Reviewing a Review, or: What is the meaning of Article 4(1) Rome II?

The 80's British pop band *Prefab Sprout* once recorded a song called „Electric Guitars", dealing with the career of the Beatles, which contained the line: „We were quoted out of context – it was great!" Being quoted out of context in a review, however, is an entirely different and less pleasant matter. In a recent issue of Lloyd's Maritime and Commercial Law Quarterly (2013, pp. 272–274), *Adrian Briggs* from Oxford University criticizes my commentary on Article 4 of the Rome II Regulation (in: *Calliess* (ed.), Rome Regulations, Alphen aan den Rijn, 2011) as follows (p. 273):

„The book is at its best when the reader is looking for an answer to a precise question, such as whether the particular contract with which he is dealing, and which does not contain an express choice of law, falls within any the specific contracts listed in Art. 4(2) of the Rome I Regulation, or whether the particular kind of assignment, or particular right to be assigned, falls within the choice of law rule in Art. 14 of the same Regulation, and so on. There are, of course, odd points with which one is simply bound to disagree. One such is the assertion, in relation to the Rome II Regulation, that the said instrument "is rather conservative, in giving the *lex loci delicti* pride of place as the general rule for torts" (p. 404). It is not the first time this kind of sentiment has been heard, but it is simply not true, and credibility is neither gained nor given by advancing it. The most striking thing about Art. 4, as it was about earlier English legislation, is that it saves one from the gymnastic pain of having to decide where a cross-border tort was committed: to look for the place of the tort is, in a significant number of cases, to look for something which is not there. Article 4 accordingly places its emphasis on the place where the damage occurs. It is not helpful to pretend that this is a rule which it manifestly is not. Indeed, the commentary makes no more of the assertion set out above; it is still a pity that it was there at all.
It might be said that the presentation of arguments is still more German than it is delocalised. For example, the elucidation of the country in which the damage occurs (which is the proper reading of Art.4(1)) states, at p. 406, that the legislation reflects something which is rendered in German as *Erfolgsort*. No

doubt it does. But for the non-German reader, the more helpful starting point would surely be to go to the substantial jurisprudence of the European Court in relation to Art. 5(3) of the Brussels I Regulation. This is soon done, but putting it after the German law point seems wrong. Certainly, when one gets there the analysis of the European material is good and clear, but one might still have thought that this, rather than German understanding of damage and its location, should have been presented as the primary source material. It must be said, however, that the citation of material from sources outside Germany is extraordinarily impressive; and it is, of course, hard not to offer lessons from one's own law where these appear to be instructive. But there are still advantages in trying, in this context, to treat the European law source material as the first resource, and anything generated by national law as ancillary only."

Briggs' first point seems to be that my commentary erroneously tries to assert that the Rome II Regulation clings to the primacy of the place where the tortfeasor acted (place of conduct). Of course, such a statement would be utterly nonsensical. Read in context, however, the incriminated section merely points out that the systematic position of Art. 4(1) Rome II as a general rule must be put into perspective when viewing the more complex structure of the Regulation. The whole section reads as follows:

„Contrary to earlier drafts (*see* mn. 12), the final Rome II Regulation is rather conservative in giving *lex loci delicti* pride of place as the 'general rule' for torts. In fact, *lex loci delicti* is, for logical and systematic reasons, rather a **subsidiary rule**: It applies only if the parties have not chosen the applicable law (Article 14), if there is no manifestly closer connection, for example, because of a contract between the parties (Article 4(3)) and if there is no common habitual residence of the parties (Article 4(2)) [footnotes omitted]".

I have difficulty in understanding what should be wrong about this analysis concerning the obvious, not to say trivial, discrepancy between the numerical position of Art. 4(1) in the Regulation and its real importance for the choice-of-law process. *Briggs*, however, seems to be more infuriated by what he perceives as my incorrect use of "lex loci *delicti*" as encompassing the lex loci *damni* (and not only the law in force at the place of conduct). In this regard, however, the text merely follows the understanding of the term as it was used by the European Commission when it drafted the Rome II Regulation. In its Explanatory Memorandum on the 2003 draft, which already opted for the place of damage as

the basic connecting factor, the Commission points out explicitly: "The Commission's objectives in confirming [!] the *lex loci delicti commissi* rule [!] are to guarantee certainty in the law and to seek to strike a reasonable balance between the person claimed to be liable and the person sustaining the damage. The solutions adopted here also reflect recent developments in the Member States' conflict rules" (COM [2003]427 final, p. 11). The fact that the European legislature saw lex loci damni merely as a more precise, uniform definition of the place where a harmful event occurred rather than an antithetical novelty is also supported by Recitals 15 and 16 of the final Regulation. Being a non-native speaker, I concede that I would accept any criticism referring to an idiosyncratic use of established English (or, in this case, Latin) legal terms. In their treatise „The Private International Law of Obligations", 3rd ed. 2009, para. 18–007, however, *Richard Plender & Michael Wilderspin* state as well: „Article 4(1) [Rome II] thus represents a refined version of the classic *lex loci delicti commissi* rule [!] which has always been applied in one way or another in all Member States." Thus, with due respect for my learned colleague *Adrian Briggs*, I still think that the section he strongly criticizes as pitiful is correct both in its wording and its substance.

Briggs' second point of concern refers to my seemingly parochial preference for quoting German sources rather than genuine European material. Again, the section that he criticizes is far more nuanced when it is read in context:

„Although the language of Article 4(1) Rome II is rather complex, defining the place of injury as 'the country in which the damage occurs … irrespective of the country or the countries in which the indirect consequences of that event occur', the explicit exclusion of 'indirect consequences' makes clear that the real connecting factor is not the place where mere pecuniary damage was suffered ('I suffered the damage in my pocket'),[35] but the place of injury, the *Erfolgsort* in the traditional German terminology.[36]"

The footnote 35 explicitly refers to the rejection of a so-called money pocket rule under Art. 5(3) of the Brussels I Regulation. Moreover, the section *Briggs* criticizes is actually preceded [!] by a paragraph (marginal number 13) which draws the reader's attention to the "settled case law of the ECJ" on Art. 5(3) Brussels I. Apart from that, even the Commission, when drafting Rome II, occasionally referred to established German legal terms, for instance in COM [2003]427 final, p. 11: "The rule entails, where damage is sustained in several

countries, that the laws of all the countries concerned will have to be applied on a distributive basis, applying what is known as *‚Mosaikbetrachtung‘* in German law.“ This explanation shows that the Commission did not legislate on a clean slate, but was very aware of the experience gained under former domestic approaches to choice of law in torts. Thus, making the reader familiar with some established German legal terms and their background might actually be helpful in understanding some ideas underlying the Rome II Regulation.

For other, more balanced reviews of the Commentary, see, for example, *Matteo Fornasier*, Zeitschrift für Europäisches Privatrecht (ZEuP) 20 (2012), p. 676 et seq. and *Xandra Kramer*, Common Market Law Review 51 (2014), pp. 335-337. By the way: A new edition of the Commentary is forthcoming in 2015. In addition to the Rome I and II Regulations, Rome III will be covered as well. Stay tuned!