EAPIL-BIICL Seminar on the Rome II Regulation

On 2 December 2022, from 4 pm to 5.30 pm (MET), the European Association of Private International Law (EAPIL) will hold a joint Seminar with the British Institute of International and Comparative Law (BIICL). The Seminar will focus on the review of the Rome II Regulation and will, in this context, shed light on the Study that was prepared in 2021 by BIICL and Civic Consulting to support the preparation of the Commission report on the Regulation's application. The seminar will focus on general issues as well as a selection of specific subjects.

Programme

4.00 pm: Introduction – Overview of the Study

Constance Bonzé, BIICL (UK) and Eva Lein, BIICL (UK)/University of Lausanne (Switzerland)

4.15 pm: Focus I – Financial Loss

Xandra Kramer, University of Rotterdam (Netherlands)

4.25 pm: Focus II – Artificial Intelligence

Martin Ebers, University of Tartu (Estonia)

4.35 pm: A View from Practice

Marie Louise Kinsler, KC, 2 Temple Gardens, London (UK)

4.45 pm: Discussion

Participation and Registration

The Seminar will take place via Zoom. Registration is possible via this link. Registered participants will receive all necessary information one day prior to the event (i.e. on 1 December 2022).

Background

The EAPIL (Virtual) Seminar Series wishes to contribute to the study and development of (European) Private International Law through English-language seminars on topical issues. It will provide an easily accessible and informal platform for the exchange of ideas – outside the bi-annual EAPIL conferences. At the same time, it will serve as a means for EAPIL members to connect with other EAPIL members and non-members.

Save the date: EAPIL Seminar on the Rome II Regulation on December 2

On Friday, December 2, at 4 pm, the European Association of Private International Law (EAPIL) will hold an Online-Seminar on the Rome II Regulation. The Seminar will shed light on the Study that was prepared in 2021 by the British Institute of International and Comparative Law (BIICL) in consortium with Civic Consulting to support the preparation of the report on the application of the Rome II Regulation.

Speakers will be:

- Eva Lein, BIICL (UK)/University of Lausanne (Switzerland)
- Constanze Bonzé, BIICL (UK)

- Xandra Kramer, University of Rotterdam (Netherlands)
- Martin Ebers, University of Tartu (Estonia)
- Marie Louise Kinsler, 2 Temple Gardens, London (UK)

More information (including a detailed program and registration information) will be made available via this blog in November.

Study Rome II Regulation published

The long-awaited Rome II Study commissioned by the European Commission, evaluating the first ten years of the application of the Rome II Regulation on the applicable law to non-contractual obligations, has been published. It is available here. The Study was coordinated by BIICL and Civic and relies on legal analysis, data collection, a consultation of academics and practitioners, and national reports by rapporteurs from the Member States. The extensive study which also includes the national reports, discusses the scope of the Regulation and the functioning of the main rules, including the location of damages under Art. 4 Rome II, which is problematic in particular in cases of prospectus liability and financial market torts. As many of our readers will know, one of the issues that triggered debate when the Rome II Regulation was negotiated was the infringement of privacy and personality rights, including defamation, which topic was eventually excluded from the Regulation. While it has been simmering in the background and caught the attention of the Parliament earlier on, this topic is definitely back on the agenda with the majority opinion being that an EU conflict of laws rule is necessary.

Three topics that the European Commission had singled out as areas of special interest are: (1) the application of Rome II in cases involving Artificial Intelligence; (2) business and human rights infringements and the application of Art. 4 and – for environmental cases – Art 7; and (3) Strategic Lawsuits against Public Participation (SLAPPs). For the latter topic, which is currently also studied

by an expert group installed by the European Commission, the inclusion of a rule on privacy and personality rights is also pivotal.

The ball is now in the court of the Commission.

To be continued.

Personal Injury and Article 4(3) of Rome II Regulation

This blog post is a follow up to my earlier announcement on the decision of Owen v Galgey [2020] EHWC 3546 (QB).

Introduction

Cross border relations is bound to generate non-contractual disputes such as personal injury cases. In such situations, the law that applies is very important in determining the rights and obligations of the parties. The difference between two or more potentially applicable laws is of considerable significance for the parties involved in the case. For example a particular law may easily hold one party liable and/or provide a higher quantum of damages compared to another law. Thus, a preliminary decision on the applicable law could easily facilitate the settlement of the dispute between the parties without even going to trial.

Rome II Regulation[1] governs matters of non-contractual obligations. Article 4 of Rome II applies to general torts/delicts such as personal injury cases. It provides that:

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.
3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

In the recent case of *Owen v Galgey & Ors.,*[2] the English High Court was faced with the issue of applying Article 4 of Rome II to a personal injury case. This comment disagrees with the conclusion reached by the High Court Judge in displacing English law under Article 4(2) of Rome II, and applying French law under Article 4(3) of Rome II.

Facts

The Claimant is a British citizen domiciled and habitually resident in England who brought a claim for damages for personal injury sustained by him as result of an accident in France on the night of April 3rd 2018, when he fell into an empty swimming pool which was undergoing works at a villa in France – a holiday home owned by the First Defendant, whose wife is the Second Defendant. The First and Second Defendants are also British citizens who are domiciled and habitually resident in England. The Third Defendant is a company domiciled in France, and the insurer of the First and Second Defendants in respect of any claims brought against them in connection with the Villa. The Fourth Defendant is a contractor which was carrying out renovation works on the swimming pool at the time of the accident, and the Fifth Defendant is the insurer of the Fourth Defendant. The Fourth and Fifth Defendants are both companies which are domiciled in France.

It was common ground between the parties that French law applied to the Claimant's claims against the Fourth and Fifth Defendants. But there was a dispute at to the applicable law in relation to his claims against the First to Third

Defendants. These Defendants contended that, by operation of Article 4(2) of Rome II, English law applies because the Claimant and the First and Second Defendants are habitually resident in England. However, the Claimant contended that French law applied by operation of Article 4(3) the Rome II because, he says, it is clear that the tort in this case is manifestly more closely connected with France than it is with England.

It was common ground that French law applied under Article 4(1) of Rome II because the direct damage occurred in France in this case; and English law applied under Article 4(2) of Rome II because the Claimant and First and Second Defendants were all habitually resident in England. The legal issue to be resolved was therefore whether under Article 4(3) the tort/delict was manifestly more closely connected to France than it is with England.

Decision

In a nutshell, Linden J held that French law applied under Article 4(3) of Rome II. The Court considered Article 4 of Rome II as a whole and read it in conjunction with both the Explanatory Memorandum[3] and Recitals to Rome II.[4]

Linden J held that Article 4(2) created a special rule which automatically displaced Article 4(1), and Article 4(2) was intended to satisfy the legitimate expectation of the parties.[5] On this basis, he observed that Article 4(2) could only apply in two party cases (only one victim and one tortfeasor), and not multi-party situations.[6] Linden J explicitly disagreed with an earlier decision of Dingemans J in *Marshall v Motor Insurers' Bureau* & *Ors*[7] that held that Article 4(2) applied in multi-party situations.[8]

Linden J considered the relevant circumstances that could give rise to applying Article 4(3) in this case in the following chronological order:

1. the desire for a single law to govern the whole case involving the Claimant and the First to Fifth Defendants;[9]
2. the circumstances relating to all the parties in the case;[10]
3. the place of direct damage under Article 4(1);[11]
4. the habitual residences of the parties, including where any insurer defendants are registered at the time of the tortious incident and when

the damage occurs;[12]
5. the habitual residence of the Claimant at the time of the consequences of the tort, including any consequential losses;[13]
6. the nationalities of the parties; [14] and
7. the fact that the parties have a pre-existing relationship in or with a particular country.[15]

Linden J held, following previous English decisions,[16] that the burden of proof was on the party that seeks to apply Article 4(3).[17] He held that Article 4(3) could only be applied as an exceptional remedy where a clear preponderance of factors supports its application.[18] However he observed that the facts of the case do not have to be unusual for Article 4(3) to apply, though Article 4(3) was intended to operate in a clear and obvious case.[19]

After considering the submission of the parties in the case, Linden J preferred the Claimant's submission that Article 4(3) applied in this case. In his words: "France is where the centre of gravity of the situation is located and the preponderance of factors clearly points to this conclusion. This conclusion also accords with the legitimate expectations of the parties."[20]

Linden J gave great weight to the place of direct damage. In his words:

"The tort/delict occurred in France, as I have noted. This is also where the injury or direct damage occurred. The dispute centres on a property in France and it concerns structural features of that property and how the First, Second and Fourth Defendants dealt with works on a swimming pool there. Although these defendants deny that there was fault on the part of any of them, the First and Second Defendants say that the Fourth Defendant was responsible if the pool presented a danger and the Fourth Defendant says that they were. The allegations of contributory negligence/fault also centre on the Claimant's conduct whilst at the Villa in France.

The First and Second Defendants also had a significant and long-standing connection to France, the accident occurred on their property…

…the situation in relation to the swimming pool which is said to have been the cause of the accident was firmly rooted in France and it resulted from works which were being carried out by the Fourth Defendant as a result of it being contracted to do so by the First and Second Defendants. The liability of the First

and Second Defendants, if any, will be affected by how they dealt with that situation, including by evidence about their dealings with the Fourth Defendant. That situation had no significant connections with England other than the nationality and habitual place of residence of the First and Second Defendants."[21]

Linden J also gave great weight to the desire to apply a single law to govern the whole case against the First to Fifth Defendants.[22] In his words:

"…the works were carried out by a French company pursuant to a contract with them which is governed by French law. Their insurer, the Third Defendant, is a French company and they are insured under a contract which is governed by French law… It is also common ground that the claim against the Fourth Defendant, and therefore against the Fifth Defendant, also a French company, is entirely governed by French law and will require the court to decide whether the Fourth Defendant or, at least by implication, the First and Second Defendants were "custodians" of the property for the purposes of French law."[23]

On the other hand Linden J did not give great weight to the common habitual residence, common nationalities and common domiciles of the Claimant and First and Second Defendants, and the place of consequential loss which pointed to England. Linden J did not consider the pre-existing relationship between the Claimant and First and Second Defendants to be a strong connecting factor in favour of English law applying in this case. He did not regard their relationship as contractual but one that appears to be "the agreement resulted from a casual conversation between social acquaintances in the context of mutual favours having been done in the past."[24] He considered that if there was a contract between the parties, he would have held that French law applied under Article 4(3) of Rome I Regulation[25] because the parties mutually performed their obligations in France.

In the final analysis, Linden J held as follows:

"To my mind the tort/delict in this case is much more closely connected to the state of the swimming pool which, as I have said, was part of a property in France and resulted from the French law contract between the First and Second Defendants and the Fourth Defendant. If any of the Defendants is liable, that liability will be closely connected with this contract. This point, taken in

combination with the other points to which I have referred, in my view clearly outweighs the existence of any contract with the Claimant relating to the Villa, even if I had found there to be a contractual relationship and even if it was governed by English law.

Similarly, although I have taken into account the nationality and habitual place of residence of the Claimant and the First and Second Defendants, these do not seem to me to alter the conclusion to which I have come. I have also taken into account the fact that the consequences of the accident have to a significant extent been suffered by the Claimant whilst he was in England, but in my view the other factors to which I have referred clearly outweigh this consideration.

I therefore propose to declare that the law applicable to the claims brought by the Claimant against the First, Second and Third Defendants is French law."[26]

Comment

Owen is the second English case to utilise Article 4(3) as a displacement tool.[27] Interestingly, *Owen* and *Marshall* are both cases where Article 4(3) was used to trump Article 4(2) in order to restore the application of Article 4(1). These judicial decisions put to rest any contrary view that Article 4(3) cannot be used to restore the application of Article 4(1), when Article 4(2) automatically displaces Article 4(1). In this connection, I agree with the judges' conclusion on the basis that Article 4(3) operates as an escape clause to both Article 4(1)&(2). Such an approach also honours the requirement of reconciling certainty and flexibility in Recital 14 to Rome II. A contrary approach will unduly circumscribe the application of Article 4(3) of Rome II.

I do not agree with Linden J that Article 4(2) of Rome II only applies in two party cases (one victim and one tortfeasor) and does not apply in multi-party cases. I prefer the contrary decision of Dingemans J in *Marshall*. Interpreting Article 4(2) as being only applicable to two party cases is a very narrow interpretation. Moreover, the fact that Article 4(2) is a strong exception to Article 4(1) does not mean that Article 4(2) should be unduly circumscribed. Article 4(2) should not be applied mechanically or without thought. It must be given some common sense interpretation that suits the realities of cross-border relations in torts.

Moving to the crux of the case, I disagree with the conclusion reached by Linden J that French law applied in this case. Applying the test of Article 4(3), the tort was not *manifestly* more closely connected with France. In other words, it was not obvious that Article 4(3) outweighed the application of Article 4(2). To my mind, the arguments between the opposing parties were evenly balanced as to whether the tort was *manifestly* more closely connected with France. Article 4(2) in this case, which pointed to English law, was also corroborated by the common domiciles and common nationalities of the Claimant and First and Second Defendants which should have been regarded as a strong connecting factor in this case. In addition, the non-contractual pre-existing relationship between the Claimant and First and Second Defendants, and consequential loss pointed to England, though I concede that these factors are not very strong in this case.

It is important to stress that Article 4(2) of Rome II is a fixed rule and not a presumption of closest connection as it was under Article 4(2) of the Rome Convention.[28] Once Article 4(2) of Rome II applies, it automatically displaces Article 4(1), except Article 4(3) regards the place of damage as *manifestly* more closely connected with another country. Linden J appeared to give decisive weight to the place of damage and the desire to apply a single law to all the parties in the case, but did not pay due regard to the fixed rule in Article 4(2) and the fact that it was corroborated by other factors such as the common nationalities and domiciles of the Claimant and First and Second Defendants involved in the case.

Conclusion

Owen presents another interesting case on the application of Article 4 of Rome II to personal injury cases. It is the second case an English judge would be satisfied that Article 4(3) should be utilised as a displacement tool. The use of the escape clause is by no means an easy exercise. It involves a degree of evaluation and discretion on the part of the judge. Indeed, Article 4(3) is very fact dependent. In this case, Linden J preferred the argument of the Claimant that French law applied in this case under Article 4(3). From my reading of the case, I am not convinced that this was a case where Article 4(3) *manifestly* outweighed Article 4(2). It remains to be seen whether the First, Second and Third Defendants will appeal the case, proceed to trial or settle out of court.

[1]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 L199/40 ("Rome II"). It takes effect in courts of Member States only for events giving rise to damage occurring after 11 January 2009, as decided by the Court of Justice of the European Union (CJEU) in Case C-412/10 *Homawoo* EU:C:2011:747 [37].

[2] [2020] EWHC 3546 (QB)

[3]Explanatory memorandum from the Commission, accompanying the Proposal for Rome II, COM(2003) 427final (Explanatory Memorandum).

[4] *Ibid* [15] – [24].

[5] *Ibid* [26] – [27].

[6] *Ibid* [27] – [29], [35]. However, the argument as to whether Article 4(2) applied only in two party situations was not put forward before Linden J.

[7] [2015] EWHC 3421 (QB) [17].

[8] *Owen* (n 2) [35].

[9] *Ibid* [36] – [38]. In this connection, Linden J considered and followed the decision in of Dingemans J in *Marshall* (n 7) [18].

[10]*Owen* (n 2) [39] – [45]. In this connection, Linden J considered and followed the decision of Cranston J in *Pickard v Marshall* & *Ors* [2017] EWCA Civ 17 [14] – [15].

[11]*Owen* (n 2) [46]. Linden J followed *Winrow v Hemphhill* & *Anor.* [2014] EWHC 3164 [43], and Dingemans J in *Marshall* (n 7) [19].

[12] *Owen* (n 2) [48]

[13] *Ibid* [49]. Linden J followed *Winrow* (n 11) [39]&[43] and *Stylianou v Toyoshima* [2013] EWHC 2188 (QB). At paragraph 50 Linden J stated that less weight was to be given to this factor.

[14] *Ibid* [51]. Linden J followed *Winrow* (n 11) [54]&[55] and *Marshall* (n 7) [22].

[15] *Ibid* [52] – [[56]

[16] *Winrow* (n 11) [16] and *Marshall* (n 7) [20].

[17] *Owen* (n 2) [57].

[18]*Ibid* [58]

[19] *Ibid* [61].

[20] *Ibid* [74].

[21]*Ibid* [75]-[77]

[22] Indeed, it was common ground in this case that the contract of insurance between the First, Second and Third Defendants was governed by French law; the contract between the First Defendant and the Fourth Defendant was governed by French law; the contract of insurance between the Fourth and Fifth Defendants was governed by French law; and the Claimant's claims against the Fourth and Fifth Defendants are governed by French law. *Ibid* [12]

[23]*Ibid* [76].

[24] *Ibid* [78].

[25]Regulation (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations [2008] OJ L177/6 ("Rome I").

[26] *Ibid* [81] – [83].

[27] *Marshall* (n 7) was the first case to successfully utilise escape clause as a displacement tool.

[28][1980] OJ L266.

Álvarez-Armas on potential human-rights-related amendments to the Rome II Regulation (II): The proposed Art. 6a; Art. 7 is dead, long live Article 7?

Eduardo Álvarez-Armas is Lecturer in Law at Brunel University London and Affiliated Researcher at the Université Catholique de Louvain. He has kindly provided us with his thoughts on recent proposals for amending the Rome II Regulation. This is the second part of his contribution; a first one on the law applicable to strategic lawsuits against public participation can be found here.

Over the last few months, the European Parliament´s draft report on corporate due diligence and corporate accountability (2020/2129(INL)) and the proposal for an EU Directive contained therein have gathered a substantial amount of attention (see, amongst others, blog entries by Geert Van Calster, Giesela Rühl, Jan von Hein, Bastian Brunk and Chris Thomale). As the debate is far from being exhausted, I would like to contribute my two cents thereto with some further (non-exhaustive and brief) considerations which will be limited to three selected aspects of the proposal´s choice-of-law dimension.

1. **A welcome but not unique initiative (Comparison with the UN draft Treaty)**

Neither Article 6a of Rome II nor the proposal for an EU Directive are isolated initiatives. A so-called draft Treaty on Business and Human Rights ("*Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises*") is currently being prepared by an *Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights*, established in 2014 by the United Nation´s Human Rights Council. Just like it is the case with the EP´s proposal, the 2nd revised UN draft Treaty (dated 6th August 2020) (for comments on the applicable law aspects of the 1st revised draft, see

Claire Bright´s note for the BIICL here) contains provisions on international jurisdiction (Article 9, "*Adjudicative Jurisdiction*") and choice of law (Article 11, "*Applicable law*").

Paragraph 1 of the latter establishes the *lex fori* as applicable for "*all matters of substance* […] *not specifically regulated*" by the instrument (as well as, quite naturally, for procedural issues). Then paragraph 2 establishes that "*all matters of substance regarding human rights law relevant to claims before the competent court may, upon the request of the victim of a business-related human rights abuse or its representatives, be governed by the law of another State where: a) the acts or omissions that result in violations of human rights covered under this (Legally Binding Instrument) have occurred; or b) the natural or legal person alleged to have committed the acts or omissions that result in violations of human rights covered under this (Legally Binding Instrument) is domiciled*".

In turn, the proposed Article 6a of Rome II establishes that: "[…] *the law applicable to a non-contractual obligation arising out of the damage sustained shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred or on the law of the country in which the parent company has its domicile or, where it does not have a domicile in a Member State, the law of the country where it operates.*" (The proposed text follows the suggestions made in pp. 112 ff of the 2019 Study requested by the DROI committee (European Parliament) on Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries.)

Putting aside the fact that the material scopes of the EP's and the UN's draft instruments bear differences, the EP´s proposal features a more ambitious choice-of-law approach, which likely reflects the EU´s condition as a "Regional integration organization", and the (likely) bigger degree of private-international-law convergence possible within such framework. Whichever the reasons, the EP´s approach is to be welcomed in at least two senses.

The first sense regards the clarity of victim choice-of-law empowerment. While in the UN proposal the victim is allowed to "*request*" that a given law governs "*all matters of substance regarding human rights law relevant to claims before the competent court*", in the EP´s proposal the choice of the applicable law unequivocally and explicitly belongs to the victim (the "*person seeking*

compensation for damage"). A cynical reading of the UN proposal could lead to considering that the prerogative of establishing the applicable law remains with the relevant court, as the fact that the victim may request something does not necessarily mean that the request ought to be granted (Note that paragraph 1 uses "*shall*" while paragraph 2 uses "*may*"). Furthermore, the UN proposal contains a dangerous opening to *renvoi*, which would undermine the victim´s empowerment (and, to a certain degree, foreseeability). Therefore, if the goal of the UN´s provision is to provide for *favor laesi*, a much more explicit language in the sense of conferring the choice-of-law prerogative to the victim would be welcomed.

2. **A more ambitious initiative (The "domicile of the parent" connection, and larger victim choice)**

A second sense in which the EP´s choice-of-law approach is to be welcomed is its bold stance in trying to overcome some classic "business & human rights" conundrums by including an ambitious connecting factor, the domicile of the parent company, amongst the possibilities the victim can choose from. Indeed, I personally find this insertion in suggested Art. 6a Rome II very satisfying from a substantive justice (*favor laesi*) point of view: inserting that very connecting factor in Art. 7 Rome II (environmental torts) is one of the main *de lege ferenda* suggestions I considered in my PhD dissertation (*Private International Environmental Litigation before EU Courts: Choice of Law as a Tool of Environmental Global Governance*, Université Catholique de Louvain & Universidad de Granada, 2017. An edited and updated version will be published in 2021 in Hart´s "Studies in Private International Law"), in order to correct some of the shortcomings of the latter. While not being the ultimate solution for all the various hurdles victims may face in transnational human-rights or environmental litigation, in terms of content-orientedness this connecting factor is a great addition that addresses the core of the policy debate on "business & human rights". Consequently, I politely dissent with Chris Thomale´s assertion that this connecting factor "*has no convincing rationale*". Moreover, I equally dissent from the contention that a choice between the *lex loci damni* and the *lex loci delicti commissi* is already possible via "*a purposive reading of Art. 4 para 1 and 3 Rome II*". For reasons I have explained elsewhere, I do not share this optimistic reading of Art. 4 as being capable of filling the transnational human-rights gap in Rome II. And even supposing that such interpretation was correct, as draft Art. 6a would

make explicit what is contended that can be read into Art. 4, it would significantly increase legal certainty for victims and tortfeasors alike (as otherwise some courts could potentially interpret the latter Article as suggested, while others would not).

Precisely, avoiding a decrease in applicable-law foreseeability seems to be (amongst other concerns) one of the reasons behind Jan von Hein´s suggestion in this very blog that Art. 6a´s opening of victim´s choice to four different legal systems is excessive, and that not only it should be reduced to two, but that the domicile of the parent should be replaced by its "habitual residence". Possibly the latter is contended not only to respond to systemic coherence with the remainder of Rome II, but also to narrow down options: in Rome II the "habitual residence" of a legal person corresponds only with its "*place of central administration*"; in Brussels I bis its "domicile" corresponds with either "*statutory seat*", "*central administration*" or "*principal place of business*" at the claimant´s choice. Notwithstanding the merits in system-alignment terms of this proposal, arguably, substantive policy rationales (*favor laesi*) ought to take precedence over pure systemic private-international-law considerations. This makes all the more sense if one transposes, *mutatis mutandis*, a classic opinion by P.A. Nielsen on the three domiciles of a corporation under the "Brussels" regime to the choice-of-law realm: "*shopping possibilities are only available because the defendant has decided to organise its business in this way. It therefore seems reasonable to let that organisational structure have* […] *consequences*" (P. A. NIELSEN, "Behind and beyond Brussels I – An Insider´s View", *in* P. DEMARET, I. GOVAERE & D. HANF [eds.], *30 years of European Legal Studies at the College of Europe [Liber Professorum 1973-74 – 2003-04]*, Cahiers du Collège d´Europe Nº2, Brussels, P.I.E.-Peter Lang, 2005, pp. 241-243).

And even beyond this, at the risk of being overly simplistic, in many instances, complying with four different potentially applicable laws is, actually, in alleged overregulation terms, a "false conflict": it simply entails complying only with the most stringent/restrictive one amongst the four of them (compliance with X+30 entails compliance with X+20, X+10 and X). Without entering into further details, suffice it to say that, while ascertaining these questions *ex post facto* may be difficult for victim´s counsel, it should be less difficult *ex ante* for corporate counsel, leading to prevention.

3. **A perfectible initiative (tension with Article 7 Rome II)**

Personally, the first point that immediately got my attention as soon as I heard about the content of the EP report´s (even before reading it) was the Article 6a *versus* Article 7 Rome II scope-delimitation problem already sketched by Geert Van Calster: when is an environmental tort a human-rights violation too, and when is it not? Should the insertion of Art. 6a crystallize, and Art. 7 remain unchanged, this question is likely to become very contentious, if anything due to the wider range of choices given by the draft Art. 6a, and could potentially end before the CJEU.

What distinguishes say *Mines de Potasse* (which would generally be thought of as "common" environmental-tort situation) from say *Milieudefensie v. Shell* 2008 (which would typically fall within the "Business & Human Rights" realm and not to be confused with the 2019 *Milieudefensie v. Shell* climate-change litigation) or *Lluiya v. RWE* (as climate-change litigation finds itself increasingly connected to human-rights considerations)? Is it the geographical location of tortious result either inside or outside the EU? (When environmental torts arise outside the EU from the actions of EU corporations there tends to be little hesitation to assert that we are facing a human-rights tort). Or should we split apart situations involving environmental damage *stricto sensu* (pure ecological damage) from those involving environmental damage *lato sensu* (damage to human life, health and property), considering only the former as coming within Art. 7 and only the latter as coming within Art. 6a? Should we, alternatively, introduce a *ratione personae* distinction, considering that environmental torts caused by corporations of a certain size or operating over a certain geographical scope come within Art. 6a, while environmental torts caused by legal persons falling below the said threshold (or, rarely, by individuals) come within Art. 7?

Overall, how should we draw the boundaries between an environmental occurrence that qualifies as a human-rights violation and one that does not in order to distinguish Art. 6a situations from Art. 7 situations? The answer is simple: we should not. We should consider every single instance of environmental tort a human-rights-relevant scenario and amend Rome II accordingly.

While the discussion is too broad and complex to be treated in depth here, and certainly overflows the realm of private international law, suffice it to say that (putting aside the limited environmental relevance of the Charter of Fundamental Rights of the EU) outside the system of the European Convention of Human Rights (ECHR) there are clear developments towards the recognition of a human

right to a healthy or “satisfactory” environment. This is already the case within the systems of the American Convention on Human Rights (Art. 11 of the Additional Protocol to the Convention in the area of Economic, Social and Cultural Rights) and the African Charter on Human and People´s Rights (Art. 24). It is equally the case as well in certain countries, where the recognition of a fundamental/constitutional right at a domestic level along the same lines is also present. And, moreover, even within the ECHR system, while no human right to a healthy environment exists as such, the case-law of the European Court of Human Rights has recognized environmental dimensions to other rights (Arts. 2 and 8 ECHR, notably). It may therefore be argued that, even under the current legal context, all environmental torts are, to a bigger or lesser extent, human-rights relevant and (save those rare instances where they may be caused by an individual) “business-related”.

Ultimately, if any objection could exist nowadays, if/when the ECHR system does evolve towards a broader recognition of a right to a healthy environment, there would be absolutely no reason to maintain an Art. 6a *versus* Art. 7 distinction. Thus, in order to avoid opening a characterization can of worms, it would be appropriate to get “ahead of the curve” in legislative terms and, accordingly, use the proposed Art. 6a text as an all-encompassing new Art. 7.

There may be ways to try to (artificially) delineate the scopes of Articles 7 and 6a in order to preserve a certain *effet utile* to the current Art. 7, such as those suggested above (geographical location of the tortious result, size or nature of the tortfeasor, type of environmental damage involved), or even on the basis of whether situations at stake “trigger” any of the environmental dimensions of ECHR-enshrined rights. But, all in all, I would argue towards using the proposed text as a new Art. 7 which would comprise both non-environmentally-related human-rights torts and, comprehensively, all environmental torts.

Art. 7 is dead, long live Article 7.

Álvarez-Armas on potential human-rights-related amendments to the Rome II Regulation (I): The law applicable to SLAPPs

Eduardo Álvarez-Armas is Lecturer in Law at Brunel University London and Affiliated Researcher at the Université Catholique de Louvain. He has kindly provided us with his thoughts on recent proposals for amending the Rome II Regulation. This is the first part of his contribution; a second one on corporate social responsibility will follow in the next days.

On December the 3rd, 2020, the EU commission published a call for applications, with a view to putting forward, by late 2021, a (legislative or non-legislative) initiative to curtail "*abusive litigation targeting journalists and civil society*". As defined in the call, strategic lawsuits against public participation (commonly abbreviated as SLAPPs) "*are groundless or exaggerated lawsuits, initiated by state organs, business corporations or powerful individuals against weaker parties who express, on a matter of public interest, criticism or communicate messages which are uncomfortable to the litigants*". As their core objective is to silence critical voices, SLAPPs are frequently grounded on defamation claims, but they may be articulated through other legal bases (as "*data protection, blasphemy, tax laws, copyright, trade secret breaches*", etc) (p. 1).

The stakes at play are major: beyond an immediate limitation or suppression of open debate and public awareness over matters that are of significant societal interest, the economic pressure arising from SLAPPs can "drown" defendants, whose financial resources are oftentimes very limited. Just to name but a few recent SLAPP examples (For further review of cases throughout the EU see: Greenpeace European Unit [O. Reyes, rapporteur], "Sued into silence – How the

rich and powerful use legal tactics to shut critics up", Brussels, July 2020, p. 18ff): at the time of her murder in 2017, Maltese journalist Daphne Caruana Galizia was facing over 40 civil and criminal defamation lawsuits, including a 40-million US dollar lawsuit in Arizona filed by Pilatus Bank (Greenpeace European Unit [O. Reyes, rapporteur], pp. 9-12); in 2020, a one million euros lawsuit was introduced against Spanish activist Manuel García for stating in a TV program that the poor livestock waste management of meat-producing company "Coren" was the cause for the pollution of the As Conchas reservoir in the Galicia region.

In light of the situation, several European civil-society entities have put forward a model "*EU anti-SLAPP Directive*", identifying substantive protections they would expect from the European-level response announced in point 3.2 of the EU Commission´s "*European democracy action plan*". If it crystallized, an EU anti-SLAPP directive would follow anti-SLAPP legislation already enacted, for instance, in Ontario, and certain parts of the US.

Despite being frequently conducted within national contexts, it is acknowledged that SLAPPs may be "*deliberately brought in another jurisdiction and enforced across borders*", or may "*exploit other aspects of national procedural and private international law*" in order to increase complexities which will render them "*more costly to defend*" (Call for applications, note 1, p. 1) Therefore, in addition to a substantive-law intervention, the involvement of private international law in SLAPPs is required. Amongst core private-international-law issues to be considered is the law applicable to SLAPPs.

De lege lata, due to the referred frequent resort to defamation, and the fact that this subject-matter was excluded from the material scope of application of the Rome II Regulation, domestic choice-of-law provisions on the former, as available, will become relevant. This entails a significant incentive for forum shopping (which may only be partially counteracted, at the jurisdictional level, by the "*Mosaic theory*").

De lege ferenda, while the risk of forum shopping would justify by itself the insertion of a choice-of-law rule on SLAPPs in Rome II, the EU Commission´s explicit objective of shielding journalists and NGOs against these practices moreover pleads for providing a content-oriented character to the rule. Specifically, the above-mentioned "gagging" purpose of SLAPPs and their interference with fundamental values as freedom of expression sufficiently justify

departing from the neutral choice-of-law paradigm. Furthermore, as equally mentioned, SLAPP targets will generally have (relatively) modest financial means. This will frequently make them "weak parties" in asymmetric relationships with (allegedly) libeled claimants.

In the light of all of this, beyond conventional suggestions explored over the last 15 years in respect of a potential rule on defamation in Rome II (see, amongst other sources: Rome II and Defamation: Online Symposium), several thought-provoking options could be explored, amongst which the following two:

1st Option: Reverse mirroring Article 7 Rome II

A first creative approach to the law applicable to SLAPPs would be to introduce an Article 7-resembling rule, with an inverted structure. Article 7 Rome II on the law applicable to non-contractual obligations arising from environmental damage embodies the so-called "theory of ubiquity" and confers the prerogative of the election of the applicable law to the "weaker" party (the environmental victim). In the suggested rule on SLAPPs, the choice should be "reversed", and be given to the defendant, provided they correspond with a carefully drafted set of criteria identifying appropriate recipients for anti-SLAPP protection.

However, this relatively straightforward adaptation of a choice-of-law configuration already present in the Rome II Regulation could be problematic in certain respects. Amongst others, for example, as regards the procedural moment for performing the choice-of-law operation in those domestic systems where procedural law establishes (somewhat) "succinct" proceedings (i.e. with limited amounts of submissions from the parties, and/or limited possibilities to amend them): where a claimant needs to fully argue their case on the merits from the very first written submission made, which starts the proceedings, how are they meant to do so before the defendant has chosen the applicable law? While, arguably, procedural adaptations could be enacted at EU-level to avoid a "catch-22" situation, other options may entail less legislative burden.

2nd option: a post-Brexit conceptual loan from English private international law = double actionability

A more extravagant (yet potentially very effective) approach for private-international-law protection would be to "borrow" the English choice-of-law rule

on the law applicable to defamation: the so-called double actionability rule. As it is well-known, one of the core reasons why "*non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation*" were excluded from the material scope of the Rome II Regulation was the lobbying of publishing groups and press and media associations during the Rome II legislative process (see A. Warshaw, "Uncertainty from Abroad: Rome II and the Choice of Law for Defamation Claims"). With that exclusion, specifically, the English media sector succeeded in retaining the application by English courts of the referred rule, which despite being "*an oddity*" in the history of English law (*Vid*. D. McLean & V. Ruiz Abou-Nigm, *The Conflict of Laws,* 9th ed., Swett & Maxwell, 2016, p. 479), is highly protective for defendants of alleged libels and slanders. The double actionability rule, roughly century and a half old, (as it originated from *Philips v. Eyre* [*Philips v. Eyre* (1870) L.R. 6 Q.B. 1.] despite being tempered by subsequent case law) is complex to interpret and does not resemble (structurally or linguistically) modern choice-of-law rules. It states that:

"*As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England … Secondly, the act must not have been justifiable by the law of the place where it was done*" (*Philips v. Eyre*, p. 28-29).

The first of the cumulative conditions contained in the excerpt is usually understood as the need to verify that the claim is viable under English law (*Lex fori*). The second condition is usually understood as the need to verify that the facts would give rise to liability also under foreign law. Various interpretations of the rule can be found in academia, ranging from considering that once the two cumulative requirements have been met English law applies (*Vid*. Dicey, Morris & Collins, *The Conflict of Laws,* vol. II, 15th ed., Swett & Maxwell, 2012, pp. 2252-2270, para. 35-111), to considering that only those rules that exist simultaneously in both laws (English and foreign) apply, or that exemptions from liability from either legal system free the alleged tortfeasor (*Vid*. Cheshire, North & Fawcett, *Private International Law*, 15th ed., OUP, 2017, p. 885. Similarly, Dicey, Morris & Collins, *The Conflict of Laws,* vol. II, 15th ed., Swett & Maxwell, 2012, pp. 2252-2270, para. 35-128). Insofar as it is restrictive, and protective of the defendant, double actionability is usually understood as a "*double hurdle*"

(*Vid*. Cheshire, North & Fawcett, *Private International Law*, 15th ed., OUP, 2017, p. 885; D. McLean & V. Ruiz Abou-Nigm, *The Conflict of Laws*, 9th ed., Swett & Maxwell, 2016, p. 479) to obtaining reparation by the victim, or, in other words, as having to win the case "*twice in order to win* [only] *once*" (*Vid*. A. Briggs, *The Conflict of Laws*, 4th ed., Clarendon Law Series, OUP, 2019, p. 274). Thus, the practical outcome is that the freedom of speech of the defendant is preserved.

A plethora of reasons make this choice-of-law approach controversial, complex to implement, and difficult to adopt at an EU level: from a continental perspective, it would be perceived as very difficult to grasp by private parties, as well as going against the fundamental dogma of EU private international law: foreseeability. This does not, nevertheless, undermine the fact that it would be the most effective protection that could be provided from a private-international-law perspective. Even more so than the protection potentially provided by rules based on various "classic" connecting factors pointing towards the defendant´s "native" legal system/where they are established (as their domicile, habitual residence, etc).

Truth be told, whichever approach is chosen, a core element which will certainly become problematic will be the definition of the personal scope of application of the rule, i.e. how to precisely identify subjects deserving access to the protection provided by a content-oriented choice-of-law provision of the sort suggested (and/or by substantive anti-SLAPP legislation, for that matter). This is a very delicate issue in an era of "fake news".

The English High Court delivers an interesting decision on Article 4(3) of Rome II Regulation

Today, the English High Court in *Owen v Galgey* [2020] EHWC 3546 (QB) delivered a thorough and interesting decision on Article 4(3) of Rome II

Regulation, which is the general escape clause for Rome II. For a complete reading of the decision see here

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The ECJ on the notions of "damage" and "indirect consequences of the tort or delict" for the purposes of the Rome II Regulation

In *Florin Lazar*, a judgment rendered on 10 December 2015 (C-350/14), the ECJ clarified the interpretation of Article 4(1) of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II).

Pursuant to this provision, the law applicable to a non-contractual obligation arising out of a tort is "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".

The case concerned a traffic accident occurred in Italy, which resulted in the death of a woman. Some close relatives of the victim, not directly involved in the crash, had brought proceedings in Italy seeking reparation of pecuniary and non-pecuniary losses personally suffered by them as a consequence of the death of the woman, ie the moral suffering for the loss of a loved person and the loss of a source of maintenance. Among the claimants, all of them of Romanian nationality, some were habitually resident in Italy, others in Romania.

In these circumstances, the issue arose of whether, in order to determine the applicable law under the Rome II Regulation, one should look at the damage claimed by the relatives in their own right (possibly to be localised in Romania) or

only at the damage suffered by the woman as the immediate victim of the accident. Put otherwise, whether the prejudice for which the claimants were seeking reparation could be characterised as a "direct damage" within the meaning of Article 4(1), or rather as an "indirect consequence" of the event, with no bearing on the identification of the applicable law.

In its judgment, the Court held that the damage related to the death of a person in an accident which took place in the Member State of the court seised and sustained by the close relatives of that person who reside in another Member State must be classified as "indirect consequences" of that accident, within the meaning of Article 4(1).

To reach this conclusion, the ECJ began by observing that, according to Article 2 of the Rome II Regulation, "damage shall cover any consequence arising out of tort/delict". The Court added that, as stated in Recital 16, the uniform conflict-of-laws provisions laid down in the Regulation purport to "enhance the foreseeability of court decisions" and to "ensure a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage", and that "a connection with the country where the *direct* damage occurred … strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage".

The Court also noted that Recital 17 of the Regulation makes clear that "in cases of personal injury or damage to property, the country in which the damage occurs should be the country where the injury was sustained or the property was damaged respectively".

It follows that, where it is possible to identify the occurrence of direct damage, the place where the *direct* damage occurred is the relevant connecting factor for the determination of the applicable law, regardless of the indirect consequences of the tort. In the case of a road traffic accident, the damage is constituted by the injuries suffered by the direct victim, while the damage sustained by the close relatives of the latter must be regarded as indirect consequences of the accident.

In the Court's view, this interpretation is confirmed by Article 15(f) of the Regulation which confers on the applicable law the task of determining which are the persons entitled to claim damages, including, as the case may be, the close relatives of the victim.

Having regard to the *travaux préparatoires* of the Regulation, the ECJ asserted that the law specified by the provisions of the Regulation also determines the persons entitled to compensation for damage they have sustained personally. That concept covers, in particular, whether a person other than the direct victim may obtain compensation "by ricochet", following damage sustained by the victim. That damage may be psychological, for example, the suffering caused by the death of a close relative, or financial, sustained for example by the children or spouse of a deceased person.

This reading, the Court added, contributes to the objective set out in Recital 16 to ensure the foreseeability of the applicable law, while avoiding the risk that the tort or delict is broken up in to several elements, each subject to a different law according to the places where the persons other than the direct victim have sustained a damage.

AG Wahl on the localisation of damages suffered by the relatives of the direct victim of a tort under the Rome II Regulation

This post has been written by Martina Mantovani.

On 10 September 2015, Advocate General Wahl delivered his opinion in Case C-350/14, *Florin Lazar*, regarding the interpretation of Article 4(1) of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II). Pursuant to this provision, a non-contractual obligation arising out of a tort is governed, as a general rule, by the law of "the place where the damage occurred", 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".

The case concerns a fatal traffic accident occurred in Italy.

Some close relatives of the woman who died in the accident, not directly involved in the crash, brought proceedings in Italy seeking reparation of pecuniary and non-pecuniary losses personally suffered by them as a consequence of the death of the woman, *ie* the moral suffering for the loss of a loved person and the loss of a source of maintenance. Among the claimants, all of them of Romanian nationality, some were habitually resident in Italy, others in Romania.

Before the Tribunal of Trieste, seised of the matter, the issue arose of whether, for the purposes of the Rome II Regulation, one should look at the damage claimed by the relatives in their own right (possibly to be localised in Romania) or only at the damage suffered by the woman as the immediate victim of the accident. Put otherwise, the question was whether the prejudice for which the claimants were seeking reparation could be characterised as a "direct damage" under Article 4(1), or rather as an "indirect consequence of the event", with no bearing on the identification of the applicable law.

According to AG Wahl, a "direct damage" within the meaning of Article 4(1) does not cover the losses suffered by family members of the direct victim.

In the opinion, the Advocate General begins by acknowledging that, under the domestic rules of some countries, the close relatives of the victim are allowed to seek satisfaction in their own right (*iure proprio*) for the pecuniary and non-pecuniary losses they suffered as a consequence of the fatal (or non-fatal) injury suffered by the victim, and that, in these instances, a separate legal relationship between such relatives and the person claimed to be liable arises and co-exists with the one already set in place between the latter and the direct victim.

In the Advocate General's view, however, domestic legal solutions on third-party damage should not have an impact on the interpretation of the word "damage" in Article 4(1), which should rather be regarded as an autonomous notion of EU law. The latter notion should be construed having due regard, *inter alia*, to the case law of the ECJ concerning Article 5(3) of the 1968 Brussels Convention and of the Brussels I Regulation (now Article 7(2) of the Brussels I*a* Regulation), in particular insofar as it excludes that consequential and indirect (financial) damages sustained in another State by either the victim himself or another person, cannot be invoked in order to ground jurisdiction under that provision

(see, in particular, the judgments in *Dumez and Tracoba, Marinari* and *Kronhofer*).

That solution, the Advocate General concedes, has been developed with specific reference to conflicts of jurisdictions, on the basis of considerations that are not necessarily as persuasive when transposed to the conflicts of laws. The case law on Brussels I, with the necessary adaptation, must nevertheless be treated as providing useful guidance for the interpretation of the Rome II Regulation.

Specifically, AG Wahl stresses that the adoption of the sole connecting factor of the *loci damni* in Article 4(1) of the Rome II Regulation marks the refutation of the theory of ubiquity, since, pursuant to the latter provision, torts are governed by one law. The fact of referring exclusively to the place where the damage was sustained by the direct victim, regardless of the harmful effects suffered elsewhere by third parties, complies with this policy insofar as it prevents the splitting of the governing law with respect to the several issues arising from the same event, based on the contingent circumstance of the habitual residence of the various claimants.

The solution proposed would additionally favour, he contends, other objectives of the Regulation. In particular, this would preserve the neutrality pursued by the legislator who, according to Recital 16, regarded the designation of the *lex loci damni* to be a "fair balance" between the interests of all the parties involved. Such compromise would be jeopardised were the victim's family member systematically allowed to ground their claims on the law of the place of their habitual residence. The preferred reading would moreover ensure a close link between the matter and the applicable law since, while the place where the initial damage arose is usually closely related to the other components of liability, the same cannot be said, generally, as concerns the domicile of the indirect victim.

In the end, according to AG Wahl, Article 4(1) of Regulation No 864/2007 should be interpreted as meaning that the damages suffered, in their State of residence, by the close relatives of a person who died as a result of a traffic accident occurred in the State of the court seised constitute "indirect consequences" within the meaning of the said provision and, consequently, the "place where the damage occurred", in that event, should be understood solely as the place in which the accident gave rise to the initial damage suffered by the direct victim.

English High Court Rules on Art. 4 Rome II Regulation

The English High Court has recently rendered an insightful and thought provoking decision on the application of Art. 4 II and III of the Rome II Regulation (Winrow v. Hemphill, [2014] EWHC 3164). The case revolved around a road traffic accident that had taken place in Germany in late 2009. The (first) defendant, a UK national, had driven the car, while the claimant, likewise a UK national, had been sitting in the rear. As a result of the accident, caused by the (first) defendant's negligence, the claimant suffered injury and initiated proceedings for damages in England.

The court had to determine the applicable law in accordance with Art. 4 of the Rome II Regulation. What made the choice of law analysis complicated were the following – undisputed – facts (quote from the judgment):

- At the time of the accident, 16 November 2009, the Claimant was living in Germany, having moved there in January 2001 with her husband who was a member of HM Armed Services. Germany was not the preferred posting of the Claimant's husband. It was his second choice. He had four separate three year postings in Germany.
- Since the Claimant's husband was due to leave the army in February 2014 after twenty-two years' service he would have returned to England one and a half to two years before that date to undertake re-settlement training. It was always their intention to return to live in England.
- Whilst in Germany, the Claimant and her family lived on a British Army base where schools provided an English education. The Claimant's eldest son remained in England at boarding school when the Claimant's husband was posted to Germany. Their three other children were at school in Germany.
- The Claimant was employed while in Germany on a full-time basis as an Early Years Practitioner by Service Children's Education. This is a UK Government Agency.

- The Claimant and her husband returned to live in England in June 2011, earlier than planned. Her husband left the Army in August 2013.
- The First Defendant is a UK national. She was also an army wife. Her husband served with the Army in Germany. She had been in Germany for between eighteen months and two years before the accident. She returned to England soon afterwards.

Against this backdrop, the court had to decide whether to apply German law as law of the place of the tort (Art. 4 I Rome II) or English law as law of the common habitual residence of the parties (Art. 4 II Rome II) or as law of the manifestly more closer connection (Art. 4 III Rome II). After a detailed discussion of the matter Justice Slade DBE held that that German law applied because England was not the common habitual residence of the parties at the time of the accident. Nor was the case manifestly more closely connected with England than with Germany:

"41. The Claimant had been living and working in Germany for eight and a half years by the time of the accident. She was living there with her husband. Three of their children were at school in Germany. The family remained living in Germany for a further eighteen months after the accident. There was no evidence that during this time the family had a house in England. The residence of the Claimant in Germany was established for a considerable period of time. The fact that the Claimant and her family were living in Germany because the Army had posted her husband there and that it was not his first choice does not render her presence there involuntary. He and his family were living in Germany because of his job. The situation of the Claimant in Germany was similar to that of the spouses of other workers posted abroad. This is not an unusual situation. Having regard to the length of stay in the country, its purpose and the establishing of a life there – three children were in an army run school in Germany and the Claimant worked at an army base school – in my judgment the habitual residence of the Claimant at the time of her accident was Germany. When the Claimant came to live in England in 2011 her status changed and she became habitually resident here. However, the family's intention to return to live in England after the Claimant's husband's posting in Germany came to an end did not affect her status in November 2009. The Claimant has not established that the law of the tort indicated by Article 4(1), German law, has been displaced by Article 4(2).

42. The burden is on the Claimant to establish that the effect of Article 4(1) is displaced by Article 4(3). The standard required to satisfy Article 4(3) is high. The

party seeking to disapply Article 4(1) or 4(2) has to show that the tort is manifestly more closely connected with a country other than that indicated by Article 4(1) or 4(2).

43. The circumstances to be taken into account are not specified in Article 4(3). As does Miss Kinsler, I respectfully take issue with the exclusion by Mr Dickinson from the circumstances to be taken into account under Article 4(3) of the country in which the accident and damage occurred or the common habitual residence at the time of the accident of the Claimant and the person claimed to be liable. That these are determinative factors for the purposes of Articles 4(1) and 4(2) does not exclude them from consideration under 4(3). All the circumstances of the case are to be taken into account under Article 4(3). If the only relevant circumstance were the country where the damage occurred or the common habitual residence of the Claimant and the tortfeasor the issue of the proper law of the tort would be determined by Article 4(1) or 4(2). However, these factors are not excluded as being amongst others to be considered under Article 4(3). Further, under Article 4(2), habitual residence is to be considered at the time when the damage occurs. Preamble (17) to Rome II makes clear that the country in which damage occurs, which is the subject of Article 4(1), is the country where the injury was sustained. However, under Article 4(3), the habitual residence of the Claimant at the time when consequential loss is suffered may also be relevant.

44. Mr Chapman rightly acknowledged that one system of law governs the entire tortious claim. Different systems do not govern liability and quantum. In Harding v Wealands [2005] 1 WLR 1539, the issue was whether damages for personal injury caused by negligent driving in New South Wales Australia should be calculated according to the law applicable in accordance with the Private International Law (Miscellaneous Provisions) Act 1995 ('the 1995 Act') or whether it is a question of procedure which fell to be determined in accordance with the *lex fori*, English law. Considering factors which connect the tort with respective countries, in section 12(1)(b) of the 1995 Act, a provision similar to Article 4(3), Waller LJ in observed at paragraph 12:

"…the identification is of factors that connect the *tort* with the respective countries, not the *issue or issues* with the respective countries."

The majority judgment of the Court of Appeal, Waller LJ dissenting, was overruled in the House of Lords. The *obiter* observations of Waller LJ on the factors which

connect the *tort* rather than separate *issues* with a particular country were undisturbed on appeal.

45. I do not accept the contention by Mr Chapman that the circumstances to be taken into account in considering Article 4(3) will vary depending upon the issues to be determined and, as I understood his argument, the stage reached in the proceedings. Nor do I accept the submission that "the centre of gravity" of the tort when liability was conceded and only damages were to be considered depended upon circumstances relevant to or more weighted towards that issue. As was held by Owen J at paragraph 46 of Jacobs:

"…the question under Art 4(3) is not whether the right to compensation is manifestly more connected to England and Wales, but whether the tort/delict has such a connection."

The "centre of gravity" referred to in the Commission Proposal for Rome II and by Flaux J in Fortress Value in considering Article 4(3) is the centre of gravity of the *tort* not of the *damage and consequential loss*caused by the tort.

46. Whilst I do not accept the argument advanced by Mr Chapman that different weight is to be attributed to relevant factors depending on the stage reached in the litigation, since there is no temporal limitation on these factors, a court will make an assessment on the relevant facts as they stand at the date of their decision. The balance of factors pointing to country A rather than country B may change depending upon the time but not the stage in the proceedings at which the court makes its assessment. At the time of the accident both the claimant and the defendants may be habitually resident in country A and by the time of the court's decision, in country B. At the time of the accident it may have been anticipated that all loss would be suffered in country A but by the date of the assessment it is known that current and future loss will be suffered in country B.

47. There is some difference of opinion as to whether the circumstances to be taken into account in considering Article 4(3) are limited to those connected with the tort and do not include those connected with the consequences of the tort. It may also be said that the tort and the consequences of the tort are treated as distinct in Article 4. Article 4(1) refers separately to the tort, to damage and to the indirect consequences of the "event". Article 4(2) refers to "damage". Accordingly it could be said that the reference in Article 4(3) to *tort* but not also

to *damage* or *indirect consequences* indicates that it is only factors showing a manifestly closer connection of the tort, but not the damage direct or indirect, caused by or consequential on it, which are relevant.

48. Section 12 of the 1995 Act considered in Harding, whilst differing from Article 4(3) by including reference to the law applicable to *issues* in the case was otherwise to similar effect in material respects to Article 4(3). Section 12(2) provides:

> *"The factors that may be taken into account as connecting a tort or delict with a country for the purposes of this section include, in particular, factors relating to the parties, to any of the events which constitute the tort or delict in question, or to any of the circumstances or consequences of those events."*

Applying section 12, Elias J, as he then was, in deciding whether the law of the place of the motor vehicle accident should be displaced, took into account "the fact that the consequences of the accident will be felt in England" [34]. This approach was not doubted on appeal CA [17]. In Stylianou, Sir Robert Nelson adopted a similar approach when considering Article 4(3) which does not expressly include the consequences of the tortious events as a relevant factor in determining whether the general rules as to the applicable law of the tort are displaced. The Judge observed that there are powerful reasons for saying that the Claimant's condition in England is a strong connecting factor with this country. [83].

49. Including the consequences of a tort as a factor to be taken into account in considering Article 4(3) has received endorsement from writers on the subject. Mr Dickinson writes in *The Rome II Regulation* at paragraph 4.86:

"The reference in Article 4(3) to 'the tort/delict' (in the French text, '*fait dommageable*') should be taken to refer in combination to the event giving rise to the damage and all of the consequences of that event, including indirect consequences."

Further the authors of *Dicey* write at paragraph 35-032:

> *"Thus it would seem that the event or events which give rise to damage, whether direct or indirect, could be circumstances relevantly considered under*

Art 4(3), as could factors relating to the parties, and possibly also factors relating to the consequences of the event or events."

50. Whilst the answer to the question is by no means clear, I will adopt the approach suggested as possible in Dicey, as correct by Mr Dickinson and adopted by Sir Robert Nelson. Accordingly the link of the consequences of the tort to a particular country will be considered as a relevant factor for the purposes of Article 4(3).

51. Unlike Articles 4(1) and 4(2), Article 4(3) contains no temporal limitation on the factors to be taken into account. If, as in this case, the claimant and the defendant were habitually resident in country A at the time of the accident but in country B at the time the issue of whether the exception provided by Article 4(3) applied, in my judgment both circumstances may be taken into account. Similarly, if at the time of the accident it was anticipated that the Claimant would remain in country A and all her consequential loss would be incurred there, but by the time the issue of whether the exception provided by Article 4(3) applied, she had moved to country B and was incurring loss there, in my judgment both circumstances may be taken into account in deciding whether in all the circumstances the tort is manifestly more closely connected with country B than with country A.

52. The European Commission recognised in their proposal for Rome II that the "escape clause" now in Article 4(3) would generate a degree of unforeseeability as to the applicable law. In my judgment that unforeseeability includes not only the factors taken into account but also that the nature and importance of those factors may depend upon the time at which a court makes an assessment under Article 4(3) in deciding whether there is a "manifestly closer connection" of the tort with country B rather than country A. The court making a decision under Article 4(3) undertakes a balancing exercise, weighing factors to determine whether there is a manifestly closer connection between the tort and country B rather than country A whose law would otherwise apply by reason of Article 4(1) or 4(2).

53. Whilst Mr Chapman relied principally on the country where consequential loss is being suffered and the current habitual residence of the Claimant and the First Defendant, I also consider other factors raised by counsel in determining

whether, in all the circumstances of the case, the tort is manifestly more closely connected with England than with Germany.

54. In my judgment the common United Kingdom nationality of the Claimant and the First Defendant is a relevant consideration. Waller LJ at paragraph 18 of Harding considered the nationality of the Defendant to a road traffic accident claim to be relevant to determining the applicable law of the tort under the similar provisions of section 12 of the 1995 Act.

55. Although there is no United Kingdom law or English nationality in my judgment that does not, as was contended by Miss Kinsler, prevent the United Kingdom nationality of those involved in the tort being relevant to whether English law applies. For example the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003 implementing Directive 2000/26/EC of 16 May 2000, the Fourth Motor Insurance Directive, referred in Regulation 13(1)(i) to the United Kingdom as "an EEA state". Regulation 12(4) specified the law applicable to loss and damage as that "under the law applying in that part of the United Kingdom in which the injured party resided at the date of the accident". Article 25 of Rome II provides that:

> *"Where a State comprises several territorial units, each of which has its own rules of law in respect of non-contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation."*

I take into account the United Kingdom nationality of the Claimant and the First Defendant at the time of the accident and now, when the issue is being determined, as a factor indicating a connection of the tort with English law.

56. That the Claimant and the First Defendant are now habitually resident in England is, in my judgment in the circumstances of this case, relevant to determining the system of law to which the tort has a greater connection. However, I view the weight to be given to this factor in the light of the Claimant's habitual residence in Germany for about eight and a half years by the time of the accident. The Claimant was not a short-term visitor to Germany. She had established a life there with her husband for the time being.

57. I take account of the fact that the Claimant remained in Germany for a further eighteen months after the accident during which time she received a significant amount of medical treatment for her injuries including, in June 2010, an operation to remove a prolapsed disc. The Claimant states that between 15 and 25 March 2011 she spent just under two weeks in a German hospital for pain management. In April and May 2011 she had further treatment in Germany for the pain. Some of the injuries she suffered after the accident, neck and shoulder pains and pain in her stomach, resolved whilst she was in Germany.

58. Article 15 of Rome II makes it clear that the applicable law determined by its provisions applies not only to liability but also to:

> *"15(c) the existence, the nature and the assessment of damage or the remedy claimed."*

Whilst recital (33) states that when quantifying damages for personal injury in road traffic accident cases all the relevant actual circumstances of the Claimant including actual losses and costs of after-care should be taken into account by the court determining the claim of a person who suffered the accident in a State other than that where they were habitually resident, as Sir Robert Nelson observed at paragraph 78 of **Stylianou**, the recital cannot override the terms of Article 4.

59. In my judgment "all the circumstances" of the case relevant to determining whether a tort is manifestly more closely connected with country B than country A can include where the greater part of loss and damage is suffered. Where, as in this case, causation and quantum of loss are in issue, at this stage the location of the preponderance of loss may be difficult to ascertain. However, weight is to be given to the assertion by the Claimant that she continued to suffer pain after she and her husband returned to England in June 2011. She attended a pain clinic in Oxford and received treatment. She states that as a result of her pain and the effects of the accident she had become depressed. The continuing pain and suffering and medical treatment is a factor connecting the tort with England. So is the contention that loss of earnings has been and will be suffered in England.

60. The vehicle driven by the First Defendant was insured and registered in England. Whilst a factor to be taken into account, as was observed in Harding at paragraph 18, where the motor vehicle involved in the accident was insured is not a strong connecting factor. Nor is where the vehicle was registered.

61. In Stylianou, Sir Robert Nelson considered that the continued and active pursuit of proceedings in Western Australia was an important factor to take into consideration under Article 4(3). The pursuit of proceedings by the Claimant in the English courts is taken into account in this case, however it is not a strong connecting factor. The choice of forum does not determine the law of the tort.

62. Factors weighing against displacement of German law as the applicable law of the tort by reason of Article 4(1) are that the road traffic accident caused by the negligence of the First Defendant took place in Germany. The Claimant sustained her injury in Germany. At the time of the accident both the Claimant and the First Defendant were habitually resident there. The Claimant had lived in Germany for about eight and a half years and remained living there for eighteen months after the accident.

63. Under Article 4(3) the court must be satisfied that the tort is manifestly more closely connected with English law than German law. Article 4(3) places a high hurdle in the path of a party seeking to displace the law indicated by Article 4(1) or 4(2). Taking into account all the circumstances, the relevant factors do not indicate a manifestly closer connection of the tort with England than with Germany. The law indicated by Article 4(1) is not displaced by Article 4(3). The law applicable to the claim in tort is therefore German law."

A discussion of the case can be found here.