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INTERACTION

between

BRUSSELS I bis, ROME I AND ROME II

All three Regulations:

- No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I),

- No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)

- No 44/2001 of the Council of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (Brussels I) – amended by Regulation No 1215/2012 of the European Parliament and of the Council of 12 December 2012 (Brussels I bis),

- create a uniform, normative complex of private international law of civil and commercial obligations – aimed to complete itself.

- could be characterized by a common concern: to favour the predictability of law and judicial certainty within the European legal space.

These effects are expressly articulated by the EU legislator as **the Recitals 7** of the respective preambles of the Rome I and II Regulations demonstrate:

Rome I

"The substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) and Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)".

Rome II

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

THE SAME FUNDAMENTAL PRINCIPLES

All three Regulations **are based on the same pillars** of private international law which are:

- the principle of freedom of choice,
- the principle of proximity
- the principle of the protection of a weaker party.

Freedom of choice (a key principle in the field of contractual obligations).

It takes precedence both in substantive law and in private international law.

In private international law it is essentially expressed by **the liberty of the parties to choose the applicable law**.

Recital 11 of the preamble to the Regulation Rome I ascribes to the freedom of the parties to choose the applicable law the role of "one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations".

Regulation Rome II dedicates its Article 14 to a party autonomy, but accords it a less important role than Rome I.

It can be explained by **the lesser practical importance of choice of law in non-contractual matters** as a result of the structure of relationships resulting from this kind of obligations – in most cases the parties do not have a prior relationship.

Rome I and II offer similar limits on the freedom of choice.

They contain parallel norms in the event of localization of the elements of the situation in a single country or within the European Union.

They provide for the application of the imperative rules of a legal system as per its internal law (Article 3 (4) of Rome I and Article 14 (2) of Rome II).

In the event when the parties submit their relations to the law of a third country

- the European imperative norms take precedence in order to guarantee a minimal European standard of protection (Article 3 (4) of Rome I and Article 14 (3) of Rome II.

Both Regulations incorporated the concept of overriding mandatory provisions (Article 9 of Rome I and Article 16 of Rome II).

However, this concept is defined only in Regulation Rome I. There is no objection to use it also in Regulation Rome II.

Regulation Brussels I bis is based on the same principles when, in its Article 25, it provides for **a forum selection clause**.

A subsequent effect of **synergy between Rome I and Brussels I bis** was provided for in the form of **a presumption of a choice of law** in the event of an agreement concerning a choice of forum (**recital 12 of the preamble to Rome I**):

"An agreement between the parties to confer on one or more courts or tribunals of a Member State exclusive jurisdiction to determine disputes under the contract should be one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated".

The abovementioned solution (*qui elegit iudicem elegit ius*) exists on in the preamble and is only one factor among others in the determination of whether a choice of law is clearly expressed.

The three Regulations are also similar with respect to the role they accord to **the principle of proximity** (the principle of "closest connection").

It could be described by two examples:

- On one hand, there is the role of the habitual residence or domicile – either as a principal criterion for the objective determination of the applicable law, or as a territorial connection with the litigation,

- On the other hand, the Regulations provide for escape clauses in the event of other – more close – connections.

In the absence of a choice of law made by the parties, **Article 4 of Regulation Rome I** is based on the habitual residence of the party whose performance characterizes the contract.

This criterion prevails over that of the place of the performance of the obligation, which has given rise to some controversies in the context of Article 5 (1) Brussels I (Article 7 (1) of Brussels I bis).

The role of the habitual residence also becomes apparent in **Article 4 (2) of Rome II**, pursuant to which application of the law of the country in which the harm occurred is rejected in favour of the law of the place of habitual residence, when the person harmed and the liable person both have their habitual residence in the same country.

Similarly, Article 2 (1) of Brussels I (Article 4 (1) of Brussels I bis), which statutes the general rule on allocation of jurisdiction, opts for a jurisdiction based on the principle of the defendant's domicile.

A conflict between the principle of proximity and the principle of legal certainty appears notably with respect to **the "escape clauses"** to the rules determining the applicable law in the absence of a choice of law in Regulations Rome I and II.
There are clauses that argue for closer connections to another country.

In Rome I Article 4 (3) statutes that where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in the preceding paragraphs, it is the law of that country that applies.

The similar situation exists under the regime of Rome II.

In this Regulation **there are a few examples of the "escape clauses"**.

It begins with the general conflict rule of Article 4 (3) and continues through most of the specific conflict rules – products liability (Article 5(2)), unjust enrichment (Article 10 (4)), *negotiorum gestio* (Article 11 (4)).
All these articles provide for the possibility of derogation of the principle rule of connection when there are "manifestly closer connections" with another country.

Regulation Brussels I bis also offers flexibility in a particular case by authorizing – as an exception – *fora* other than that of the defendant's domicile. This flexibility is of course intentional, as **recital 16** of the preamble to the Regulation demonstrates:

"In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on **a close connection** between the court and the action or in order to facilitate the sound administration of justice. The existence of a close connection should ensure legal certainty and avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen. This is important, particularly in disputes concerning non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation".

In areas in which the contracting parties do not have an equal status, all the Regulations tend to assure an adequate **protection of the weaker party**.

Article 6 (2) of Regulation Rome I (**concerning a consumer contract**) is an example.
In this case the choice of law is permitted, but cannot result in depriving the consumer of the protection that is assured by the provisions of the law that would have been applicable in the absence of choice which cannot be avoided by a contract.

The next example is protection is foreseen in Article 8 (**individual employment contracts**).

A parallel to this concept is revealed within **the regime of Brussels I bis** and its Articles 17 *et seq.* (jurisdiction concerning consumer contracts) and its Articles 20 *et seq.* (jurisdiction in individual employment contracts).

Another parallelism is also established between Article 7 of Rome I (insurance contracts) and related Article 10 *et seq.* of Brussels I bis (jurisdiction in insurance matters).

In Regulation Rome II the idea of the protection of the weaker party seems to be **less apparent**, but recital 31 of the preamble to the Regulation statutes:

"To respect the principle of party autonomy and to enhance legal certainty, the parties should be allowed to make a choice as to the law applicable to a non-contractual obligation. This choice should be expressed or demonstrated with reasonable certainty by the circumstances of the case. Where establishing the existence of the agreement, the court has to respect the intentions of the parties. **Protection should be given to weaker parties by imposing certain conditions on the choice**".

Additionally, **Article 5 (1 a)** – in a case of product liability, and **Article 6 (1)** – in a case of unfair competition seems to follow the same line of reasoning.

THE STRUCTURE COHERENCE

All three Regulations are complementary and consistent in their **scope of application**.
They form a homogenous group of civil and commercial obligations, excluding the same matters from their scope of application, *i.e.* administrative and customs matters, family relations, bills of exchange, checks *etc.*

The European legislator saw to introduce **a parallel legal structure** into the texts of the three Regulations.

The general rules are followed by specific rules concerning particular contractual and non-contractual relationships and are accompanied by escape clauses.
This logical order allows to increase comprehensibility and transparency for everyone who calls upon to apply the law.

In all the Regulations **the parallelism and consistency of main notions** is kept.

The same definition of "habitual residence" appears in Article 23 of Rome II and Article 19 of Rome I, both for natural persons and for legal entities.

This example could be also cited as **one of express divergence with respect to Regulation Brussels I bis.**
Under both conflict of law Regulations only the place of central administration is important for the determination of the habitual residence of legal persons. The different situation appears in Article 63 of Brussels I bis, which proposes three criteria of determination.

Recitals 7 and 24 of the preamble to Regulation Rome I expressly provide for a harmony between the texts of this Regulation and Brussels I, as well as **recital 7 of the preamble to Regulation Rome II**.

One of the most apparent and positive example of synergy of solutions between Rome I and II appears through a parallelism with

- the law declared applicable pursuant to both instruments in Article 4 (3) clause 2, 10 (1), 11 (1) and 12 (1) of Regulation Rome II that demand the application of the *lex contractus* in all cases where the non-contractual relationship in question presents connections with an envisioned or existing contractual relationship.

DIFFERENCES

- while **Rome I and II**, as acts on the conflict of laws, essentially answer the question of applicable law, **the Brussels I bis**, as an act of procedural law, basically solves questions of jurisdiction, mutual recognition and the enforcement of judgments

- **the objectives** of the law of conflicts and those of the law of international civil procedure do not necessarily run in a parallel way.

  For instance, the principle of protecting the defendant plays a substantive role under Regulation Brussels I bis, while Regulations Rome I and II call for the applicability of the law most apt for the specific situation.

- while **Brussels I bis** assigns the case to the authoritative power of a state - or even directly specifies the relevant court - by regulating jurisdiction, **Rome I and II** only decide on the meta-question of the applicable law.

- **in contrast to Rome I and II**, which in principle only call for the applicability of the law of a single jurisdiction, **Brussels I bis** provides the possibility of alternative *fora*.