.. The relevant provisions are articles 4.1 (c) and (d) Rome I. The basic rule is that the tenancy of immovable property is governed by the law of the country where the immovable is situated; by way of exception, in cases of contracts for the temporary use of an immovable property for a period of no more than six consecutive months, concluded between two parties habitually resident in the same country, the law of that country becomes applicable, provided that the tenant is a natural person. This would be the case here and German law would thus govern.

IV. The claim against Happy travels

1. Jurisdiction

Participants have been asked to examine an alternative scenario in which the Schmidts booked travel and accommodation from a Dutch tour operator. From the point of view of jurisdiction this does not mean any change. They would in this case be able to rely on the special section of the Brussels I Regulation dealing with consumer contracts, provided it could be established that Happy travels directed its commercial or professional activities to Germany (see art. 17.1 c). In consequence they would as plaintiffs have the possibility of suing in Germany (see art. 18.1) or in the Netherlands, at Happy Travels domicile.

2. The applicable law

As always, it is necessary to determine first whether the claim falls under scope of application of Regulation Rome I, which should not pose any difficulties as regards the material or the temporal scope.

3. 2nd Characterization: Which are the relevant provisions in Rome I?

3.1 Special or general rules

We excluded the claim against the hotel from the scope of application of the provision dealing with consumer contracts on the basis of the rule contained in art. 6.4 a). Contracts of carriage that were examined in the context of the claim against the airline are as well excluded in art. 6.4 b). This second exclusion does however not apply if the contract is a package travel within the meaning of Council Directive 90/314/EEC (OJ L 158, 23.6. 1990). It is therefore decisive to determine whether the package booked by the Schmidts qualifies as a package travel as understood by the Directive.

Article 2 of the Directive defines "package travel" as the pre-arranged combination of transport and accommodation when sold or offered for sale at an inclusive price and when the service covers a period of more than twenty-four hours or includes overnight accommodation. This is the case here and the package qualifies as a consumer contract for the purpose of Regulation Rome I.

3. 2. The law applicable to consumer contracts

3. 2. 1. Special protection for all consumers?

European PrIL distinguishes between the situation of the so-called passive consumer and that of the so-called active consumer. This is developed in the Preamble, in paras. (23), (24) and (25). The basic idea is to protect weaker parties by conflict-of-law rules that are more favourable to their interests than the general rules. In the case of consumer contracts this means that they will be protected by the rules of their country of habitual residence that cannot be derogated from by agreement (mandatory Rules). But in order to also take care of the interests of the professional who needs to be able to evaluate risks and plan his activities this only applies if the contract has been concluded as the result of activities performed by the professional in the country of the consumer's residence or directed to this country by any means (so-called passive consumer). If the professional did not target the consumer's market, the general rules apply- see art. 6.3.

According to art. 6.1 (a) and (b) the law of the habitual residence of the consumer applies in two cases:

- if the professional pursues his or her activities in that country, or
- if the professional by any means directs such activities to that country or to several countries including that country.

Mr. and Mrs. Schmidt concluded their contracts on a web page which by definition is accessible in any part of the world. Does this mean that professionals who set up web pages are directing their activities to any country in the world? Para. (24) of the Preamble of Rome I contains useful guidance as regards this issue. It states by reference to the consumer jurisdiction rules that the mere fact that an Internet site is accessible is not sufficient, although a factor will be that this Internet site solicits the conclusion of a distance contract and that a contract has actually been concluded at a distance by whatever means. It does as well specify that in this respect the language or currency which a website uses does not constitute a relevant factor.

We would therefore need to investigate further whether the website of Happy Travels was targeting the German market. This issue has been dealt with by the ECJ in a jurisdiction case[4] which is relevant because Recital (24) asks for a consistent interpretation of the concept of "directed activity" in Regulation Brussels I and Rome I. According to this case law the trader must have manifested his intention to establish commercial relations with consumers from one or more other Member States, including that of the consumer's domicile, before the contract is concluded. The ECJ mentions several criteria that may help to establish this, such as the international nature of the activity, itineraries from other Member States for going to the trader's establishment, use of a language or a currency other than the language or currency used in the country where the trader is established with the possibility of making and confirming the reservation in that other language, mention of telephone numbers with an international code, outlay of expenditure on an Internet referencing service in order to facilitate access to the trader's site or that of its intermediary by consumers domiciled in other Member states, use of a domain name other than that of the Member State in which the trader is established, and mention of an international clientele composed of customers in various Member States.

In our case it seems likely that Happy travels was targeting the German market because several factors point to this- the fact that there were many reviews from German customers and the highlighting of " Kaffee und Kuchen" indicates that Happy travels was

[4] ECJ, case C-585/08 and 144/09, *Pammer and Hotel Alpenhof,* [210] ECR I-12527

actually trying to attract German customers. If this is so then the law applicable would be German law, unless there had been a choice of law agreement.

V. The personal injury claim

1. Introduction

Mrs. Schmidt claims that the hotel is responsible for her accident because there was an oil puddle at the hotel- entrance that made her slip. We are not told whether she bases her claim in tort or contract or in both. Part of the analysis depends therefore on how she phrases her claim.

If it were based on contract the analysis should follow section III. Hereinafter we will assume that the claim is a claim in tort.

2. Jurisdiction

Under Regulation Brussels I a, failing a prorogation agreement jurisdiction would pertain to the courts of the defendant's domicile (art. 4) or alternatively to the courts of the place where the harmful event occurred (art.7.2). The plaintiff therefore has different choices as regards jurisdiction, but this is not relevant to our purpose since the aim of any choice of law unification is to apply the same law, no matter where the case is heard. The courts in any European Union Member State would be bound to analyze the issue of the applicable law as developed hereinafter.

3. Applicable law: Scope of application of the Rome II Regulation

3.1 Subject Matter Scope

On the basis of the Article 1, the Regulation applies to situations involving a conflict of laws, that is, in cases that are international and have contacts with more than one legal system. This is not an issue in our case.

The Regulations applies in civil and commercial matters and does not apply, in particular to revenue, customs or administrative matters (art.1.1 Rome II). Rome II adds that the Regulation does not apply to the liability of States for acts or omissions in the exercise of State authority, which comes from the *Lechouritou* case[5], a case on the substantive scope of application of Regulation Brussels I.

Art. 1. 2 of Regulation Rome II contains a negative list of non-contractual obligations that are excluded from the Regulation's substantive scope of application. None of these exclusions is relevant to the case at hand, but the list must be systematically checked in every case. The Regulation does in principle not apply to evidence and procedure (art. 1.3 Rome II).

3.2 Temporal Scope

On the temporal scope of Rome II there was some confusion because of the language of article 31 which states that the Regulation applies to events occurring after its entry into force. There were as well discrepancies as regards the title of art. 32 in different

5 Case C-292/05, Lechouritou, [2007] ECR I-01519.

language versions- in some the title made reference to the date of application, in others the title was "Entry into force".

The CJEU interpreted arts. 31 and 32 in conjunction, and ruled that the only interpretation that ensures the full attainment of the Regulation's objectives (predictability of the outcome of litigation, legal certainty as to the law applicable and uniform application in the Member States) is that which keeps the distinction between entry into force and applicability. Rome II contains no provision on entry into force and therefore the date of entry into force is that specified in article 297 (1) TFEU, that is, twenty days after the publication in the OJ (which happened on 11 July 2007). The Regulation applies to events giving rise to damage occurring after its date of application, that is, after 11 January 2009[6]. An issue worth bearing in mind is that according to CJEU case law in cases of doubt the text of a provision should be interpreted and applied in the light of the versions existing in other official languages.

3. 3. International Conventions

European Union Member States have to comply with their international obligations vis a vis Third States. This is clearly stated in art. 25.1 Rome I and art. 28.1 Rome II which provide that "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" on respectively contractual or non-contractual obligations.

This rule is particularly important in connection to traffic accidents and product liability because two Hague Conventions were adopted in 1971 and 1973. These Conventions continue to apply in those Member States that are party to them and where this is not the case the Rome II Regulation is applicable.

NB It might be useful to take this opportunity to familiarise participants with several e-tools at their disposal- Judicial Atlas, E-Justice, and the web-site of Hague Conference.

4. 2nd Characterization: Which are the relevant provisions in Rome II?

Rome II again contains general rules and special rules. Participants should check first whether the action in tort falls into one of the special categories of articles 4, 5, 6 or 7 Rome II Regulation. This not being the case the general rules apply.

5. Party Autonomy

Although it is not relevant in the present case Rome II allows parties to choose the applicable law (art. 14). If this is the case the choice prevails over the law determined by the general and special choice of law provisions, unless there is an explicit rule excluding party autonomy (like in art. 8.3 in the case of an infringement of intellectual property rights or in art. 6.4 in cases of unfair competition or acts restricting free competition).

In order for it to be valid the choice of law agreement needs to have been entered into after the event giving rise to the damage occurred or where all parties are pursuing a commercial activity also by an agreement freely negotiated before. The agreement needs

6 CJEU- Case 412/10 Homawoo [2011], ECR I-11603.

to be express or demonstrated with reasonable certainty by the circumstances of the case.

6. General rule: lex loci delicti

In the case at hand the applicable provision is art. 4 Rome II. The law that governs is the *lex loci delicti*. This is further developed in art. 4.1- the provision states that the law applicable is that of the country where the damage occurred. Participants should therefore decide whether the damage occurred in Spain- where Mrs. Schmidt actually broke her wrist- or in Germany- where she continued experiencing pain, underwent surgery and needed to go to rehab and also hired a person to take over her daily duties.

It is necessary to distinguish between delicts where the event giving rise to the damage and the damage occur in the same country and delicts where cause and effect are located in different countries. The case at hand is a case of the first type of delict- Mrs. Schmidt's accident was caused by the fact that there was an oil puddle in the hotel entrance, which caused her to slip and the effect is that she broke her wrist. All other consequences (that she continued experiencing pain, needed to undergo surgery and rehab and to hire a house keeper) would fall under the category "indirect consequences" and are not relevant for locating the applicable law (if they were we would always end up applying the law of the victim's domicile and that would be unfair to the person who caused the damage who should not be surprised by the application of an unforeseeable law. The responsibility of whoever spilled the oil should not depend on whether the person slipping is domiciled in country A or country B). This interpretation corresponds to that developed by the CJEU in connection to jurisdiction rules (see CJEU, Case *Marinari*[7]) and is as well referred to in Recital (17) of the Preamble.

Although not applicable in the present case the rule established under article 4.2 should as well be discussed. If the person claimed to be liable and the person sustaining the damage both have their habitual residence in the same country at the time when the damage occurred then the law of that country applies.

Art. 4.3 contains an escape clause allowing to disregard the law of the place where the damage occurred where it is clear from all the circumstances of the case that the tort is more closely connected to another country. The second sentence makes reference to a pre-existing contractual relationship between the parties. This rule would allow applying the law governing the contract also to a tort closely connected to the contract.

7. Alternative Case: Claim against the Municipality of Marbella

Participants have been asked to consider which law would apply if Mrs. Schmidt had fallen on the streets of Marbella and were suing the Municipality of Marbella.

The issue in connection to such a claim would be whether it falls under the scope of application of Regulation Rome II. Claims against a public body can qualify as a civil or commercial matter according to the ECJ if the public body did not exercise any prerogative connected to public authority (ius imperium). It is debatable whether the duty to keep a space safe belongs to the exercise of public authority since also private owners have such a duty. As always, if in doubt, there is the possibility of requesting a preliminary ruling from the ECJ.

7 Case C-364/93, Marinari, [1995], ECR I 2719.

8. The scope of the law applicable

The group has been asked to consider whether the law governing the tort is also applicable as regards the intervention of experts. This question has been put in order to focus their attention on the scope of the law applicable.

The issues covered by the applicable law (lex causae) are listed in art. 15 of the Rome II. The list is not exhaustive. The existence, the nature and the assessment of damage are mentioned in letter (c). On the other hand, however, art. 1.3 stipulates that the Regulation shall not apply to evidence and procedure, matters that are traditionally subject to the lex fori. To distinguish between substance and procedure is a traditional characterization issue in PrIL that is relevant here.

As a rule of the thumb we can say that particular tariffs, guidelines, or formulae which are used in the calculation of damages are a matter of substance. Since the applicable law is Spanish law this means that the competent authority might wish to apply a predetermined valuation scale known as "Baremo"[8].

Proof of the underlying facts- whether an injury falls under one or the other of the categories used in the valuation scheme or not- is an issue of procedure. It would thus seem that the intervention of an expert in order to ascertain these facts would be governed by the lex fori.

In this context it might be interesting to refer to article 18.1 Rome I, because this rule also deals with the characterization of matters as substantial or procedural. Rules which raise presumptions of law or determine the burden of proof in matters of contractual obligations fall under the *lex causae*.

To round off the discussion of this first case, participants could discuss how they will have access to information on the contents of foreign law in practice. This is an issue where there are (still) no common rules. Reference can be made to the European Judicial network in civil and commercial matters.

[8] Applying the so called "baremo" is however only facultative outside the area of traffic accidents and might not give adequate consideration to the actual circumstances of the specific victim which would be problematic in view of Recital (33) .