

A Textbook Example of Art 17 Rome II: Higher Regional Court of Cologne, 27 March 2020

Art. 17 of the Rome II Regulation, which transposes an element of US conflicts theory (the concept of local data) into a European choice-of-law instrument, is certainly one of the more controversial provisions of the Regulation. It stipulates that

[i]n assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability.

In a highly illustrative decision of 27 March 2020 (1 U 95/19), the Higher Regional Court of Cologne (upholding a decision from the Regional Court of Bonn) has provided a textbook example of its application in practice.

The case involved two German citizens who had collided while paragliding/hang gliding in Italy. While one had remained unharmed, the other one had sustained several injuries and, upon returning home, decided to sue for damages.

As both parties were habitually resident in the same Member State – in fact, they lived less than 50 km away from each other, in Cologne and Bonn, respectively – the Court naturally applied German law pursuant to Art. 4(2) Rome II. Under the applicable tort statute, the fact that both parties had engaged in aerial activities meant that the degree to which the defendant would be liable depended on the respective dangerousness of each party's activity as well as on whether or not one party had behaved negligently.

While the first factor already put the claimant on the back foot with the Court deeming his hang glider significantly more dangerous than the defendant's paraglider, the Court went on to apply two Italian presidential decrees as well as the general regulations approved by the Italian Civil Aviation Authority (*Ente Nazionale per l'Aviazione Civile, ENAC*) on the basis of Art. 17 Rome II in order to

establish that the claimant had negligently violated the applicable aviation rules. Accordingly, his claim failed in its entirety.