Freedom to choose the applicable law in tort - Articles 14 and 4(3) of the Rome II Regulation

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A. *Introduction*

The Rome II Regulation provides in Article 14(1) that "[t]he parties may agree to submit non-contractual obligations to the law of their choice". Before the Rome II Regulation was adopted, the opinion that there was little need for party autonomy in the field of torts was widespread. Moreover, it was thought that party autonomy would probably not be desirable.[1] Following the adoption of the Rome II Regulation, commentators have recently continued to state "that in the area of non-contractual obligations parties seldom exercise their freedom of choice" and that deliberations concerning party autonomy in torts "are primarily meant to stir up academic debate, not to illuminate the limits of Article 14 in actual practice".[2] Following this logic, one would have to conclude that Article

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[1] See, *e.g.*, Adolfo Miaja de la Muela, *Derecho internacional privado, Tomo segundo, parte especial*, 10th ed. (by Bouza Vidal), Madrid 1987, p. 411: 'las obligaciones *ex delicto*, a diferencia de las obligaciones contractuales, tienen su origen en la Ley y no en la voluntad de las particulares, de tal modo que las partes no han podido "organizar" los puntos de conexión de la relación con los distintos ordenamientos jurídicos implicados.'; more recently, *e.g.*, Peter Huber/Ivo Bach, 'Die Rom II-VO. Kommissionentwurf und aktuelle Entwicklungen', 2005 IPRax 73, 75.

[2] de Boer, "Party Autonomy and its Limitations in the Rome II Regulation" 2008 YbPIL 19, 23; see also Brière, "Le règlement (CE) n° 864/2007 du 11 juillet 2007 sur la loi applicable aux obligations non contractuelles (Rome II)" 2008 Clunet 31, 59 n° 38.

14 of the Rome II Regulation will most probably remain a dead letter. There are two lines of reasoning in support of this opinion.

First, parties to an extra-contractual relationship are often strangers to each other before the damaging event occurs. It is further argued that, once an accident has occurred they are not willing to agree on the applicable law *ex post* because, given the differences in the substantive tort law systems, one of the parties would necessarily be disadvantaged by such an agreement.

Secondly, if the parties are in a relationship with each other (*i.e.* a contractual relationship) before the damaging event occurs and the tort violates this relationship, the law governing the relationship will also apply to liability in tort anyway (by way of the so-called *rattachement accessoire* or accessory connection mechanism, provided for in Article 4(3) of the Rome II Regulation).[3] It is therefore argued that a rule providing for party autonomy *ex ante* would be superfluous.

The author does not share this point of view and disagrees with both lines of reasoning. Arguably, the rules on party autonomy in the Rome II Regulation may – if interpreted carefully and reasonably – prove to be among the *most important rules on applicable law* in the Rome II Regulation.

The following contribution will first look at the role Article 14 of the Rome II Regulation may play in practice. It will then analyse the extent to which Rome II allows parties to choose the law applicable in tort and delict and the limits Article 14 puts on party autonomy. The different options Article 14 offers will be presented and analysed and proposals will then be set out as to the possible influence of Article 14 on the exception clause in Article 4(3) 2nd sentence of the Rome II Regulation.

B. *The Emergence of Party Autonomy in European Private International Law of Tort*

Since the late 1970's, party autonomy has occupied an ever increasing place in the statutory provisions on European conflict-of-law rules in tort. Practically all modern European statutes on private international law (PIL) that have expressly addressed this issue allow the parties to choose the applicable law in tort to a certain extent. Some national systems allow the choice of the applicable law only after the tort has occurred; this is the position in Germany, Belgium, and Lithuania;[4] it is also the position in Switzerland, Russia, and for example, in

[3] See *infra*, F.

[4] Article 101 of the Belgian PIL Code; Article 42 of the German EGBGB; Article 1.43 Sect. 3 of the Civil code of Lithuania.

the new Japanese Act on the General Rules of Applications of Laws.[5] In other countries, the parties are free to choose the applicable law both *ex ante* and *ex post, i.e.* before or after the injury occurred, if they were already in contact at that time. This is the situation in Austria, Liechtenstein and the Netherlands.[6]

The Rome II Regulation follows this trend towards party autonomy. As a result, from 2009 onwards, when applying Rome II, the first question to be asked will be whether the parties have agreed on the applicable law.

There are numerous arguments for recognising party autonomy in tort.[7] Given that the injured party almost always has the possibility to make a claim or to refrain from bringing a claim and that parties can settle out of court and compromise, the injured party should also be able to determine the applicable law in agreement with the defendant.[8] Allowing the parties to choose the applicable law helps to eradicate any doubts as to the applicable law and as such reinforces legal certainty.[9] The parties will have the possibility to submit all of their legal relations, contractual and non-contractual, to one specific law and as such deal with all the various types of liability that could come about in the same way. In the end, it is the parties that are in the best position to know which applicable law would best protect their interests and would lead to the desired outcome.

The question of whether the rule on party autonomy will turn out to be a dead letter as has been predicted by some commentators or if, on the contrary, it will play a central role in the application of the Rome II Regulation will be

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[5] Article 132 of the Swiss PIL Act; Article 1219 Sect. 3 of the Russian Civil Code; Article 21 of the new Japanese Act on the General Rules of Applications of Laws.

[6] § 35 section 1 of the Austrian PIL Act; Article 39 Sect. 1 of the PIL Act of Liechtenstein; Article 6 of the Dutch Act on PIL in the field of tort.

[7] For arguments in favour of party autonomy in tort, see *e.g.* de Boer, "Facultative Choice of Law – The procedural status of choice-of-law rules and foreign law" (1996) 257 Rec. des Cours 223 *et seq.*, 331. He refers to an often successful practice of the Dutch courts to suggest to the parties to agree on the application of the *lex fori* in order to facilitate and speed up the proceedings; Flessner, *Interessenjurisprudenz im internationalen Privatrecht*, Tübingen 1990, 117 *et seq.*; Lagarde, "Le principe de proximité dans le droit international privé contemporain" (1986) 196 Rec. des Cours 9 *et seq.*, 104; Hans van Houtte, Internationale Forumshopping bij onrechtmatige daad, in: *Mélanges Roger O. Dalcq*, Brussels 1994, pp. 574 *et seq.*, at 576; Gerhard Wagner, 2006 IPRax 372 *et seq.*, 375; Gérard Légier, Le règlement Rome II sur la loi applicable aux obligations extracontractuelles, Aperçu rapide, JCP 2007, Actualités n° 348, pp. 4 *et seq.*; for the field of product liability, Sabine Corneloup, La responsabilité du fait des produits, in: Sabine Corneloup/Natalie Joubert (dir.), *Le règlement communautaire "Rome II" sur la loi applicable aux obligations extracontractuelles*, Paris 2008, 85–106, at 100: *"il faudra, à l'avenir, très fortement encourager les parties à une transaction à exercer cette faculté de choix afin de remédier aux incertitudes résultant de la coexistence d'une pluralité de sources juridiques en la matière."*

[8] See, *e.g.*, de Boer, (2007) 9 YbPIL 19, 20.

[9] *Cf.* Recital 31 1st sentence of the Rome II Regulation.

analysed firstly where there is a choice of the applicable law *ex post* (see section III. below) and secondly for an *ex ante* choice of law (see section IV. below).

C. *Choice* Ex Post

In what is probably the most famous case in the European PIL of torts, the case *Bier* v. *Mines de Potasse d'Alsace*,[10] the French Mines de potasse d'Alsace had released saline residue into the Rhine. Consequently, a Dutch horticultural company who used water from the river for irrigation purposes was forced to install a water purification system. The Dutch claimants brought a claim for damages against the French company before the Dutch courts.

Article 1384 of the French *Code Civil* provided for one of the strictest liability regimes in Europe at that time. Following the argument that parties will not be willing to agree on the applicable law once the damage has occurred, it should have been the case in *Bier* v. *Mines de Potasse* that no agreement on the applicable law could be reached.

Indeed, at the first stage of the proceedings, each party wanted the law of its own country to apply.[11] However, the parties eventually agreed on the application of Dutch law. The reason for this agreement was that the application of a foreign law could not be appealed against before the Dutch courts. By choosing Dutch law, the parties left open the possibility for the application of the substantive law to be checked by the higher courts.[12]

This famous case thus perfectly illustrates that – mostly for reasons of procedure and practical convenience – choosing the applicable law *ex post*, and in particular choosing the *lex fori* often constitutes an attractive option for the parties. Even the party for which the substantive law that may be chosen seems, at first glance, to be somewhat unfavourable, may have good reasons for opting for choosing the applicable law, in particular choosing the law of the forum (the *lex fori*). This is the case, for example, if the chosen law can be quickly, easily and reliably established, reducing the duration and the costs of litigation, or if the rules of the chosen law governing the burden of proof are actually advantageous for this party or if – as was the case in *Bier* – the application of a foreign law cannot be appealed against.

In fact, reaching an agreement on the applicable law should be an attractive option in *almost all cases* in which the objective connecting factors set out in the Rome II Regulation would lead to the application of a foreign law.

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[10] ECJ Case 21/76 *Bier* v. *Mines de Potasse d'Alsace* [1976] ECR 1735.

[11] See Rechtbank Rotterdam 8.1.1979, *Nederlandse Jurisprudentie* 1979, n° 113, 15.

[12] *Ibid.*

D. Ex Ante *Choice*

Where there is a special relationship between the parties, in particular where they are bound by a contract (for example a sales or service contract), under Article 14(1)(b) of the Rome II Regulation the parties may, under some circumstances, choose the applicable law also *ex ante, i.e.* before the damage occurs.

Parties who are in a pre-tortious relationship (for example parties to a complex construction contract or parties in an ongoing business relationship) may have a strong interest in determining the law applicable to all their relationships, including future extra-contractual liability, *in advance*. An *ex ante* choice of the applicable law makes it possible for the parties to be clear on the rules governing any possible tort law claims from the outset, even before a damage has occurred.

It is true that if the parties are in a relationship with each other (*e.g.* have entered into a contract) before the event giving rise to damage occurs and if the tort violates this relationship, the law governing this relationship shall also apply to liability in tort (through the *rattachement accessoire* or accessory connection mechanism, provided for in Article 4(3) of the Rome II Regulation);[13] some authors have therefore questioned the need for the Regulation to also permit the *ex ante* choice of the applicable law in tort and delict.

The European legislator did not share these doubts and quite rightly so: The accessory connection mechanism introduces party autonomy into the law of torts "through the backdoor". A rule that extends party autonomy in torts to the choice of the applicable law *ex ante* and that clearly defines the limits of this freedom is, arguably, preferable to introducing party autonomy in a merely indirect way. Such a rule provides the parties with the information necessary for them to organise their relationships in the most clear and efficient way possible.

Moreover, in certain situations, for example in complex construction contracts, parties may be working on the same project but they may not be in direct contractual relationship meaning that there would be no contractual basis for a *rattachement accessoire*. At any rate, there is clearly a need for rules on the choice of law in tort where the parties' contractual relations are governed by *uniform contract law*, in particular by the United Nations Convention on Contracts for the International Sale of Goods (CISG), or where the parties have agreed to submit their contractual relations to non-state rules such as the Principles of European Contract Law (PETL or Lando Principles),[14] the UNIDROIT

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[13] See *infra*, F; Fentiman, "The Significance of Close Connection", *supra*.

[14] Commission on European Contract Law, *Principles of European Contract Law, Parts I–II*, ed. by Ole Lando and Hugh Beale; Part III, ed. by Ole Lando, Eric Clive *et al.*, Dordrecht *et al.* 2000–2003; Commission on European Contract Law, *Principles of European Contract Law*, Text in French, English, German, Spanish, Italian and Dutch, at: http://frontpage.cbs.dk/law/commission_on_european_contract_law/index.html.

Principles of International Commercial Contracts (UNIDROIT Principles)[15] or the *lex mercatoria*. In the future, the same need could equally be felt where the parties choose to apply the (Draft) Common Frame of Reference (CFR)[16] or a future optional Community instrument on contract law. Given that neither the CISG, nor these non-state rules, nor the future Common Frame of Reference contain provisions on tort and delict, an accessory connection to the law governing the contract between the parties is ruled out in all of these situations.

Lastly, the fact that Article 14(1) of the Rome II Regulation expressly provides for the possibility to agree on the applicable law clearly indicates to the parties that this possibility exists and shows its limits in non-contractual matters.

E. *Extent of the Parties' Freedom to Choose the Applicable Law and Limits on this Freedom*

Art. 14 of the Rome II Regulation allows parties to choose the applicable law in torts but also puts limits on party autonomy.

1. *Choice of the Law of a third Country and Choice of Non-State Rules*

The Rome II Regulation allows the law of the forum to be chosen.[17] It also allows the parties to opt for the law of another country, for example for the *neutral law* of a *third country* if they wish to do so.

Does the Rome II Regulation allow the parties to choose *non-stale rules* to govern their liability in tort? The question if and to what extent parties may choose non-state rules to govern their relationships has recently been the subject of intense discussion in the field of contractual obligations. The Regulation on the law applicable to contractual obligations (Rome I Regulation)[18] provides in Article 3 that "[a] contract shall be governed by the law chosen by the parties", law being understood as the law of a State. Recital 13 of the same Regulation provides, however, that "[t]his Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law [...]". As far as the rules of the applicable law are non-mandatory, the parties are therefore free

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[15] Text with comments, available at: www.unilex.info/.

[16] Study Group on a European Civil Code/Research Group on EC Private Law (Acquis Group) (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR). Interim Outline Edition*, Munich 2008.

[17] Very few national systems restricted the freedom of the parties to a choice of the law of the Forum. This used to be the case in Lithuania (Article 1.43 Sect. 3 of the Civil code of Lithuania) and it still is the case in Switzerland and Russia (see Article 132 of the Swiss PIL Act; Article 1219 Sect. 3 of the Russian Civil Code).

[18] OJ 2008, L 177/6.

to refer to non-state rules, such as the "UNIDROIT Principles of International Commercial Contracts" or the "Principles of European Contract Law" (PECL of "Lando Principles").

Like the Rome I Regulation, Article 14 of the Rome II Regulation permits the choice of the applicable *law*. Here again, law will have to be understood as the law of a state. However, like the Rome I Regulation in contractual matters, the Rome II Regulation leaves it to the parties to agree on the application of non-state rules and to replace the non-mandatory rules of the applicable law by these non-state rules. In particular, one might think of the *Principles of European Tort Law* here.[19] They were presented a few years ago by the *European Group on Tort Law*. These Principles are based on intensive comparative research taking into account most European legal orders; they are available in numerous languages and a commentary in English is also available.[20] The Principles thus provide neutral rules that are perfectly adapted to the needs of transnational actors, just as – in the field of contract law – the Principles of European Contract Law, the UNIDROIT Principles of International Commercial Contracts or the future Common Frame of Reference.

It thus seems perfectly possible that in situations where the parties are of equal bargaining power and they do not reach an agreement on the application of the law of one of the parties' country of origin, that they might well agree on the application of the Principles of European Contract Law or the UNIDROIT Principles of International Commercial Contracts for their contractual relations, and on the application of the Principles of European Tort law for any potential extracontractual liability, as far as the rules of the state law that would be applicable according to the rules of the Rome II Regulation are non-mandatory.

The parties can explicitly agree on the application of non-state rules; the choice of such principles can also follow from an agreement between the parties to submit their relationships to the "common principles of law" or to "recognized principles of law".

2. *Tacit Choice of the Applicable Law in the Course of the Proceedings?*

Like Article 3(1) of the Rome I Convention and Article 3(1) of the forthcoming Rome I Regulation, the 2nd sentence of Article 14(1) of the Rome II Regulation provides that the choice of law shall be "expressed" or "demonstrated with reasonable certainty by the circumstances". Before the drafting of the Rome II Regulation, the courts in some countries accepted a tacit choice in tort in favour

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[19] European Group on Tort Law, *Principles of European Tort Law*, available at: www.egtl.org/.

[20] European Group on Tort Law (ed.), *Principles of European Tort Law – Text and Commentary*, Wien/New York 2005; for further references, see: European Centre of Tort and Insurance Law (ECTIL), www.ectil.org.

of the law of the forum during the proceedings. The case-law of the German courts provides a prominent example:[21] A group of companies in the chemical industry in the United States produced a pesticide that was distributed on the German market by a subsidiary. In Germany, a fruit grower bought some pesticide and used it to combat apple scabs but the product turned out to be ineffective. There was a significant loss of crops. If a different pesticide had been used this would not have happened. The fruit grower initiated proceedings against the American manufacturer and its German subsidiary before the German courts, basing his claim on breach of contractual warranty as well as claiming in tort. In the course of the proceedings, the claimant limited his claims to those available under German law, although the conflicts-of-law rule of the forum might have allowed him to base the claim on a foreign tort law that would probably be more generous. In this as well as in many other cases, the courts inferred from the parties' silence on the issues of the applicable law that they had made a tacit choice of the law of the forum.

Article 14(1) will quite rightly rule out such a practice.[22] In reality, courts and lawyers still forget about the impact of private international law on a regular basis and, in particular, the possible application of a foreign law.[23] Inferring a choice of law from mere silence would therefore be a pure fiction in the majority of cases.

3. *Limits on Party Autonomy and the Protection of Weaker Parties*

3.1. *Parties Pursuing a Commercial Activity*

To avoid abuse and protect actors considered to be weak, *e.g.*, consumers and employees,[24] the Rome II Regulation limits the freedom of choice *ex ante* to

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[21] BGH 17.3.1981, 1982 IPRax 13 with case note by Karl Kreuzer, 1982 IPRax 1; see also: BGH 6.11.1973, 1974 NJW 410; BGH 24.9.1986, BGHZ 98, 263, at 274; BGH 22.12.1987, *NJW-Rechtsprechungsreport (RR)* 1988, 534, at 535; see for Dutch law, *e.g.* Hof's-Hertogenbosch 29.11.1995, 1996 NIPR 105.

[22] *Cf.* Junker, "Das Internationale Privatrecht der Straßenverkehrsunfälle nach der Rom II-Verordnung" 2008 JZ 169, 173: "*es gelten 'strenge Anforderungen'*" (the requirements are high); von Hein, "Die Kodifikation des europäischen Internationalen Deliktsrechts" 2003 ZVglRWiss 528, 548; Michael Sonnentag, "Zur Europäisierung des Internationalen außervertraglichen Schuldrechts durch die geplante Rom II-Verordnung" 2006 ZVglRWiss 256, 278.

[23] See, *e.g.*, Hamburg Group for Private International Law, Comments on the European Commission's Draft Proposal for a Council Regulation on the Law Applicable to Non-Contractual Obligations, (2003) 67 RabelsZ 1, 4: "Long-standing experience with legal practice in this field shows that lower courts [have] little experience in private international law [...] The state of knowledge is by no means better in private legal practice".

[24] *Cf.* European Commission, Amended proposal for a European Parliament and Council Regulation on the Law Applicable to Non-Contractual Obligations ("Rome II"), Brussels, 21.02.2006, COM(2006) 83 final, p. 3, on Amendment 25.

parties that "are pursuing a commercial activity", Article 14(1)(b). Arguably, it is furthermore necessary for there to be a connection between the commercial activity pursued and the tort in question.[25] For consumer contracts and contracts of employment, only an *ex post* choice of the applicable law (*i.e.* after the damage has occurred) will therefore be possible under the Rome II Regulation.

3.2. *Freely Negotiated Agreements*

Article 14(1)(b) of the Rome II Regulation further provides that a choice of the applicable law before the event giving rise to damage must be made by a "freely negotiated" agreement. It will therefore arguably be the case that this choice cannot be made solely with reference to general terms of business or standard terms imposed by one party on the other[26] unless the terms are expressly accepted by the other party. Since choice of law agreements are rarely individually negotiated[27] it should be sufficient that pre-formulated conditions be signed by the other party in order to meet the requirement to be "freely negotiated". To be more demanding would deprive an *ex ante* choice of law of most of its value in practice, which would be contrary to the legislator's will.

If, on the other hand, the parties provide for the same law to be applicable in their respective general terms of business, there is no reason not to respect this choice.

3.3. *Choice Expressly Made or Demonstrated with Reasonable Certainty*

An *ex ante* or an *ex post* choice of the applicable law must be "express" or "demonstrated with reasonable certainty by the circumstances" (Article 14(1) 2nd sentence). The question is therefore whether, where the parties have a contractual relationship and where they choose the applicable law, this demonstrates, "with reasonable certainty by the circumstances", that they wanted to extend this choice to possible future non-contractual liability. A clause in which it is stipulated

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[25] See also Eric Loquin, La règle de conflit générale en matière de délit dans le Règlement du 11 juillet 2007 (Rome II), in: Corneloup/Joubert (dir.), *Le règlement communautaire « Rome II » supra*, note 7 35, 52.

[26] The requirement that the agreement must be "freely negotiated" was first introduced in the European Parliament's first draft, see: Position of the European Parliament adopted at first reading on 6 July 2005 with a view to the adoption of Regulation (EC) No.../2005 of the European Parliament and of the Council on the law applicable to non-contractual obligations ("ROME II"), P6_TC1–COD(2003)0168, Article 3(1). The European Parliament cited "standard-form contracts – *contrats d'adhésion*" as an example of agreements not freely negotiated, Article 2a(1), Amendment 25. See also Rushworth and Scott, "A Commentary on the Rome II Regulation: Choice of Law for Non-Contractual Obligations", [2008] L.M.C.L.Q. 274, 293 *et seq.* – *Contra* G. Wagner, 2008 IPRax 1, 13–14: to rule out choice of law clauses in standard terms would deprive Article 14(1)(b) of all of its value in practice ("*seiner praktischen Bedeutung weitgehend beraubt*").

[27] See already Rushworth and Scott, *op. cit.*, at 293; Wagner, *op. cit.*

that the chosen law is to cover "all relations between the parties", as well as a clause stipulating that "all obligations between the parties shall be governed by the law chosen", should however be enough to fulfil the conditions set out in Article 14(1) of the Rome II Regulation.

4. *Freedom of Choice and Third Party Rights*

Like all modern statutes in this field,[28] Article 14(1) *in fine* of the Rome II Regulation makes clear that the choice of the applicable law "shall not prejudice the rights of third parties". The provision relates, in particular, to relatives or others with a close relationship with the victim, as well as to the victim's insurers or the insurers of the person claimed to be liable.[29] Article 14(1) *in fine* is, however, open to different constructions:

a) One way of interpreting this article is to consider that the parties should always consult with the third parties mentioned in Article 14(1) *in fine* in order for their agreement on the applicable law to have effect on these third parties. If Article 14 were constructed in this way, an insurer would *always* be able to invoke Article 14 if the applicable law was chosen by the parties without his consent: if the insurer were opposed to a choice of applicable law which differs from the one designated under the objective connecting factors of the Rome II Regulation, the insurer would be liable only for the amount of the damage that would have been due had the parties not chosen the applicable law. If the law chosen by the parties provides for a more extensive liability than the law that would have been applicable under the Rome II rules, the insurer would only cover the amount that would have been due in the absence of an agreement on the applicable law; the person liable would then have to pay the difference out of his or her own funds.

b) A second way of interpreting Article 14(1) *in fine* would be to distinguish between cases of *ex ante* and *ex post* choice.

Under this construction of Article 14(1) *in fine, before* a damaging event occurs the parties are free to choose the law applicable to their relationships without third parties, *e.g.* insurers, being able to invoke Article 14(1) *in fine* in

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[28] See, *e.g.*, Article 11(3) of the Austrian PIL Act and Article 11(3) of the PIL Act of Liechtenstein; Article 42 2nd sentence of the German EGBGB; Article 21 2nd sentence of the Japanese Act on the General Rules of Applications of Laws.

[29] European Commission, Proposal for a European Parliament and Council Regulation on the Law Applicable to Non-Contractual Obligations ("Rome II"), Brussels, 22.7.2003, COM(2003) 427 final, p. 25; see also Junker, 2008 JZ 169, 173; von Hein, "Die Kodifikation des europäischen IPR der außervertraglichen Schuldverhältnisse vor dem Abschluss?" 2007 VersR 440, 445; Leible and Lehmann, "Die neue EG-Verordnung über das auf außervertragliche Schuldverhältnisse anzuwendende Recht (Rom II)" 2007 RIW 721, 727; Martin Fricke, "Kollisionsrecht im Umbruch" 2005 VersR 726, 738; Brière, *op. cit.*, 58 no. 41.

their favour – in tort law just as in contract law. At this moment in time, no right or obligation of third parties has yet come into being. Neither relatives nor other persons in a close relationship with the victim nor insurers have the right that the parties to a future tortious relationship act under a certain law, be it determined by objective connecting factors or by an *ex ante* choice of the parties. According to this interpretation, agreements on the applicable law thus do not, in principle, interfere with third parties' rights if made *before* the damaging event occurs and Article 14(1) in fine of the Rome II Regulation thus does not, in principle, apply to such agreements.

On the other hand, for an *ex post* choice, Article 14(1) *in fine* of the Rome II Regulation fully applies.

c) As long as it has not been clarified which interpretation will eventually be given preference by the courts and in particular by the ECJ, it is strongly recommended that parties that are considering an agreement on the law applicable to their cross-border torts, be it an *ex post* or an *ex ante* agreement, should consult with their insurance companies before making the choice in order to avoid losing part of their insurance cover.

5. *The Law Applicable to the Choice of Law Clause*

The Rome II Regulation does not expressly clarify which law governs the existence and the validity of a choice of law clause. The issue is relevant if, *e.g.*, one party invokes error or duress regarding the choice of law clause.

There are numerous arguments in favour of applying Article 8 of the Rome I Convention or Article 10 of the Rome I Regulation to this issue, either through direct application or by way of analogy.[30] The existence and validity of the choice of law clause should thus be determined by the law designated by the parties in that clause; for this purpose the choice of law clause should be respected regardless of whether it turns out to be valid or not.

Under the Rome I Convention or the Rome I Regulation[31] "a party, in order to establish that he did not consent, may rely upon the law of the country in which he has his habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law" designated in the choice of law clause.

In tort law, as in the field of contract law, the application of these rules should lead to a reasonable outcome.

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[30] See also Rushworth and Scott, *op. cit.*, fn. 26, *supra*, 292.

[31] Article 8(2) of the Rome I Convention and Article 10(2) of the forthcoming Rome I Regulation.

F. *Relationship between Article 4(3) and Article 14 of the Rome II Regulation*

1. *Concurrent Actions in Contract and Tort: the Rattachement Accessoire Mechanism*

Many national tort law regimes, such as English, German, Italian and Swiss law, allow concurrent actions in contract and tort if the conditions of both systems of liability are met.[32] Given that the rules designating the applicable law in contractual matters and in tort are not the same (for example, the habitual residence of the seller or service provider in contractual matters, and the *lex loci delicti commissi* in tort), the tort claims between the parties might end up being governed by a different law to claims in contract that are based on the same facts and events.

In the second half of the twentieth century, a new trend became widespread in PIL aiming to achieve greater flexibility when it comes to rules on applicable law in tort or delict.[33] In accordance with this trend, Article 4(3) of the Rome II Regulation provides that "where it is clear from all the circumstances of the case that the tort is manifestly more closely connected" to a country other than the country in which the damage occurred or in which the parties have their habitual residence, "the law of that other country shall apply". The most important case for this exception clause is mentioned in Article 4(3) 2nd sentence of the Rome II Regulation: "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" (*i.e.* the *rattachement accessoire* mechanism).[34] In cases in which a tort is closely

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[32] See for English law: *Lister* v. *Romford Ice and Cold Storage Co. Ltd.* [1957] A.C. 555, at 573 *per* Lord Simonds: "It is trite law that a single act of negligence may give rise to a claim either in tort or for breach of a term express or implied in a contract."; *Coupland* v. *Arabian Gulf Petroleum Co.* [1983] 2 All ER 434 *per* Hodson, J. and [1983] 3 All ER 226 (CA), *per* Goff, L.J.; *Henderson* v. *Merrett Syndicates Ltd.* [1995] 2 A.C. 145; for German law: BGH 4.3.1971, BGHZ 55, 392, 395: "echte Anspruchskonkurrenz, die sich aus dem gleichen Rangverhältnis von Delikts- und Vertragsrecht ergibt"; BGH 24.11.1976, *BGHZ* 67, 359, 362 *et seq.*; 7.11.1985, BGHZ 96, 221, 228 *et seq.*; for Swiss law BG 25.5.1938, BGE 64 II 254, 258 *et seq.*; 21.5.1946, BGE 72 II 311, 316; 28.4.1987, *BGE* 113 II 246; for Italian law: Corte di Cassazione 7.10.1967, n. 2335; 21.3.1970, n. 762; 19.6.1977, n. 261; Corte di Appello di Roma 6.9.1983, 1984 Riv. dir. int. priv. proc. 167, 170 *et seq.*

[33] General exception clauses are in force *e.g.* in England, Sect. 12 of the Private International Law Act (1995); in Germany, Article 41 Sect. 1 of the EGBGB; Liechtenstein, Article 52 Sect. 1 of the PIL Act; Switzerland, Article 15 Sect. 1 of the PIL Act; Turkey, Article 25 Sect. 3 of the PIL Act.

[34] For rules providing an accessory connection mechanism, see Article 133 Sect. 2 of the Swiss PIL Act; Article 41 Sect. 2 of the German EGBGB; Article 5 of the Dutch Act on PIL in the field of liability in tort; Article 100 of the Belgian PIL Code; the solution was also adopted in

connected to a contract between the parties, Article 4(3) thus allows the courts to apply the law governing the contract to the claim in tort as well.

In cases in which the tort or delict in question is closely connected to a contract, the accessory connection mechanism avoids claims in contract and tort being subject to different rules. It also avoids the frictions that could result if the liability regimes of different countries were to be applied to claims in contract and tort that are based on the same facts.[35]

2. *Defining the Relationship Between the* Rattachement Accessoire *Mechanism and an* Ex Ante *Choice of the Applicable Law*

If the parties have chosen the law applicable to their *contractual relationship*, this choice may, by way of the *rattachement accessoire* mechanism in Article 4(3) of the Rome II Regulation, affect the law applicable in tort and delict. Article 14 of the Rome II Regulation does, however, limit the parties' ability to choose the law applicable to their non-contractual relations.[36] The question therefore arises as to whether the limits set by Article 14 should also be observed when it comes to applying Article 4(3). The idea is to avoid Article 4(3) leading to *indirect compliance* with the parties' wishes in situations where a *direct choice* of the applicable law is *excluded* under Article 14 of the Rome II Regulation.

The answer to this question should depend largely on the method of interpretation applied: If the interpretation of Article 4(3) has regard to the Regulation's origins and if it follows the examples in the national laws on PIL that guided the European legislator when drafting Article 4(3), both Article 4(3) and Article 14 should be applied independent from each other (see section 2.1 below). An interpretation with regard to the Regulation's objectives and scheme will arguably lead, on the contrary, to observing the limits set by Article 14 also when it comes to applying Article 4(3) (see section 2.2 below).

2.1. *Interpretation with Regard to the Regulation's Origins*

When drafting Article 4(3), the European legislator took inspiration from Article 133(2) of the Swiss PIL Act and Article 41(2) of the German EGBGB. The PIL Acts of both countries only allow a choice of law in tort to be made *ex post*.[37] In both countries, the accessory connection mechanism is used even though a direct *ex ante* choice of law is ruled out in tort. The examples the European

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Austria, Supreme Court (OGH) 29.10.1987, 1988 IPRax 363, 364; OGH 30.3.2001, 2002 ZfRV 149, 152.

[35] European Commission, Proposal of 2003 (*supra*, note 29), p. 14; for details, see Kadner Graziano, *Gemeineuropäisches Internationales Privatrecht*, Tübingen 2002, 437 *et seq.*

[36] See *supra*, E.2. and 3.

[37] Article 132 of the Swiss PIL Act and Article 42(1) of the German EGBGB.

legislator followed when drafting Article 4(3) thus speak in favour of applying the accessory connection mechanism independent of the limits on party autonomy in the field of tort, provided for in Article 14.

2.2. *Interpretation with Regard to the Regulation's Objectives and Scheme*

If the interpretation of Article 4(3) of the Rome II Regulation has regard to the Regulation's objectives and scheme, the outcome will arguably be different.[38] In the following analysis, the different limits set out in Article 14 of the Rome II Regulation will be dealt with separately:

a) For parties not pursuing a commercial activity, *i.e.* consumers and employees, Article 14(1)(b) of the Rome II Regulation rules out the choice of the law applicable in tort or delict *before* the event giving rise to the damage occurs (*ex ante* choice).[39] The European legislator has justified this limitation by a concern for protection of these potentially vulnerable groups. It is based on the idea that a consumer or an employee is often not in a position to fully appreciate the consequences of an *ex ante* choice of the law applicable in tort or delict.

Yet, following the logic in Rome II, there appears to be an even greater risk that the consumer and the employee will not fully appreciate the consequences of their acts and that they will be deprived of this protection if the choice of the law applicable to non-contractual matters is made indirectly (the parties therefore being unaware of it) by means of an accessory connection under Article 4(3) of the Rome II Regulation. This reinforces the argument that the limits laid down in Article 14(1)(b) of the Rome II Regulation for party autonomy in tort should also apply where the issue of *rattachement accessoire* under Article 4(3) arises.[40]

Consequently, if the parties chose the law governing their consumer or employment contract *before* the event giving rise to the damage occurred, an accessory connection to tort should, in principle, be ruled out, just as a choice

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[38] *Cf.* European Commission, Proposal of 2003 (*supra*, note 29), 14.

[39] *Supra*, E.3.1.

[40] Some authors have already pointed out the contradiction that lies in employing the accessory connection mechanism where an agreement on the applicable law is excluded: see Lorenz, Die allgemeine Grundregel betreffend das auf die außervertragliche Schadenshaftung anzuwendende Recht, in: Ernst von Caemmerer, *Vorschläge und Gutachten zur Reform des deutschen internationalen Privatrechts der außervertraglichen Schuldverhältnisse*, Tübingen 1983, 97, at 133–134; von Hein, "Rechtswahlfreiheit im Internationalen Deliktsrecht" (2000) 64 RabelsZ 595, 600–601. The proposal presented by the Hamburg Group for PIL, (2003) 67 RabelsZ 1, 36, provided for an express link between the accessory connection mechanism and the rules on party autonomy for complex torts, see Article 11a(2) of the proposal ("Escape clause"): "A substantially closer connection with another country may be based in particular on *a contract or another* pre-existing relationship between the parties, *provided that they could have chosen the applicable law for this type of non-contractual obligation* [...]". See also European Commission, Proposal of 2003 (*supra*, note 29), 14.

of the law applicable to tort would be in the same circumstances. This could be achieved by an interpretation with regard to the Regulation's objectives and scheme that takes into account the value judgements underlying Article 14 when applying Article 4(3).

b) In two situations, however, consumer protection does not require an exclusion of the accessory connection mechanism.

i) The first such situation concerns consumer contracts that fulfil the conditions in Article 6(1) and (2) of the Rome I Regulation, *i.e.* where a professional "pursues his commercial or professional activities in the country where the consumer has his habitual residence", Article 6(1)(a), or if he "by any means, directs such activities to that country or to several countries including that country", Article 6(1)(b). In such a case, in contractual matters, the choice of applicable law may not "have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law" of the country in which the consumer has his habitual residence, Article 6(2).

In these circumstances, the facts are "manifestly more closely connected" to the country in which the consumer has his habitual residence, Art. 4(3) of the Rome II Regulation. For this type of contract, the accessory connection mechanism of Article 4(3) of the Rome II Regulation should thus lead to the application of the law of the consumer's habitual residence (instead of the law chosen by the parties to govern the consumer contract). The accessory connection mechanism thus avoids the relationship between parties that are in a contractual relationship with each other being governed by three different laws:

- the law chosen by the parties to govern their consumer contract;
- the mandatory rules of the law of the consumer's habitual residence;
- and the *lex loci delicti* for actions in tort.

For this type of consumer contract, the accessory connection mechanism in Article 4(3) of the Rome II Regulation should thus not be excluded and should lead to the application of the law of the consumer's habitual residence for claims in tort.

ii) The second situation in which consumer protection does not require an exclusion of the accessory connection mechanism concerns cases in which the accessory connection leads to the application of a law that is actually *closer for the consumer* than the law that would otherwise be applicable.

For example, one could think of the case of a French consumer who enters into a contract with a German travel agent for a trip to Kenya where he suffers damage. In such a case, the *contractual* relationship between the parties would be governed by German law, in accordance with Article 3 (if the parties had chosen German law) or in accordance with Article 4 (in the absence of a choice) of the Convention of Rome I or the Rome I Regulation.

In the numerous European countries in which concurrent actions in contract and tort are permitted, the injured party could also base his claim, under certain conditions, on tort. Given that in such a scenario, the facts show a manifestly closer connection to German law as opposed to the law of Kenya, the country in which the damage occurred, an accessory connection under Article 4(3) of the Rome II Regulation should be admitted and would lead to the application of German law for the claim in tort. The European case law shows that such scenarios are far from being purely academic.[41]

c) The choice of applicable law in standard terms of business annexed to a contract by one of the parties will arguably have no effect in tort. In actual fact, according to Article 14(1)(b) of the Rome II Regulation, "where all the parties are pursuing a commercial activity", the parties can choose the law applicable to non-contractual obligations "before the event giving rise to the damage occurred" only if this is done by a "freely negotiated" agreement.[42]

Consequently, if the choice of the law governing a contract between the parties is made solely in the standard terms of business submitted by one party to another without this choice being expressly confirmed by this other party, an accessory connection in tort could arguably also be ruled out in order to avoid an accessory connection leading, in an indirect way, to an outcome that the parties could not have obtained by a direct choice of the law applicable to their extra-contractual relations.

d) Last but not least, Article 14 could also have an impact on the application of Article 4(3) if the law applicable to a *consumer (or employment) contract* has not been agreed upon by the parties, but is determined by the rules of the Rome I Convention (or the forthcoming Rome I Regulation). According to the reasoning above, for parties not pursuing a commercial activity, *i.e. consumers* and *employees*, the accessory connection under Article 4(3) of the Rome II Regulation should, in principle, be excluded. The purpose of this exclusion is to avoid the parties' choosing *e.g.* the law of the seller's or the service provider's country of origin which would then apply instead of the *lex loci delicti* (which may be the law of the consumer's habitual residence) without the consumer (or employee) being fully aware of the consequences of this choice for a future action in tort.

If the parties do *not* choose the applicable law, the Rome I Convention and the forthcoming Rome I Regulation lead, in principle, to the application of the *country of origin* of the seller, the service provider etc., *i.e.* the law of the

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[41] See the French case: Cour de cass., 1re Ch. civ., 28.10.2003 (Pays-Fourvel *c.* Société Axa Courtage): acccident in Cambodia on the river Mekong, travel contract booked in an agency in Paris, 2004 Rev. Crit. 82, note Bureau; 2004 Clunet 499, note Légier; *JCP* 2004.II.10006, note Lardeux; 2003 LPA, n° 255, p. 11, note Pascal Ancel; 2006 IPRax 307, note Kadner Graziano.

[42] See *supra*, E.3.3.

party that is not the consumer. This is, however, exactly the result that is prevented by excluding the right of the parties to consumer contracts to agree on the applicable law *ex ante* under Article 14(1)(b). This outcome could be avoided by an interpretation of Article 4(3) in the light of Article 14. According to this interpretation, the accessory connection mechanism of Article 4(3) would, in principle, be excluded for consumer and employment contracts not only in cases where the law applicable to the contract has been chosen, but also where the law applicable to the consumer or employment contracts is determined by the rules set out in the Rome II Regulation.

2.3. *Case Scenario*

A case scenario will help to illustrate the interaction between Articles 14 and 4(3) of the Rome II Regulation according to the interpretation of Article 4(3) suggested above in section 2.2.:

A person living in the England drives through Germany on the way to his holiday destination in Italy. The car breaks down and repairs are undertaken at a German garage. A couple of weeks later, after he has returned to England, the car owner is injured in an accident which is due to the repairs having been negligently carried out. The service contract between the parties provides a clause according to which "*all obligations between the parties shall be governed by German law*".

The injured car owner brings a claim for damages in both contract and tort against the negligent garage owner. Will the choice of law clause in the service contract extend to his action in tort? If this is not the case, will the accessory connection mechanism in Article 4(3) of the Rome II Regulation lead to the application of the law governing the contract also to govern a claim in tort?

a) The agreement between provided that "*all obligations between the parties shall be governed by German law*". Taken as it is, this clause would seem to apply to liability in tort.[43] However, Article 14(1)(b) rules out the possibility for consumers to choose the applicable law "by an agreement [...] before the event giving rise to the damage occurred". As the car owner was not pursuing a "commercial activity" when concluding the contract, according to Article 14(1)(b) of the Rome II Regulation the parties were not in a position to make an *ex ante* choice of the applicable law in tort. The choice of law clause in the contract could therefore not be extended to cover a claim in tort.

b) Will the accessory connection mechanism in Article 4(3) of the Rome II Regulation lead to the application of the law governing the contract for a claim in tort?

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[43] *Cf. supra*, E.3.3.

In a first step, the law applicable to the contract between the parties needs to be determined: A claim for damages in *contract law* would not fall within the scope of the CISG, as the contract between the parties is not a sales contract (see Article 1 of CISG). What is more, the CISG does not apply to liability for death or personal injury (Article 5 CISG). The law governing a claim in contract will thus be determined by Article 3 of the Rome I Convention or, in the future, of the Rome I Regulation. According to Article 3 of both instruments, a contract shall be governed by the law chosen by the parties. In this example, the parties chose German law to govern their relationships which will therefore, in principle, govern the contractual liability.

But what about Article 6, the Rome I Regulation's rule on consumer contracts? In this example, the garage owner was only pursuing his commercial activity in Germany, not in England. Given that the garage owner did not "pursue his commercial or professional activities in the country where the consumer has his habitual residence" and that he did not "by any means, direct [his] activities to that country or to several countries including that country", the rule of the Rome I Regulation on consumer contracts (Article 6) will not apply and the contract between the parties will be governed exclusively by the law chosen by the parties, *i.e.* by German law.

Will the parties' choice of German law extend to a claim in tort by way of the accessory connection mechanism?

Article 4(3) states that "[w]here 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". The negligent performance of the contract led to the accident so the service contract between the parties was closely linked with the accident in question. The conditions of Article 4(3) are thus met and the law applicable to the contract could, according to the wording of Article 4(3), be extended to a claim in tort.

However, applying Article 4(3) would lead to the application of a law (German law) that the parties would not have been able to choose as the applicable law, *i.e.* as the choice would be considered void under Article 14(1)(b). According to the above reasoning,[44] Article 4(3) and 14 of the Rome II Regulation have to be read together and the underlying purpose of Article 14 (*i.e.* to protect consumers from agreements with consequences they might not be aware of) should also be respected when applying Article 14 of the Rome II Regulation. As the parties

[44] *Supra*, F.2.2.

could not have chosen German law, the application of the same law by means of the exception clause in Article 4(3) should be excluded.

As the parties did not have their habitual residence in the same country (Article 4(2) of the Rome II Regulation), the claim in tort is governed by the law of the place where the accident and the damage occurred, *i.e.* by English law.

Had the accident in the above example occurred during the car owner's vacation in Italy, Italian law would apply to the claim in tort. However, the parties would still be able to choose German or English tort law *ex post* if they wished to do so.

c) Would the parties' choice of the applicable law in the case scenario extend to claims in tort if the English party had been on a business trip in Germany?

According to Article 14, "[t]he parties may agree to submit non-contractual obligations to the law of their choice" before the event giving rise to the damage occurred if all parties were "pursuing a commercial activity". It should, however be required that there be a connection between the victim's commercial activity and the tort in question in order for the parties to be able to choose the applicable law and for a contract to be taken into consideration for the accessory connection mechanism.[45] This connection would clearly have existed if the parties had been in business contact with each other before the tort was committed and if there had been a connection between the commercial activity pursued and the tort in question. This was, however, not the case in the above example (the contractual relations between the parties were limited to the repair work to be carried out on the car) so that the choice of the law applicable in tort, as well as the accessory connection mechanism, are arguably still ruled out by Art. 14(1)(b).

G. *Conclusion*

1) By admitting the choice of law not only *ex post* but, under certain conditions, also *ex ante*, Article 14 provides for a modern approach, centring on the parties' freedom to choose. Article 14 makes clear that the parties are free to come to an agreement on the law applicable not only to their contractual, but also to their extra-contractual relations. Article 14 also clearly sets out the circumstances in which an agreement on the applicable law is allowed. Consequently, the Rome II Regulation considerably contributes to legal certainty and to foreseeability with regards to the outcome as to the applicable law in tort.

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[45] See *supra*, E.3.1.

2) As for the limits on party autonomy in tort, experience will show whether the parties' freedom to choose the applicable law really needs to be limited as much as in the current version of the Rome II Regulation.

3) The task for the courts and academics will be to establish a coherent relationship between the rule on party autonomy (Article 14) and the rule on *rattachement accessoire* (accessory connection), *i.e.* the rule that provides for the application of the same law for contractual and extra-contractual obligations, Article 4(3).

4) Since Article 14(1)(b) rules out *ex ante* agreements on the applicable law for parties not pursuing a commercial activity, for *consumer and employment contracts* that do not fulfil the conditions set down in Article 6(1) of the forthcoming Rome I Regulation, an accessory connection under Article 4(3) of the Rome II Regulation should, in principle, also be excluded. The same applies if the choice of the applicable law was made in *standard terms of business* annexed to a contract unless the terms are expressly accepted by the other party, *e.g.* by signing pre-formulated conditions.

5) As for the role party autonomy will play in practice, much will arguably depend on the way in which the provision is constructed, *i.e.* stating that the choice of the applicable law "shall not prejudice the rights of third parties", in particular the rights of insurers. It is essential that this provision be interpreted with care. Parties will only consider choosing the applicable law if they do not simultaneously risk losing their insurance cover. If Article 14 is interpreted carefully and reasonably, party autonomy will probably become one of the most important rules in tort, just as it has always been in contract.