



Annual Meeting 2009 of the Association of American Law Schools

Section on Conflict of Laws

Choice of Law Reforms in the EU:

A Model for the U.S. or a Cautionary Tale?

Reflections by Scholars and Suggestions for Teachers

Rome II-Regulation

I. Introduction

II. Scope of application

1. Characterization

- Civil and commercial matters; especially liability of the State (cf. Art. 1(1)(2) and recital (9))
- Non-contractual obligations (cf. Art. 2 and recital (11))
- Especially: culpa in contrahendo (cf. Art. 1(2)(i) Rome I-Regulation)

2. Exceptions for particular areas

- Non-contractual obligations arising out of family relationships (cf. Art. 1(2)(a) and recital (10))
- Non-contractual obligations arising out of nuclear damage (Art. 1(2)(f))
- Non-contractual obligations arising out of violations of privacy and rights relating to personality (Art. 1(2)(g))

3. Internal conflicts: the applicable rule in cases of multiple characterization

III. Choice of Law (Art. 14)

1. Exclusion of choice of law for particular torts (cf. Art. 6(4), 8(3))

2. Choice of law before the tort occurred (Art. 14(1)(1)(b))

- Both parties pursuing a commercial activity
- Individual agreement

IV. General rule for torts (Art. 4)

1. Law of the country in which the damage occurs (Art. 4 (1) and recital (17))

2. Escape clause (Art. 4(3))
3. Traffic accidents: Hague Convention and forum shopping (cf. Art. 28(1))

V. Product liability (Art. 5 and recital 20))

1. Notion of product liability
2. Hague Convention and forum shopping (cf. Art. 28(1))
3. Cumulative connecting factors and interests of the parties (Art. 5(1))
 - Place of marketing of the product: Reasonable foreseeability of the applicable law for the tortfeasor
 - Notion of marketing of the product
 - Notion of product of the same type
 - Notion of foreseeability
 - Notion of the place of acquisition
4. Escape clause: the problem of the “bystander” (Art. 5(2))
5. Rules of safety and conduct (Art. 17)

VI. Market related torts (Art. 6)

1. Relevance of the place of marketing (cf. recitals (21) and (22))
2. Notion of private antitrust law (cf. recital (23))
3. Treatment of multi-state-torts (cf. Art. 6(3)(b))
4. Influence of the country of origin-principle?

VII. Environmental damages (Art. 7)

1. Notion of environmental damage (cf. recital (24))
2. Rule of ubiquity and most-favorable-treatment principle (cf. recital (25))
3. Effect of permissions granted by public authorities (Art. 17)

VIII. Culpa in contrahendo (cf. recital (30))

1. Breach of contract-related duties (Art. 12)
2. Breach of general duties of care (Art. 4)

IX. Outlook