PURELY ECONOMIC LOSS IN CONFLICT OF LAWS: THE CASE OF TORTIOUS INTERFERENCE WITH CONTRACT

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[456]1. Introduction

In early 2001, Mexican soap opera star Juan Mauricio Islas entered into an exclusivity agreement with the Mexican based company Televisa, producer of Spanish language television and radio programmes for broadcast in Mexico, the United States and other countries. According to the agreement, which contained a governing law provision specifying Mexican Federal Copyright Law, Islas offered his services, including the 'use of image' and services for 'artistic interpretation' in certain productions, on an exclusive basis for a period of seven years, in return for remuneration. Notwithstanding this, at the end of 2003, Islas signed another exclusivity agreement with Spanish language broadcasting company Telemundo, which was both negotiated and concluded at Telemundo's headquarters in Florida. By signing this agreement with Telemundo, Islas violated his exclusivity agreement with Televisa. Televisa raised civil proceedings against Telemundo at the federal district court of Miami asserting, on the basis of Florida law, that Telemundo, as a third party, tortiously interfered with its contract with Islas. Televisa sought a preliminary injunction to prevent Telemundo from using Islas' services throughout the duration of the contract and claimed damages. Telemundo, on the other hand, argued that Mexican law was applicable to the dispute and this did not recognise an action for tortious interference with contract.

This case[1] illustrates the importance of establishing which law applies to a tort claim for interference with another's contract. The fact that in this instance, applying the law of Florida would lead to a diametrically opposite result to the outcome if Mexican law were to be applied, is not a coincidence. Comparative analysis in this field of law shows that conditions for liability vary from country to country and this may result in different outcomes when applied to the same set of facts.[2]

Determining the applicable law in a case of interference with contractual relations may, however, not be easy to accomplish. Within Europe, claims arising out of tort and delict are generally governed by the law of the country where the damage occurs (*lex loci damni*), according to Article 4(1) of the EC Regulation on the law applicable to non-contractual relations (hereinafter referred to as Rome II).[3] However, when applying this provision to contract-interference cases, several questions arise from both a practical perspective, such as: what is the damage and how can it be localised? and from a normative

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[1] *Grupo Televisa, S.A. v. Telemundo Communications Group, Inc.*, 485 F.3d 1233 (C.A.11.Fla. 2007).

[2] Some jurisdictions, including France and the Netherlands, provide comparatively broad protection to contracts, while others, especially England and Wales, allow a rather great deal of freedom to third parties. The approaches also differ: from a more flexible, multi-factor approach (e.g. the Netherlands, Germany and the United States), leaving room for the court to take into account the specific circumstances of the case, to a more closed approach with – at least on the face of it – clear-cut rules (France, England and Wales). See for an in-depth analysis of Dutch, German, French, English and US substantive law on the liability of third parties for interfering with another's contract, L.M. van Bochove, *Betrokkenheid van derden bij contractbreuk*, Oisterwijk: Wolf Legal Publishers 2013.

[3] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations, *OJ* 2007, L199/40.

point of view for instance: does applying the rule lead to the best result in terms of predictability and fairness?.

This paper concentrates on the question of how a court should determine the applicable law in contract-interference cases under the Rome II Regulation. Section 2 describes the problems the general *lex loci damni*-rule of Article 4(1) of the Regulation poses, many of which are representative of the problems that generally arise in purely economic loss cases – and assesses possible alternatives, including applying the exception provided by Article 4(3) Rome II, in favour of the 'manifestly more closely connected law', as well as the application of Article 6 Rome II, which contains a specific rule for unfair competition. In Section 3, a comparison is made with United States case law, which deals with the issue of the applicable law in cases of third party interference with contract on a regular basis and offers an outsider's perspective on the issue. Finally, section 4 provides some points of reference for the courts.

Given that the place of the damage, often referred to as the *Erfolgsort*, is relevant not only for establishing the applicable law pursuant to Article 4(1) Rome II, but also to determining whether a court has jurisdiction in a tort/delict case pursuant to Article 7(2) of the Brussels I*bis* Regulation,[4] the case law of the Court of Justice of the EU (hereinafter referred to as CJEU) in respect of this provision is taken into consideration in the analysis which follows, particularly in Section 2.2. It should however be noted that although Rome II's preamble states that the provisions of this Regulation and the Brussels I*bis* Regulation should be consistent,[5] the CJEU has emphasised [457] that the provisions of both regulations cannot be interpreted 'in a manner which is unconnected to the scheme and objectives pursued by that regulation.'[6] One notable difference between the two instruments is that Article 7(2) Brussels I*bis* can confer jurisdiction to more than one court whereas Article 4(1) Rome II only refers to a single legal system.

2. The law applicable to contract-interference cases pursuant to Rome II

2.1 Introduction

Pursuant to the general rule of Article 4(1) Rome II, the law of the country where the damage occurred applies to a non-contractual obligation arising out of tort/delict, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country where the indirect consequences of that event occurred. In order to apply this provision to cases of third party interference with contract, the first step is to establish what the damage resulting from the interference actually is. The second step is to determine whether this damage constitutes 'damage' in accordance with Article 4(1). If so,

[4] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), *OJ* 2012, L 351/1.
[5] See Recital 7 of the preamble to the Rome II Regulation.
[6] CJEU 16 January 2014, Case C-45/13, ECLI:EU:C:2014:7, *NIPR* 2014, 51 (*Kainz* v. *Pantherwerke*), para. 20.

the third step is to ascertain the place of the damage (*Erfolgsort*). These three steps are discussed further in section 2.2. Examples taken from case law are also analysed.

Article 4 Rome II provides two general exceptions to the *lex loci damni* rule. Firstly, should the victim and the tortfeasor have their habitual residence[7] in the same country, the law of that country applies pursuant to Article 4(2). Furthermore, if the tort/delict is manifestly more closely connected with a country other than that indicated in paras. (1) and (2), the law of that country applies pursuant to Article 4(3). Section 2.3 discusses the application of the latter exception in contract-interference cases.

Since most contract-interference cases take place in a competitive context, the application of Article 6 Rome II also needs to be examined. Article 6(1) Rome II, which provides a rule to determine the law applicable to acts of unfair competition, is considered in section 2.4. This provision will, however, only apply in a limited number of cases. Usually, the interference primarily affects the interests of one specific competitor and therefore falls under the scope of Article 6(2) Rome II, which refers back to Article 4 Rome II. For this reason, the main focus is the application of this latter provision.

2.2 Place of damage

2.2.1 Damage resulting from interference with contract

The damage in cases of tortious interference with a contract usually[8] consists of purely economic loss.

> Consider the following situation: A (habitual residence in the Netherlands) and B (habitual residence in Germany) conclude a contract for the sale of an antique vase for a price of €10,000, to be paid from B's Swiss bank account, on delivery of the vase. According to expert evaluation, the appraised value of the vase is €12,500. The governing law clause in the contract lays down that Dutch law is applicable and the contract further stipulates that A shall deliver the vase to Belgium, where it will be kept temporarily for restoration. However, prior to the date of delivery, third party C, from his habitual residence in Italy, induces A to transfer the vase to him by offering him a price of €15,000 by e-mail. In addition, C promises to indemnify A for any future claims made by B. A receives and reads the e-mail in Spain. Upon his return to the Netherlands, A accepts C's offer. A few days later, he delivers the vase to C in Italy, despite his contractual obligation to transfer the vase to B. As a consequence of A's breach of contract, B loses the benefits of the contract, namely, not being the owner of the vase, which could have a monetary value estimated at €2,500 euros being the difference between the appraised value and the agreed purchase price. When it transpires that A has

[7] Habitual residence is defined in Art. 23 Rome II. The habitual residence of companies is their place of central administration.

[8] Although it is not ruled out that emotional distress or reputational harm cannot be considered as compensable. See e.g. § 744A of the American Restatement (Second) of Torts; *Cherberg v. Peoples Nat. Bank of Washington*, 88 Wash.2d 595 (Wash. 1977); *Mooney v. Johnson Cattle Co., Inc.*, 634 P.2d 1333 (Or. 1981).

disappeared and is nowhere to be found, B claims damages from C for tortiously interfering with his contract with A.

It is clear that B has suffered no personal injury or physical damage to his (tangible) property. The damage sustained by B is purely economic in nature.

Some German scholars have argued that in most instances of tortious interference, the interference does not cause any actual damage.[9] They reason that the party suffering the loss, can usually also claim damages from his counter party, who has committed breach of contract. However, the fact that the victim can claim damages from his contracting party, does not mean that he did not suffer loss caused by the tortious behaviour of the third party. As to whether the tortfeasor and contracting party in breach are jointly and/or severally liable, constitutes another question.

2.2.2 Regarding purely economic loss as 'damage'

The next step is to establish whether the damage resulting from third party interference with a contract constitutes 'damage' in terms of Article 4(1) Rome II. Despite a plethora of scholarship on the role of purely economic loss in substantive tort, there is no universally accepted definition of such loss,[10] which raises the question whether it can in fact function as a relevant connecting factor for the determination of the applicable law.

In line with CJEU case law concerning Article 7(2) of the Brussels I*bis* Regulation,[11] Rome II only differentiates between direct and indirect damage and remains silent regarding whether purely economic loss should also be regarded as damage within the meaning of Article 4(1). Recital 17 of the Rome II preamble focuses on personal injury and damage to property and states that the country where the damage occurs is the country where the injury was sustained or where the property was damaged. In these cases, related economic losses have to be considered as 'indirect consequences', which are not [458] relevant to establishing the law which applies.[12] The question therefore remains unanswered as to what should be done if the damage occurred is not related to personal or physical injury or damage and thus is considered to be purely economic loss.

Persuasive arguments that purely economic loss should be considered direct damage in the context of Article 4(1) Rome II can be found in CJEU case law on (now) Article 7(2) of

[9] H. Köhler, 'Die "Beteiligung an fremdem Vertragsbruch" – eine unerlaubte Handlung?', in: A. Heldrich et al. (eds.), *Festschrift für Claus-Wilhelm Canaris zum 70. Geburtstag, Band I*, Munich: Verlag C.H. Beck 2007, p. 598; H. Koziol, *Die Beeinträchtigung fremder Forderungsrechte*, Vienna: Springer Verlag 1967, p. 79-80.

[10] M. Bussani and V.V. Palmer, 'The notion of pure economic loss and its setting', in: M. Bussani and V.V. Palmer (eds.), *Pure Economic Loss in Europe*, Cambridge: Cambridge University Press 2003, p. 4.

[11] See, *inter alia*, ECJ 11 January 1990, Case C-220/88, ECR 1990, I-49, ECLI:EU:C:1990:8 (*Dumez* v. *Hessische Landesbank*); ECJ 16 July 2009, Case C-189/08, ECR 2009, I-6917, ECLI:EU:C:2009:475, *NIPR* 2009, 207 (*Zuid-Chemie BV* v. *Philippo's Mineralenfabriek NV/SA*).

[12] J.A. Pontier, *Onrechtmatige daad en andere niet-contractuele verbintenissen*, Apeldoorn: Maklu 2015, no. 247. See also, in the context of the Brussels regime, ECJ 19 September 1995, Case C-364/93, ECR 1995, I-2719, ECLI:EU:C:1995:289, *NIPR* 1995, 538 (*Marinari* v. *Lloyd's Bank*), para. 15.

the Brussels I*bis* Regulation. In its *Kolassa* judgment,[13] a case concerning prospectus liability, the CJEU held that the purely economic damage sustained by the victim could be considered damage within the meaning of Article 7(2), and that the courts where the victim is domiciled have jurisdiction, on the basis of the place where the damage occurred, in particular when that damage materialises directly in the victim's bank account held with a bank established within the area of jurisdiction of those courts.[14] In *CDC*,[15] the CJEU also recognised purely economic loss – in this case loss consisting of additional costs incurred due to artificially high prices caused by a cartel – as damage within the meaning of Article 7(2) and ruled that the place where the purely economic loss is suffered (*in casu*: the place of the victim's registered office) was a relevant connecting factor to determine whether or not a court has jurisdiction.[16]

More recently, the CJEU ruled on the topic of purely economic loss in the case of *Universal Music*,[17] again in relation to the matter of jurisdiction. The facts of the case were as follows.

> In 1998, Universal Music International Ltd. (part of the Universal Music Group) and Czech record company B&M agreed upon the purchase of 70 per cent of the shares of B&M by companies within the Universal Music Group. Furthermore, parties agreed that in 2003, Universal would buy the remaining 30 per cent. In the draft version of the Letter of Intent, the intended purchase price for all shares equalled five times the annual profit of B&M. For the drafting of the definitive share option agreement for 30 per cent of the shares, the Universal Music Group instructed a Czech law firm, Burns Schwartz International. On 5 November 1998, a share option agreement was entered into by Universal Music International Holding B.V. (hereinafter referred to as Universal Music), registered in the Netherlands, B&M and its shareholders. However, due to an alleged error on the part of an employee of Burns Schwartz International whilst drafting the agreement, the price Universal Music were required to pay for the shares was increased dramatically. In 2003, Universal Music bought, as agreed, the remaining 30 per cent of the shares. It calculated, on the basis of the intended purchase price, that it should pay approximately €313,000. B&M's shareholders, however, calculated the price of the shares on the basis of the formula in the final agreement, resulting in a purchase price of more than €30 million. Parties went to arbitration and in 2005, Universal Music and B&M's shareholders settled their dispute for €2.6 million. Thereafter, Universal Music commenced legal proceedings against Burns Schwartz International and its employee before the court of Utrecht in the Netherlands. It sought the amount of €2.7 million, this being the difference between the intended price of the shares and the settlement sum reached plus the costs for the arbitration proceedings and the settlement.

[13] CJEU 28 January 2015, Case C-375/13, ECLI:EU:C:2015:37, *NIPR* 2015, 50.
[14] Idem, para. 55.
[15] CJEU 21 May 2015, Case C-352/13, ECLI:EU:C:2015:335, *NIPR* 2015, 292.
[16] Idem, para. 52.
[17] CJEU 16 June 2016, Case C-12/15, ECLI:EU:C:2016:449.

It was beyond doubt that the place where the event giving rise to the damage took place was the Czech Republic. The parties however did not agree with the determination of the place where the damage occurred. Although payment of €2.6 million was made from Universal Music's Dutch bank account, the CJEU conclusively held that the damage, which was purely economic, not physical, also occurred in the Czech Republic:

> 'The damage for Universal Music resulting from the difference between the intended sale price and the price in that contract became certain in the course of the settlement agreed between the parties before the arbitration board, in the Czech Republic, on 31 January 2005, the date on which the actual sale price was fixed. Therefore, the obligation to pay placed an irreversible burden on Universal Music's assets. […] Accordingly, the loss of some assets happened in the Czech Republic, the damage having occurred there.' [18]

Thus, the place where the purely economic loss occurred, in so far as it was directly linked to the harmful event, qualifies as *Erfolgsort* and thus constitutes a ground for jurisdiction.[19] The next question is, the extent to which this reasoning in the context of jurisdiction is relevant to establishing the law applicable to claims for tortious interference with contract. As aforementioned, the provisions of the Rome II Regulation should in principle be consistent with those of the Brussels I*bis* Regulation, but this does not mean that consistency should be achieved no matter what. It seems, however, unlikely that to consider direct, purely economic loss as 'damage' in terms of Article 4(1) Rome II would be contrary to either the scheme of the Rome II Regulation, or to its objectives to enhance the foreseeability of court decisions and to ensure a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage.[20] The fact that neither Article 4(1) nor the preamble specify any limitations as to the type of damage, is supportive of this view.[21]

In conclusion, pure economic loss should be recognised as 'damage' within the meaning of Article 4(1) Rome II. Determining the place of damage in contract-interference cases, however, is a different question.

2.2.3 Determining the place of damage in contract-interference cases

Lehmann has argued that when applying the *lex loci damni*-rule of Article 4(1) Rome II to purely economic loss cases, one must differentiate between certain fact patterns, since

[18] Idem, paras. 31-32.
[19] See also M.H. ten Wolde and K.C. Henckel, 'The ECJ's interpretation of Article 5(3) Brussels I Regulation: a carefully balanced system of jurisdictional rules?', *International Journal of Procedural Law* 2013-2, p. 220. It should be noted that in *Universal Music* the place of damage did not constitute an additional ground of jurisdiction, since the Czech Republic was also the *Handlungsort*.
[20] See Recital 16 of the preamble to the Regulation.
[21] See also L. Strikwerda in his case note on *Kolassa* in *Nederlandse Jurisprudentie* 2015, 332, no. 6; Pontier 2015, no. 249 (*supra* n. 12).

economic loss cannot be located by a geographical one-size-fits-all rule.[22] Hence, the next step is to determine where the damage occurs in the case of tortious interference with contract. In the example case involving the sale of the vase, in section 2.2.1, the following potential *loci damni* can be identified: [459] (i) Spain: the place where the seller A receives third party C's persuasive statements to conclude an 'inconsistent transaction'; (ii) the Netherlands: the place where A decides to conclude the inconsistent transaction with C; (iii) the place where A and C conclude their contract. This is difficult to determine in cases of distant contracting; (iv) Belgium: the place where the contractual obligation towards first buyer B should have been performed, but was not; (v) Italy: the place where the actual delivery to C took place; (vi) Switzerland: the place where B holds his bank account; (vii) Germany: the place where B has his domicile and feels the impact of the loss.

To establish where the initial damage took place, the 'reversibility test' may be useful. This test, which is sometimes used in cases of misrepresentation,[23] entails that the relevant damage occurs when the negative consequences of the wrongful act are no longer reversible.

> The reversibility test is also referred to by the CJEU in the *Universal Music* judgment, when the Court stated that the obligation to pay, arising from the settlement agreed between the parties, 'placed an irreversible burden on Universal Music's assets'[24] in the Czech Republic, thus making the Czech Republic the *Erfolgsort*.

Based on this test, the receipt of the information (i) cannot be regarded as relevant.[25] Option (ii) and (iii) can be disregarded for the same reason given that A still has an opportunity to fulfil its contractual obligations towards B (that is, if he breaches his contract with C).

In view of CJEU's ruling in *Universal Music*, the place where the victim has his bank account (option vi) and the place where the victim has his domicile/habitual residence (option vii) should *not*, in itself, be regarded as the place where the (initial) damage occurred.[26] With regard to option (vii), the CJEU, referring to the *Kronhofer* judgment,[27] held that the notion of place where the harmful event occurred (more particularly the place where the damage occurs) in (now) Article 7(2) Brussels I*bis* Regulation 'does not refer to the place where the applicant [victim, LvB] is domiciled and where his assets are concentrated by reason of the fact that he has suffered financial damage there resulting

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[22] M. Lehmann, 'Where Does Economic Loss Occur?' *JPIL* 2011-3, p. 549. This is also evident from the case law on Art. 7(2) Brussels I*bis* Regulation, see *supra*, 2.2.1 and 2.2.2.
[23] A. Dickinson, *The Rome II Regulation. The law applicable to non-contractual obligations*, Oxford: Oxford University Press 2008, p. 328.
[24] CJEU *Universal Music*, para. 31 (*supra* n. 17).
[25] See also Lehmann 2011, p. 536 (*supra* n. 22), who argues that even in cases of misleading information the receipt of information 'in and of itself is not damage'.
[26] CJEU *Universal Music*, para. 38 (*supra* n. 17). This was different in CJEU *Kolassa* (*supra* n. 13) and CJEU *CDC* (*supra* n. 15) where the other circumstances also contributed to attributing jurisdiction to the courts for the place where a purely economic loss occurred.
[27] ECJ 10 June 2004, Case C-168/02, ECR 2002, I-6009, ECLI:EU:C:2004:364, *NIPR* 2004, 249.

from the loss of part of his assets which arose and was incurred in another Member State'.[28] This is in keeping with previous case law in which the CJEU has repeatedly ruled that Article 7(2) Brussels I*bis* Regulation does not aim to create a *forum actoris* for tort victims.[29] Furthermore, the Court held in *Universal Music* that 'purely financial damage which occurs directly to the applicant's bank account cannot, in itself, be sufficient to constitute a "relevant connecting factor",'[30] for establishing the jurisdiction of the court for the place where the damage occurred. The CJEU argued that this place, in itself, is not necessarily the most reliable connecting factor since a company may have multiple bank accounts.[31] The fact that Universal Music's bank account and domicile were both located in the Netherlands, was insufficient to regard the Netherlands as the *Erfolgsort*.

At first glance, *Universal Music* may seem difficult to reconcile with the CJEU's previous judgments in *Kolassa* and *CDC*. In *Kolassa*, the Court ruled that in certain circumstances, the jurisdiction of the court for the *Erfolgsort* is attributed to the court situated in the victim's domicile if he suffered pure financial loss to his bank account held within a bank established within the jurisdiction of this court.[32] In *CDC*, a case regarding purely economic damage caused by a hydrogen peroxide cartel, the CJEU held that the *Erfolgsort* should be located at the victim's registered office.[33] These judgments are however rooted in the particular features of those cases. In *Kolassa*, the bank had published a prospectus in the country where the victim, a consumer, was domiciled *and* held his bank account.[34] In *CDC*, a large number of people had been harmed and it was not possible to identify one single place as the location of the causal event. Additionally, locating the *Erfolgsort* at the place of the company's registered office could be justified by the fact that usually, a company conducts its economic activities at its registered office.[35] In *Universal Music* however, it seems that the CJEU regarded the financial damage suffered by the victim in his bank account at the place of his domicile as indirect damage, following from the loss of assets, which was the initial damage, which was sustained in the Czech Republic.[36]

The two remaining options are the place where the contractual obligation would have been performed except for the interference (*in casu*: non-delivery in Belgium) (iv), and

[28] CJEU *Universal Music*, para. 35 (*supra* n. 17).
[29] ECJ *Dumez* (*supra* n. 11). See also Ten Wolde and Henckel 2013, p. 218 (*supra* n. 19).
[30] CJEU *Universal Music*, para. 38 (*supra* n. 17).
[31] Idem.
[32] CJEU *Kolassa*, para. 55 (*supra* n. 13). This case has received much attention in literature, see, *inter alia*, T.M.C. Arons, 'On financial losses, prospectuses, liability, jurisdiction (clauses) and applicable law. European Court of Justice 28 January 2015, Case C-375/13 (Kolassa/Barclays Bank)', *NIPR* 2015, p. 377-382; M. Lehmann, 'Prospectus Liability and Private International Law - Assessing the Landscape after the CJEU Kolassa Ruling (Case C-375/13)', *JPIL* 2016-2, p. 318-343. See also M. Haentjens and D.J. Verheij, 'Finding Nemo: Locating Financial Losses after Kolassa and Profit', *Journal of International Banking Law and Regulation* 2016, p. 358, arguing that the Court was incorrect to refer to the place of the bank account and should have taken the place of the securities account into consideration instead.
[33] CJEU *CDC*, para. 52 (*supra* n. 15).
[34] See Conclusion A-G Szpunar to Case C-12/15, ECLI:EU:C:2016:161, para. 45.
[35] Idem, para. 47.
[36] Cf. ECJ *Kronhofer* (*supra* n. 27).

the place where the actual performance of the conflicting contractual obligation took place (*in casu*: delivery of the vase to third party C in Italy) (v).

Option (iv) was adopted in the *Dolphin* case,[37] in which the English Queen's Bench Division (Commercial Court) held that claims for inducing a breach of contract fell within the scope of Article 5(3) Brussels I Regulation (now Article 7(2) Brussels I*bis* Regulation) and that the place where the damage occurred is the place where the victim should have received his contractual entitlement be that, money or goods.[38] Although [460] locating the damage at the place where the contractual obligation should have been performed appears to be sensible, it is perhaps questionable whether this option is fully reconcilable with Rome II's overall objective of enhancing the foreseeability of court decisions.[39] Article 7(1) of the Brussels I*bis* Regulation, which provides the option for the plaintiff to bring proceedings concerning contractual matters at the place where the contract was performed or ought to have been performed, shows that the identification of the place of performance of a contractual obligation can be problematic, especially for obligations not yet performed, provided that the contract does not stipulate the place of performance. In that case, the court should determine the place of performance on the basis of the law applicable to the contract.[40] This particular issue has led to a large number of CJEU rulings,[41] and is the main reason why Article 7(1) is considered one of the most complex provisions of the Brussels I*bis*

[37] [2010] 1 *All ER* (Comm) 473.

[38] See also P. Stone, *EU Private International Law*, Cheltenham: Elgar European Law 2014, p. 103, who also claims that the place of injury is the place 'where under the contract the relevant payment or other benefit should have been received by the plaintiff'. At p. 381, within the context of Rome II, he argues that the country of direct injury is the country 'in which the breach induced occurred and the plaintiff suffered direct financial loss (for example, by failing to receive a benefit contracted for)'.

[39] See Recital 16 of the preamble to the Regulation.

[40] ECJ 6 October 1976, Case 12/76, ECR 1976, III-1473, ECLI:EU:C:1976:133 (*Tessili* v. *Dunlop*).

[41] The first cases were ECJ *Tessili* v. *Dunlop* (*supra* n. 40) and ECJ 6 October 1976, Case 14/76, ECR 1976, III-1497, ECLI:EU:C:1976:134 (*De Bloos* v. *Bouyer*) (ruling, also on the basis of Art. 5(1) Brussels Convention 1968, that the court has to identify the contractual right on which the plaintiff's claim is based and determine the place of performance of that specific right). To enhance legal certainty, the EU legislator introduced a new provision for sales and services contracts in the Brussels I Regulation 2001 (Art. 5(1)(b), now Art. 7(1)(b) Brussels I*bis*), which contains an autonomous place of performance for these types of contracts. Yet, the new provision did not put an end to the influx of preliminary questions on the *forum contractus* rule, see, *inter alia*, ECJ 3 May 2007, Case C-396/05, ECR 2007 I-3699, ECLI:EU:C:2007:262, *NIPR* 2007, 127 (*Color Drack*) (on multiple places of delivery), CJEU 25 February 2010, Case C-381/08, ECR 2010, I-1255, ECLI:EU:C:2010:90, *NIPR* 2010, 194 (*Car Trim v. KeyStafety*) (considering the situation where parties did not determine a place of delivery in their agreement); CJEU 9 June 2011, Case C-87/10, ECR 2011, I-4987, ECLI:EU:C:2011:375, *NIPR* 2011, 346 (*Electrosteel*) (on considering standard stipulations in contracts such as INCOTERMS). See also, *inter alia*, H. Duintjer Tebbens, 'Jurisdiction and Enforcement in International Contract Law (Selected Aspects of the Brussels Convention of 1968/1978), in: P. Sarcevic (ed.), *International Contracts and Conflicts of Laws; A Collection of Essays*, Londen: Graham and Trotman 1990, p. 124-150; H. van Lith, *International Jurisdiction and Commercial Litigation* (PhD thesis Rotterdam), The Hague: T.M.C. Asser Press 2009, p. 88 ff.; U. Grušić, 'Jurisdiction in Complex Contracts under the Brussels I Regulation', *JPIL* 2011(2), p. 321-340; R. Fentiman, *International Commercial Litigation*, Oxford: Oxford University Press 2015, nos. 9.45 ff.; P. Mankowski, 'Article 7', in: U. Magnus and P. Mankowski, *European Commentaries on Private International Law, Volume I, Brussels Ibis Regulation*, Cologne: Otto Schmidt 2016, nos. 139 ff.

Regulation.[42] Moreover, the place of performance in terms of the contract which has been interfered with, may be coincidental and only slightly connected to the tort (such as the delivery of the vase to Belgium in the example detailed above).

One could argue that damage for B becomes irreversible at the moment when party A delivers the vase to third party C (option v), since from that moment on, A is no longer in a position to deliver the vase to B. There is however a major objection to the place of actual performance in that it gives rise to a real possibility for the tortfeasor to manipulate the law applicable to the tort. A and C could effectively agree upon a place of delivery in a country with a relatively high threshold for liability for interference with contract, with the aim of reducing B's chances for a successful claim against C.

In conclusion, none of these options provide a fully conclusive yardstick to locate the place of damage in contract-interference cases. In my view, the place of performance of the obligation interfered with (option iv) is the one that comes closest however only in the context of relatively straightforward transactions, provided that the place of performance can be easily identified. For contracts involving multiple rights and obligations and/or obligations for which the place of performance is difficult to establish, this approach will not suffice and an alternative solution should be sought.

2.2.4 Place of damage according to domestic case law

The difficulties related to establishing the *Erfolgsort* in cases of third party interference with contract are also demonstrated in domestic case law in point. The first case to be discussed, *AMT Futures Ltd* v. *Marzillier, Dr Meier & Dr Gunter Rechtsantwaltsgesellschaft MbH* (hereinafter referred to as *AMTF* v. *MMGR*),[43] was heard by the English Court of Appeal in 2015.

> The case concerns the inducement of a breach of an exclusive jurisdiction clause. AMTF, an English financial services provider, had concluded a number of agreements with its clients to trade in derivatives on their behalf. Each of the agreements contained an exclusive forum clause nominating the English courts. In some cases, clients incurred losses on their trades and about 70 of them instigated proceedings against AMTF in Germany. According to AMTF, the German proceedings were induced by MMGR, a German legal firm. AMTF raised a civil claim for damages in the English court for inducement of breach of contract, namely, violation of the choice of forum clause. Moreover, it sought injunctive relief to prevent future inducement.

The central issue was whether or not the English court had jurisdiction pursuant to the Brussels I Regulation. Since the defendant (third party) did not have its domicile in England, the English court could not accept jurisdiction on the basis of Article 2 of the Brussels I

[42] See M. Lehmann, 'Special Jurisdiction. Matters Relating to Contract', in: A. Dickinson and E. Lein (eds.), *The Brussels I Regulation Recast*, Oxford: Oxford University Press 2015, no. 4.31.
[43] [2015] 3 *WLR* 282.

Regulation (now Article 4 Brussels I*bis*) (*forum rei*). The court had to consider whether it had jurisdiction pursuant to Article 5(3) of the Brussels I Regulation (now 7(2) Brussels I*bis*). Since the event giving rise to the damage (the inducement) had not taken place in England, the English court could only accept jurisdiction if England was the place where the damage occurred. The alleged damage consisted of (a) money paid in settlements (51 out of 70 cases were settled), (b) legal costs incurred in Germany and England, (c) loss of management time, and (d) loss of profit in respect of future contracts.

The court of first instance had ruled that England was indeed the *Erfolgsort*. It referred to the above-mentioned *Dolphin* case,[44] according to which, the damage occurs at the place where the contractual entitlement ought to have been received. In the court's view, this reasoning could also rightfully be applied to exclusive jurisdiction clauses. MMGR however argued that, contrary to the *Dolphin* case, the present case concerned a negative contractual obligation, namely the obligation not to start proceedings anywhere else than in England. [461] There was, however, no positive obligation to litigate in England. If proceedings had not been brought, there would not have been a breach of an obligation. The court, however, did not accept this contention. It held that the English party was entitled to decide any disputes falling under the scope of the forum clause in England. Therefore, England was the place where the contractual benefit should have been enjoyed, 'just as much as would be deprivation of a money sum which fell to be paid in England, or goods which fell to be delivered in England.'[45] An alternative submission that AMTF had suffered damage in England because it had to pay settling expenses and costs of defending from England was however rejected. The court ruled that the expense caused by litigation occurred in Germany, since it consisted of costs for instructing German lawyers and court fees, as well as payments of settlements which were concluded in Germany. Moreover, loss of wasted management time and loss of business were not taken into account since the court considered them 'merely the remoter financial consequences of the harm suffered in Germany.'[46]

The Court of Appeal presented a different view. It started by concluding that on the basis of the CJEU case law, Article 5(3) of the Brussels I Regulation 'plainly' permits taking account of purely economic damage.[47] The court continued by stating that the question whether the relevant obligation required to do or to not do something was not a crucial factor. The key issue was 'where in reality AMTF suffered the damage which formed the basis of its tortious claim.'[48] The court then determined the harm suffered by AMTF by comparing the current situation with the situation if there had not been an inducement of a breach of the forum clause, namely, if proceedings had not been started in Germany. The Court of Appeal distinguished between 'initial damage' and 'subsequent' or 'remote' damage. It held that Germany was the place where the initial damage comprising the cost

[44] *Supra* n. 37.
[45] [2015] 2 *WLR* 187, 207.
[46] Idem, at 208.
[47] *AMTF* v. *MMGR*, at 297 (*supra* n. 43).
[48] Idem.

and expense incurred by litigation, the payment of court fees, the instructing of German lawyers etc. had occurred. The fact that AMTF felt the impact of the damage in England, was not considered relevant since the damage *occurred* in Germany.[49]

In 2013, the Dutch Gerechtshof 's-Hertogenbosch (Court of Appeal) had to establish the *Erfolgsort* in a case of (indirect) interference with an exclusive distribution contract, also for the purposes of jurisdiction.[50]

> The case concerned a Dutch plaintiff, who had concluded an agreement with the Dutch company Armas, which gave the plaintiff the right to distribute self-tanning products by the brand Australian Gold exclusively in the territory of the Benelux. Notwithstanding the plaintiff's exclusive distribution right, a German company started offering Australian Gold tanning products in the Benelux. The plaintiff then commenced proceedings against Armas for breach of contract, asserting that Armas had not taken measures to prevent the German party from selling the products in the Benelux, and against the German company for knowingly taking advantage of this breach. The Court of Appeal had to determine whether the Dutch court had jurisdiction in relation to the claim against the German defendant. The plaintiff argued that the Dutch court had jurisdiction on the basis of Article 5(3) of the Brussels I Regulation (now Article 7(2) Brussels I*bis*), since the damage had occurred in the Netherlands.

The Court of Appeal had to determine which place qualified as the *Erfolgsort*. As described in the previous section, several options were available. The court could, for instance, have equated the place of damage with the place of performance of the contractual obligation (indirectly) interfered with. In that case, it would have needed to establish where, according to the contract, Armas was obliged to take action against the German party. This could, however, have been a difficult undertaking.

The Court of Appeal opted for a different approach. It ruled that the initial damage was suffered in the Netherlands since the defendant offered products in the Netherlands notwithstanding the plaintiff's right to distribute these products exclusively in the Benelux. Then, the Court of Appeal referred to the *Wintersteiger* case,[51] in which the CJEU ruled that in the case of a violation of an intellectual property right, the *Erfolgsort* is located in the Member State of registration. Applying this reasoning to exclusive distribution, it ruled that the Dutch court had jurisdiction in relation to the damage sustained due to the fact that the plaintiff's exclusive right to distribute the goods in the Netherlands had been disrespected. By contrast, it did not accept jurisdiction in relation to damage suffered in Belgium and Luxembourg. Even though its argumentation does not seem fully conclusive – unlike *Wintersteiger,* this case did not concern the infringement of an intellectual property right – there is strong case to be made for the Court of Appeal's decision not to consider the place of performance of the breached obligation. It is clear that the plaintiff suffered damage in the Netherlands, where he experienced diminishing sales due to the defendant's acts.

[49] Idem, at 298.
[50] Gerechtshof 's-Hertogenbosch 26 November 2013, ECLI:NL:GHSHE:2013:5658, *NTHR* 2014(1), p. 29.
[51] CJEU 19 April 2012, Case C-523/10, ECLI:EU:C:2012:220, *NIPR* 2012, 350.

Although this case concerned a third party knowingly taking advantage of a breach of contract, rather than actively interfering with the contract, it is likely that the same reasoning would have been followed if the third party had induced the breach of contract.

2.3 Manifestly closer connection

Article 4(3) Rome II contains an escape clause in favour of the law of the country 'manifestly more closely connected' with the tort.[52] This clause is narrow in scope. The word 'manifestly' as well as the Explanatory Memorandum make clear that this provision may only be applied by way of exception and should be subject to strict interpretation.[53] Furthermore, Article 4(3) states that a manifestly closer connection might be based on a 'pre-existing relationship between the parties, such as a contract'. It is questionable whether, in a case of tortious interference with contract, the contract interfered with can be qualified as such. If this were to be the case, the claim against the third party who interfered with the contract, would be governed by the same law as the claim against the party in breach. In the example of the sale of the vase in Section 2.2.1, [462] this would be Dutch law, in accordance with Art. 3(1) Rome I Regulation.[54]

It is, *prima facie*, unlikely that the contract interfered with could be qualified as such. This contract was not, after all, concluded between the tortfeasor and the victim. Yet, the requirement that the pre-existing relationship should be *between the parties* has to be put into perspective. In the view of Kramer and Verhagen this condition can be disregarded in the case of multiple tortfeasors.[55] They argue that, in situations of joint tortfeasance, there can be reasons to apply the law applicable to the prime tortfeasor's non-contractual obligation to the tort(s) of the additional tortfeasor(s). Can this line of reasoning be extrapolated to cases of tortious interference?

English law suggests that the answer might be in the affirmative. According to English case law,[56] inducement of a breach of contract is an instance of 'secondary' or 'accessory liability', in which the party in breach is considered the prime 'wrongdoer', and the inducer the secondary wrongdoer. The so-called 'secondary civil liability theory' follows the same pattern as the doctrine of joint tortfeasance.[57] Hence, one could argue that

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[52] See on the problem related to the interpretation of the word 'manifestly' R. Fentiman, 'The Significance of Close Connection', in: J. Ahern and W. Binchy, *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations. A New International Litigation Regime*, Leiden: Martinus Nijhoff Publishers 2009, p. 103-105. At p. 112, Fentiman argues that the exception included in Art. 4(3) is of limited significance and might even be unnecessary.

[53] See also X.E. Kramer, 'The Rome II Regulation on the Law Applicable to Non-Contractual Obligations: The European private international law tradition continued', *NIPR* 2008-4, p. 422; Dickinson 2008, p. 340 (*supra* n. 23). See on the interpretation of the word 'manifestly': R. Fentiman 2009, p. 103-105 (*supra* n. 52).

[54] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, *OJ* 2008, L 177/6.

[55] X.E. Kramer and H.L.E. Verhagen, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. Internationaal privaatrecht, Deel III Internationaal vermogensrecht*, Deventer: Kluwer 2015, no. 1015.

[56] *OBG* v. *Allan* [2008] 1 *AC* 1, 27, 59.

[57] H. Carty, *An Analysis of the Economic Torts*, Oxford: Oxford University Press 2010, p. 305.

pursuant to Article 4(3) Rome II, the law applicable to the contractual obligation of the primary wrongdoer should also apply to the non-contractual obligation of the secondary wrongdoer.[58]

It should be noted that English law occupies an exceptional position within the EU and care should be taken to avoid attaching too much weight to this, especially in view of the forthcoming 'Brexit'. Most EU jurisdictions consider the inducer's liability as non-derivative in nature, independent of the liability of the party in breach, which makes it less convincing to apply the law applicable to the contract interfered with, as the manifestly more closely connected law. From the perspective of legal certainty and harmonisation, Article 4(3) Rome II has to be interpreted autonomously, by making reference to the objectives and scheme of the Regulation and to the general principles underlying the national legal systems as a whole and without referring to a specific national law, be it the *lex fori* or the *lex causae*.[59] Since the majority of EU Member States does not regard the liability of the third party as accessory or secondary in nature, there appears to be no strong case for classifying the contract interfered with as a 'pre-existing relationship between the parties'. This view is also in line with Dutch case law.[60]

This does not, however, detract from the fact that, highly depending on the fact pattern specific to the case, it is still possible to apply another law than the *lex loci damni* if it is manifestly more closely connected to the tort.

2.4 Market-effects rule

Article 6 of the Rome II Regulation contains specific conflict-of-law rules for acts of unfair competition and acts restricting free competition.[61] Since situations of contract-interference often take place within the competitive context, it is necessary to explore this provision further.

Pursuant to Article 6(1) Rome II, non-contractual obligations arising out of an act of unfair competition are governed by the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected. Its purpose is to protect fair competition 'by obliging all participants to play the game by the same rules'.[62] This provision should be considered as a clarification of, rather than an exception to, the *lex*

[58] In *AMTF* v. *MMGR* (*supra* n. 43), Christopher Clarke LJ seems to back this view when stating that 'there is much to be said for the determination of what is in essence an ancillary claim in tort for inducement of breach of contract to be made in the court which the contract breaker agreed should have exclusive jurisdiction in respect of that contract'. Although he continued by asserting that 'the governing law of the relationship between the former clients and AMTF […] is not a determining factor in the allocation of jurisdiction under the [Brussels I] Regulation', the suggestion is made that this could be different for the determination of the applicable law.

[59] See also Pontier 2015, nos. 198-200, and – on autonomous interpretation in general – no. 10 (*supra* n. 12).

[60] See Rechtbank Utrecht 8 February 2012, ECLI:NL:RBUTR:2012:BW1631, para. 3.11, on the basis of Art. 5 of the (then applicable) Dutch Conflict of Laws (Torts) Act, which resembled Art. 4(3) Rome II.

[61] The latter ones, including violations with antitrust law, fall under the scope of Art. 6(3) Rome II and can be disregarded for this paper.

[62] Commission proposal, COM(2003) 427 final, p. 15.

loci damni rule of Article 4(1) Rome II.[63] Indeed, it is difficult to think of situations in which the application of Article 6(1) would lead to fundamentally different outcomes than the application of Article 4(1).[64] Nevertheless, pursuant to Article 6(2) Rome II, the applicable law shall be determined on the basis of Article 4 Rome II when an act of unfair competition exclusively affects the interests of a specific competitor, which suggests that Article 6(1) and Article 4 *can* produce different results.[65] The main difference between Article 6(1) and Article 4 seems, however, that the exceptions in favour of the law of the common habitual residence[66] and the manifestly more closely connected law,[67] which are ruled out in relation to Article 6(1), are reinstated. Moreover, it is assumed that in situations falling within the scope of Article 6(2), the opportunity for parties to choose the applicable law within the boundaries set by Article 14 is also resurrected, which is excluded in relation to Article 6(1).[68]

Most contract-interference cases will fall within the scope of Article 6(2) Rome II.[69] Although it is not ruled out that there may be a public interest involved,[70] usually, the interference [463] will *primarily* affect the interests of one specific competitor, which validates applying Article 6(2) in conjunction with Article 4 (and 14) Rome II.[71] There are however, situations conceivable in which interference with another's contract violates the interests of others as much, or even more than, the interests of the party whose contractual rights have been infringed.

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[63] Recital 21 of the preamble to the Regulation. See also C. Wadlow, 'The new private international law of unfair competition and the "Rome II" Regulation', 4 *Journal of Intellectual Property Law & Practice* 2009(11), p. 794, who argues that it is difficult to think of situations in which the application of Art. 6(1) Rome II would lead to fundamentally different outcomes than the application of Art. 4(1) Rome II.

[64] Wadlow 2009, p. 794 (*supra* n. 63).

[65] See Dickinson 2008, p. 397 (*supra* n. 23).

[66] Art. 4(2) Rome II.

[67] Art. 4(3) Rome II.

[68] See also Dickinson 2008, p. 426 (*supra* n. 23); G. Wagner, 'Die neue Rom II-Verordnung', *IPRax* 2008, p. 8; T. Rosenkranz and E. Rohde, 'The law applicable to non-contractual obligations arising out of acts of unfair competition and acts restricting free competition under Article 6 Rome II Regulation', *NIPR* 2008-4, p. 438; S.J. Schaafsma, 'Rome II: intellectuele eigendom en oneerlijke concurrentie', *WPNR* 2008/6780, p. 1002.

[69] In its proposal, the Commission mentions enticing a competitor's employees and inducing a breach of contract –which can both be regarded as instances of third party interference with contract – as examples of acts falling under the scope of Art. 6(2). See Commission proposal, p. 16 (*supra* n. 62).

[70] See J. Drexl, in: *Münchener Kommentar zum BGB, Internationales Recht gegen den unlauteren Wettbewerb*, Munich: Beck 2015, no. 159, arguing that in cases concerning the enticing of employees the stability and operation of the labour market as a whole are at stake.

[71] The Commission also acknowledges that it cannot be ruled out completely that acts falling under the scope of Art. 6(2) also have a negative impact on the market, see Commission proposal, p. 16 (*supra* n. 62). See however Drexl 2015, no. 154 (*supra* n. 70), who argues that the exception of Art. 6(2) Rome II should be more narrowly construed, and should only encompass those situations in which the interests of one competitor are immediately violated, without the intervention of another party. In his opinion, situations of inducement of a breach of contract or the enticing of employees do not fall within the scope of Art. 6(2); the applicable law should be determined on the basis of Art. 6(1) Rome II. See also BGH 11 February 2010, *GRUR* 2010, 847, in which German Federal Court of Justice (BGH), on the basis of the German conflict-of-law rules, ruled that in a case of commercial disparagement, the market-effects rule had to be applied, instead of the law of the country of the parties' common habitual residence. The BGH stated that the result would have been the same under the Rome II Regulation, which was not yet temporarily applicable.

> Suppose car manufacturer B, having its head office in Germany, sets up a selective distribution system for the Netherlands, by concluding contracts with a limited number of car dealers, including A, seated in the Netherlands. In order to be permitted to sell the cars, the dealers should meet certain requirements regarding the services they provide to customers, the design of their showroom, etc. Moreover, they are only allowed to sell the cars to end users. Car dealer C, who does not belong to B's selective distribution network in the Netherlands, and is seated in country Germany, induces dealer A to breach its contract with B. In violation with his contractual obligations towards B, A sells and delivers cars to C, making it possible for C to resell the cars on the Dutch market, without being obliged to meet the conditions set by B. Because of this, C has less expenditure related to the car sales compared to the affiliated group members of the selective distribution network, which provides C with a competitive advantage. Although B, whose contract has been breached, has an interest in maintaining his selective distribution network – with C's inducement potentially leading to its disintegration if network members decide to cancel or terminate their contracts – the inducement first and foremost affects the affiliated car dealers who immediately experience a competitive disadvantage.

In this type of case, which clearly involves the interests of more than one competitor, it appears more appropriate to adhere to the application of the market-effects rule of Article 6(1) Rome II. In this example, this would lead the law of the country where the distribution network is affected (here the Netherlands) being applied, irrespective of any common habitual residence of the parties or a manifestly closer connection with another country.

3. Comparison with US conflict of laws

3.1 Various approaches

In the United States, conflict of laws falls under state law, which means that, within the limitations of the US Constitution,[72] states are free to adopt their own rules in respect of this matter, resulting in different variations in rules from state to state.[73] Conflict-of-law rules are mostly embodied in common law rules rather than in statutes or treaties.[74] Observing US case law shows that several approaches are used by state and by federal[75] courts to determine the law that applies to cases of tortious interference with contractual relations. This includes governmental interest analysis which means applying the law of the state which has the most significant interest in seeing its substantive law applied to the case,[76]

[72] See Restatement (Second) of Conflict of Laws, Chapter 1. Introduction, § 2, *comment* b.
[73] See also S.C. Symeonides, 'The American choice-of-law revolution in the courts: today and tomorrow', *Recueil des Cours* 2002, p. 27 ff.
[74] See Restatement (Second) of Conflict of Laws, Chapter 1. Introduction, § 5, *comment* c.
[75] Federal courts sitting in diversity jurisdiction have to apply the conflict-of-law rules of the forum state to determine the applicable law, see *Bigio v. Coco-Cola Co.*, 675 F.3d 163, 169 (C.A.2 (N.Y.) 2012).
[76] E.g. *Discover Group, Inc. v. Lexmark Intern., Inc.*, 333 F.Supp.2d 78 (E.D.N.Y. 2004), in which the court held that in a tort claim, 'New York applies the "greater interest test," under which "controlling effect is given to the

the *lex loci damni* rule[77] and the *lex loci delicti commissi* rule, which refers to the law of the place where the tort was committed.[78] In addition, some courts have considered the contents of laws which could potentially be applicable, and have made comparisons in order to determine what the applicable law will be.[79] For the purposes of this paper however, it seems opportune to concentrate on the most significant relationship test, which is used by US courts rather often.[80] This test is also considered to be the general principle for the determination of the law applicable to torts in the Restatement (Second) of Conflict of Laws (hereinafter referred to as Restatement), which is persuasive authority.

3.2 Most significant relationship

According to the most significant relationship test, the rights and liabilities of the parties with respect to an issue in tort are governed by the law of the country (or state) which, with respect to that issue, has the most significant relationship to the occurrence and the parties.[81] In order to establish which country has the most significant relationship, § 145 of the Restatement stipulates that a court should take into account the following connecting factors: '(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered'.

The place where the injury occurred (cf. *Erfolgsort*, Article 4(1) Rome II) is thus one of the factors which has to be taken into consideration, but it is not decisive in itself. The authors of the Restatement have set down that in cases of unfair competition, such as misappropriation of trade values or false advertising, the effect of loss of customers or trade is pecuniary in nature and will generally be felt at the plaintiff's principal place of business. Consider however, the following sentences:

> [464] '[T]his place may have only a slight relationship to the defendant's activities and to the plaintiff's loss of customers or trade. […] For all these reasons, the place of injury does not play so important a role for choice-of-law purposes […] as in the case of other kind of torts. […] Instead, the principal location of the defendant's conduct is the contact that will usually be given the greatest weight […].'[82]

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law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties has the greatest concern with the specific issue raised in the litigation".'

[77] E.g. *Eureka Resources, LLC v. Range Resources-Appalachia, LLC*, 62 A.3d 1233, 1238 (Del.Super. 2012).

[78] E.g. *Corning Inc. v. SRU Biosystems, LLC*, 292 F.Supp.2d 583 (D.Del. 2003).

[79] *Brinkley & West, Inc. v. Foremost Ins. Co.*, 499 F.2d 928 (C.A.5.La. 1974); *Marks v. Struble*, 347 F.Supp.2d 136 (D.N.J. 2004). See on 'content-oriented' law selection Symeonides 2002, p. 385 ff. (*supra* n. 73).

[80] See Symeonides 2002, p. 116 ff. (*supra* n. 73).

[81] Restatement (Second) of Conflict of Laws, § 145.

[82] Restatement (Second) of Conflict of Laws, § 145, *comment* f.

From this, it could[83] be concluded that in contract-interference cases the place of the conduct has greater weight than the place of damage.[84] This is in keeping with the case of *Grupo Televisa, S.A. v. Telemundo Communications Group, Inc.*,[85] described in the introduction, in which the court of appeals held that Florida had the most significant relationship with the dispute, since the alleged tortious conduct (negotiations, signing of a second, conflicting agreement) occurred in Florida (*Handlungsort*). However, the court also considered that Florida had a significant interest in deterring tortious interference in Florida, since the competition between the parties was centred in Florida (cf. market rule of Art. 6(1) Rome II), irrespective of the fact that the contract which had been interfered with, was governed by Mexican law.[86]

The court of appeal also held that if the nature of the tort of interference with contractual relations is characterised as 'the misappropriation of trade values', as was the case at the district court, in keeping with the Restatement this means that the place where the conduct occurred is the single most important contact to establish the applicable law.[87]

Emphasising the location of the conduct giving rise to the damage is also in line with the idea that the tort of interference with contract is viewed as primarily conduct-regulating in nature, as opposed to loss-distributing or loss-allocating. Conduct-regulating rules are 'territorially orientated', whereas this is not *per se* the case for loss-distributing rules. This distinction translates into different connecting factors to identify the applicable law. For conflicts between conduct-regulating rules, the place of conduct or injury is decisive, whereas both territorial and personal (such as the habitual residence of parties) factors are important in conflicts between loss-distributing rules.[88]

Although there is much to be said for the Restatement's view in which considerable importance is attached to the *Handlungsort*, it appears difficult to reconcile with the scheme and objectives of the Rome II Regulation. After all, Article 4(1) Rome II refers to the *lex loci damni*, and explicitly states that this law applies, 'irrespective of the country in which

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[83] In this paragraph, the Restatement does not explicitly mention tortious interference with contract.

[84] See also *Integral Resources (PVT) Ltd.* v. *Istil Group, Inc.*, 155 Fed.Appx. 69 (C.A.3.Del. 2005) (under Delaware conflicts law), stating: 'The harm factor's site is of lesser significance in tortious interference with contractual relations cases.' Along the same lines: *Calixto* v. *Watson Bowman Acme Corp.*, 637 F.Supp.2d 1064, 1067 (S.D.Fla 2009) (under Florida conflicts law). Also, with respect to interference with a marriage relationship, § 154 of the Restatement (Second) on Conflict of Laws, states that the law of the state of the defendant's conduct is the most important contact. Using analogous interpretation, one could argue that the same goes for situations of interference with contractual relations.

[85] *Supra* n. 1.

[86] In addition, the court deemed it of importance that the suit could not have been filed in Mexico. The lower district court had argued that Mexican law should be applied to assure 'certainty, predictability and uniformity of result' and that if Mexican law and the law of Florida would have been equal, the plaintiffs would have filed the suit in Mexico. One of the reasons for the district court to apply Mexican law was, therefore, to prevent forum shopping. However, according to the court of appeals, this was no valid argument since the Mexican court would probably not have jurisdiction to handle the case, see *Grupo Televisa,* at 1245 (*supra* n. 1).

[87] See *Grupo Televisa,* at 1241 (*supra* n. 1) in which the court refers to Restatement (Second) of Conflict of Laws § 145(2), *comment* f.

[88] For an extensive analysis of the distinction between conduct-regulation and loss-distribution in tort conflicts, see Symeonides 2002, p. 154 ff. (*supra* n. 73). See also, within the specific context of tortious interference with contract, *Hidden Brook Air, Inc.* v. *Thabet Aviation Intern., Inc.*, 241 F. Supp. 2d 246, 277 (S.D.N.Y. 2002).

the event giving rise to the damage occurred.' Recital 16 of the Rome II preamble states that this rule 'strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage, and also reflects the modern approach to civil liability'.

A domestic court could, nevertheless, attach particular importance to the *Handlungsort* within the context of Article 4(3) Rome II, and thus consider the country where the event giving rise to the damage connected to the tort manifestly more closely. Although some have questioned whether the *Handlungsort* can be taken into account,[89] there seems to be no limitation to the circumstances which can be considered to determine whether a manifestly closer connection with another country exists.[90]

4. Conclusions

The determination of the applicable law in a cross border case of tortious interference with contract is far from easy. This paper shows there is no one-size-fits-all solution for all contract-interference cases. The analysis above does however offer some guidance as to how a court, confronted with this issue, should proceed.

Since the (initial) damage resulting from interference with a contract is usually pecuniary in nature, it is necessary to establish whether purely economic loss can be considered 'damage', relevant to establishing the applicable law pursuant to Article 4(1) Rome II. This paper argues, also in light of CJEU case law in the context of Article 7(2) Brussels I*bis* Regulation, that the answer is in the affirmative.

Next, the question arises in respect of how to locate the place of damage (*Erfolgsort*). When applying the *lex loci damni*-rule of Article 4(1) to a contract-interference case, the court should examine where the damage, which formed the basis of the claim in tort, was actually suffered. Although the victim usually *feels* the impact of the damage – which is mostly pecuniary in nature – at his domicile/his place of business or the location of the bank where his account is held, EU case law on Article 7(2) of the Brussels I*bis* Regulation indicates that the *locus damni* should not, in principle, be equated to the victim's domicile and/or bank account location. The place where the inconsistent transaction was concluded, should be disregarded because at that particular moment, the damage is not yet irreversible. The place where the inconsistent transaction is performed, has to be left out of account because it would provide the tortfeasor with an opportunity to manipulate the result.

According to the prevailing opinion in scholarship, the place of damage in contract-interference cases should be located at the place where the contractual obligation interfered with what ought to have been performed, for instance, where the goods or money should have been received in terms of the [465] contract. Although it may be an

[89] See Fentiman 2009, p. 99 (*supra* n. 52), arguing that this location has explicitly been rejected as a connecting factor under the general rule of Art. 4(1) Rome II.

[90] See also G. Van Calster, *European Private International Law*, Oxford: Hart 2016, p. 256, by reference to the English case *Winrow* v. *Hemphill* [2014] *EWHC* 3164 (QB).

appropriate criterion for relatively simple transactions, using the place of performance as a connecting factor has some significant shortcomings. The place of performance of the contractual obligation which has been interfered with may be difficult to determine and/or may require the interpretation of the terms of the contract or need to be established on the basis of the law applicable to the contract. This appears to be at odds with the objective of the Rome II Regulation to improve the predictability of the outcome of litigation,[91] especially from the perspective of the (alleged) tortfeasor, who is not a party to the contract which has been interfered with and thus may not be fully aware of all contractual terms. Even more importantly, perhaps, the place of performance may be more or less coincidental (e.g. a Swiss bank account belonging to a subsidiary), having no real connection with the tort.

In specific cases, the court will have to determine the *Erfolgsort* in a different way. When, for instance, there is a direct link between the contract-interference and declining sales, as in the aforementioned case of the Dutch Court of Appeal concerning exclusive distribution,[92] the place of damage should be located at the place where the victim's sales were affected, rather than at the place where the contractual obligation should have been performed. This solution is also in line with the market-effects rule of Article 6(1) Rome II. Although this paper argues that most contract-interference cases will fall under the scope of Article 6(2), which refers back to Article 4, there is no contradiction here. Since the rule of Article 6(1) should be seen as a clarification of Article 4(1) Rome II, there is no objection to applying the market-effects rule to a contract-interference case on the basis of the latter provision. In contrast to Article 6(1) however, the exceptions of 4(2) and 4(3) and Article 14 (choice of law) are not ruled out.

Finally, this paper proposes a rather flexible interpretation of the escape clause provided in Article 4(3) Rome II. For those contract-interference cases in which the place of damage is merely coincidental or difficult to ascertain, the law of the country with the most significant connection to the tort should be applied pursuant to Article 4(3) Rome II. This may, however, require a broader interpretation of this provision, which is formulated as an exception in favour of the 'manifestly more closely connected law' in comparison to the law applicable pursuant to Article 4(1) or (2) Rome II, implying that the applicable law can be determined on the basis of either or both provisions.[93] When determining the country with which the tort has the most significant connection, the court has to consider *all* relevant factors. In keeping with the prevailing view in the US, it should also attach importance to the place of the tortious conduct. The law applicable to the contract interfered with should, however, not be given a great importance. After all, the contract interfered with is not a 'pre-existing relationship *between the parties*' in accordance with Article 4(3) Rome II.

[91] See Recital 6 of the preamble to the Regulation.
[92] *Supra*, 2.2.4.
[93] Cf. Pontier 2015, no. 259 (*supra* n. 12).