APPLICABLE LAW TO NON CONTRACTUAL OBLIGATIONS ON INTERNET: AN OVERVIEW OF THE FORTHCOMING "ROME II" REGULATION

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APPLICABLE LAW TO NON-CONTRACTUAL OBLIGATIONS ON INTERNET: AN OVERVIEW OF THE FORTHCOMING "ROME II" REGULATION.

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Introduction

The European Commission has published on May 2002, a preliminary draft proposal for a Council Regulation on the applicable law to non-contractual obligations. This draft proposal aimed to be complementary to the Rome Convention and, at the same time, a step forward in the Commission's legislative policy concerning Private International Law. .

This Regulation, for a long time expected, has been strongly criticized for many reasons, which we will try to summarize alongside this article.

The applicable law to non-contractual obligations has been considered, during a long period of time, as an exclusive competence of the Member States, and in consequence, the European Commission had no functions in regulating the so called "conflict of law" matters.

The revolution introduced by the expansion of the use of new technologies, and in particular of Internet, has increased the number of disputes or plaints regarding non-contractual obligations. The actual system of determining the applicable law, creates uncertainty, which directly affects Internet users, and among them, consumers.

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Once defined the interest arising from the approval of the Regulation, and consequently of this short article, I will analyze, in a first part, the origins and the need of the forthcoming "Rome II" Regulation , and, afterwards, I would summarize the key sections included in the draft proposal published by the Commission lightened by the answers given by the interested parties in the field of non-contractual obligations.

I.- The Origins of the forthcoming "Rome II" Regulation

1.- Genesis.

Until the late sixties, the European Institutions have not seen the need of a legislative instrument over applicable law to non-contractual obligations. During that period, the European Commission had designed a group of experts in order to prepare a draft-proposal on the applicable law to obligations, including contractual and non-contractual obligations. Unfortunately, the group soon assumed the impossibility of accomplishing the task, and decided, in 1978, to reduce the scope of the instrument only to contractual obligations. Throughout this decision, the group thought it would be easier to reach the necessary agreements.

In June 1980, the Rome Convention was opened to signature, and entered into force in April 1991. The Rome Convention has a Universal application and is considered a key instrument on applicable law.

At that stage, what have been the posterior works headed by the Commission?

Through the 1st October 1994 Resolution, on the European objectives over cooperation in Justice and Home Affairs matters, the European Council announced his determination to give a European instrument on applicable law to non-contractual obligations.

The Council, in February 1998, sent a questionnaire to the different Member States over a preparatory draft-proposal for a European Convention. This questionnaire

constituted the basis for four meetings which took place under Austria presidency. In the last meeting, the Austria presidency presented a draft-proposal for a European Convention on applicable law to non-contractual obligations.

At the same period, the European Commission financed, in the framework of project GROTIUS, his own draft proposal for a European Convention. This project was headed by the European Group of Private International Law and aimed to highlight the possibility for the European Communities to establish a Convention over applicable law to non-contractual obligations. To achieve this goal, the European Commission intervened actively using the Council's questionnaire in order to prepare a draft paper.

The choice for a non community law Instrument must be explained by the absence of competence of the European Communities, due to the enforcement of subsidiary and proportionality principles. In addition, the EC Treaties, did not foreseen a competence for European Union in that matter.
Nevertheless, when the Treaties had to be revised, the Member states soon assumed the need for harmonization in the applicable law matters in order to achieve the Internal Market goal. The entry into force of Amsterdam Treaty, in May 1999, meant the recognition of new community competences in Justice and Home Affairs matters through the insertion of a new Title IV. In particular, article 65 of the Treaty provides the basis for a community action over applicable law to non-contractual obligations.
Accordingly, The European Council, in December 1998, approved an Action Plan to create a Community law instrument.

2.- The need for a community legislation over applicable law to non-contractual obligations.

As we have mentioned above, there is a real need for a harmonization over applicable law rules. Harmonization does not mean unification. Whereas unification means a common legislation in the different Member States (giving a clear solution for a specific

conflict), harmonization designates the law governing a relationship (but not the concrete solution). The absence of harmonization created some uncertainty, and on the other hand had encouraged the so called "Forum Shopping". Consequently the choice of the community law instrument was the best option even if, as Mr. Andrew Dickinson underlines, we can observe a total absence of transparency in the legislative procedure .

II.- The key points of the "Rome II" Regulation

As will be apparent from the foregoing, I am deeply convinced of the benefices from an EC instrument in any form laying down applicable law rules for non-contractual obligations. I would, however, make the following particular comments on the proposal enshrined in the Commission working paper.

a.- *Article 1: Scope*

The draft Regulation applies "to non-contractual obligations in any situation involving a choice between the laws of different countries", subject to certain excluded matters. There is no express exclusion for obligations imposed under criminal, tax or regulatory legislation, although such obligations are "non-contractual" in nature. It is possible that the draftsman thought that such exclusions were not necessary on the ground that the application of the relevant legislation (administrative, tax, or criminal law) does not involve, at first sight, a choice between the laws of different countries. But, nevertheless, it would be preferable if the scope of the draft Regulation were expressly limited to "civil and commercial matters" as the Rome Convention establishes in its first article.

Others exclusions from the draft Regulation are "non-contractual obligations among the settlers (*sic*), trustees and beneficiaries of a trust". This exclusion recognizes the detailed applicable law rules contained in the 1985 Hague Convention on the law applicable to trusts and on their recognition, but t draftsman had to take into account the following matters:

(a) Of the EC Member States, only the UK, Italy and the Netherlands have ratified the Hague Convention.
(b) The Hague Convention applies only to trusts created voluntarily and evidenced in writing, although the UK implementing legislation has a broader application. Considerable uncertainty is likely to result if the draft Regulation does not make clear whether it applies, in particular, to the obligations owed by constructive trustees[1]
Thus, it would be likely if Article 1 addresses the status of intellectual property rights under the draft Regulation. This is pointed out in the preparatory documents of the Commission, specially due to the particular regime of intellectual property rights.

2.- Article 2: Universal application

As did the Rome Convention, the draft proposal recognizes the universal application of the Regulation. Nevertheless, some interested parties[2] like Amazon.com or, even more, publishers and European press/media associations had strongly criticized the content of this article, as they would be, potentially, subject to all national legislations because of their world wide activities.

3.- *Article 3.1: General rule*

Under the draft Regulation, the law applicable to a non-contractual obligation arising out of a tort or delict shall be the law of the country in which the loss is sustained. That rule is simply stated to apply in the case of personal injury and physical damage to property, but less useful in the case of economic loss. The remainder of the first paragraph of Article 3 serves only to confuse by providing that the law of the place of loss shall apply "irrespective or the country or countries in which the *harmful event* occurred and irrespective of the country in which the *indirect consequences* of the harmful event are sustained". This wording appears to have been intended for the avoidance of doubt, but that is precisely what it generates or recognizes. In fact, the term used by the draft Regulation was introduced also in other EU instruments (e.g.

[1] As it is highlighted by Mr. Andrew Dickinson.
[2] See Amazon.com reaction to the draft proposal.
http://europa.eu.int/comm/justice_home/unit/civil/consultation/contributions/amazon_com_en.pdf

Brussels Convention or EU Regulation 44/2001), been as well quite vague. Consequently, the European Court of Justice had been forced to built up an extraordinary case law concerning its meaning in that context. Notably, in *Bier v. Mines de Potasse d'Alsace*, the Court decided that the expression "the place where the harmful event occurred" in the Brussels Convention must be interpreted so that the claimant has an option to commence proceedings *either at the place where the damage occurred or at the place of the event giving rise to it*. I would agree with Mr. Andrew Dickinson in that it would be less confusing if Article 3.1 were to refer to "the place of the event(s) giving rise to loss" rather than "harmful event".

The European Court has also been called to clarify where the relevant damage has been suffered. The Court built up a distinction between direct and indirect consequences of the event giving rise to damage. Unfortunately, the distinction has not prove his efficiency in real cases, and neither will, in my opinion, in non-contractual obligations matters.

The draft Article 3.1 also fails to address the applicable law solution in a case where damage from a single act causes loss to the same person in more than one jurisdiction.

That is essentially the case in a great number of disputes arising from Internet (e.g. defamation).

The general rule does not apply where the author of the tort and the injured party have their habitual residence in the same country when the tort or delict is committed. In such cases, the applicable law shall be the country of habitual residence[3]. It is submitted that this exception to the general rule is insufficiently flexible. In fact, the “habitual residence” connection is, in many cases, a source of injustice as the law to be applied could not have any substantial or relevant connection with the damage, or could create, in any way, a disadvantage for the weaker party[4].

In addition, the draft regulation does not take into account the global context of Internet (and, in general, cross-border commerce) as, except rare cases, the habitual residence does not constitute a valid connection.

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[3] Surprisingly, the term “habitual residence” is not defined in the draft regulation, and, as Mr. Andrew Dickinson underlined, the sole definition concerning the residence is that of bodies, corporate or un incorporate. (cf. Art. 18).

[4] See Jakson vs. Bacon.

In my view, the inflexible exception in Article 3.2 needs to be re-addressed in connection with that in Article 3.3. Under Article 3.3, if it appears from the circumstances as a whole that there is a substantially closer connection with another country and there is no significant connection between the non-contractual obligation and the country whose law would otherwise be applicable, the law of that other country shall be applicable.
Nevertheless, the existence of a substantially closer connection may be based, in particular, on a pre-existing relationship between the parties. Again, in my view, this exception is insufficiently flexible. In particular, the requirement that there must be a pre-existing relationship between the parties, does not cover all the hypothetical cases (just those related to product liability). Moreover, the absence of a clear definition of what must be understood by "pre-existing relationship" rends the task even more difficult.

4.- Article 4: Areas not subjected to territorial sovereignty.

In my view, the draft article 4 does not make clear the distinction between paragraph 1 and 2. Paragraph 1 applies when the tort or delict occurs in areas not subject to the sovereignty of a State (e.g. on board of a ship, etc.). On the contrary, paragraph 2 applies when there is no connection with a specific country. This is almost the case of disputes arising on Internet, as some disputes can be hardly connected to a specific jurisdiction or sovereignty. In fact, some Court decisions had yet underlined the difficulties to determine the connection with a State, and consequently, to a national legislations[5].

5.- *Article 5: Product liability*

Draft Article 5 contains the applicable law rules for non-contractual obligations "arising out of damage caused by a product". The title of the provision suggests that its scope is intended to be relatively narrow, but the language quoted is capable of extending, for example, to injuries caused in a road traffic accident. It was suitable to exclude the road

[5] Amazon.com fears to be subject to every potential legislation, as they are accessible world wide. In addition, some court decisions in the Yahoo case, had underlined those difficulties.

traffic injuries from the scope of Article 5, as the Hague Convention of May 1971 applies (and has to be respected under article 24 of the draft Regulation).

It is also unclear why draftsman has chosen the place where the tort was committed[6] instead of the place of purchase, manufacture or even the habitual residence of the seller or manufacturer. In my opinion, those connections are less vague and more efficients than the "place of commission" connection, specially when applied to Internet- because it is hard to define where the product is purchased or the delict is committed-.

The draft regulation, in paragraph 1, tries to be flexible in determining the applicable law. Regretfully, paragraph 1 will hardly be applied, as it requires that "the injured party has his habitual residence in the same country where the product is purchased or the person to be liable has his main establishment". Consequently, this subsection will only apply to internal activities, and no to cross-border activities.

In addition, draft article 5, does not think to disputes arising from Internet. As an example, if a purchaser buy a software on-line, and once downloaded , he notices it is a virus (having his computer damaged), it seems difficult to determine the place where the delict is committed (the place where the virus is hosted[7]? The place where the computer is located[8]? Etc.).

As Article 5 stands, it would seem that an individual who suffers injury from a product purchased outside his home state may be in a less certain position than one who has purchased the product in his home state[9].

6.- *Article 6: Unfair competition and other unfair practices*

Draft article 6 contains the applicable law rules for non-contractual obligations "arising from unfair competition or other unfair practices".

At first sight we can notice the use of a vague term and a large classification, in which are included a vast number of practices, that could produce- at least- uncertainty.

[6] The term "committed" is, in my opinion too vague, and must be clearly defined, specially when it applies to disputes arising from Internet.

[7] As the virus is "potentially" damageable.

[8] As the damage is produced on the computer.

[9] As underlined by Mr. Andrew Dickinson. http://europa.eu.int/comm/justice_home/unit/civil/consultation/contributions/andrew_dickinson_en.pdf

In my view, the Commissions effort to reduce the so called "forum shopping", makes incomprehensible article 6. As Article 6 stands, the applicable law shall be "the law of the country where the unfair competition or other practice affects competitive relations". Under a such regulation, the forum shopping is almost encouraged[10].

On the other hand, as we noticed above, the Regulation is not thought to be applied to Internet. Where does the unfair practice "affects" the competitive relations on Internet?

As the net is world wide accessible, the unfair practice can affect the competitive relations all over the world, and, in consequence, it would be difficult to determine the applicable law[11].

7.- *Article 7: Defamation*

Draft article 7 contains the applicable law rule for non-contractual obligations "arising from a violation of private or personal rights or from defamation". This provision is perhaps the least satisfactory and the most strongly criticized of the whole draft Regulation. The interested parties, like Amazon.com and the publishers associations, have criticized the connection established in this provision. In fact, the victim's habitual residence connection opens a door to the "forum shopping" as it is easier for individuals to move or change their habitual residence, than for companies. In consequence, it would have been more interesting, from my point of view, to chose the residence of the party alleged to be liable rather than the residence of the victim. At least, this choice would promote legal certainty, even if it at expenses of the weaker party criteria[12].

8.- *Article 9: Scope of the applicable law*

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[10] if the unfair practice affects competitive relations in a country where those practices are not considered as illegal, the interest of the liable party is to establish in this country.

[11] In my view, it would have been more suitable if draftsman had chosen a different connection, as for example, the habitual residence of the party alleged to be liable or, even, the residence of the party who suffers the damage.

[12] Usually chosen by daftsman, the weaker party criteria looks for a higher level of protection for the party consider as weaker (generally, consumers).

Draft Article 9 contains a detailed list of the matters to be governed by the law applicable under Articles 3 to 8 and 11. It includes (in sub-paragraphs 3, 4, 5 and 8) matters that might otherwise be characterized as procedural. For the avoidance of doubt, I would be more suitable that the exclusion from the draft Regulation, contained in Article 1.2(g),[13] should refer expressly to Article 9. The main purpose of article 9, is, in my opinion, to permit a wider flexibility in the application of a vast number of provisions.

9.- *Article 10: General rule (other non-contractual obligations)*

The problems of scope and classification of non-contractual obligations other than those arising in tort or delict have already been discussed. In view of these difficulties, it is surprising that the Commission have chosen to define the rules of applicable law in four short paragraphs that lay down inflexible rules and appear collectively to fall short of a comprehensive formulation.

The first paragraph relates to obligations concerning a relationship previously existing between the parties and applies the law governing that relationship. This rule, in my view, does not take into account the multiplicity of relationships that can exist between the parties. Neither does it consider that we are in a non contractual obligations context, and, except rare cases, there is no previous relationship between the parties (specially on Internet).

The second paragraph relates to obligations arising out of unjust enrichment and applies the law of the country in which the enrichment takes place. Although the rule is easy to state, it may be less straightforward to apply where the place of initial and ultimate enrichment differ.

The third paragraph relates to obligations arising out of actions performed without due authority in relation to the affairs of another and applies the law of the place of those actions.

The fourth paragraph contains an exception to the second and third paragraphs in favor of the parties' country of habitual residence, if this is shared.

Taking these four provisions together, it is far from clear that all non-tortious contractual obligations are covered, yet there is no default rule.

[13] Article 1.2 (g) of the draft regulation, excludes from the scope “evidence and procedure”, and only refers to article 17 as an exception. In my view, this provision has to refer also to article 9.

Finally, I note that this part of the draft Regulation contains no provision equivalent to Article 9, specifying the scope of the applicable law. This omission should be remedied, for example by making Article 9 of general application (with the appropriate changes set before).

11.- *Article 11: Freedom of choice*

Draft Article 11.1 permits the parties to choose the law applicable to contractual obligations. The recognition of the principle of party autonomy in the field of non-contractual obligations is welcome. The choice must be made "expressly" and shall not adversely affect the rights of third parties. It is unclear whether the requirement that the agreement be express means that the fairly common form choice of law provision in an agreement which states that "this agreement and any matters arising out of or connected with it shall be governed by the law of X" will effectively fix the law governing tort claims between the contracting parties arising out of the agreement. Clarification on this issue would be helpful. The recognition of party autonomy is subject to mandatory rules and public policy of the forum (see Articles 12 and 20) as well as to two specific limitations.

The first is included in Article 3.3 of the Rome Convention and appears to be intended to prevent a choice of law to evade the mandatory rules of a third country with which the factual circumstances giving rise to the obligation are exclusively connected. Like Article 3.3 its potential scope is extremely restricted, although unlike Article 3.3 it refers to the elements of the situation being "located in", rather than "connected with" the third country, excluding (it would seem) the habitual residence and nationality of the parties as relevant factors. Again draftsman forgets the specific problems raising from Internet (as the “location” notion is useless in the virtual context).

The second preserves the application of mandatory provisions of Community law where the factual circumstances giving rise to the obligation are exclusively connected with one Member State.

12.- *Article 18: Habitual residence*

Article 18 contains provisions to determine the habitual residence of bodies corporate or unincorporated, but not individuals. A body corporate or incorporate is treated for the purposes of the draft Regulation as being habitually resident (a) in the country of its central administration, or (b) in the country of its principal place of business (if the act giving rise to the non-contractual obligation is perpetrated or suffered in the exercise of a trade or profession), or (c) in the country of a particular place of business through which the relevant act was perpetrated or suffered (if there is more than one place of business).

13.- Article 20: “Ordre Public”

Draft Article 20 contains an « Ordre Public » rule, generally used in Private International Law. This rule permits the judge to enable a mandatory rule related to the applicable law, when this one is contrary to the constitutional principles or the law of the state of the for. As the Commission underlines, some contributors asked for a clearer explanation of what was meant. It was emphasized that the wide territorial scope of Art. 2 (universal application) requires as a counterpart a more precise ordre-public reservation – in particular with regard to punitive damages and excessive compensation sums.

In fact, the “ordre Public”, rule is clearly subjective, and in consequence it will cause some uncertainty. In addition, some judgments had yet demonstrate the impossibility to enforce this rule in the digital context.[14]

14.- *Article 23: Relationship with other provisions of Community law*

Draft article 23 provides: "1. This Regulation shall not prejudice the application of provisions which are or will be contained in the Treaties establishing the European Communities or in acts of the institutions of the European Communities which:

[14] See UFEJ vs. Yahoo! Inc.

• in relation to particular matters, lay down choice of law rules relating to non-contractual obligations; or

• lay down rules which apply, irrespective of the national law governing the non-contractual obligation in question by virtue of this Regulation; or

• prevent application of a provision or provisions of the law of the forum or of the law designated by this Regulation.

2. This regulation shall not prejudice the application of Community instruments which, in relation to particular matters and in areas coordinated by such instruments, subject services to the laws of the Member State where the service provider is established and, in the area coordinated, allow restrictions on freedom to provide services originating in another Member State only in limited circumstances."

The generally understood intention behind this provision is that it should clarify the relationship between the draft Regulation and EC instruments such as the E-Commerce Directive[15], which regulate particular cross-border activities in certain fields of activity. Regretfully, this provision will create more uncertainty as the E-Commerce Directive does not apply automatically, and, furthermore, its application field is restrictive[16]. It is generally understood that E-Commerce Directive contains general rules over applicable law. That view, however, appears inconsistent with Article 1.4 of the Directive which emphasizes that it "does not establish additional rules on private international law", although Recital (23) recognizes that "provisions of the applicable law designated by rules of private international law must not restrict the freedom to provide information society services as established in this Directive". There is, therefore, a mismatch: the draft Regulation lays down rules on private international law whereas the Directive disclaims any such intention.

It is not clear that the provisions of the E-Commerce Directive would prevent the application of the private international law rules contained in the draft Regulation (specially regarding that in Article 7 for defamation claims). As the coordinated field, in terms of the E-Commerce Directive, is reduced to some items, we can not conclude that the applicable law to non-contractual obligations arising from Internet, will be determined by the Directive. Furthermore, the coordinated field is, in my opinion,

[15] Directive 2000/31/CE on certain aspects of information society services, in particular electronic commerce, in the Internal Market.

[16] Essentially, the E-Commerce Directive contains a main provision related to applicable law (article 3), which applies only to the so called “coordinated field” .

thought to solve problems related to contractual obligations (much more than non-contractual obligations).

CONCLUSIONS

Alongside this article I have highlighted the difficulties to enforce such a Regulation, specially in the virtual/digital context. Regretfully, draftsman has not take into account the first initiatives in the matter of applicable law to non-contractual obligations which tried to solve conflicts arising from Internet.

Even if the proposal for a draft regulation can be considered as a good step forward, it is clear that we can regret the absence of an active participation from the interested parties.

Some of the rules regarding applicable law have changed dramatically, and, as far as I know, they won't be sufficiently efficient to fight against "forum shopping" and other undesired practices.

Concerning applicable law to non contractual obligations on Internet, the forthcoming Rome II Regulation is insufficient. In my opinion, the Commission needs to revise the proposal or, otherwise prepare a complementary instrument.

We will have to wait until January 2003 to know the modifications introduced by the European Commission.

ANNEX 1

CONSULTATION ON A PRELIMINARY DRAFT PROPOSAL FOR A COUNCIL REGULATION ON THE LAW APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS

The purpose of this preliminary draft proposal for a Council Regulation is to launch a public debate on a future Community instrument on the law applicable to non-contractual obligations, provided for by the Vienna Action Plan (point 40(b)) and the Mutual Recognition Programme (point II.B(3)).

It is no more than a Commission staff working paper for the sole purpose of consulting interested parties.

The Commission invites all interested parties to present duly substantiated comments on the various conflict rules set out in this document. More general comments will also be welcomed.

The Commission will take account of reactions to this Green Paper when preparing a proposal for a Community instrument.

Interested parties are invited to present their comments in writing no later than 15 September 2002 to the following address:

Directorate-General for Justice and Home Affairs
Unit A3, Judicial Cooperation in Civil Matters
European Commission
Office: LX 46 5/152
B-1049 Brussels

Fax: (+32 2) 299.64.57

E-Mail: jai-coop-jud-civil@cec.eu.int

In the absence of instructions to the contrary from the author, replies and comments may be posted on the Commission's website.

TITLE 1 - SCOPE

Article 1 - Scope

1. The rules of this Regulation shall apply to non-contractual obligations in any situation involving a choice between the laws of different countries.

2. They shall not apply to:

(a) non-contractual obligations arising out of a family relationship or a relationship deemed to be equivalent, including maintenance obligations to the extent that they are governed by specific rules;

(b) non-contractual obligations governed by the law of succession;

(c) obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;

(d) the personal liability of officers, of members, and of persons responsible for carrying out the statutory audits of accounting documents, for the obligations of a company or body incorporate or unincorporate;

(e) liability incurred in the exercise of public authority;

(f) non-contractual obligations among the settlers, trustees and beneficiaries of a trust;

(g) evidence and procedure, without prejudice to Article 17.

3. For the purposes of this Regulation, "Member State" means any Member State other than [the United Kingdom, Ireland or] Denmark.

Article 2 – Universal application

Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.

TITLE II - UNIFORM RULES

CHAPTER 1
NON-CONTRACTUAL OBLIGATIONS DERIVING FROM A TORT OR DELICT

Article 3 - General rule

1. The law applicable to a non-contractual obligation arising out of a tort or delict shall be the law of the country in which the loss is sustained, irrespective of the country or countries in which the harmful event occurred and irrespective of the country in which the indirect consequences of the harmful event are sustained, subject to paragraph 2.

2. Where the author of the tort or delict and the injured party have their habitual residence in the same country when the tort or delict is committed, the applicable law shall be the law of that country.

3. However, if it appears from the circumstances as a whole that there is a substantially closer connection with another country and there is no significant connection between the non-contractual obligation and the country whose law would be the applicable law under paragraphs 1 and 2, the law of that other country shall be applicable.

A substantially closer connection with another country may be based in particular on a pre-existing relationship between the parties, such as a contract that is linked to the tort or delict in question.

Article 4 - Areas not subject to territorial sovereignty

1. The law applicable to a tort or delict occurring in areas not subject to the territorial sovereignty of a State shall be the law of the country in which the means of transport or the installation connected with the tort or delict is registered or whose flag it flies or with which it has similar connections.

2. If there is no connection with a specific country or if there is a connection with several countries, the applicable law shall be that of the country with which the case is most closely connected.

Article 5 - Product liability

1. The law applicable to a non-contractual obligation arising out of damage caused by a product shall be that of the country in which the person directly sustaining the loss is habitually resident or has his main establishment, if that country is also the country where :

- the person alleged to be liable has his main establishment; or

- the product was purchased.

2. In all other cases, the applicable law shall be that of the country where the tort or delict is committed.

Article 6 - Unfair competition and other unfair practices

The law applicable to a non-contractual obligation arising from unfair competition or other unfair practices shall be the law of the country where the unfair competition or other practice affects competitive relations or the collective interests of consumers.

Article 7 - Defamation

The law applicable to a non-contractual obligation arising from a violation of private or personal rights or from defamation shall be the law of the country where the victim is habitually resident at the time of the tort or delict.

Article 8 - Violation of the environment

The law applicable to a non-contractual obligation arising from a violation of the environment shall be the law of the country in whose territory the damage occurs or threatens to occur.

Article 9 – Scope of the law applicable to non-contractual obligations arising out of a tort or delict

The law applicable to non-contractual obligations under Articles 3 to 8 and 11 of this Regulation shall govern:

1. the basis, conditions and extent of liability, including the determination of persons who are liable for acts performed by them;

2. the grounds for exemption from liability, any limitation of liability and any division of liability;

3. the existence and kinds of injury or damage for which compensation may be due;

4. the measures which a court has power to take under its procedural law to prevent or terminate injury or damage or to ensure the provision of compensation;

5. the measure of damages in so far as prescribed by law;

6. the question whether a right to compensation may be assigned or inherited;

7. persons entitled to compensation for damage sustained personally;

8. liability for the acts of another person;

9. the rules of prescription and limitation, including rules relating to the commencement of a period of prescription or limitation and the interruption and suspension of the period.

CHAPTER 2
NON-CONTRACTUAL OBLIGATIONS ARISING OUT OF AN ACT OTHER THAN A TORT OR DELICT

Article 10 - Determination of the applicable law

1. If a non-contractual obligation arising out of an act other than a tort or delict concerns a relationship previously existing between the parties, it shall be governed by the law of the country whose law governs that relationship.

2. Subject to paragraph 1, a non-contractual obligation arising out of unjust enrichment shall be governed by the law of the country in which the enrichment takes place.

3. Subject to paragraph 1, a non-contractual obligation arising out of actions performed without due authority in connection with the affairs of another person shall be governed by the law of the country in which the action takes place.

4. Notwithstanding paragraphs 2 and 3 and subject to paragraph 1, if the parties have their habitual residence in the same country when the non-contractual obligation arises, the obligation shall be governed by the law of that country.

CHAPTER 3
COMMON RULES APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS ARISING OUT OF A TORT OR DELICT AND THOSE ARISING OUT OF AN ACT OTHER THAN A TORT OR DELICT

Article 11 - Freedom of choice

1. The parties may choose the law applicable to a non-contractual obligation. The choice shall be made expressly and shall not adversely affect the rights of third parties.

2. If all the other elements of the situation at the time when the obligation arises are located in a country other than that whose law has been chosen, the choice of the parties shall not prejudice the application of rules of the law of that country which cannot be derogated from ("mandatory rules").

3. The choice of the parties of the applicable law shall not debar the application of mandatory provisions of Community law where the other elements of the situation were located in one of the Member States of the European Community at the time when the obligation came into being.

Article 12 – Mandatory rules

Nothing in this Regulation shall restrict the application of the mandatory rules of the law of the forum irrespective of the law otherwise applicable to the non-contractual obligation.

Article 13 – Rules of conduct and safety

Whatever may be the applicable law, in determining liability account shall be taken of the rules of conduct and safety which were in force at the place and time of the act giving rise to non-contractual liability.

Article 14 – Direct action against the insurer of the person liable

1. Persons who have suffered injury or damage shall have a right of direct action against the insurer of the person liable if they have such a right under the law applicable to the non-contractual obligation.

2. If this law does not provide any such right, it may be exercised if it is provided by the law governing the contract of insurance.

Article 15 - Subrogation

1. Where a person ("the creditor") has a non-contractual claim upon another ("the debtor"), and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship in whole or in part.

2. The same rule shall apply where several persons are subject to the same claim and one of them has satisfied the creditor.

Article 16 – Formal validity

A unilateral act intended to have legal effect and relating to a non-contractual obligation is formally valid if it satisfies the formal requirements of the law which governs the non-contractual obligation in question or the law of the country in which this act is done.

Article 17 – Burden of proof, etc

1. The law governing non-contractual obligations under this Regulation applies to the extent that it contains, in matters of non-contractual obligations, rules which raise presumptions of law or determine the burden of proof.

2. Acts intended to have legal effect may be proved by any mode of proof recognised by the law of the forum or by any of the laws referred to in Article 16 under which that act is formally valid, provided that such mode of proof can be administered by the forum.

TITRE III - GENERAL PROVISIONS

Article 18 – Habitual residence

1. For bodies corporate or unincorporate, the central administration shall be considered to be the habitual residence.

2. Where the act giving rise to the non-contractual obligation is perpetrated or suffered in the exercise of a trade or a profession, the principal place of business shall be considered to be the habitual residence. Where there is more than one place of business, the one at which the harmful event was perpetrated or suffered shall be considered to be the habitual residence.

Article 19 – Exclusion of renvoi

The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law.

Article 20 – "Ordre public"

The application of a rule of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*"ordre public"*) of the forum.

Article 21 – No retrospective effect

This Regulation shall apply to non-contractual obligations deriving from acts occurring after its entry into force.

Article 22 – States with more than one legal system

1. Where a State comprises several territorial units, each of which has its own rules of law in respect of non-contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation.

2. A State within which different territorial units have their own rules of law in respect of non-contractual obligations shall not be bound to apply this Regulation to conflicts solely between the laws of such units.

Article 23 - Relationship with other provisions of Community law

1. This Regulation shall not prejudice the application of provisions which are or will be contained in the Treaties establishing the European Communities or in acts of the institutions of the European Communities which:

- in relation to particular matters, lay down choice of law rules relating to non-contractual obligations; or
- lay down rules which apply, irrespective of the national law governing the non-contractual obligation in question by virtue of this Regulation; or
- prevent application of a provision or provisions of the law of the forum or of the law designated by this Regulation.

2. This regulation shall not prejudice the application of Community instruments which, in relation to particular matters and in areas coordinated by such instruments, subject services to the laws of the

Member State where the service-provider is established and, in the area coordinated, allow restrictions on freedom to provide services originating in another Member State only in limited circumstances.

Article 24 – Relationship with existing international conventions

This Regulation shall not prejudice the application of international conventions to which the Member States are party when this Regulation is adopted and which, in relation to particular matters, lay down choice of law rules relating to non-contractual obligations.

TITLE IV - FINAL CLAUSES

Article 25

This Regulation shall enter into force six months after its publication in the *Official Journal of the European Communities*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.