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*"According to data from the European Commission and previous calculations, the number of cross-border road traffic accidents in the EU might be assumed to 775,000 per year".*[1]

# Cross-Border Traffic Accidents: Jurisdiction and Applicable Law

## An Introduction to the Relevant Rules of Private International Law

***Scenario***[2]

A family living in Poland go on holiday to Spain. They drive in separate cars one after the other on a Spanish motorway. The son, who is driving the car out in front, approaches a long left-hand curve. In order to pass a lorry, he switches from the right-hand lane to the left when suddenly he notices a broken down Seat Cordoba left immobile in the left-hand lane following an accident in which no other vehicle was involved. The young man slams on the brakes, thereby avoiding a collision with the Seat Cordoba. His father, however, does not manage to stop in time and the two family cars collide. The son is severely injured and loses the capacity to work for the rest of his life. Both cars, driven by father and son, are registered and insured in Poland. The Seat (which was left unscathed by the collision) is registered and insured in Spain.

***Variation*:** The collision between the cars of the family was caused because an autonomous driving device, installed in the father's car, was defective. The car was manufactured in Sweden by a company established there. This type of car was marketed all around the European Union, notably in Poland, where the father of the victim had acquired it.

[1] European Parliamentary Research Service, Study: Limitation periods for road traffic accidents (author: Christian SALM), PE 581.386 (July 2016), p. 8.

[2] The scenario is inspired by the Swiss case: Tribunal Fédéral (*Federal Supreme Court of Justice*), 05.11.2015 (William Siegrist gegen Helvetia Schweizerische Versicherungs AG), 4A_41 3/2015.

## Introduction

In the present scenario, the accident in question has links with *three* different countries and their respective laws:

- *Poland*, where the father and son are domiciled; where the cars were registered and insured;
- *Spain*, where the accident occurred; where the Seat Cordoba was registered and insured;
- *Sweden*, where the car was manufactured in the *variation*.

In scenarios presenting cross-border elements, the injured party has an interest to know *where* he can bring his claim (that is, which courts have *jurisdiction* and are competent to hear the claim), and *which law* will be applicable to govern such claim. The answers to these questions are provided by the rules on *Private International Law* (*Choice of Law*). Private International Law thus fulfils the task of *coordinating* the different national legal systems.

In the European Union, the rules of Private International Law (PIL) are increasingly found in EU law, spread over a number of EU regulations, notably

- the Brussels I Regulation for determining jurisdiction, and the recognition and enforcement of judgments in civil and commercial matters, and
- the Rome II Regulation determining the law applicable to non-contractual obligations.

Other PIL rules are found in international conventions, especially the Hague Conventions, and – for claims in extra-contractual liability – notably the Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents and the Hague Convention of 2 October 1973 on the Law Applicable to Products Liability.

Given that the PIL rules in the Rome II Regulation on the one hand and the Hague Conventions on the other use different criteria to designate the applicable law (so-called *connecting factors*), the outcome in a given case may depend on the country in which a claim can be brought.

In our scenario these questions are of particular relevance to the injured young man. By performing comparative research into the laws of the relevant jurisdictions in the scenario, we note in the materials below that whereas the liability laws of most European countries apply the principle of *full compensation*,[3] Spanish law uses binding tables (so-called *Baremos*) with amounts which are calculated with regard to the economic conditions in Spain. Regarding loss of income, for example, these awards may be considerably lower than the damage actually suffered by a victim domiciled abroad.

[3] See consequently art. 10:101 (Nature and purpose of damages) of the Principles of European Tort Law: "Damages are a money payment to compensate the victim, that is to say, to restore him, so far as money can, to the position he would have been in if the wrong complained of had not been committed. […]". In line with this predominant solution in Europe: Recital 33 of the Rome II Regulation (below).

**Ley 35/2015, de 22 de septiembre, de reforma del sistema para la valoración de los daños y perjuicios causados a las personas en accidentes de circulación *(Law No. 35/2015 of 22nd September, reforming the assessment of compensatory damages awarded to victims of traffic accidents)*[4]**

**Sección 2.ª Indemnizaciones por secuelas**
**(*Section 2. Compensation for lifelong disability*)**

**Tabla 2.C** Perjuicio patrimonial (***Table 2.C*** *Financial loss)*

**Tabla 2.C.4** Lucro cesante por incapacidad para realizar cualquier trabajo o actividad profesional (absoluta) (***Table 2.C.4*** *Loss of earnings due to incapacity resulting in (total) loss of ability to work or pursue any professional activity)*

| Ingreso neto *(Net income)* | Edad del lesionado *(Age of the victim)* | | |
|---|---|---|---|
| Hasta *(Up to)* | 17 | 20 | 23 |
| 15.000,00 | 66.348 € | 60.774 € | 55.587 € |
| 18.000,00 | 79.618 € | 72.929 € | 66.704 € |
| 21.000,00 | 92.888 € | 85.084 € | 77.822 € |
| […] | | | |
| 75.000,00 | 1.089.425 € | 1.031.231 € | 976.725 € |

[4] The following extracts are taken from the annex to Spanish Law No. 35/2015. For more information, see e.g. MIQUEL MARTÍN-CASALS, An Outline of the Spanish Legal Tariffication Scheme for Personal Injury Resulting from Traffic Accidents, in: *Festschrift für Pierre Widmer*, Zurich et *al.* 2003, 235 ff. ; REGLERO CAMPOS, ***Tratado de Responsabilidad Civil*, 2nd ed., Madrid 2002, n°** 587 f.; THOMAS MANNSDORFER, Regulierung von Sach- und Personenschäden bei Motorfahrzeugunfällen nach spanischem Recht – Eine Einführung, *Haftung und Versicherung (HAVE)* 2005, 12 ff.

## Questions

1. The injured young man would like to claim damages for his personal injuries and for the loss of his life's income. From whom might he consider claiming compensation? Keep in mind that, following a traffic accident, the laws of all EU Member States permit the victim to bring a *direct claim* also against the liability insurer for the vehicle of the person alleged to be liable.[5]

2. Where can a claim for damages be brought (in other words, the courts of which countries have *jurisdiction* to hear a claim) against each of these respective actors:
   a) the driver of the Spanish car, domiciled in Spain,
   b) the Spanish vehicle's liability insurer, established in Spain,
   c) the victim's father, domiciled in Poland, and
   d) the father's vehicle liability insurer, established in Poland?

   Remember that in the European Union questions of jurisdiction are, in principle, governed by the Brussels I Regulation (recast)

3. Before the courts having jurisdiction as identified in question 1, which law applies to determine the liability of
   a) the driver of the Spanish car, and
   b) the victim's father?[6]

   In the European Union, questions of applicable law for claims in extra-contractual liability are governed either by the Rome II Regulation or the 1971 Hague Traffic Accidents Convention.

   You will see that the applicable laws may differ, depending on the State where the claim is brought. If you were the young man's lawyer, before the courts of which country would you recommend bringing the claim?

4. Imagine that father and son had been living in *Germany*, and their car been registered and insured there. Which law would German courts apply to the claim against the father?

5. *Variation:* In the variation, the injured young man wants to bring a products liability claim against the Swedish manufacturer of his father's car.
   a) Where could such a claim be brought according to the Brussels I Regulation (recast)?

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[5] Compare: Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009, relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability (codified version), [2009] OJ L263/11 (Motor Insurance Directive), Art. 3 (Compulsory insurance of vehicles): "Each Member State shall […] take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance. […]". Art. 18: "Member States shall ensure that any party injured as a result of an accident caused by a vehicle covered by insurance as referred to in Article 3 enjoys a direct right of action against the insurance undertaking covering the person responsible against civil liability." For more detail, see examples of national legislation transposing the Directive into domestic law, xyz. See for Switzerland: Strassenverkehrsgesetz (SVG), art. 65.

[6] This law applies also if the claim is brought directly against the vehicle's liability insurers.

b) Before these courts, what is the applicable law?

6. In the above scenario, the Rome II Regulation on the one hand and the 1971 Hague Traffic Accident Convention on the other lead to the application of different laws (questions 3 and 4). The application of which law would you consider more appropriate taking into consideration the interests of the parties involved?

   In the variation, the Rome II Regulation and the 1973 Hague Product Liability Convention also designate different laws (question 5). The application of which of these laws would you consider more appropriate for the claim against the car manufacturer, taking into consideration the parties' interests?

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## I. Jurisdiction: European Union

1. Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2012] OJ L 351/1, Recital (18) (Brussels I Regulation, recast), arts. 1(1), 4(1), 5(1), 6(1), 7, 10, 11(1), 12, 13(2), 61(1)

2. Direct claim against the vehicle's liability insurer: Court of Justice of the European Union, *FBTO Schadeverzekeringen NV v. Jack Odenbreit*, 13.12.2007, C-463/06

3. Products liability claims: Court of Justice of the European Union, *Andreas Kainz v Pantherwerke AG*, 16.01.2014, C-45/13

## II. Applicable law

### 1. European Union

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, [2007] OJ L 199/40 (Rome II Regulation), Recital (33), arts. 1(1), 3, 4(1), (2), 5(1), 14, 18, 26, 28(1)

### 2. Hague Conventions

a) Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents, arts. 1 - 4, arts. 8 - 11

b) Schweizerisches Bundesgericht (*Swiss Federal Supreme Court of Justice*), 11.11.2008, BGE 135 III 92

c) Hague Convention of 2 October 1973 on the Law Applicable to Products Liability, arts. 1(1), 3 – 8, 10, 11

# Materials

## I. Jurisdiction: European Union

For claims against defendants domiciled in an EU Member State, courts in the EU determine *jurisdiction* according to the rules set out in the Brussels I Regulation (recast). The Regulation applies if the case is within the material and personal scope of application of the Brussels I Regulation, as defined by its Art. 1(1) (material scope of application) and Arts. 4 - 6 (personal scope of application).

If the case is within the scope of application of the Brussels I Regulation, the court which is seized then has to research whether there is a head of jurisdiction that applies (such as arts. 4(1), 7 n° 2, or 11 - 13, for example) so that the court can hear the claim.

### 1. Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2012] OJ L 351/1 (Brussels I Regulation, recast)[7]

**[Recital] (18)** In relation to insurance, consumer and employment contracts, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules.

**Chapter I**
**SCOPE AND DEFINITIONS**

**Art. 1.** (1) This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. […]

**Chapter II**
**JURISDICTION**

***SECTION 1***
***General provisions***

**Art. 4.** (1) Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State. […]

**Art. 5.** (1) Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter. […]

**Art. 6.** (1) If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall […] be determined by the law of that Member State. […]

[7] The Brussels I Regulation (recast) applies to all EU Member States except Denmark (where the 1968 Brussels Convention applies instead).

***SECTION 2***
***Special jurisdiction***

**Art. 7.** A person domiciled in a Member State may be sued in another Member State:
[…] 2. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur; […]

***SECTION 3***
***Jurisdiction in matters relating to insurance***

**Art. 10.** In matters relating to insurance, jurisdiction shall be determined by this Section […].

**Art. 11.** (1) An insurer domiciled in a Member State may be sued:
(a) in the courts of the Member State in which he is domiciled;
(b) in another Member State, in the case of actions brought by the policyholder, the insured or a beneficiary, in the courts for the place where the claimant is domiciled; […]

**Art. 12.** In respect of liability insurance […], the insurer may in addition be sued in the courts for the place where the harmful event occurred. […]

**Art. 13.** […] (2) Articles 10, 11 and 12 shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted. […]

***SECTION 4***
***Common provisions***

**Art. 63.** (1) For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its:
(a) statutory seat;
(b) central administration; or
(c) principal place of business. […]

## 2. Direct claim against the vehicle's liability insurer: Court of Justice of the European Union, *FBTO Schadeverzekeringen NV c. Jack Odenbreit,* 13.12.2007, Case C-463/06

*Note:* The provisions cited in the following decisions refer to an earlier version of the Brussels I Regulation (44/2001). For educational reasons, they have been updated to reflect the regulation in its current form (1215/2012), reproduced above.[8] The relevant provisions in the previous and the current version have the same content.

Regarding the heads of jurisdiction that are available for victims of road traffic accidents, the Court of Justice of the European Union has delivered the following leading decision:

[8] Above, I.1.

JUDGMENT OF THE COURT (Second Chamber)

13 December 2007

In Case C-463/06, […]

**FBTO Schadeverzekeringen NV**

v

**Jack Odenbreit,**

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, J. Makarczyk, P. Kūris, J.-C. Bonichot and C. Toader (Rapporteur), Judges, […] gives the following

**Judgment**

1 This reference for a preliminary ruling concerns the interpretation of Articles [11(1)(b) and 13(2) of Council Regulation (EC) No 1215/2012]. […].

2 The reference was made in the course of proceedings between Jack Odenbreit, domiciled in Germany, the injured party in a road traffic accident which occurred in the Netherlands, and the insurance company of the person responsible for that accident, the private limited liability company FBTO Schadeverzekeringen NV ('FBTO'), established in the Netherlands. […]

**The dispute in the main proceedings and the question referred for a preliminary ruling**

9 On 28 December 2003 Mr Odenbreit was involved in a road traffic accident in the Netherlands with a person insured with FBTO. As the injured party he brought a direct action against the insurer before the Amtsgericht Aachen (Aachen Local Court), which is the court for the place where he is domiciled, on the basis of Articles [13(2) and 11(1)(b) of Regulation No 1215/2012].

10 By judgment of 27 April 2005 that court dismissed the action as inadmissible on account of the lack of jurisdiction of the German courts. Mr Odenbreit brought an appeal against that judgment before the Oberlandesgericht Köln (Higher Regional Court, Cologne). By interlocutory judgment of 12 September 2005 that appeal court recognised the jurisdiction of German courts over an action to establish liability, on the basis of the same provisions of [Regulation No 1215/2012].

11 FBTO brought an appeal on a point of law ('Revision') against that interlocutory judgment before the Bundesgerichtshof (Federal Court of Justice). […]

15 […] [T]he Bundesgerichtshof decided to stay proceedings and to refer to the Court the following question for a preliminary ruling:

> 'Is the reference to Article [11(1)(b) in Article 13(2) of Regulation No 1215/2012] to be understood as meaning that the injured party may bring an action directly against the insurer in the courts for the place in a Member State where the injured party is domiciled, provided that such a direct action is permitted and the insurer is domiciled in a Member State?'

*[…] Reply of the Court*

24 […] [I]n order to reply to the question referred by the national court, it is necessary to define the scope of the reference made in Article [13(2) of Regulation No 1215/2012 to Article 11(1)(b)] of that regulation. It is necessary, in particular, to establish whether that reference should be interpreted as recognising only those courts designated in the latter provision, that is, those of the place of domicile of the policy holder, of the insured or of a beneficiary, as having jurisdiction to hear a direct action brought by the injured party against the insurer, or whether that reference allows the rule of jurisdiction of the courts for the place where the plaintiff is domiciled, set out in Article [11(1)(b) of Regulation No 1215/2012], to be applied to that action. […]

26 […] [T]o interpret the reference in Article [13(2) of Regulation No 1215/2012 to Article 11(1)(b)] of that regulation as permitting the injured party to bring proceedings only before the courts having jurisdiction under that latter provision, that is to say, the courts for the place of domicile of the policy holder, the insured or the beneficiary, would run counter to the actual wording of Article [13(2)]. The reference leads to a widening of the scope of that rule to categories of plaintiff other than the policy holder, the insured or the beneficiary of the insurance contract who sue the insurer. Thus, the role of that reference is to add injured parties to the list of plaintiffs contained in Article [11(1)(b)]. […]

28 That line of reasoning is also based on a teleological interpretation of the provisions at issue in the main proceedings. According to Recital [18] in the preamble to Regulation [No 1215/2012], the regulation aims to guarantee more favourable protection to the weaker party than the general rules of jurisdiction provide for […]. To deny the injured party the right to bring an action before the courts for the place of his own domicile would deprive him of the same protection as that afforded by the regulation to other parties regarded as weak in disputes in matters relating to insurance and would thus be contrary to the spirit of the regulation. […]

29 Such an interpretation is supported by the wording of Directive 2000/26 on matters relating to insurance against civil liability in respect of the use of motor vehicles, as amended […] by Directive 2005/14. In Directive 2000/26 the Community legislature not only provided, in Article 3, that injured parties should have a direct right of action against the insurance undertaking in the legal systems of the Member States, but also referred expressly, in Recital [16a] to Articles [11(1)(b) and 13(2) of Regulation No 1215/2012] in mentioning the right of injured parties to bring proceedings against the insurer in the courts for the place where they are domiciled. […]

31 In light of all the foregoing considerations the reply to the question referred for a preliminary ruling must be that the reference in Article [13(2) of Regulation No 1215/2012 to Article 11(1)(b)] of that regulation is to be interpreted as meaning that the injured party may bring an action directly against the insurer before the courts for the place in a Member State where that injured party is domiciled, provided that a direct action is permitted and the insurer is domiciled in a Member State. […]

On those grounds, the Court (Second Chamber) hereby rules:

The reference in Article [13(2) of Council Regulation No 1215/2012 to Article 11(1)(b)] of that regulation is to be interpreted as meaning that the injured party may bring an action directly against the insurer before the courts for the place in a Member State where that injured party is domiciled, provided that such a direct action is permitted and the insurer is domiciled in a Member State.

## 3. Products liability claims: Court of Justice of the European Union, *Andreas Kainz v Pantherwerke AG*, 16.01.2014, C-45/13

Products liability is the field of law that deals with the extra-contractual liability of manufacturers, distributors, suppliers, retailers, and other persons for damage caused by products they have made available to the public. In products liability cases the person alleged to be liable has often acted in a place that is different from the place where the person claiming compensation has suffered injury: a product is designed and manufactured in one place and marketed and purchased in others. Once acquired, the product is carried to yet other places where it ultimately causes damage to the person who acquired it, to persons close to the purchaser, or to third parties. Hence the question of how to determine "the place where the harmful event occurred" pursuant to art. 7 n° 2 of the Brussels I Regulation (recast). The CJEU has addressed this question for products liability cases in the following decision:

JUDGMENT OF THE COURT (Fourth Chamber)

16 January 2014

In Case C-45/13, […]

**Andreas Kainz**

v

**Pantherwerke AG,**

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Chamber, M. Safjan (Rapporteur) and J. Malenovský, Judges, […]

gives the following

**Judgment**

[…] **The dispute in the main proceedings and the questions referred for a preliminary ruling**

11 Pantherwerke AG is an undertaking established in Germany which manufactures and sells bicycles. On 3 November 2007, Mr Kainz, who is resident in Salzburg, purchased a bicycle manufactured by Pantherwerke AG from Funbike GmbH, a company established in Austria. On 3 July 2009, while riding that bicycle in Germany, Mr Kainz suffered a fall and was thereby injured.

12 Before the Landesgericht Salzburg (Regional Court, Salzburg), on the basis of a claim founded on liability for defective products, Mr Kainz sought from Pantherwerke AG the payment of EUR 21 200 […], and a declaration of liability on the part of that company for any future damage arising from the accident. According to Mr Kainz, his fall from the bicycle was caused by the fact that the fork ends had detached themselves from the wheel fork. Pantherwerke AG, as the manufacturer of the product, was, he claimed, liable in respect of that manufacturing defect.

13 For the purposes of establishing the jurisdiction of the court seised, Mr Kainz relies on Article [7(2) of Regulation No 1215/2012]. The place of the event giving rise to the damage is,

he claims, located in Austria as the bicycle was brought into circulation there, in the sense that the product was there made available to the end user by way of commercial distribution.

14 Pantherwerke AG contests the international jurisdiction of the Austrian courts. […]

23 It is […] settled case-law that, in the case where the *place in which the event which may give rise to liability* in tort, delict or quasi-delict occurs and the *place where that event results in damage*[9] are not identical, the expression 'place where the harmful event occurred' in Article [7(2) of Regulation No 1215/2012] must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it, with the result that the defendant may be sued, at the option of the claimant, in the courts for either of those places […].

25 In the context of the dispute in the main proceedings, it is common ground that the referring court expresses uncertainty solely with regard to the determination of the *place of the event giving rise to the damage*.[10]

26 The Court has already held in this connection that, with regard to products liability, this is the place where the event which damaged the product itself occurred […]. This is, in principle, the place where the product in question was manufactured.

27 In so far as proximity to the place where the event which damaged the product itself occurred facilitates, on the grounds of, inter alia, the possibility of gathering evidence in order to establish the defect in question, the efficacious conduct of proceedings and, therefore, the sound administration of justice, the attribution of jurisdiction to the courts in that place is consistent with the rationale of the special jurisdiction conferred by Article [7(2) of Regulation No 1215/2012], that is to say, the existence of a particularly close connecting factor between the dispute and the courts for the place where the harmful event occurred […].

28 Attribution of jurisdiction to the courts for the place where the product in question was manufactured addresses, moreover, the requirement that rules governing jurisdiction should be predictable, in so far as both the manufacturer, as defendant, and the victim, as applicant, may reasonably foresee that those courts will be in the best position to rule on a case concerning, inter alia, the finding that the product in question is defective.

29 It must therefore be held that, in the case where a manufacturer faces a claim of liability for a defective product, the place of the event giving rise to the damage is the place where the product in question was manufactured.

30 As regards, lastly, Mr Kainz's argument that the interpretation of special jurisdiction in matters relating to tort, delict or quasi-delict must take into account not only the interests of the proper administration of justice but also those of the person sustaining the damage, thereby enabling him to bring his action before a court of the Member State in which he is domiciled, that argument cannot be upheld.

31 Not only has the Court already held that Article [7(2) of Regulation No 1215/2012] is specifically not designed to offer the weaker party stronger protection […], but it should also be noted that the interpretation proposed by Mr Kainz that the place of the event giving rise to the damage is the place where the product in question was transferred to the end consumer or to the reseller likewise does not guarantee that that consumer will, in all circumstances, be able to bring an action before the courts in the place where he is domiciled since that place may be elsewhere or even in another country. […]

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[9] Emphasis added.

[10] Emphasis added.

33 In the light of the foregoing, the answer to the questions referred is that Article [7(2) of Regulation No 1215/2012] must be interpreted as meaning that, in the case where a manufacturer faces a claim of liability for a defective product, the place of the event giving rise to the damage is the place where the product in question was manufactured. […]

On those grounds, the Court (Fourth Chamber) hereby rules:

Article [7(2) of Regulation No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)] must be interpreted as meaning that, in the case where a manufacturer faces a claim of liability for a defective product, the place of the event giving rise to the damage is the place where the product in question was manufactured.

## II. Applicable law

Courts in EU Member States (except Denmark) determine the law applicable to a claim in extra-contractual or delictual liability in principle according to the rules of the Rome II Regulation. However, pursuant to Art. 28(1) Rome II Regulation, the 1971 Hague Convention on the Law Applicable to Traffic Accidents and the 1973 Hague Convention on the Law Applicable to Products Liability prevail over the Rome II Regulation for claims brought in Contracting States of the Hague Convention. Spain and Poland are Contracting States to both of these Hague Conventions. In Germany, on the contrary, neither of the two conventions is in force.

### 1. European Union

**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, [2007] OJ L 199/40 (Rome II Regulation)[11]**

**[Recital] (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.

**Chapter I**
**SCOPE**

**Art. 1. Scope.** (1) This Regulation shall apply, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters. […]

**Art. 3. Universal application.** Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.

[11] The Rome II Regulation applies to all EU Member States except Denmark.

## Chapter II
## TORTS/DELICTS

**Art. 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. […]

**Art. 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). […]

## Chapter IV
## FREEDOM OF CHOICE

**Art. 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. […]

## Chapter IV
## COMMON RULES

**Art. 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.

## Chapter VI
## OTHER PROVISIONS

**Art. 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.

**Art. 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.[12] […]

## 2. Hague Conventions

### a) Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents[13]

**Art. 1.** (1) The present Convention shall determine the law applicable to civil non-contractual liability arising from traffic accidents, in whatever kind of proceeding it is sought to enforce this liability.
(2) For the purpose of this Convention, a traffic accident shall mean an accident which involves one or more vehicles, whether motorised or not, and is connected with traffic on the public highway, in grounds open to the public or in private grounds to which certain persons have a right of access.

**Art. 2.** The present Convention shall not apply – to the liability of manufacturers, sellers or repairers of vehicles; […]

**Art. 3.** The applicable law is the internal law of the State where the accident occurred.

**Art. 4.** […] [T]he following exceptions are made to the provisions of Article 3
(a) where only one vehicle is involved in the accident and it is registered in a State other than that where the accident occurred, the internal law of the State of registration is applicable to determine liability
   - towards the driver, owner or any other person having control of or an interest in the vehicle irrespective of their habitual residence,
   - towards a victim who is a passenger and whose habitual residence is in a State other than that where the accident occurred,
   - towards a victim who is outside the vehicle at the place of the accident and whose habitual residence is in the State of registration.

(b) Where two or more vehicles are involved in the accident, the provisions of a) are applicable only if all the vehicles are registered in the same State.
(c) Where one or more persons outside the vehicle or vehicles at the place of the accident are involved in the accident and may be liable, the provisions of a) and b) are applicable only if all these persons have their habitual residence in the State of registration. The same is true even though these persons are also victims of the accident.

[12] Before courts in EU Member States that are also Contracting States to the Hague Conventions, Art. 28(1) gives priority in particular to the 1971 Hague Traffic Accident Convention, see below, 2(a), and the 1973 Hague Products Liability Convention, see below, 2(c).

[13] The Hague Convention on the Law Applicable to Traffic Accidents is in force in Austria, Belarus, Belgium, Bosnia & Herzegovina, Croatia, Czech Republic, France, FYR Macedonia, Latvia, Lithuania, Luxembourg, Montenegro, Morocco, the Netherlands, Poland, Serbia, Slovakia, Slovenia, Spain, Switzerland, and Ukraine.

**Art. 8.** The applicable law shall determine, in particular
(1) the basis and extent of liability;
(2) the grounds for exemption from liability, any limitation of liability, and any division of liability;
(3) the existence and kinds of injury or damage which may have to be compensated;
(4) the kinds and extent of damages;
(5) the question whether a right to damages may be assigned or inherited;
(6) the persons who have suffered damage and who may claim damages in their own right;
(7) the liability of a principal for the acts of his agent or of a master for the acts of his servant;
(8) rules of prescription and limitation, including rules relating to the commencement of a period of prescription or limitation, and the interruption and suspension of this period.

**Art. 9.** (1) Persons who have suffered injury or damage shall have a right of direct action against the insurer of the person liable if they have such a right under the law applicable according to Articles 3, 4 or 5. If the law of the State of registration is applicable under Articles 4 or 5 and that law provides no right of direct action, such a right shall nevertheless exist if it is provided by the internal law of the State where the accident occurred.
(2) If neither of these laws provides any such right it shall exist if it is provided by the law governing the contract of insurance.

**Art. 10.** The application of any of the laws declared applicable by the present Convention may be refused only when it is manifestly contrary to public policy ("*ordre public*").

**Art. 11.** The application of Articles 1 to 10 of this Convention shall be independent of any requirement of reciprocity. The Convention shall be applied even if the applicable law is not that of a Contracting State.

For the interpretation of art. 4 of the 1971 Hague Convention, see the following case:

**b) Schweizerisches Bundesgericht (*Swiss Federal Supreme Court of Justice*), 11.11.2008, BGE 135 III 92[14]**

A. B. (Beschwerdegegner) ist Halter des Fahrzeuges Mercedes Benz C 180 mit dem Kennzeichen ZG x. Sein Bruder A. (Beschwerdeführer) lenkte das vorerwähnte Fahrzeug in der Nacht vom 16. auf den 17. August 2000 in der Nähe von D. in Nordostbosnien. In einer Linkskurve verlor er die Kontrolle über das Fahrzeug. Er kam nach der Kurve von der Strasse ab und prallte gegen die Wand eines Bauernhauses.

B. Am 6. Dezember 2005 reichte der Beschwerdeführer gegen den Beschwerdegegner und dessen obligatorische Haftpflichtversicherung, die C. Versicherungs-Gesellschaft (Beschwerdegegnerin), beim Kantonsgericht Zug Klage ein […]. Den Streitwert bezifferte er auf Fr. 200'000.-. Zur Begründung führte er insbesondere aus, er sei von einem entgegenkommenden Fahrzeug, bei dem das Fernlicht eingeschaltet gewesen sei, geblendet worden. In einer Panikreaktion habe er das Steuer herumgerissen, wobei sein Fahrzeug ins Schleudern geraten und von der Strasse abgekommen sei. Während die drei Mitfahrer nur leichte Verletzungen erlitten hätten, sei er in schwerster Weise in seiner körperlichen Integrität beeinträchtigt worden und seit dem Unfall auf den Rollstuhl angewiesen. […] Das Kantonsgericht wies die Klage […] ab. […] Das Obergericht wies am 10. Juni 2008 die

[14] Switzerland is Contracting State to the 1971 Hague Traffic Accident Convention.

Berufung ab und bestätigte das Urteil des Kantonsgerichts. Es hielt mit dem Kantonsgericht dafür, dass die vorliegende Streitigkeit gemäss […] Art. 3 des Haager Übereinkommens vom 4. Mai 1971 über das auf Strassenverkehrsunfälle anzuwendende Recht nach innerstaatlichem Recht von Bosnien-Herzegowina zu beurteilen sei. Nach bosnisch-herzegowinischem Recht trete die Haftung der Person, der das Fahrzeug anvertraut wurde, vollständig an die Stelle der Haftung des Fahrzeughalters. Der Beschwerdeführer habe demnach den von ihm geltend gemachten selbst erlittenen Schaden alleine zu tragen […]. […]

Aus den Erwägungen:

3. […] 3.1 Das anwendbare Recht, dem die geltend gemachten Ansprüche des Beschwerdeführers aus dem Strassenverkehrsunfall in Bosnien- Herzegowina unterstehen, richtet sich […] nach dem Haager Übereinkommen vom 4. Mai 1971 über das auf Strassenverkehrsunfälle anzuwendende Recht ([…] im Folgenden: SVÜ).

Art. 3 SVÜ erklärt grundsätzlich das Recht jenes Staates für anwendbar, in dessen Hoheitsgebiet sich der Unfall ereignet hat. Neben dieser Grundsatzanknüpfung enthalten die Art. 4 ff. SVÜ Sonderanknüpfungen. Nach Art. 4 lit. a SVÜ ist insbesondere auf die Haftung gegenüber dem Fahrzeughalter das Recht des Zulassungsstaates anzuwenden, wenn nur ein Fahrzeug an dem Unfall beteiligt und dieses Fahrzeug in einem anderen als dem Staat zugelassen ist, in dessen Hoheitsgebiet sich der Unfall ereignet hat. Sind mehrere Fahrzeuge an dem Unfall beteiligt und alle Fahrzeuge im selben Staat zugelassen, gelangt ebenso das Recht des Zulassungsstaates zur Anwendung (Art. 4 lit. b SVÜ).

3.2 Der Beschwerdeführer bringt vor, entgegen der Auffassung der Vorinstanz sei nur das von ihm gelenkte Fahrzeug und nicht auch das entgegenkommende am Unfall beteiligt gewesen. Die Vorinstanz hätte somit seine Ansprüche gegenüber den Beschwerdegegnern in Anwendung von Art. 4 lit. a SVÜ nach Schweizer Recht beurteilen müssen.

3.2.1 Zur Auslegung des Begriffs der Unfallbeteiligung im Sinne von Art. 4 lit. a und b SVÜ ist zunächst der Wortlaut der englischen und französischen Originalfassungen zu konsultieren. Der englische Vertragstext verwendet in Art. 4 lit. a und b SVÜ den Begriff „involved“ und der französische Text den Begriff „impliqué“. Während „involved“ kein schuldhaftes Mitwirken am Unfallgeschehen voraussetzt, kann dem Begriff „impliqué“ zusätzlich auch die Bedeutung der schuldhaften Verursachung zukommen (ERIC W. ESSEN, Rapport explicatif, Conférence de La Haye de droit international privé, Actes et documents de la onzième session, 7 au 26 octobre 1968, Bd. III, Accidents de la circulation routière, 1970, Ziff. 7.1 f. zu Art. 4 SVÜ). In Art. 4 lit. a und b SVÜ ist der Begriff „impliqué“ jedoch einzig in seiner objektiv neutralen Bedeutung zu verstehen, ohne dass darin eine Form von Schuldzuweisung zum Ausdruck käme […]. Der Begriff der Unfallbeteiligung im Sinne von Art. 4 lit. a und b SVÜ ist in einem weiten Sinn auszulegen […]. Jede Mitwirkung am Unfallgeschehen gilt in Bezug auf die Fahrzeuge als Beteiligung, das heisst, beteiligt im Sinne von Art. 4 lit. a und b SVÜ sind alle in den Unfall aktiv oder passiv verwickelten Fahrzeuge […]. […]

3.2.2 Die Vorinstanz hat demnach zu Recht das Vorliegen eines Selbstunfalles verneint und das entgegenkommende Fahrzeug als beteiligt im Sinne von Art. 4 lit. a und b SVÜ betrachtet. Wie sie in tatbestandlicher Hinsicht feststellte, wurde der Unfall nicht ausschliesslich durch das Fehlverhalten des Beschwerdeführers verursacht, sondern hat das entgegenkommende Fahrzeug am Unfall durch das Blenden mitgewirkt. Als den Unfall mitverursachendes Fahrzeug ist dieses daher in den Unfall verwickelt. Dass es dabei nicht zu einem

Zusammenstoss resp. nicht einmal zu einem Berühren der beiden Fahrzeuge kam, ändert nach der oben dargelegten Auslegung nichts daran.

[…] [Auch der österreichische Oberste Gerichtshof geht] in ständiger Rechtsprechung davon [aus], dass der Ausdruck „beteiligt" in Art. 4 lit. a und b SVÜ im objektiven, weiteren Sinn dahingehend zu verstehen sei, dass das Fahrzeug beim Unfall eine aktive oder passive, aber nicht bloss eine zufällige Rolle gespielt habe (Urteile des OGH 2Ob314/97h vom 2. September 1999; 2Ob48/93 vom 16. September 1993; 2Ob59/89 vom 14. November 1989). Der Beschwerdeführer verkennt […], dass vorliegend in tatbestandlicher Hinsicht feststeht, dass das entgegenkommende, blendende Fahrzeug nicht bloss eine untergeordnete, rein zufällige Rolle gespielt hat. […]

**Translation**

A. B (the respondent) is keeper of a Mercedes Benz C 180 vehicle with registration plate ZG-- His brother, A (the appellant) was driving the aforementioned vehicle near D-- in North-East Bosnia on the night of the 16th August 2000. He lost control of the vehicle on a left-hand bend. He veered off the road and crashed into the wall of a farmhouse.

B. On 6th December 2005, the appellant filed suit against the respondent before the Cantonal Court of Zug (*Kantonsgericht Zug*), co-joining a claim against the latter's compulsory third-party liability insurer, C […]. The value of the claim amounts to 200,000 CHF. In support of his claim, he maintains that he had been dazzled by an oncoming vehicle which had its lights on full beam. Panicking, he jerked his steering wheel, which is thought to have caused the car to skid and veer off the road. While his three passengers escaped with only minor injuries, he claims that he himself has suffered serious injury to his bodily integrity as a result of the accident and that he has been bound to a wheelchair ever since. […] The *Kantonsgericht* […] dismissed the claim. […] On 10th June 2008, the High Court (*Obergericht*) rejected his appeal and affirmed the judgment of the *Kantonsgericht*. It confirmed the view of the *Kantonsgericht* which had based its decision on […] Art. 3 of the Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents, leading to the application of the domestic law of Bosnia-Herzegovina. According to Bosnian law, the act of handing over control of a vehicle transfers any potential liability from the owner to the recipient. The appellant was therefore required to bear the damage he had sustained […]. […]

Extract from the court's reasoning:

3. […] 3.1 The law applicable to the appellant's claim following his road traffic accident in Bosnia-Herzegovina […] is that of the Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents ([…] hereafter *the Convention*).

Art. 3 of the Convention sets out the basic principle that the applicable law is that of the State where the accident occurred. Arts. 4 and following of the Convention contain special connecting factors complementing this general rule. Notably, under Art. 4(a) of the Convention,[15] the liability of the keeper of the vehicle is to be determined by the State in which the vehicle was registered if only one vehicle was involved in the accident and this vehicle was registered in a Member State other than that where the accident occurred. If two or more

[15] See above, 2.a.

vehicles were involved in the accident and all vehicles were registered in the same State, the State of registration is once again applicable (Art. 4(b) of the Convention[16]).

3.2 The appellant submits, contrary to the view of the court of previous instance, that the only vehicle involved in the accident was his own, and not that of the oncoming driver. Thus, according to Swiss law, the court of previous instance should have assessed his claim under Art. 4(a) of the Convention.

3.2.1 In order to interpret the term "am den Unfall beteiligt" [in the German-language version of the Convention] in line with Art. 4 (a) and (b) of the Convention, the court must consult the wording of the original English- and French-language texts. The English-language text employs the term "involved" in Art. 4 (a) and (b) of the Convention, and the French-language text the term "impliqué". While the [English] term "involved" is indifferent as to whether fault played any part in the accident, such requirement could potentially be inferred from the [French] "impliqué" (ERIC W. ESSEN, Explanatory Report, Hague Conference on Private International Law, Acts and Documents of the Eleventh Session, 7 - 26 October 1968, Tome III, Traffic Accidents, 1970, Section 7.1 f. on Art. 4 of the Convention). However, the term "impliqué" as found in Art. 4 (a) and (b) of the Convention, can only be understood in the neutral and objective sense of the word, without reading into it an element of fault […]. The notion of involvement in the accident is to be broadly construed within the context of Art. 4 (a) and (b) of the Convention […]. Any vehicle which has a role in the accident is deemed to be involved in the accident; in other words, any vehicle contributing to the accident, whether directly or indirectly, shall fall under the scope of Art. 4 (a) and (b) of the Convention […]. […]

3.2.2 It follows from the foregoing that the court of previous instance rightly rejected the assertion that the accident involved a single vehicle, and correctly stated that the oncoming vehicle was involved in the accident in line with Art. 4 (a) and (b) of the Convention. As the facts have shown, the accident was the result of not only driver error on the part of the appellant, but also of the actions of the oncoming driver who had dazzled the appellant with his headlights. Since this vehicle played a role in the accident, it is thus involved in the accident. The fact that there was no collision, nor indeed contact between the two vehicles, has no effect on the court's interpretation.

[…] [The Austrian Supreme Court, in addition, has] consistently held that the term "beteiligt" [involved] in the context of Art. 4 (a) and (b) of the Convention be understood in its broader, objective sense as encompassing any vehicle playing a direct or indirect role in the accident, insofar as its role is not wholly incidental (Judgment of the Austrian Supreme Court of 2 September 1999; 2Ob48/93 of 16 September 1993; 2Ob59/89 of 14 November 1989). The appellant failed to acknowledge on the basis of the facts that […] the oncoming vehicle which dazzled him played more than a wholly incidental role in the accident. […]

### c) Hague Convention of 2 October 1973 on the Law Applicable to Products Liability[17]

**Art. 1.** (1) This Convention shall determine the law applicable to the liability of the manufacturers and other persons specified in Article 3 for damage caused by a product […].

[16] See above, 2.a.

[17] The Hague Convention on the Law Applicable to Products Liability is in force in Croatia, Finland, France, FYR Macedonia, Luxembourg, Montenegro, the Netherlands, Norway, Serbia, Slovenia, and Spain.

**Art. 3.** This Convention shall apply to the liability of the following persons
1. manufacturers of a finished product or of a component part; […]
2. suppliers of a product; […]

**Art. 4.** The applicable law shall be the internal law of the State of the place of injury, if that State is also
(a) the place of the habitual residence of the person directly suffering damage, or
(b) the principal place of business of the person claimed to be liable, or
(c) the place where the product was acquired by the person directly suffering damage.

**Art. 5.** Notwithstanding the provisions of Article 4, the applicable law shall be the internal law of the State of the habitual residence of the person directly suffering damage, if that State is also
(a) the principal place of business of the person claimed to be liable, or
(b) the place where the product was acquired by the person directly suffering damage.

**Art. 6.** Where neither of the laws designated in Articles 4 and 5 applies, the applicable law shall be the internal law of the State of the principal place of business of the person claimed to be liable, unless the claimant bases his claim upon the internal law of the State of the place of injury.

**Art. 7.** Neither the law of the State of the place of injury nor the law of the State of the habitual residence of the person directly suffering damage shall be applicable by virtue of Articles 4, 5 and 6 if the person claimed to be liable establishes that he could not reasonably have foreseen that the product or his own products of the same type would be made available in that State through commercial channels.

**Art. 8.** The law applicable under this Convention shall determine, in particular
(1) the basis and extent of liability;
(2) the grounds for exemption from liability, any limitation of liability and any division of liability;
(3) the kinds of damage for which compensation may be due;
(4) the form of compensation and its extent;
(5) the question whether a right to damages may be assigned or inherited;
(6) the persons who may claim damages in their own right;
(7) the liability of a principal for the acts of his agent or of an employer for the acts of his employee;
(8) the burden of proof insofar as the rules of the applicable law in respect thereof pertain to the law of liability;
(9) rules of prescription and limitation, including rules relating to the commencement of a period of prescription or limitation, and the interruption and suspension of this period.

**Art. 10.** The application of a law declared applicable under this Convention may be refused only where such application would be manifestly incompatible with public policy ("*ordre public*").

**Art. 11.** The application of the preceding Articles shall be independent of any requirement of reciprocity. The Convention shall be applied even if the applicable law is not that of a Contracting State.

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