

THE APPLICATION OF THE ROME II REGULATION ON THE INTERNET TORTS

by

ANABELA SUSANA DE SOUSA GONÇALVES*

The internet is a global system of interconnected networks that enable the development of private relations in contact with several legal systems. Different type of torts may occur on the cybernetic space. The Regulation No 864/2007 on the law applicable to non-contractual obligations (Rome II) does not have specific rules for the internet torts, but that does not make it inapplicable to them. Sometimes the application of the Rome II Regulation rules to the internet torts will not have particular features, but most of the times the global scope and flexibility of location, two of the main characteristics of the internet, require an effort of adaptation of the Rome II Regulation rules. We tried to determine which conflict-of-law rules of the Rome II Regulation may be applicable to the internet torts and how that application should be done. There are damages carried out on the internet that falls under the general rules of the Rome II Regulation (Article 4 and Article 14), that arises from an infringement of an intellectual property rights (Article 8), cases of product liability (Article 5) and damages that arises of unfair competition or acts restricting free competition (article 6). As a previous step we have determined the scope of application of the Rome II Regulation and analyzed the relation between the Rome II Regulation and the Directive on electronic commerce.

KEYWORDS

Rome II Regulation, torts/delict, internet, private international law

* Professor of Law, Law School, University of Minho, Portugal;
asoncalves@direito.uminho.pt

1. INTERNET TORTS

The internet is a global system of interconnected networks, which is characterized by having a diffuse and a global nature, the wide spreading of information, the simplicity of establishing contacts and the exchange of data. The worldwide character of the internet and the ease of communication determine that the private legal relations established through this global network are generally in contact with more than one legal system. The internet is an environment where private international relations multiply, because it is very simple for those who operate through this network to become in contact with several laws.

The Regulation No 864/2007 on the law applicable to non-contractual obligations (Rome II) is applicable to situations involving conflicts of law, which means situations in contact with one or more systems of law other than the one of the forum - private international relations. The Internet by its features, as a global system of interconnected computer networks that serves billion of users worldwide, is a fertile ground for the establishment of private international relations: it's a way of communication, doing business, hosting and spreading data and information, and enables relations with a global scope and in contact with more than one legal system. Rome II does not have a specific rule for the internet. However, many different types of torts may occur on the cybernetic space and the damages must be compensated and the absence of special rules does not make the Rome II Regulation inapplicable to those torts. Sometimes the application of the Rome II Regulation rules to the internet torts will not have particular features, but most of the times the global scope and flexibility of location, two of the main characteristics of the Internet, require an effort of adaptation of the Rome II Regulation rules.

2. THE ROME II REGULATION

The Rome II Regulation is a part of the common legal framework of the European Union policy of judicial cooperation in civil matters. Through a set of legal acts, grounded on the principle of mutual recognition, the judicial cooperation in civil matters aims to eliminate the distortions present in the internal market that are the result of the disparity of the various legal systems existing in the Union and thus simplify the dispute resolution.

Rome II Regulation unifies the conflict-of-law rules regarding non-contractual obligations in civil and commercial matters involving a conflict of laws [art. 1 (1)], and that includes the consequences arising out of tort/delict. Article 1 (2) and (3) of the Rome II Regulation expressly excludes certain matters from its scope. Analyzing the matters listed, we realize that the non-contractual obligations arising out privacy violations and other personality rights are excluded [Article 1 (2) (g)]. The Internet is a public worldwide system, through which the information circulates and is communicated to millions of users. The violation of personality rights throughout the Internet, like defamation on offensive websites, disclosure of confidential data and photographs on the Internet, data theft, has an enormous repercussion and should have a unified solution in the European Union. In the preparatory work on the Rome II Regulation, it was discussed the inclusion of a special rule for the violation of personality rights, but the absence of consensus dictated the exclusion of these issues from its material scope.¹ However real-life situations show that the violation of personality rights should have unified conflict-of-law rules in the European Union.

Rome II has a universal application, in the sense that the law specified by the Regulation rules will be applied even if it is not the law of a Member State (Article 2). There is not any distinction between intra-Community situations and situations involving third countries. In what concerns its temporal scope, Rome II is applicable to events giving rise to damage which occur after 11 January 2009 (Article 32). Within in material and temporal scope, the Rome II Regulation preempts national conflict-of-law rules.

3. THE RELATIONSHIP OF THE ROME II REGULATION AND THE DIRECTIVE ON ELECTRONIC COMMERCE

One previous step is to set out the relationship of the Rome II Regulation and other provisions of European Union law. In this context, it is essential to determine the scope of application of the *Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)*. The *Directive on electronic commerce* creates a coordinated field by the harmonization of certain provisions in the area of the information society services. The requirements concerning the liability of the information society service pro-

¹ Dickinson, A., 2008, *The Rome II Regulation: The law applicable to non-contractual obligations*, Oxford University Press, Oxford, pp. 238-240.

vider is one of the legal aspects ruled by the *Directive on electronic commerce* and this is where it may be a mismatch between this Directive and Rome II. Therefore, it is important to articulate both legal instruments.

The *Directive on electronic commerce* only applies to the information society service provider in relation to services and goods which take place online, as we can deduce from the Recitals 17 and 18. The Recital 17 establishes the definition of information society services by reference to the *Directive 98/34/EC of 22 June 1998 laying down a procedure for the provisions of information in the field of technical standards and regulation and of rules on information society services*² and to the *Directive 98/84/EC of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access*.³ In this sense, information society services, according to Recital 17, «(...) covers any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service».

Article 3 (1) of the *Directive on electronic commerce* subjects the information society services provided by a service provider established on the territory of a Member State to the law of that State and, according to art. 3 (2), the other Member States cannot restrict the freedom to provide information society services from another Member State. This is the country of origin-principle and it is justified in Recital 22 where is stated that «[i]nformation society services should be supervised at the source of the activity, in order to ensure an effective protection of public interest objectives», and to guarantee the free movement of goods and services, and «(...) the legal certainty for suppliers and recipients of services, such information society services should in principle be subjected to the law of the Member State in which the service provider is established». This solution of subjecting the information society services only to the law of the Member State in which the service provider is established is a way to enable the development of this kind of services in the European Union: if they were subject to the law of the country of the recipients of services, their development would be more complex, because they would have to comply with the law of each recipient of services. This would multiply the laws to which they would be subjected and would increase the complexity of their activity and the costs.

² OJ L 204, 21.7.1998, p. 37, as amended by Directive 98/48/EC, OJ L 217, 5.8.1998, p. 18.

³ OJ L 320, 28.11.1998, p. 54.

Article 27 of the Rome II Regulation states that the provisions of European Union law that lay down conflict-of-law rules concerning non-contractual obligations in particular matters prevails over the Rome II Regulation. Even though, Article 1 (4) of the *Directive on electronic commerce* states that Directive does not establish additional rules on private international law, the Recital 23 determine that the provisions of the Directive overcome the rules of private international law. A lot was already written about the nature of the rules of the *Directive on electronic commerce*,⁴ but several Member States transposed the principle of origin-principle the Directive through a unilateral conflict-of-law rule.

Regardless the nature recognized to Article 3 (1) of the *Directive on electronic commerce*, it is unquestionable that this rule has an influence on the determination of the law that governs electronic commerce, which is recognized in Recital 35 of Rome II. While the *Directive on electronic commerce* establishes the country of origin-principle (that will be the place of establishment), the option of the Rome II Regulation is by the law of the country in which the damage occurs (not giving importance to the place where the event giving rise to the damage occur). This is a contradiction that affects the application of the Rome II Regulation. Article 27 of the Rome II Regulation establishes the priority of the conflict-of-law rules relating to non-contractual obligations existing in Community law instruments in specific matters, but it is not certain that the Article 3 of the *Directive on electronic commerce* is a conflict-of-law rule. Anyway, it is clear from Recital 35 the prevalence of the *Directive on electronic commerce*.

This is a questionable solution, which creates a complexity of sources and hampers the determination of the applicable law. To ensure the coherence of the regulation of non-contractual obligations, all the questions of torts and liability should have been submitted to the Rome II Regulation and excluded from the directives. If the European Union legislator regards as essential the country of origin-principle to the development of the information society services, Rome II should have expressly rule these subjects and accept that principle, clearing up the question.

⁴ Heller, Michael, 2004, 'The Country of Origin Principle in the E-Commerce Directive – A Conflict with Conflict of Laws', ERPL, Vol. 12, no. 2, pp. 206 et seq.; Mankowski, Peter, 2002, 'Herkunftslandprinzip und deutschesUmsetzungsgesetz zur e-commerce-Richtlinie', IPRax, Vol. 4, pp. 257 et seq.

4. GENERAL RULES

There are damages carried out on the internet that falls under the general rules of the Rome II Regulation (Article 14 and Article 4). That happens, for example, when the internet is used as a way to share malicious data and spread damages, like virus, worms, and malicious programs that can destroy restricted networks or personal computers.

In those cases, there are two general conflict-of-law rules of Rome II that can be applicable. The first one is Article 14 which stipulates freedom of choice in the field of non-contractual obligations. The parties' involved in a tort situation may choose the applicable law by an agreement after the event giving rise to the damage occur (*ex post agreement*) or by an agreement before the event giving rise to the damage occur (*ex ante agreement*). In this last case, all the parties must pursue a commercial activity and the agreement must be freely negotiated. According to the conditions of Article 14 section (1) the choice of law must be expressed or demonstrated with reasonable certainty by the circumstances of the case. The choice cannot harm the rights of third parties. In the circumstances of article 14 section (2), the chosen law cannot derogate the mandatory provisions of the law of the country which would be applicable in the absence of agreement. In the circumstances of Article 14 section (3), the parties cannot derogate the mandatory provisions of European Law, by choosing the law of a third State.

In the absence of choice, the general rule is Article 4, in which the first connecting factor to assess is the habitual residence of the parties. If the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time the damage occur, the applicable law will be the one of the habitual residence of the parties [section (2)]. The significant element is the common social environment. Article 23 (2) defines that the habitual residence of a natural person acting in the course of his business is his principal place of business. If the case concerns a legal person its habitual residence will be the place of central administration. However, if the damage occurs in the course of operation of a branch, agency or other establishment, the habitual residence will be the place where is located that branch, agency or other establishment [Article 23 (2), 2nd part]. This notion of presumed residence has its origins in the *Brussels Convention on jurisdiction and the enforcement of judgments in civil and commer-*

cial matters (Brussels Convention),⁵ and it is present also in the *Regulation No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* (Brussels I).⁶ It must be interpreted in accordance with the ECJ jurisprudence which has stated that «(...) the concept of branch, agency or other establishment implies a place of business which has the appearance of permanency, such as the extension of a parent body, has a management and is materially equipped to negotiate business with third parties so that the latter, although knowing that there will if necessary be a legal link with the parent body, the head office of which is abroad, do not have to deal directly with such parent body but may transact business at the place of business constituting the extension».⁷

If the tortfeasor and the victim do not have their habitual residence in the same country, the applicable law is the law of the country in which the damage occurs, materializing the principle of *lex loci delicti commissi*. Article 4 (1) clarifies that the law of the country where the wrongful action occur and the law of the country where the indirect consequences of the damage occur are not relevant in the determination of the applicable law. To the determination of the applicable law it is only significant the place of the direct damage, defined in Recital 17 «(...) in cases of personal injury or damage to property (...)» as «(...) the country where the injury was sustained or the property was damaged respectively». This is called the first impact rule and it arises also of Article 5 (3) of Brussels Convention and Article 5 (3) of Brussels I Regulation, for which the ECJ had already made the distinction between direct damage and consequential damage.⁸ Applying this connecting factor on the Internet torts, if the virus or malicious program infects a certain computer or a network of an enterprise, the direct damage will be the place where is located the computer that is affected by the virus or the malicious program or the network of companies that are affected.

This rule raises several complex issues. The first is that one wrongful action may give rise to damages in computers or networks located in several states, which is possible because of the worldwide nature of the Internet (“Streudelikt” or scattered tort). In those cases, it is clear from the Regulation rules that we will have to apply the mosaic approach, and apply a dif-

⁵ Article 8 No. 3, Article 13 No. 3, 2nd part, Brussels Convention.

⁶ Article 9 No. 2, Article 15 No. 2, Article 18 No 2 Brussels I Regulation.

⁷ ECJ, *Somafer SA v Saar Fern Gas AG*, case C-33/78, ECR 1978, p. 2183, § 12.

⁸ V.g., ECJ, *Antonio Marinari v Loyd’s Bank Zubaidi Trading Company*, case C-364/93, ECR 1995, pp. I-2719.

ferent law to each one of the different damages, distributing the applicable law. This may lead to a situation where the same wrongful action that gave rise to damages in two countries, is compensated in the first country and is not in the second country, by the application of the law where the damage occur. The same event that gave rise to the same damages has different solutions. This harms the coherence in the regulation of unitary situations, harms the justice in the regulation of those cases and reduces the legal certainty. The second problem is that in some situations it can be difficult to locate the damage.

In the two situations described, the “escape clause” of manifestly closer connection may be of some help [Article 4 (3)]. This section introduces some flexibility in the rule by allowing the application the law of another country that is more closely connected with the tort than the ones indicated by section 1 and 2. The “escape clause” allows, by evaluating the concrete circumstances of the case, to reach to a decision more just and suitable to the case *sub judice*. The rule states that the manifestly closer connection may consist in a preexisting relationship between the parties, such as contract. This accessory connection clause allows the application of another law, that governs another relationship between the parties, to the non-contractual claim, avoiding fragmentation of legal situations.

5. VIOLATION OF INTELLECTUAL PROPERTY RIGHTS

Through the Internet is also possible to infringe intellectual property rights. The intellectual property rights were thought as a way of protecting the creation, the innovation, the research by granting the creator an exclusive right to explore their inventions. That means that the right-holder can prevent others of using their creations and he enjoys the economic advantages of their exploration in a period of time, in a certain territory. After this period expired, those creations enter the public domain. The worldwide character of the internet and the swift circulation of communications makes easier to spread the inventions and innovations on a global level but also simplify the spread of violations of intellectual property rights. One book protected by copyrights may be wrongfully uploaded in one country and easily placed in a website that is seen worldwide or allows downloading worldwide.

Article 8 (1) establishes the application of the law of the country for which the plaintiff claims protection. Article 8 (1) sets the criterion of *lex loci*

protectionis. The *lex loci protectionis* is also the rule that governs the existence and constitution of intellectual property law, in accordance with the principle of territoriality that rules this question on the substantive law.⁹ The option of the Rome II legislator for the *lex loci protectionis* is justified by the need to avoid that a State law governs an infringement of an intellectual property rights that does not exist according to the law that governs their existence. This option was dictated by the need of coherence and unitary regulation of related questions. So, to the infringement of an intellectual property right is applicable the law of the country for which the plaintiff claims protection, and this may give rise to several claims for which are applicable different laws. In an internet tort, where the act of infringement is spread to several countries, this will guide to the application of the mosaic principle, and that will force the plaintiff to identify in which country he claims protection.

If the non-contractual obligation arises of the infringement of a unitary Community intellectual property right it is applicable the law of the country in which the act of infringement was committed, to the questions that are not governed by the Community instruments [Article 8 (2)]. The criterion set on this section is the application of the *lex loci delicti* to the infringement of a unitary Community intellectual property right. In case of the infringement of a unitary Community intellectual property right the protection is demanded in all the territory of the European Union, so the *lex loci protectionis* would not be able to determine the applicable law. The law of the country where the act of infringement was committed will only apply to the questions that are not ruled in Community instruments, which prevail over the Rome II regime [Article 27 and Article 8 (2)]. However, it may also be complicated to locate the place where the violation of the intellectual property right was committed, where the act of infringement took place, for example, the infringement of a Community trademark by its use in a site on the internet that is visible in several countries.

6. PRODUCT LIABILITY

Related to the internet torts it is also possible cases of product liability, since a lot of software products are bought on the internet. In this situation, the number of applicable laws that the person claimed to be liable would be

⁹ About the *lex loci protectionis* principle, v. Fawcett, James/Torremans, Paul, *Intellectual Property and Private International Law*, Oxford University Press, Oxford, 1998, pp. 449 et seq.

submitted could be vast. To avoid this result, the foreseeable defense plays a central role in Article 5 of Rome II. This article has several connecting factors that are applicable in a subsidiary way, in a cascade connection. Besides the choice of law (Article 14), according to Article 5, it is applicable: (1) the law of the habitual residence of the person claimed to be liable and the person sustaining damage if both have their habitual residence in the same country at the time the damage occur - failing that; (2) the law of the habitual residence of the victim at the time the damage occur, if the product was market in that country and as long as the producer has reasonably foresee the marketing of the product in that country – failing that; (3) the law of the acquisition of that product, if the product was market in that country, and if the producer has reasonably foresee the marketing of the product in that country – failing that; (4) the law of the country where the damage occur, if the product was market in that country, and if the producer has reasonably foresee the marketing of the product in that country. Besides the application of these laws, it is also possible the application of the law of another country that has a closer connection with the case [Article 5 (2)]. The escape clause gives flexibility to this rule.

The application of Article 5 to the internet may be complex, for example, in the application of the law of the country of acquisition, which can be difficult to determine in case of distance sales. The country of acquisition in case of distance sales must be considered the place where the buyer has received the product or the place where the seller is. The place where the seller is may be difficult to locate, because that information may not be given on the website. In addition, the seller and the person claimed to be liable may not be the same person and may be located in different countries. Because of this the place of receipt seems preferable¹⁰ and the person claimed to be liable would be protected by the foreseeability clause.

In several connecting factors, for application of a certain law is necessary that the product is market in that country and that the producer can reasonably foresee the marketing of the product there. One question is to know what is the concept of marketing. The country where the product is marked is the country where the product is distributed, where it is for sale.¹¹ The product may be distributed through the internet. The fact that the internet

¹⁰ With this opinion, v. Dickinson, A., 2008, *The Rome II Regulation: The law applicable to non-contractual obligations*, Cit, p. 382.

¹¹ Junker, A., 2010, 'Art. 5 Rom II-VO' in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, ed. Hans Jürgen Sonnenberger, 5. Auflage, Verlag C.H. Beck, München, p. 1235, § 29.

has a global reach does not mean that just because the product is selling on the internet, the whole world is the market of that product and that the producer must foresee the trade in every country of the world. To access the market of a certain product that is sold on the internet it is necessary to analyze the web site and try to find some indication of the market, in a process that we think may be similar to the one that is done in Article 6 of the Rome I Regulation to determine in the case of electronic consumer contracts «when the professional directs his activities to a country». In ECJ joined cases *Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG* and *Hotel Alpenhof GesmbH v Olivier Heller* the court set out a non exhaustive list of elements «(...) which are capable of constituting evidence from which it may be concluded that the trader's activity is directed to the Member State of the consumer's domicile (...)»¹² and we think that those elements can be adapted to this situation.

If the internet site excludes a certain country from the commercialization that is very important because that is a sign that that country was excluded from commercialization and that the producer will not reasonably foresee the marketing of the product in that country. By contrary, the internet site may only include one or two countries, explicitly or through the indication of some characteristics, and that is important for the foreseeable defense.

7. UNFAIR COMPETITION AND ACTS RESTRICTING FREE COMPETITION

Internet may also be used as a way of disturbing fair competition. In those situations, the wrongdoing may be directed to the market in general or to one specific competitor (Article 6). If the unfair competition act is directed to a market (market-related act) it affects the collective consumers, the functioning of the market in general and the interest of specific competitors. In this case it is applicable the law of country where those interest were affected [Article 6 (1)]. If the act of unfair competition only affects the interest of a specific competitor it is applicable the general rule of Article 4. Those are the cases of sabotage, recruitment of specialized staff of a direct competitor, espionage, theft of production secrets: competitor-related acts which generally are not significant to the correct functioning of the market.¹³

¹² ECJ, *Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG* and *Hotel Alpenhof GesmbH v Olivier Heller*, Case C-585/08 and C-144/09, ECR 2010, pp. I-12527, § 96.

¹³ Regarding this section we refer to what we said about Article 4.

The specificity is in section (1) of Article 6: it states that in situations of market-related act it is applicable the law of country where the general interests of the market was affected or is likely to be affected. As Recital 21 determines «[i]n matters of unfair competition, the conflict-of-law rule should protect competitors, consumers and the general public and ensure that the market economy functions properly», so it is applicable the law of the affected market. The application of market effects principle prevents that competitors use their national patterns of fair competition in foreign markets. In those cases, the question is how to establish the country where the market interests were affected. The answer depends on the type of act of unfair competition and the internet can be used as an easy mean to reach a certain market or several markets at the same time. If the act of unfair competition is done through publicity or sales promotions on the internet, the market affected is the one for which the publicity is directed and where the product is sold or the service is provided, where the other competitors and the consumers will be affected by that act. If the act of unfair competition consists in a sale in one country violating, for example, a market regulatory law, that will be the country where are located the interests of consumers, competitors and general interests of competition affected by that act.

In relation to the internet as a way to spread the unfair competition acts, we may be facing an act, like publicity or a sale through the internet, which is directed to several countries and affects the market of several countries at the same time. In this case we have to apply the mosaic approach and apply to damage occurring in each of the markets the law of the affected market. It has to be like that, because each market has its own regulatory laws according to its specific structures and the kind of competition that wants to promote. So, even if it is the same act, or different similar acts, the damages in each market will be different, according to the different structures, so it is necessary the application of different laws.

Article 6 section (3) is related to acts restricting free competition, which according to Recital 23 should cover, for example, «(...) prohibitions on agreements between undertaking, decisions by associations of undertakings and concerted practices which have as their object the prevention, restriction or distortion of competition within a Member State or within the internal market, as well as prohibitions on the abuse of dominant position within a Member State or within the internal market, where such agreements, decisions, concerted practices or abuses are prohibited by art. 101 and 102 of

the Treaty or by the law of a Member State». To acts restricting free competition Article 6 (3) (a) applies the market effects principle. Under Article 6 (3) (b), when the market is affected in more than one country the plaintiff can choose to submit the entire damage to the law of the forum provided that some conditions are fulfilled: the court seized is the domicile of the defendant; that domicile is in a Member State; that the market of that Member State is amongst those directly and substantially affected by the restriction of competition. One typical situation is the abuse of a dominant position (Article 102 TFUE).¹⁴ In case of several co-defendants the option by the law of the forum is only possible if the claim of restricting free competition against each defendant directly and substantially affects the market of that State. Typical situations are the cases of cartel or concerted practice (Article 101 TFUE).¹⁵

¹⁴ Illimer, Martin, 'Art. 6 Rome' in Rome II Regulation Pocket Commentary, ed. Peter Huber, Sellier European Law Publishers, Munich, pp. 198-199.

¹⁵ Idem, *ibidem*.