



## Rome II. - General and specific rules

Applicable law in torts/delicts, unjust enrichments, negotiorum gestio and culpa in contrahendo

Krakow, 04.11.2016

Key word: area of justice

What are the essential elements of it?

requirement of legal certainty  
need to do justice in individual cases

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Targets of Rome II. as a tool for conflict-of law:

predictability

minimize “forum shopping”

with a possible maximum level of the legal certainty

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Rome II scheme for determining the applicable law:

fixed connecting factors:

- a general rule (Art.4)
- five special conflict-of-law rules (Art. 5-9)
- three special conflict-of-law rules for non-delictual damages (non-contractual obligations arising out of strict liability)

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General rule - specific rule - escape clause

escape clause:

allows a departure from general rules where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country

relevancy: it enables the court seised to treat individual cases in an appropriate manner.

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General rule in the international private law:

based on a penal law view: Lex loci delictii commissi

(it makes the procedure of improvement easier)

Problem: place of the delict/tort – place of the direct damage are in a different countries

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EU solution:

Lex loci damni: where the direct damage occurred

Art.4.(1): law of the country in which the damage occurs

- foreseeability of court decisions
- ensure a reasonable balance between the interests of  
the person claimed to be liable and  
the person who has sustained damage

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Important distinctions in Art (4) 1.:

- **the place where the damage occurs**

*irrespective of the country in which*

- the place where the event giving rise to the damage occurred
- the place where the indirect consequences of that event occur.

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## ECJ Practice

C-412/10 Homawoo  
C-173/11 Football Dataco and Others  
C-45/13 Kainz

C-240/14 Eleonore Prüller-Frey  
C-359/14 ERGO Insurance and Gjensidige Baltic  
C-191/15 Verein für Konsumenteninformation vs Amazon s.a.r.l.  
C-350/14 Florin Lazar s Allianz Spa

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## Corrective mechanism in the Art 4.

### **Art 4.(2)**

the person liable and the victim of the damage have their

***habitual residence in the same country:***

the law of that country is applicable.

**Art 4.(3)** “escape clause” When it clear from all circumstances that the delict is ***manifestly most closely connected with a country other*** that indicated the Art (4)1. and Art 4.(2)

(e.g.: pre-existing relationship between the parties, such as a contract)

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## Art. 5.- Art.9.

Specific rules for reasonable balance:

- product liability
- unfair competition and acts restricting free competition
- environmental damage
- infringement of IPR's
- industrial actions

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## Art. (5): Product liability

Non-contractual liability (!)

operating as a "cascade"

strict sequence

an exception identified to all rules – (see Art. 4.(3) )

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the person sustaining the damage/liable person

are resident in the same country at the time when the damage occurred, the law of that country shall apply - see Art.4(2)

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Without this common habitual residence:

The law of the country

(a)-where the person who sustaining the damage has **habitual residence**, if the product **marketed** there

(b)- in which the product was **acquired**, if the product was **marketed** in that country

(c)- in which the **damage occurred**, if the product was **marketed** in that country

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Two escape clauses:

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).

manifestly more closely connected with a country other than that indicated in paragraph (1)

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Questions:

-“marketed”

-“was acquired”

-“same type of product”

Directive 85/374/EEC — practice of ECJ

Marketed: put into circulation - when it leaves the production process operated by the producer and **enters a marketing process in the form in which it is offered to the public in order to be used or consumed**. It is not generally important in that regard that the product is sold directly by the producer to the user or to the consumer or that the sale is carried out as part of a distribution process involving one or more suppliers.(C-127/04 O'Bryan case)

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## Art.6.: Unfair competition and acts restricting free competition

- **where** competitive relations or the collective interests of consumers are ( or are likely to be) **affected**
- if there is **only one specific competitor**: general rule → **Art. 4**
- more countries are affected: the **law of the court seised**, provided that the market in that Member State is amongst those **directly and substantially** affected by these acts

No agreement accepted under the Art. 14!!

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## Art.7.: Environmental damages

The claimant's choice:

- Art. 4. (1) general rule
- on the law of the country in which the event giving rise to the damage occurred

meaning of the environmental damage: Preamble. (24)

time of choice: ruled by national laws

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→ Article 191(2) TFEU

→ Articles 1 and 8(3) of Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage – not applicable to cases of personal injury, to damage to private property or to any economic loss and does not affect any right regarding these types of damages.

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## Intellectual property rights

What is IPR? → Preamble. (26) defines

“for instance”: copyright, related rights, the sui generis right for the protection of databases and industrial property rights (e.g.: software).

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Art. 9.(1)

the law of the country for which protection is claimed - Lex loci protectionis – well-known international rule

Art.9. (2) unitary Community intellectual property right:  
law of the country in which the act of infringement was committed

Art 9. (3) No agreement accepted under the Art. 14!!

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infringements of copyright via the internet and the traditionally territorial approach vs. forum shopping

ECJ case-law connected with the 44/2011 (now 1215/2015) Regulation:

- where the content was placed online
- courts of the Member State at which the website aims its activity
- the centre of the author's interest (eDate Advertising and Martinez)

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## Industrial action

the law of the country where the action is to be, or has been taken

Or Art 4.(2) - common habitual residence in the same country: law of this country

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## UNJUST ENRICHMENT, NEGOTIORUM GESTIO AND CULPA IN CONTRAHENDO

“special rules where damage is caused by an act other than a tort/delict”

Rome I. Art 1. 2. (i) : obligations arising out of dealings prior to the conclusion of a contract are excluded

Rome II. Preamp. (7): consistency with the instruments dealing with the law applicable to contractual obligations.

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## Unjust enrichment

- common principles in the Member States

ECJ case-law: C-68/79, C-47/0, C-259/87, C-102/15  
(tax and Committee support cases)

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## Art.10 Unjust enrichment

- (1) there is a closely connected relationship existing between the parties – the law that governs this relationship
- (2) common habitual residence (when the event giving rise to unjust enrichment occurs)
- (3) where the unjust enrichment took place
- (4) manifestly close connection instead of (1) (2) (3)

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## Art.11 Negotiorum gestio

Five conditions – Masdar case T-333/03

Art. 11:

1. there is a closely connected relationship existing between the parties – the law that governs this relationship
2. common habitual residence (when the event giving rise to unjust enrichment occurs)
3. where act was performed
4. manifestly close connection instead of (1) (2) (3)

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## Art.12 Culpa in contrahendo

Autonomous concept (Preamble. 30)

- includes the violation of the duty of disclosure and the breakdown of contractual negotiations
- direct link needed
- e.g.: contract is being negotiated and a person suffers personal injury → Article 4

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Art. 12.

1. the law that applies to the contract or that would have been applicable to it had it been entered into

2.

a) the law of the country **in which the damage occurs**

b) if the parties have **common habitual residence** in the same country at the time when the event giving rise to the damage occurs, the law of that country

c) **manifestly close connection** instead of a) and b)

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