

EUROPEAN PARLIAMENT

1999



2004

Committee on Legal Affairs and the Internal Market

PAR 2 REV

5 February 2004

WORKING DOCUMENT

on the proposal for a regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (“Rome II”)

Part 2 - Articles 6 to end

Committee on Legal Affairs and the Internal Market

Rapporteur: Diana Wallis

Violations of privacy and rights relating to the personality

a. Jurisdiction

In *Fiona Shevill*¹, the Court of Justice held that where a claimant has been defamed in two or more Member States, he may sue in the courts of the place where the defendant is established (place where the harmful event occurred) or in the courts of the place where the loss was suffered.

Example

A UK newspaper circulated in the UK (1,000,000 papers), France (2000) and Germany (3000) libels a German Minister. The Minister can either sue in the UK courts, in which case he can claim damages for the whole of the damage wherever incurred or, for instance, in the German courts but only for the damage incurred in that State where he suffered damage to his reputation (*i.e.* in respect of the 3000 newspapers sold in Germany). Hence the victim has an interest in suing in the country of origin so as to avoid suing in several Member States.

b. Applicable law

At present, English law differs from the approach taken in any other Member State, apart from Ireland. Under the "double actionability rule", the law of the place where the damage occurs is applied but, before any award of damages is made, it is checked whether the application of UK law would have resulted in the award of damages.

Under Rome II, the Commission has sought to introduce a compromise. The law of the place where the damage arises is applied **unless the application of that law would be contrary to the fundamental principles of the law of the forum**. This notion is not particularly easy to grasp. It is clearly meant to be flexible, especially since, unlike Article 22, it does not state that the application of the foreign law has to be manifestly contrary to the fundamental principles of the law of the forum.

Example

Same facts as the previous example. If the Minister sues in the UK and the application of German law would be contrary to the fundamental principles of UK law relating to freedom of the press/freedom of expression, the British court would set aside the application of that law and apply national law. If the Minister sues in Germany, German law would apply but the claim and the operation of German law would be restricted to the losses arising in Germany.

Violation of the environment

Here the general rule in Article 3(1) applies, unless the person sustaining the damage elects to base his claim on the law of the country in which the harmful event occurred (Article 7).

¹ Case C-68/93 *Fiona Shevill* [1995] ECR I-415.

The fact that damage which is likely to arise is covered by Article 3(1) may be problematic for existing insurance contracts in certain jurisdictions.

Infringement of intellectual property rights

The applicable law with regard to a non-contractual obligation arising from an infringement of an intellectual property right is the law of the country for which protection is sought (Article 8). Where a unitary Community industrial property act exists, the applicable law is governed by that instrument. For questions not covered by such an instrument, the applicable law is the law of the Member State in which the infringement is committed.

The question arises here as to whether provision should be made for choice-of-law agreements. It is not clear why such agreements in respect of intellectual property rights have been excluded.

Non-contractual obligations other than those arising out of a tort/delict

The basic rule is that where there is a previous relationship (*e.g.* a contract), the applicable law is that governing that relationship (Article 9(1)).

Nonetheless, subject to the basic rule, where the parties have their habitual residence in the country where the harmful event occurs, the applicable law is that of that country.

Furthermore, in cases of unjust enrichment, the applicable law is that of the country in which enrichment took place.

As regards cases of actions performed without due authority (*negotiorum gestio*), the applicable law is that of the country of habitual residence of the beneficiary.

In any event, however, where the non-contractual obligation is manifestly more closely connected with another country, that country's law is to apply.

Finally, it is made clear that non-contractual obligations relating to intellectual property are covered by Article 8 alone.

This is designed to cover a variety of non-contractual obligations so as to encompass such matters as sums wrongly received/unjust enrichment and agency without authority. The rules are extremely flexible and reflect the concern to ensure that the proper law for a tort claim and the proper law for a concurrent claim in restitution should coincide as far as possible. Likewise, the rationale for allowing parties resident in the same country to have that country's law applied (*lex propria in foro proprio*) is self-evident. But in view of the disparate obligations covered by this residual provision, the rules are flexible.

A question has been raised with regard to the basic rule as to what the position is where the relationship between parties is governed by more than one law. Furthermore, as regards unjust enrichment it has been pointed out that it is not uncommon for enrichment to take place across a series of countries.

As regards agency without authority (*negotiorum gestio*), transborder cases are probably rare and salvage of vessels falls mostly nowadays within the law of contract and will be covered by the International Convention on Salvage.

Whether the lack of precision as to what precisely Article 8 covers, especially in view of the different categorisation of obligations in common law systems (where some of the cases seemingly covered might fall under the law of trusts), is likely to give rise to difficulties will need to be considered.

Freedom of choice

Article 10 enables the parties to agree on the application of a given law after the dispute has arisen. However, where all the elements of the situation were located in a country other than the country whose law is chosen, the parties cannot elect not to apply the mandatory rules of the former country. The Commission states that such rules have to be distinguished from the overriding mandatory rules referred to in Article 12 (internal rules which you cannot contract out of) and the public policy of the forum referred to in Article 22 (which apply irrespective of the applicable law). There is also a clause to preserve the application of Community law. The intention behind these rules is clear, but some thought could be given to rationalising them, also in view of the provision of Article 6(1) relating to the fundamental provisions of the forum as regards freedom of expression and information.

No provision is made for agreements made before a dispute has arisen. It may be that the view is taken that this is covered by the provision of Article 3(3) relating to a closely connected contract, but this needs examination.

A further problem is that the freedom-of-choice rules do not apply to intellectual property rights. This needs further clarification.

Scope of the law applicable to non-contractual obligations

It is assumed that in this context "damage" also includes "loss". It seems that the "extent of liability" covers, inter alia, the type of liability. Clarification would be welcome. The idea behind point (d) ("within the limits of its powers") seems reasonably intelligible from the explanatory memorandum, but not from the provision read in isolation.

Overriding mandatory rules

Example

In *Arblade*¹ the Court of Justice held that the public interest relating to the social protection of workers in the construction industry and the monitoring of compliance with the relevant rules may constitute an overriding requirement. It defined mandatory rules as "national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order of the Member State concerned as to require compliance therewith by all persons present on the territory of that Member State and all legal relationships within that State".

¹ Joined Cases C-369/96 and C-376/96 *Arblade* [1999] ECR I-8453.

Article 12(1) provides that where the law of a specific country¹ is applicable, effect may be given to the mandatory rules of another country with which the dispute is closely connected. This may be objectionable to several Member States which entered reservations in respect of the analogous provisions of the Rome Convention on contractual obligations.

Rules of safety and conduct

Whatever the applicable law, the rules of safety and conduct in force at the place and time of the harmful event are to be taken into account.

Example

A road accident to which Article 3(2) is applied (law of the place of habitual residence of the tortfeasor and the victim applied). The road traffic rules of the country in which the accident occurred would be taken into account (Article 13). It must be borne in mind, too, that the Hague Convention on the law applicable to traffic accidents of 4 May 1971 would probably be applicable in such a case.

This provision might well be included in Article 11 (scope of the law applicable).

Direct action against the insurer of the person liable

Article 14 provides that the right to proceed against the tortfeasor's insurer is to be governed by the law applicable to the non-contractual obligation unless the victim prefers to base his claim on the law applicable to the insurance contract.

Subrogation and multiple liability

Article 15 is designed to cater for subrogation. The wording, however, seems over-complex and could give rise to misapprehensions.

Example

Peter O'Toole, an Irishman resident in the Germany, is insured against accidents with the XYZ-Versicherungsgesellschaft GmbH, of Frankfurt-am-Main. He is injured by Pietro Bianco, an Italian resident in Milan, in a traffic accident for which Bianco would appear responsible while both parties are visiting Paris.

Under the general rules, the applicable law is that of France and the courts of Paris have jurisdiction.

O'Toole makes a claim on his insurance company and the insurance company pays up. Under Article 15 the XYZ-Versicherungsgesellschaft, whose insurance contract provides for subrogation, can sue Bianco under the laws of France.

Public policy of the forum (Article 22)

¹ The English text seems to refer wrongly here to the law of a "third country".

This enables the application of a rule of law applicable by virtue of Rome II to be refused if it would be manifestly applicable with the public policy of the forum.

The relationship of this article with Article 6 on violation of privacy and rights relating to the personality is problematic. The question arises also as to whether and to what extent it would be possible and desirable to have Community public policy.

Relationship with other provisions of Community law

This article is designed to take out, for instance, Community internal market legislation from the application of the Rome II rules where they make provision, say, for the application of the country-of-origin principle. This would cover, it is argued, the e-commerce directive, the television without frontiers directive and any future legislation on unfair commercial practices and services.

Non-compensatory damages

Article 24 is designed to rule out the award of exemplary or punitive damages. The question arises whether this is equitable or appropriate in an instrument such as this. It could amount in effect to harmonisation of the law of one aspect of the law on damages.