Cross-Border Damage Caused by Genetically Modified Organisms: Jurisdiction and applicable law

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Case scenario 1

X farms genetically modified (GM) corn on his field in Austria. The field is adjacent to Y’s organic farm in Hungary. When X sows his field, some GM corn is taken by the wind and mixes with the organic corn stored in Y’s warehouse. The contamination of Y’s corn is caused by a faulty fence on X’s farm.

Y (the organic farmer) sells his crop to Z’s organic food company in the Czech Republic where it gets mixed with corn from other organic providers and is processed into cornflakes. When the organic food company Z learns about the contamination, they have to destroy several thousand tons of their products resulting in damage of €5,000,000.

Which courts have jurisdiction and what law would apply in the two following situations?

(a) Z claims damages from Y on a contractual basis. Y pays him out and brings a claim for damages against X on a non-contractual basis.

(b) Y is in financial difficulties. Z thus considers suing X for damages on a non-contractual basis.

(c) Z brings a claim against Y on a non-contractual basis.

(d) The cornflakes are sold in 15 countries. When the customers, having acquired the cornflakes in one of these countries, learn about the contamination they claim damages from Z, the Czech producer.

Case scenario 2

GM wheat originating from a farm in France contaminates a nearby field with rare species in Belgium.
(a) The contaminated area is owned by a state-run research institute. The institute takes the necessary measures to decontaminate the area.

(b) The contaminated field belongs to a private association. The Belgian administrative authorities take the necessary measures to decontaminate the area in order to prevent imminent danger to health and safety of the environment.

The State-run research institute and the Belgian administrative authorities subsequently claim damages, from the company that owns and farms the wheat field in France, for the cost of decontaminating the area.

Would the claims fall under the scope of the Brussels I and Rome II Regulations?

I. Introduction

The Amsterdam reform treaty of 1997 granted comprehensive legislative powers to the European Union (EU) in the field of private international law (PIL).\(^1\) In the years following the conclusion of the treaty, international jurisdiction and conflict of law issues became the subject of important EU legislative activities.

The first major legislative step by the European Union in the area of private international law was Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I).\(^2\) The latter has, for the most part, maintained the provisions of the 1968 Brussels Convention on the same subject matter and transformed it into EU law. The other regulation that we will cover in this contribution is a genuine novelty, introducing, for the first time, common European rules on the law applicable to non-contractual obligations. This regulation is titled Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations (Rome II).\(^3\)

This contribution will first deal with the jurisdictional issues that may arise in claims for damage caused by GMOs. We shall therefore examine the Brussels I Regulation and the rules on jurisdiction it establishes (infra, II.). We will then address the issue of the applicable law in cases of cross-
border damage caused by GMOs (infra, III.). The above case scenarios may
serve to illustrate these issues.

II. Jurisdiction under the Brussels I Regulation

1. Scope of application

4 The scope of application of the Brussels I Regulation is determined by
Art. 1 to Art. 4 of the Regulation. An examination of the scope of applica­
tion involves four different aspects: (a) territorial; (b) personal; (c) material;
and (d) temporal requirements.4

(a) Territorial requirement

5 Due to the immediate binding character of regulations, as stated in
Art. 288(2) of the Treaty on the functioning of the European Union (here­
after TFEU),5 each and every court in a EU Member State6 has to apply the
Brussels I Regulation when dealing with issues of international jurisdiction.

(b) Personal requirement

6 The Brussels I Regulation is applicable if the defendant is domiciled in a
Member State of the European Union. This flows from Art. 2 through
Art. 4 of the Regulation.

7 Most of the rules of the Brussels I Regulation are – as part of the EU law –
to be interpreted autonomously, i.e. independently of the national laws of
the EU Member States.7 In order to determine whether a party is domi­
ciled in the Member State whose courts are seised, the court shall, accord­
ing to Art. 59 of the Brussels I Regulation, however apply its internal law
(i.e. the lex fori). For companies or other legal persons or associations,

Introduction note 42 f.
5 OJ 2008 C 115.
6 While Denmark was originally excluded from the scope of application, it was extended to
Denmark by way of a bilateral agreement with the European Community that entered
into force on 1 July 2007: Agreement between the European Community and the King­
dom of Denmark on jurisdiction and the recognition and enforcement of judgments in
Art. 60(1) of the Brussels I Regulation provides, on the other hand, an autonomous legal definition of their domicile. According to this article, a company or other legal person or association is domiciled at the place where it has one of the following: (a) its statutory seat, (b) its central administration, or (c) its principal place of business.

(c) Material requirement

The Brussels I Regulation applies to "civil and commercial" matters, Art. 1(1). In cases of damage caused by GMOs, action to repair the damage is often taken by state authorities (see our second case scenario). If the state authorities subsequently bring a claim for compensation the question is whether the compensation claim qualifies as "civil or commercial matter". The Brussels I Regulation excludes "administrative matters" from its scope of application. However, the mere fact that a claim is brought to court by a public authority does not, in itself, exclude it from the Regulation’s scope of application. The European Court of Justice (ECJ) has, on several occasions, ruled on the question of qualification as "civil and commercial matter", as it is stated in Art. 1(1) of the Brussels I Regulation. Under the principles of interpretation, developed in a well established line of precedents by the Court, the Regulation and its scope of application “must be regarded as an independent concept which must be construed with reference first to the objectives and scheme of the [Regulation] and secondly to the general principles which stem from the corpus of the national legal systems”. In its 1976 landmark decision in the case *LTU v. Eurocontrol*, the Court held that litigations involving a public authority and a person governed by private law will fall within the scope of application of the Regulation unless the authority "acts in the exercise of its powers". Thus, the crucial question in each case is to know whether or not a public authority was acting within its public powers – that is, in the exercise of state authority. In several decisions, the ECJ provided guidelines as to when a public authority is to be regarded as acting in the exercise of its public powers.

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In the case *Netherlands v. Rüffer*, a German boat collided with a Dutch motor vessel and sank in a public waterway. An international treaty between Germany and the Netherlands provided that the Netherlands were to be responsible for the "removal of wrecks" in the waterway. The Dutch authorities had the wreck removed by a Dutch company and claimed compensation for the removal costs from the German owner of the sunken boat. The Dutch Hoge Raad (Supreme Court) referred the issue to the ECJ in order to clarify whether the claim for redress was a "civil and commercial matter" under Art. 1 of the Brussels Convention (now: the Brussels I Regulation). The ECJ held that if a state removes "a wreck in a public waterway, administered by the State responsible in performance of an international obligation and on the basis of provisions of the national law which, in the administration of that waterway, confer [upon the State] the status of public authority in regard to private persons", the State claiming recovery of such costs acts "in the exercise of its public authority powers". The fact that the state brought a claim for damages once the removal had been effected did not, according to the ECJ, change the character of the measure taken and did not have the effect that it was to be qualified as a civil matter.

In subsequent cases, the ECJ took a broader view of the notion of "civil and commercial" matters in the context of Art. 1(1) of the Brussels I Regulation. In 1993, the ECJ had to decide on a damage claim brought by the parents of a pupil against a German state-school teacher for having caused the death of their son on a school trip to Italy. The teacher, who was supposed to have been supervising the pupils, had breached this duty and, as a result, caused the death of the claimants' son. In this case, the ECJ held that the claim was a "civil matter" even though the teacher was acting in the capacity of a civil servant and even though the case was covered by a scheme of social insurance under public law that, according to German law, excluded a direct damage claim against a teacher. The court argued that "a teacher in a State school assumes the same functions vis-à-vis his pupils [...] as those assumed by a teacher in a private school" and held that "the right to obtain compensation for injury suffered as a result of conduct regarded as culpable in criminal law is generally recognised as being a civil law right".

12 Ibid., par. 8, 9; For a critical analysis of this case-law, see G. Betlem/Ch. Bernasconi, *European Private International Law, the Environment and Obstacles for Public Authorities*, Law Quarterly Review (LQR) 2006, 124 at 132 f.
14 Ibid., par. 19.
In recent judgments, the ECJ held that actions against individuals for the recovery of expenses incurred by public authorities may fall within the scope of the Brussels I Convention/Regulation.\textsuperscript{15} In the \textit{Baten} case, a community in the Netherlands had paid monthly contributions to a woman under Dutch social assistance laws. These laws provided a right to recovery for the amounts paid “from persons who do not, or do not fully, meet their maintenance obligations following a divorce” and, accordingly, the Dutch community claimed recovery from the woman’s ex-husband, living in Belgium. The ECJ held that such an action for recovery of sums paid by public authorities, as long as exercised in accordance with the rules and principles governing actions for recovery between private parties, is as well within the scope of application of the Brussels I Regulation.\textsuperscript{16}

If this principle is applied to the field of environmental law and GMOs, an action for recovery of expenses incurred for cleaning up the environment or removing whatever damage may have been caused by GMOs, could be regarded as a “civil matter” as long as the recovery is in accordance with the principles governing the right of recovery between private parties. In cases in which the above-mentioned requirements are fulfilled, claims for damage caused by GMOs may thus be considered “civil and commercial matters” in the sense of Art. 1(1) of the Brussels I Regulation\textsuperscript{17} and they may then fall into its material scope of application.

\textbf{(d) Temporal requirement}

According to Art. 66(1) of the Regulation, it “shall apply only to legal proceedings instituted […] after the entry into force thereof.” Art. 76 stipulates that the Regulation enters into force on 1 March 2002. Any tort case that is brought to court after this date thus falls into the temporal scope of application of the Brussels I Regulation.

\textsuperscript{16} Ibid., at par. 34–37. See also Betlem/Bernasconi, LQR 2006, 124 at 134: “The parallel with the Rüffer scenario where a right of recourse for cost recovery of removal of a wreck was at issue is striking”.
\textsuperscript{17} This point of view is further supported by an analysis of Directive 2004/35/EC on environmental liability, \textit{cf.} Th. Kadner Graziano, \textit{Yb PIL, Vol. IX} (2007) 71 at 83 ff.
2. General rule on jurisdiction

Art. 2 of the Regulation not only determines the personal scope of application of the Brussels I Regulation but also establishes its general rule of jurisdiction. In general, a person domiciled in an EU Member State must be sued in the courts of that Member State. This maxim, i.e. the actor sequitur forum rei-rule, may be one of the few truly globally recognised general principles on jurisdiction. Alleged tortfeasors thus have to be sued in the country where they are domiciled or where they have their statutory seat, their central administration or their principal place of business, cf. Art. 60(1). It is important to remember that Art. 2(1) only deals with international jurisdiction. The question regarding which court is locally competent is governed by the national law of the state designated by Art. 2(1).

3. Special heads of jurisdiction

The Brussels I Regulation contains numerous special heads of jurisdiction. These may either be exclusive or alternative. Exclusive jurisdictions exist in the areas listed in Art. 22 of the Brussels I Regulation. They concern cases regarding rights to immovable property, the validity of the constitution, the nullity or the dissolution of legal persons or the validity of entries in public registers, and do not apply to the areas covered by this contribution. Further, insurance, consumer and employment matters are also exclusively governed by sec. 3 through 5 respectively of the Brussels I Regulation.

In our context, the special rule on alternative jurisdictions concerning non-contractual liability scenarios is of particular interest. According to Art. 5(3) of the Regulation, a person domiciled in a Member State may be sued in another Member State “in matters relat[ed] to tort, delict or quasi-delict, in the court of the place where the harmful event occurred or may occur”.

Art. 5(3) seems, at first sight, easy to grasp. And indeed, in most scenarios, the place where the harmful event occurred can be determined easily. If, for example, the truck of company A that is located in country X causes an accident while driving through country Y and releases some of its GM-corn there, contaminating farmer B’s organic field in country Y, then the harmful event occurs in country Y.

The situation is more difficult if a person acts in one country (or several countries) and the damage occurs in another country (or in several other

countries). In such cases we speak of “multilocal torts”, “double or multiple locality cases” or “complex torts”. Imagine, for example, that in country X the load of the truck in our example is negligently secured causing the load to be released in country Y, contaminating a field located there.

The ECJ had to deal with the question of whether the “place where the harmful event” occurs is to be understood in the sense of the place where the harmful act is committed or, on the contrary, where its result manifests. In its major precedent dealing with this question, the Court held that the special head of jurisdiction in Art. 5(3) of the Brussels I Regulation provides for an exception to the actor sequitur forum rei-rule, and that this exception is based on a “particularly close connecting factor between a dispute and the court which may be called upon to hear it”. The Court stated that this close connection exists in the context of both the place of the action and the place of the result.

This case-law offers the plaintiff up to three different courts for his claim: (1) those of the country in which the defendant is domiciled, Art. 2(1); (2) those of the country where the defendant’s act took place (if located in another country), Art. 5(3); and (3) those of the country in which the harm was sustained by the victim (if located in yet another country), Art. 5(3). In the field of international jurisdiction, this interpretation of Art. 5(3) is widely recognised in legal writing.

According to this interpretation, under Art. 5(3) of the Brussels I Regulation, the courts in the country in which the harmful act was committed and those in the country in which the damage was sustained thus both have jurisdiction.

4. Jurisdiction in case scenario 1(a)

Having examined the legislative framework, we may now turn to our case scenarios and analyse them under the Brussels I Regulation. In scenario 1(a), the organic farmer Y from Hungary considers suing the Austrian farmer of GMOs X on a non-contractual basis.
a) According to the general rule on jurisdiction in Art. 2(1) of the Brussels I Regulation, the courts of the country in which the defendant is domiciled have jurisdiction, i.e. the Austrian courts for a claim of the Hungarian farmer Y against the Austrian farmer X.

b) Alternatively, Y may choose to sue X under Art. 5(3) in the courts of the place where the harmful event occurred. However, Art. 5(3) applies only if this country is different from the one designated by Art. 2(1) of the Brussels I Regulation.

For a claim against X, the harmful event that caused Y’s damage was the contamination of Y’s crop by X. X’s act (or equally important: his omission in violation of a duty to act) that led to the contamination of the crops happened in Austria where X failed to secure his field with appropriate fencing. The country of the defendant’s domicile is thus also the country where the defendant acted; Art. 5(3) consequently does not apply in respect to the courts in Austria since, as we have seen, the Austrian courts already have jurisdiction under Art. 2(1) of the Brussels I Regulation.

The damaging result manifested in Hungary, where Y’s crops (the crops that were later sold to Z) were contaminated. Under Art. 5(3) of the Brussels I Regulation, the courts of the place in Hungary where Y’s field is located thus have jurisdiction for Y’s claim against X.

The Hungarian farmer Y thus has the choice to bring a claim for non-contractual liability against the Austrian farmer of GMOs X either in Austria, Art. 2(1) of the Brussels I Regulation, or in Hungary, Art. 5(3) of Brussels I.

5. Jurisdiction in case scenario 1(b)

a) According to the general rule on jurisdiction in Art. 2(1) of the Brussels I Regulation, the courts of the country in which the defendant is domiciled have jurisdiction. The Austrian courts thus have jurisdiction for a claim of the Czech organic food company Z against farmer X, domiciled in Austria.

b) Just like Y, Z may alternatively choose to sue X under Art. 5(3) in the courts of the place where the harmful event occurred.

For a claim of Z against X, the harmful event that caused Z’s damage was the contamination of Y’s crop by X that eventually led to the destruction of Z’s organic products. X’s act (or omission to act in violation of a duty to act) that led to the contamination of the crops happened in Austria where X failed to secure his field with appropriate fencing. Since the Austrian
courts already have jurisdiction under Art. 2(1) of the Brussels I Regulation, Art. 5(3) does not apply in respect to these courts.

The damaging result manifested in Hungary, where Y’s crops (the crops that were later sold to Z) were contaminated. The case presents, however, a particularity compared to the standard situation under Art. 5(3). Whereas in the standard case for Art. 5(3), the damage manifests itself in the sphere of the victim’s legally protected interests, in our scenario it needed the further step of the sale of the contaminated crops by Y in Hungary to Z in the Czech Republic in order to cause damage to Z’s interests. The source of Z’s injury, attributable to X, lies however in the contamination of Y’s crops that took place in Hungary. Under Art. 5(3) of the Brussels I Regulation, the courts of the place in Hungary where Y’s field is located thus, arguably, have jurisdiction for Z’s claim against X.

c) The question then is whether the Czech courts also have jurisdiction since it is the Czech Republic where Z mixed the contaminated crops with corn from his other organic providers and where these crops were processed into cornflakes that could consequently not be sold under the label “organic”.

The ECJ has not yet had to deal with such an issue under Art. 5(3) of the Brussels I Regulation. It could be argued that X’s act (or omission to act) caused damage not only in Hungary (where Y’s crops were contaminated) but also in the Czech Republic where Y’s contaminated crops were mixed with Z’s other crops, causing further contamination. On the other hand, in order for X’s act (or omission to act) to cause such further damage in the Czech Republic, the crops needed to be sold by Y to Z, to be mixed by buyer Z with his other crops, further spreading the contamination to buyer Z’s final products and causing him damage to these other crops and loss of earnings as the cornflakes could no longer be sold as organic flakes. As for an action against X, this further damage is, arguably, to be considered indirect or consequential damage which is generally not held sufficient to establish jurisdiction of the country in which the consequential damage was suffered.23

In order to establish jurisdiction of the Czech courts, Z could, on the other hand, try to argue that the contamination of the products he had bought from other producers was, with regard to his own legally protected interests, not consequential damage but the first damage he suffered due to X’s act (or

23 Cf. Kropholler (fn. 22) Art. 5 note 87; ECJ 364/93; Bundesgerichtshof (German Federal Court, BGH) in Entscheidungen des Bundesgerichtshofes in Zivilsachen (BGHZ) 98, 263.
omission to act). He could further argue that this damage happened in the Czech Republic where his whole production was rendered unmerchantable. This would, however, make jurisdiction for X entirely unforeseeable, in particular when taking into consideration that X was not part of the distribution line of the crops.

36 If our above line of reasoning is followed, Z may, for his claim against X, choose between the courts in Austria, Art. 2(1), and the courts of the place in Hungary where Y’s field is located, Art. 5(3); whereas, arguably, the courts in the Czech Republic do not have jurisdiction to hear a claim by Z against X.

6. Jurisdiction in case scenario 1(c)

37 a) For a claim of Z against Y, i.e. against the organic farmer in Hungary that sold the crop to Z’s organic food company, Hungarian courts have jurisdiction since Y has his domicile or his statutory seat, central administration or principal place of business in Hungary, Art. 2(1) and 60(1) of the Brussels I Regulation.

38 b) For Z’s non-contractual claim against Y, jurisdiction may also be based on Art. 5(3) of the Brussels I Regulation. Since the Hungarian courts already have jurisdiction under Art. 2(1) of the Brussels I Regulation, Art. 5(3) does not apply with respect to these courts.

39 According to Art. 5(3) of the Brussels I Regulation, Czech courts have jurisdiction if the harmful event occurred in the Czech Republic. In case of a claim against Y, the harmful event is the delivery of contaminated corn. Once again, we are dealing with a complex tort: the delivery is organised in Hungary and takes place as it were from Hungary to the Czech Republic, whereas the contamination of the whole production line and thus the damage to Z occurs while the crops delivered by Y are mixed with the other producers’ crops in the Czech Republic. Further, since the harmful result occurred in the Czech Republic, for a claim against Y, an alternative jurisdiction is given in the courts of the place where the damage occurred, namely, Z’s place of business in the Czech Republic.

7. Jurisdiction in case scenario 1(d)

40 In scenario 1(d) (i.e.: the cornflakes are sold in 15 countries where customers learn about the contamination and claim damages from the Czech
organic food company Z on an extra-contractual basis), Czech courts have jurisdiction under Art. 2(1).

Under Art. 5(3) of the Brussels I Regulation, Z’s customers may bring an extra-contractual claim against Z both at the place where the harmful act was committed (if this country is different from the country of Z’s domicile) and the place where the damage was sustained. The harmful act committed by Z was the marketing of the contaminated cornflakes labelled “organic” in the consumers’ respective countries of residence; the damage occurred in the countries where the consumers bought the products, i.e. most likely the countries of their residence.

In scenario 1(b), the customers can thus choose to go to courts in the Czech Republic, these courts having jurisdiction under Art. 2(1), and in the countries where the product was marketed and bought, Art. 5(3) of the Brussels I Regulation, if of course these countries are Member States of the EU.

8. Jurisdiction in case scenario 2

Case scenario 2 illustrates the difficulties involved in classifying a case as civil or commercial matter under Art. 1(1) of the Brussels I Regulation. The difficulty lies in the fact that, in this scenario like in many others, the claim is brought by public authorities.

a) In scenario 2(a), the state-run research facility decontaminates a field owned by the facility. The measures taken are not any different from what a private association or research institute would have had to do in the same situation. The fact that the field belongs to a public institution is merely incidental. The claim for compensation of the clean-up costs is, consequently, a civil action and falls under Art. 1(1) of the Brussels I Regulation.

For the claim against the French company, French courts would have jurisdiction flowing from Art. 2(1) of the Brussels I Regulation. The Belgian courts of the place where the damage occurred, i.e. the place where the contaminated field lies, would also have jurisdiction according to Art. 5(3) of the Brussels I Regulation.

b) In case scenario 2(b), the public authority acts in order to prevent imminent danger to health and to safety of the environment. It is exercising its public duty and authority to protect these goods in the general interest. The measures taken by the state are based on administrative law. Furthermore, only the state authority is empowered to take action in the general
interest of preserving public goods such as public health and the safety of the environment. Having regard to the criteria used by the ECJ in the case Netherlands v. Rüffer,\textsuperscript{24} these aspects speak in favour of the public authority acting “in the exercise of its public powers”. In case scenario 2(b), the claim for damages brought by the Belgian government is, according to this reasoning, to be regarded as an “administrative matter” as opposed to a “civil matter” in the sense of Art. 1(1). The Brussels I Regulation does then not apply.

47 If, however, the public authorities claim compensation for expenses incurred on the basis, and according to rules and principles of private law,\textsuperscript{25} the matter falls, according to the ECJ’s reasoning in the Baten case,\textsuperscript{26} within the scope of application of the Brussels I Regulation. Applied to the field of environmental law and GMOs, an action for recovery of expenses incurred for cleaning up the environment, such as the action for recovery in scenario 2(b), could thus well be regarded as a “civil matter” if the public authorities seek recovery according to rules and principles governing the right of recovery between private parties. Whether or not the subjacent action taken by the state authority is a public or civil matter is not crucial in the context of a subsequent claim for redress. According to this line of reasoning, only if the action for recovery itself is based on public law rules would the action be outside the scope of the Brussels I Regulation.\textsuperscript{27}

III. The applicable law under the Rome II Regulation

1. Introduction

48 Once a court has determined that it has jurisdiction, the question in cross-border cases then is which law to apply. Since 11 January 2009, Regulation

\textsuperscript{24} Cf. supra no. 10, and the case [1980] ECR 3807.
\textsuperscript{25} See, e.g., the rule of private law suggested in the Draft Common Frame of Reference (DCFR), Art. VI-2:209: “Burdens incurred by the state upon environmental impairment”: “Burdens incurred by the state or designated competent authorities in restoring substantially impaired natural elements constituting the environment, such as air, water, soil, flora and fauna, are legally relevant damage to the state or the authorities concerned” [for which compensation can be claimed according to the DCFR], text of the DCFR in: Ch. von Bar/E. Clive/H. Schulte-Noelke/H. Beale et al. (eds.), Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (DCFR) (2009).
\textsuperscript{26} Cf. supra no. 12.
\textsuperscript{27} For further details and many more arguments, see Th. Kadner Graziano, Yb PIL, Vol. IX (2007) 71 at 82 ff.
Jurisdiction and Choice of Law

(EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) is applicable in twenty-six of the twenty-seven Member States of the European Union. The Regulation applies to events that gave rise to damage occurring after its entry into force on 20 August 2007 (20 days after its publication in the Official Journal).

2. Scope of application of the Regulation and general remarks

When adopting the Rome II Regulation, the European legislator intended to create an instrument that would work in parallel with the Brussels I Regulation. Recital 7 of the Rome II Regulation expressly states this purpose by emphasising that “the substantive scope and the provisions of this Regulation should be consistent with [the Brussels I Regulation]”. Therefore, much of what was said for the scope of application of the Brussels I Regulation should, in principle, also apply for the Rome II Regulation.

According to Art. 3 of the Rome II Regulation, any law designated by the Regulation “shall be applied whether or not it is the law of a Member State”. The Regulation thus is a loi uniforme and does not require that the other state(s) involved are EU Member States.

For damage caused by GMOs, several conflict of law rules may have to be taken into consideration. Rome II favours freedom of choice regarding the applicable law so that the first rule to be considered is the rule on party autonomy, Art. 14 of the Rome II Regulation. One will further have to consider the rule on product liability, Art. 5 of the Rome II Regulation, if the damage was caused by a product containing GMOs, and/or the rule on


29 The United Kingdom and Ireland are taking part in the adoption and application of this Regulation (see Recital 39). In accordance with Art. 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Union, Denmark is not taking part in the adoption of the Rome II Regulation (see Recital 40). For the date of application, see Art. 32.

30 Art. 31 of the Rome II Regulation.
environmental damage, Art. 7, if the conditions for its application are met. If none of these specific rules apply, the applicable law will be determined by the general rule of Art. 4.

52 As far as product liability is concerned, regard must also be had to the 1973 Hague Convention on the Law Applicable to Products Liability.\textsuperscript{31} The 1973 Hague Convention is in force in 11 countries, including 6 EU Member States.\textsuperscript{32} According to Art. 28(1) of the Rome II Regulation, Rome II “shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to non-contractual obligations”. In the EU Member States in which the Hague Convention is in force (i.e. France, Finland, Luxembourg, the Netherlands, Slovenia and Spain), the applicable law in product liability cases will thus be determined by the 1973 Hague Convention and not by Art. 5 of the Rome II Regulation.\textsuperscript{33} This following presentation will, however, focus on the rules of the new Rome II Regulation.\textsuperscript{34}

3. Party autonomy

53 Since the second half of the last century, the place of party autonomy has become more and more important in modern conflict of law in tort and delict.\textsuperscript{35} Art. 14 of the Rome II Regulation follows this trend towards the acceptance of party autonomy. Under Art. 14(1), the choice of law must be “expressed or demonstrated with reasonable certainty by the circumstances of the case”. Furthermore, as soon as non-commercial parties are involved, the choice of law has to be by virtue of an agreement that was

\textsuperscript{31} Text and list of Contracting States available online at: www.hcch.net.

\textsuperscript{32} The Convention of 2 October 1973 on the Law Applicable to Products Liability is currently in force in France, Luxemburg, the Netherlands, Norway, Finland, Spain, Slovenia, Croatia, Macedonia, Serbia and Montenegro; www.hcch.net.

\textsuperscript{33} For more information, see Th. Kadner Graziano, The Rome II Regulation and the Hague Conventions on Tort Law – Interaction, Conflicts and Future Perspectives, Nederlands Internationaal Privaatrecht (NIPR) 2008, 425–429.

\textsuperscript{34} For the main differences between the 1973 Hague Convention and the Rome II Regulation, see Th. Kadner Graziano, NIPR 2008, 425 at 3.2.

\textsuperscript{35} Party autonomy, without any manifest limitations, was recognised in Art. 35(1) of the Austrian PIL Act, in Art. 39(1) of the Lichtenstein PIL Act and Art. 6 of the Dutch PIL Act. Moreover, \textit{ex post} choice of law was permitted, see Art. 42 of the German EGBGB, Art. 101 of the Belgian PIL Act, Art. 132 of the Swiss PIL Act, Art. 1219(3) of the 3rd part of the Russian Civil Code, see for French PIL: Cour de cass. 19.4.1988 (Roho \textit{v. Caron et autres}), Revue Critique 1989, 68, note H. Barillol.
“entered into after the event giving rise to the damage occurred”. As a result, when applying Rome II, the first question to be asked will be whether the parties have agreed on the applicable law.

4. Complex torts: The general rule

If the parties have not made a choice of law, objective connecting factors are required to determine the applicable law.

According to Art. 4(1) of the Rome II Regulation, complex torts are ordinarily governed by the law “of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of the event occur”. The Regulation thereby adopts the principle according to which the law of the place where the injury occurs is applied and, generally speaking, moves away from the application of the law of the place where the event giving rise to the damage (the damaging act) occurs. If the injury or damage occurs in several countries, the laws of these countries will be applied to the damage that occurred in each country respectively.

For cross-border damage caused by GMOs – just as for all other activities that potentially give rise to damage across borders – this implies that a person causing damage in another country will be subject to the rules on liability of the country in which his or her actions have their effects. The person acting must, consequently, take into consideration the potential victims’ legitimate expectations to be protected according to the level of protection provided by the law of the state where the injury occurs and the victim suffers harm. Hence, the law of the place where the person causing the damage acted will, from now on, be applied only in exceptional circumstances, see Art. 4(1) to (3) of the Rome II Regulation.

Consequently, for cross-border torts caused by omissions, it is not the place where the person claimed to be liable should have acted that determines the applicable law; rather, the determining factor is the place where the damage which the person ought to have prevented occurs.

37 Commission’s 2003 Proposal, note 11.
5. **Product liability**

The general rule of Art. 4(1) will, however, only apply if no specific conflict of laws rule is applicable. In the case of damage caused by GMOs, one special rule that may be of particular importance is the rule on product liability, Art. 5 of the Rome II Regulation.

(a) *Conditions of application*

In Art. 5, the Rome II Regulation establishes a specific regime for tort and delict caused by a product. In order to know whether this regime applies, we have to determine under what circumstances GMOs fall into the scope of that rule.

First, the Regulation concerns the liability for a *product*. This notion is not specified in the Regulation itself. Two points of interest must be distinguished:

i) The first point concerns *processed products* contaminated by GMOs, for example, the corn flakes produced by Z in our first case scenario. In the case of damage caused by processed products contaminated by GMOs, Art. 5 would be applied to determine the law applicable to claims of persons having sustained damage by the processed product.

It is important to note that Art. 5 of the Rome II Regulation only gives an answer to the question as to the law of which country is applicable in a product liability case. Once the applicable law is determined, the question of who is liable under what conditions will then have to be analysed under this law. Whether a specific person within the production chain, e.g. the actual producer, the supplier of components, the wholesaler, the importer, or the final seller, are eligible to be held liable, or whether, in our first case scenario, X or Y can actually be sued, is a matter of the applicable substantive law. The same is true for liability under the 1985 Directive on Product Liability and the question as to whether the 1985 Directive on Product Liability has been transposed in the relevant country's legal order (and which exceptions to the Directive's liability regime apply under the applicable law).

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ii) The second point of interest is the question as to whether agricultural products (the corn in our first scenario) can be considered products pursuant to Art. 5 of the Rome II Regulation. Based on a common understanding of the term “product”, one might argue that only manmade objects should be considered “products”. In order to answer this question, it is helpful to look at other regulations or directives that deal with the same subject-matter – in particular the 1985 Directive on Product Liability. The 1985 Directive establishes a system liability for products and may hence serve as a suitable point of reference to aid the interpretation of the term product.

When the Directive was first enacted in 1985, Art. 2 defined a product as meaning, “all movables, with the exception of primary agricultural products”. After the BSE crisis in the late 1990s, the European Union was eager to enforce and “restore consumer confidence in the safety of agricultural products” and accordingly amended the 1985 Directive by including agricultural products in its scope of application. Based on this decision of the European legislator, there is absolutely no reason not to consider agricultural products, such as GM corn, “products” within the terms of Art. 5 of the Rome II Regulation. Art. 5 thus applies not only to manmade objects but also to agricultural products and, in particular, to GMOs.

(b) Cascade of relevant connecting points

Art. 5 of the Rome II Regulation establishes a sophisticated system of connecting factors for product liability cases. Art. 5 combines different criteria that must be fulfilled in order to arrive at the applicable law. The different criteria are hierarchical; as such, if the first rule does not apply, then the second is applied and if this rule cannot be applied, then the third is applied (and so on). In any given scenario, the court will commence the process of reviewing these connecting factors until one of them specifies the applicable law.

i) Party autonomy: As mentioned above, Art. 14(1) of the Rome II Regulation favours party autonomy in the field of torts. It also applies in product liability cases if the parties make an “express” choice of the applicable law or make a choice which is “demonstrated with reasonable certainty by the circumstances”.

67 ii) Rattachement accessoire: If the parties have not chosen the applicable law pursuant to Art. 14 of the Regulation, Art. 5(2) provides for rattachement accessoire. That means that if there is a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question, this relationship may establish a closer connection between the parties taking precedence over the other connecting factor specified by Art. 5(1). Art. 5 leads to the result that, if parties to a delivery chain are in a direct contractual relationship with each other, the same law applies to product liability claims in contracts and torts between them.

68 Where the contract is between a professional and a person that is not pursuing a commercial activity, the limitations on party autonomy provided for in Art. 14(1) of the Rome II Regulation and applying to a choice of law before the damaging event occurred may apply mutatis mutandis to the rattachement accessoire.40

69 iii) Parties' common habitual residence: If “the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs”, the law of this country applies to claims for product liability, Art. 5(1) in conjunction with Art. 4(2) of the Rome II Regulation.

70 iv) Habitual residence of the injured party: Where neither of the previous connecting factors applies, the law applicable to the non-contractual obligation shall be the law of the country in which the aggrieved person had his habitual residence at the time the damage occurred, Art. 5(1)(a) of the Rome II Regulation. This solution allows the injured party to enjoy the standards of compensation that he or she is accustomed to and expects. It also guarantees equal treatment of persons who sustained damage in the same country, but caused by persons acting in different countries.

71 The legislator, however, chose to introduce a further condition for the application of the lex laesi: It is only applicable if the product was marketed in the country in which the damage was sustained, be it that it was marketed there by the person that is sued or by someone else.

72 v) Place where the product was acquired: If the product that caused the harm was not marketed in the country of the aggrieved person’s habitual residence, the claim shall be governed by the law of the country in which the product was acquired if the product was marketed there, Art. 5(1)(b).

Arguably, the application of this law of the marketplace is not appropriate for bystanders, i.e. persons who are affected by a defective product but who did not themselves acquire it. Art. 5(1)(b) should, therefore, not be used in these cases, and the following rule in Art. 5(2) (place of damage) should be applied.

vi) Place where the damage occurred: Finally, if none of the rules presented above applies, the law applicable to product liability cases shall be the law of the country in which the damage occurred if the product was marketed in this country, Art. 5(2).

6. Environmental damage

(a) Scope of application and general remarks

The law applicable to liability for cross-border damage caused by GMOs may also be determined by the rule Rome II provides for damage caused to the environment. In order for Art. 7 of the Rome II Regulation to apply, it is necessary that damage be caused to the environment. According to Recital 24 of the Rome II Regulation, “environmental damage should be understood as meaning adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms.” Art. 7 of the Rome II Regulation makes clear that the provision covers both environmental damage (i.e. damage to natural resources as such, so-called ecological damage) and damage sustained by persons or property as a result of damage to the environment.

On the one hand, the notion of environmental damage used in the Rome II Regulation is significantly wider than the notion of such damage used in Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage. The 2004 Directive provides a definition of environmental damage in its Art. 1. According to Art. 1 (c), environmental damage includes “land damage, which is any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction in, on or under land, of substances, preparations, organisms or micro-organisms”. This category seems rather narrow, especially as a significant risk of human health being affected is part of the definition. It is, at this stage, not possible to know to what extent GMOs affect human health. Art. 3 of the 2004 Directive, however, refers to the “occupational activities” that are...
considered to potentially cause environmental damage and that are listed in Annex III of the Directive. The Annex mentions under point 11 the “deliberate release into the environment, transport and placing on the market of genetically modified organisms...”. This proves that the legislator considers the manipulation of GMOs a potentially dangerous activity with regard to the environment.

77 On the other hand, the notion of environmental damage in the Rome II Regulation requires an “adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms.” It may be argued that, in the light of the definition of environmental damage given in Recital 24 of the Rome II Regulation, plants farmed for human consumption, e.g. the corn in our first case scenario, are – even if grown organically – not considered natural resources and therefore not part of the goods and interests protected by Art. 7. In this case, the law applicable to damage to humanly grown plants will be determined by Art. 4 or Art. 5 (instead of Art. 7).

(b) The ubiquity approach of Art. 7

78 In the legislative process leading to Rome II, the question of whether environmental damage required a special rule or should be governed by the general rule of Art. 4 was most controversial. In the end, the decision was to apply Art. 4 (in general) but to modify this approach at the discretion of the plaintiff. The final version of Art. 7 now stipulates that in the case of environmental damage, the applicable law “shall be the law determined pursuant to Art. 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.”

79 Art. 7 of the Rome II Regulation penalises cross-border polluters as compared to polluters who commit the same act inside the borders of the state where the result occurs. The European legislator was aware of this fact and deliberately chose to favour the protection of the environment over the equal treatment of foreign and domestic polluters. Any potential polluter has to respect the most stringent standards of safety and diligence in order to avoid liability resulting from his actions.

80 According to Art. 7, the applicable law on environmental damage is the law of the country in which the damage occurs or the law of the country in which the event giving rise to the damage occurs, at the choice of the
jurisdiction and choice of law

claimant. According to recital 25 of the rome ii regulation, "[t]he question of when the person seeking compensation can make the choice of the law applicable should be determined in accordance with the law of the member state in which the court is seised."

7. the effect of foreign authorisations

in some legal systems, civil liability is excluded altogether if the act that caused the harm was permitted by a public authorisation. if the case is governed by the law of the country in which the damage occurred, but the action that led to the damage is covered by an authorisation under the legislation of the country where the harmful act was committed, the question will be if and in what manner the public authorisation is to be taken into account when dealing with a compensation claim.

before the entry into force of the rome ii regulation, it was argued that, according to the principle of territoriality governing public law, foreign administrative authorisations need not be given any weight at all. however, totally ignoring a foreign authorisation may lead to a judgment not being recognised or enforced in the country in which the authorisation was issued; as such, disregard for the authorisation may be seen as a violation of the country’s public policy (see art. 34(1) of the brussels i regulation which allows member states to not recognise a foreign judgment when it is manifestly contrary to public policy).

according to another opinion, a foreign administrative authorisation held by the person causing the damage should, under certain circumstances, be taken into account when dealing with liability claims for damage caused by the relevant activity. according to this opinion, a foreign administrative authorisation should be taken into consideration, provided that the authorisation in question is legal under international law and the conditions for obtaining the authorisation are the equivalent of those provided for under domestic law.

41 see the german decisions in bgh 10.3.1978, die deutsche rechtsprechung auf dem gebiete des internationalen privatrechts (ipr spr.) 1978, no. 40; olg saarbrücken 22.10.1957, neue juristische wochenschrift (njw) 1958, 752 at 754.


43 olg linz, jbl 1987, 577 (579).
It seems that the Rome II Regulation itself provides some support for this second point of view. Recital 34 states that, “in order to strike a reasonable balance between the parties, account must be taken, in so far as appropriate, of the rules of safety and conduct in operation in the country in which the harmful act was committed, even where the non-contractual obligation is governed by the law of another country. The term ‘rules of safety and conduct’ should be interpreted as referring to all regulations having any relation to safety and conduct, including, for example, road safety rules in the case of an accident.”

However, such administrative authorisations cannot be recognised as proper justification for the harmful behaviour, excluding any liability. Rather, courts have to take them into account and consider them as a relevant fact in the process of applying the substantial law designated by Art. 7 (or Art. 4) of the Rome II Regulation.

8. The applicable law in case scenario 1

Having discussed the relevant conflict rules of the Rome II Regulation, we can now proceed to apply them to our case scenarios.

(a) Claim of Y against X

i) Arguably, Art. 7 of the Rome II Regulation (the rule on environmental damage) does not apply to the claim of Y against X since, in light of the definition of environmental damage given in Recital 24 of the Rome II Regulation, plants farmed for human consumption, e.g. the corn in our scenario, are not part of the goods and interests protected by Art. 7.

The applicable law is, therefore, to be determined either by Art. 5 (the rule on product liability) or by the general rule on extra-contractual liability in Art. 4 of the Rome II Regulation. This is true for a claim both before Austrian or Hungarian courts.

ii) The crops that caused the damage to Y were not marketed by X. He was, however, producer of these crops which may lead to the application of Art. 5 of the Rome II Regulation (the rule on product liability). As we

45 Cf. supra no. 75.

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have seen, Art. 5 applies not only to processed products but also to *agricultural products* such as the GM corn in our scenario.⁴⁶

If the parties do not choose the applicable law, objective connecting factors apply. According to Art. 5(1)(a) of the Rome II Regulation, the law applicable to the non-contractual obligation shall be the law of the country in which the aggrieved person had his habitual residence at the time the damage occurred if the product that caused the damage was marketed in the country in which the damage was sustained. The crops produced by X were never purposefully marketed but taken by the wind to Y’s estate. This should exclude the application of Art. 5(1)(a) of the Rome II Regulation.

The same aspect should exclude the application of Art. 5(1)(b) according to which the claim shall be governed by the law of the country in which the product was acquired if the product was marketed there; finally, if none of these rules applies, the law applicable to product liability cases shall be the law of the country in which the damage occurred if the product was marketed in this country, Art. 5(2). Here again, the fact that X’s GM crops were not marketed at all should exclude the application of this rule.

These considerations show that, although *agricultural products* such as the GM corn in our scenario fall, in principle, within the scope of Art. 5 of the Rome II Regulation, Art. 5 requires that the product be deliberately put onto a market. This was not the case for X’s crops which were taken by the wind to Y’s estate; consequently, the case falls within the scope of the general rule of Art. 4(1) of the Rome II Regulation.

iii) According to Art. 4(1) of the Rome II Regulation, complex torts are ordinarily to be governed by the law “of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred.” In scenario 1(a) the damage occurred when X’s crops contaminated Y’s stock in Hungary. Art. 4 thus leads to the application of Hungarian law to Y’s claim against X.

(b) Claim of Z against X

As we have seen, neither Art. 7 of the Rome II Regulation (environmental damage) nor Art. 5 (product liability) apply to a claim against X. The law

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⁴⁶ Cf. supra no. 63–64.
applicable to Z’s claim against X is thus to be determined according to the general rule in Art. 4 of the Rome II Regulation.

95 In scenario 1(b) the damage occurred when X’s crops contaminated Y’s stock in Hungary. The contamination of Y’s crops in Hungary was also the source of the further injury suffered by Z. Here again, in order to lead to an injury of Z’s legally protected interests, it needed the further step of the sale of the contaminated crops by Y to Z. The source of Z’s injury, attributable to X, lies however in the contamination of Y’s crops that took place in Hungary. Art. 4 should thus arguably lead to the application of Hungarian law to Z’s claim against X.

(c) Claim of Z against Y

96 Organic farmer Y sold and delivered a product that caused damage to Z, the producer of the corn flakes. Primary agricultural products are to be considered products in the sense and for the purpose of Art. 5 of the Rome II Regulation. Since neither Hungary nor the Czech Republic are Members of the 1973 Hague Convention on the Law Applicable to Products Liability, the applicable law will be determined, before the courts of both countries, according to Art. 5 of the Rome II Regulation.

97 i) The parties have not chosen the law applicable to Z’s claim in tort against Y, an option they had under Art. 14 of the Rome II Regulation.

98 ii) Art. 5(2) then provides for rattachement accessoire, i.e. the application of the law governing “a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question”.

99 In our case scenario, Y and Z have concluded a sales contract. Since both parties to the contract have their places of business in different Contracting States of the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG), the conditions for the application of CISG set by Art. 1(1)(a) of the CISG are met and the contract between Y and Z is, in principle, governed by the CISG. As the CISG does not contain any rules on tort liability, rattachement accessoire is, in this case, excluded. In this case, the tort will be governed by “the law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred, if the product was marketed in that country”, Art. 5(1)(a) of the Rome II Regulation.

47 For the parallel problem in the context of jurisdiction cf. supra no. 32.
48 Cf. supra no. 63–64.
Should the parties have excluded the application of the CISG, the CISG would not apply (see Art. 6 of the CISG). In the absence of a choice of law-clause, their sales contract would then, according to Art. 4(1)(a) of Regulation (EC) No 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I),

be governed “by the law of the country where the seller has his habitual residence”. The seller Y has his habitual residence in Hungary so that, pursuant to Art. 4(1)(a) of the Rome I Regulation, Hungarian law governs their contractual relationship and, according to Art. 5(2) of the Rome II Regulation, the Hungarian law (by way of rattachement accessoire) also governs Z’s claim against Y for damages in tort.

(d) The customers’ claims against Z

In scenario 1(d), Z marketed a product that does not meet the description he made of it. He may, therefore, be liable to the customers for the damage they suffered due to the difference between the description and the actual product quality. In such a situation, the applicable law is to be determined by the rule on product liability, i.e. Art. 5 of the Rome II Regulation.

i) If the customers claiming damages acquired the product directly from Z, according to Art. 5(2) of the Rome II Regulation the rattachement accessoire may again apply. The customers’ claim in torts will then be governed by the law of the same state that governs their contractual relationship.

In case scenario 1(d), this would lead to the application of Czech law to a claim against Z in tort: In the absence of a choice of law-clause in the contract between Z and his customers, their contracts are governed by the law of the country in which the seller has his habitual residence or central administration, Art. 4(1)(a) of the Rome I Regulation on the law applicable to contractual obligations. Since Z has his central administration in the Czech Republic, the contracts with his customers are governed by Czech law. By way of rattachement accessoire, according to Art. 5(2) of the Rome II Regulation and supra no. 52.

49 OJ L 177, 4.7.2008, 6–16.
50 This is true if the claim against Z is brought before the Czech courts, according to Art. 2(1) of the Brussels I Regulation; it is also true if, under Art. 5(3) of the Brussels I Regulation, a consumer sues Z in another country which is not a Contracting State of the 1973 Hague Convention on the Law Applicable to Products Liability. If, on the other hand, a customer sues Z, on the basis of Art. 5(3) of the Brussels I Regulation, in a Contracting State of the 1973 Hague Convention, the applicable law will be determined according to the rules of the 1973 Hague Convention, see Art. 28 of the Rome II Regulation and supra no. 52.
Regulation, Czech law would then also govern Z's alleged tortious liability towards his customers.

104 ii) If, on the other hand, the customers acquired the corn via intermediaries, such as supermarkets or organic food stores, there is no direct contractual relationship between the customers and the *rattachement accessoire* has to be ruled out.

105 The applicable law in that case is to be determined by pursuing the cascade established by Art. 5(1) of the Rome II Regulation:

- if the parties did not agree on the applicable law (Art. 14 of Rome II), and
- since there is no case for *rattachement accessoire* (Art. 5(2) of Rome II), and
- if the parties do not have their habitual residence in the same country (Art. 5(1) in conjunction with Art. 4(2) of Rome II),

the tort will be governed by "the law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred, if the product was marketed in that country", Art. 5(1)(a) of the Rome II Regulation. Thus, if the cornflakes in our case scenario 1(d) were available in the supermarkets of the country of the consumers' habitual residence, the law of this country will apply to their claims against Z (independently of whether or not the claimants actually bought the cornflakes in that country).

- if the product was not marketed in the country of the consumers' habitual residence, the applicable law is the law of the country in which the product was acquired, if the crops were marketed there, Art. 5(1)(b) of the Rome II Regulation. 51

106 In most cases, the person having suffered the damage would have acquired the product in the country of his or her habitual residence, where the product would have also been marketed; in these (most frequent) cases, Art. 5(1)(a) of the Rome II Regulation leads to the application of the tort law of the country of the customers' habitual residence.

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51 In the rare cases in which the cornflakes were not marketed there either, "the law of the country in which the damage occurred" applies, "if the product was marketed in that country", Art. 5(1)(c) of the Rome II Regulation.
9. The applicable law in case scenario 2

a) As mentioned above,\(^{52}\) the material scope of application of the Rome II and Brussels I Regulations are identical. Just as for the purpose of the Brussels I Regulation, for the application of the Rome II Regulation the claim of the state in case scenario 2(a) is to be considered a “civil matter” within the meaning of Art. 1(1) of both Regulations.

Case scenario 2(a) provides a perfect example for the application of Art. 7 of the Rome II Regulation. The damage in this scenario falls within the definition given in Recital 24 of the Rome II Regulation for “environmental damage” (i.e. “an adverse change in a natural resource, such as water, land or air” etc.). According to Art. 7 and Art. 4 of the Rome II Regulation, the claim of the Belgian state-run research institute is, in principle governed by the law of the country in which the damage occurs (i.e. by Belgian law); however, the research institute can, according to Art. 7 of the Rome II Regulation, opt for the application of the law of the country in which the French farm acted, i.e. for the application of French law.

b) In scenario 2(b), according to the first line of arguments presented above,\(^{53}\) the state authorities intervened in their function as guardian of the public health and safety. They exercised their public and administrative powers so that the case does not qualify as a “civil and commercial matter”, according to Art. 1(1) of the Rome II Regulation. Under these circumstances, the Rome II Regulation is not applicable.

If, however, the public authorities claim compensation for expenses incurred on the basis, and according to rules and principles of private law, the claim for recovery of expenses incurred for the restoration of environmental goods is to be regarded as a “civil and commercial matter” and the Rome II Regulation applies.\(^{54}\) The claim then is, in principle governed by the law of the country in which the damage occurred (i.e. by Belgian law), the Belgian administrative authorities having the possibility to opt for the application of the law of the country in which the French farmer acted (i.e. for the application of French law), Art. 7 and Art. 4 of the Rome II Regulation.

\(^{52}\) Supra no. 49.

\(^{53}\) Supra no. 46 in the context of the Brussels I Regulation.

\(^{54}\) Supra no. 47. For further details and more arguments, see Th. Kadner Graziano, Yb PIL, Vol. IX (2007) 71 at 82 ff.
IV. Concluding Remark

111 The case scenarios used in this contribution illustrate the interaction of the Brussels I and the Rome II Regulations and the variety and the complexity of legal issues to be considered in cases of cross-border damage caused by GMOs. Since the Rome II Regulation has been applicable since January 2009 only, many of the issues raised as well as some of the solutions suggested have not been submitted to the courts yet.