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ROME II IN THE FACE OF HUMAN-RIGHTS CHALLENGES: THE LAW APPLICABLE TO SLAPPS AND TO HUMAN-RIGHTS-RELATED TORTS

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ABSTRACT

In recent times, two significant human-rights-related legislative projects have been initiated at the international and European levels: the so-called draft UN "Treaty on Business and Human Rights" and a potential EU (legislative or non-legislative) initiative to "[fight the] abusive use of strategic lawsuits against public participation" (SLAPP). These two projects will entail either the enactment of new rules of private international law or the amendments of existing ones to accommodate their policy goals. The potentially upcoming process of review of the EU´s Rome II Regulation (on the law applicable to non-contractual obligations) opens space for reflection on how the said instrument faces or will have to face human-rights challenges connected to the two above-referred initiatives. This article will : i) put forward a suggestion to introduce a content-oriented choice-of-law rule on SLAPP in the Rome II Regulation; ii) assess options in respect of the potential insertion of a content-oriented choice-of-law rule on human-rights-related torts in the Rome II Regulation

KEYWORDS

Rome II — tort — human rights — SLAPP — strategic litigation against public participation — choice of law — applicable law — non-contractual obligations — defamation — business and human rights — corporate social responsibility — CSR

TABLE DES MATIÈRES

I. INTRODUCTION

In recent times, two significant human-rights-related legislative projects have been initiated at the international and European levels.

Firstly, following a 2014 mandate from the United Nation´s Human Rights Council, an *Open-ended intergovernmental working group* is preparing a so-called draft Treaty on Business and Human Rights ("*Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises*")[1], whose 2nd revised draft is dated 6th August 2020.[2]

Secondly, on December the 3rd 2020, the EU Commission´s published its "*European democracy action plan*",[3] whose point 3.2 establishes a will to "[fight the] *abusive use of strategic lawsuits against public participation*", and foresees a (legislative or non-legislative) initiative in that sense in late 2021.

These two projects will entail either the enactment of new rules of private international law or the amendments of existing ones to accommodate their policy goals. The potentially upcoming process of review of the EU´s Rome II Regulation (on the law applicable to non-contractual obligations)[4] opens space for reflection on how the said instrument faces or will have to face human-rights challenges connected to the two above-referred initiatives. Specifically, it opens up two questions: i) What should be the applicable law to SLAPPs whenever they are adjudicated before courts of EU Member States? ii) Should human-rights-related torts deserve their own choice-of-law rules? The following pages will explore these questions.

II. PART I: THE LAW APPLICABLE TO "STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION" (SLAPPS)

On December the 3rd 2020 the EU commission published a call for applications to establish an Expert Group against "Strategic Lawsuits Against Public Participation" (SLAPP), with a view to putting forward, by late 2021, a (legislative or non-legislative) initiative to curtail *"abusive litigation targeting journalists and civil society*". As defined in the call, SLAPPs "*are groundless or exaggerated lawsuits, initiated by state organs, business corporations or powerful individuals against weaker parties who express, on a matter of public interest, criticism or communicate messages which are uncomfortable to the litigants*". As their core objective is to silence critical

[1] https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf

[2] For comments on the applicable law aspects of the 1st revised draft, see Claire Bright´s note for the BIICL here:https://www.biicl.org/documents/111_comment_on_article_9_applicable_law_of_the_revised_draft_of_the_proposed_business_and_human_rights_treaty.pdf

[3] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions on the European democracy action plan, COM(2020) 790 final, Brussels, 3.12.2020 (https://ec.europa.eu/info/sites/info/files/edap_communication.pdf)

[4] https://www.biicl.org/projects/com-study-on-the-rome-ii-regulation

voices, SLAPPs are frequently grounded on defamation claims, but they may be articulated through other legal bases (as "*data protection, blasphemy, tax laws, copyright, trade secret breaches*", etc).[5]

The stakes at play are major: beyond an immediate limitation or suppression of open debate and public awareness over matters that are of significant societal interest, the economic pressure arising from SLAPPs can "drown" defendants, whose financial resources are oftentimes very limited. Just to name but a few recent SLAPP examples: [6] at the time of her murder in 2017, Maltese journalist Daphne Caruana Galizia was facing over 40 civil and criminal defamation lawsuits, including a 40-million US dollar lawsuit in Arizona filed by Pilatus Bank;[7] in 2020, a one million euros lawsuit was introduced against Spanish activist Manuel García for stating in a TV program that the poor livestock waste management of meat-producing company "Coren" was the cause for the pollution of the As Conchas reservoir in the Galicia region.[8]

In light of the situation, several European civil-society entities have put forward a model "*EU anti-SLAPP Directive*",[9] identifying substantive protections they would expect from the European-level response announced in point 3.2 of the EU Commission´s "*European democracy action plan*".[10] If it crystallized, an EU anti-SLAPP directive would follow anti-SLAPP legislation already enacted, for instance, in Ontario,[11] and certain parts of the US.[12]

Despite being frequently conducted within national contexts, it is acknowledged that SLAPPs may be "*deliberately brought in another jurisdiction and enforced across borders*", or may "*exploit other aspects of national procedural and private international law*" in order to increase complexities which will render them "*more costly to defend*".[13] Therefore, in addition to a substantive-law intervention, the involvement of private international law in SLAPPs is required. Amongst core private-international-law issues to be considered is the law applicable to SLAPPs.

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[5] Call for applications for the selection of Members of the expert group against SLAPP (No further reference information), p. 1, available on 8th January 2021 in:
https://ec.europa.eu/transparency/regexpert/index.cfm?do=calls.calls_for_app&id=277

[6] For further review of cases throughout the EU see: Greenpeace European Unit (O. Reyes, rapporteur), "Sued into silence - How the rich and powerful use legal tactics to shut critics up", Brussels, July 2020, p. 18ff (https://storage.googleapis.com/planet4-eu-unit-stateless/2020/07/20200722-SLAPPs-Sued-into-Silence.pdf, accessed on October 15th 2020):

[7] Greenpeace European Unit (O. Reyes, rapporteur), "Sued into silence - How the rich and powerful use legal tactics to shut critics up", Brussels, July 2020, pp. 9-12 (https://storage.googleapis.com/planet4-eu-unit-stateless/2020/07/20200722-SLAPPs-Sued-into-Silence.pdf, accessed on October 15th 2020):

[8] https://www.20minutos.es/noticia/4169485/0/un-ecologista-se-enfrenta-a-una-demanda-de-coren-por-aparecer-en-un-programa-de-tv-denunciando-vertidos-en-a-limia/

[9] https://dq4n3btxmr8c9.cloudfront.net/files/zkecf9/StopSLAPPs_04Dec.pdf

[10] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions on the European democracy action plan, COM(2020) 790 final, Brussels, 3.12.2020 (https://ec.europa.eu/info/sites/info/files/edap_communication.pdf)

[11] https://www.osler.com/en/resources/critical-situations/2020/supreme-court-rearticulates-test-under-ontario-anti-slapp-legislation

[12] https://www.medialaw.org/topics-page/anti-slapp?tmpl=component&print=1

[13] Call for applications for the selection of Members of the expert group against SLAPP, note 5, p. 1,

De lege lata, due to the referred frequent resort to defamation, and the fact that this subject-matter was excluded from the material scope of application of the Rome II Regulation, domestic choice-of-law provisions on the former, as available, will become relevant. This entails a significant incentive for forum shopping (which may only be partially counteracted, at the jurisdictional level, by the "*Mosaic theory*").

De lege ferenda, while the risk of forum shopping would justify by itself the insertion of a choice-of-law rule on SLAPPs in Rome II, the EU Commission´s explicit objective of shielding journalists and NGOs against these practices moreover pleads for providing a content-oriented character to the rule. Specifically, the above-mentioned "gagging" purpose of SLAPPs and their interference with fundamental values as freedom of expression sufficiently justify departing from the neutral choice-of-law paradigm. Furthermore, as equally mentioned, SLAPP targets will generally have (relatively) modest financial means. This will frequently make them "weak parties" in asymmetric relationships with (allegedly) libeled claimants.

In the light of all of this, beyond conventional suggestions explored over the last 15 years in respect of a potential rule on defamation in Rome II,[14] several thought-provoking options could be explored, amongst which the following two:.

A. 1ST OPTION: REVERSE MIRRORING ARTICLE 7 ROME II

A first creative approach to the law applicable to SLAPPs would be to introduce an Article 7-resembling rule, with an inverted structure. Article 7 Rome II on the law applicable to non-contractual obligations arising from environmental damage embodies the so-called "theory of ubiquity" and confers the prerogative of the election of the applicable law to the "weaker" party (the environmental victim). In the suggested rule on SLAPPs, the choice should be "reversed", and be given to the defendant, provided they correspond with a carefully drafted set of criteria identifying appropriate recipients for anti-SLAPP protection.

However, this relatively straightforward adaptation of a choice-of-law configuration already present in the Rome II Regulation could be problematic in certain respects. Amongst others, for example, as regards the procedural moment for performing the choice-of-law operation in those domestic systems where procedural law establishes (somewhat) "succinct" proceedings (i.e. with limited amounts of submissions from the parties, and/or limited possibilities to amend them): where a claimant needs to fully argue their case on the merits from the very first written submission made, which starts the proceedings, how are they meant to do so before the defendant has chosen the applicable law? While, arguably, procedural adaptations could be enacted at EU-level to avoid a "catch-22" situation, other options may entail less legislative burden.

B. 2ND OPTION: A POST-BREXIT CONCEPTUAL LOAN FROM ENGLISH PRIVATE INTERNATIONAL LAW = DOUBLE ACTIONABILITY

A more extravagant (yet potentially very effective) approach for private-international-law protection would be to "borrow" the English choice-of-law rule on the law applicable to defamation: the so-called double actionability rule. As it is well-known, one of the core reasons why "*non-contractual obligations arising out of violations of privacy and rights relating to*

[14] See, amongst other sources: https://conflictoflaws.net/2010/rome-ii-and-defamation-online-symposium/

personality, including defamation" were excluded from the material scope of the Rome II Regulation was the lobbying of publishing groups and press and media associations during the Rome II legislative process.[15] With that exclusion, specifically, the English media sector succeeded in retaining the application by English courts of the referred rule, which despite being "*an oddity*" in the history of English law,[16] is highly protective for defendants of alleged libels and slanders. The double actionability rule, roughly century and a half old, (as it originated from *Philips v. Eyre*, [17] despite being tempered by subsequent case law) is complex to interpret and does not resemble (structurally or linguistically) modern choice-of-law rules. It states that:

> "*As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England … Secondly, the act must not have been justifiable by the law of the place where it was done*".[18]

The first of the cumulative conditions contained in the excerpt is usually understood as the need to verify that the claim is viable under English law (*Lex fori*). The second condition is usually understood as the need to verify that the facts would give rise to liability also under foreign law. Various interpretations of the rule can be found in academia, ranging from considering that once the two cumulative requirements have been met English law applies,[19] to considering that only those rules that exist simultaneously in both laws (English and foreign) apply, or that exemptions from liability from either legal system free the alleged tortfeasor.[20] Insofar as it is restrictive, and protective of the defendant, double actionability is usually understood as a "*double hurdle*"[21] to obtaining reparation by the victim, or, in other words, as having to win the case "*twice in order to win* [only] *once*".[22] Thus, the practical outcome is that the freedom of speech of the defendant is preserved.

A plethora of reasons make this choice-of-law approach controversial, complex to implement, and difficult to adopt at an EU level: from a continental perspective, it would be perceived as very difficult to grasp by private parties, as well as going against the fundamental dogma of EU private international law: foreseeability. This does not, nevertheless, undermine the fact that it would be the most effective protection that could be provided from a private-international-law perspective. Even more so than the protection potentially provided by rules based on various "classic" connecting factors pointing towards the defendant´s "native" legal system/where they are established (as their domicile, habitual residence, etc).

C. PARTIAL CONCLUSION

Truth be told, whichever approach is chosen, a core element which will certainly become problematic will be the definition of the personal scope of application of the rule, i.e. how to

[15] *Vid*. A. Warshaw, "Uncertainty from Abroad: Rome II and the Choice of Law for Defamation Claims", 32 *Brook. J. Int'l L.* (2006). (Available at: https://brooklynworks.brooklaw.edu/bjil/vol32/iss1/7)
[16] *Vid*. D. McLean & V. Ruiz Abou-Nigm, *The Conflict of Laws*, 9th ed., Swett & Maxwell, 2016, p. 479.
[17] *Philips v. Eyre* (1870) L.R. 6 Q.B. 1.
[18] *Philips v. Eyre*, pp. 28-29.
[19] *Vid*. Dicey, Morris & Collins, *The Conflict of Laws,* vol. II, 15th ed., Swett & Maxwell, 2012, pp. 2252-2270, para. 35-111.
[20] *Vid*. Cheshire, North & Fawcett, *Private International Law*, 15th ed., OUP, 2017, p. 885. Similarly, Dicey, Morris & Collins, *The Conflict of Laws,* vol. II, 15th ed., Swett & Maxwell, 2012, pp. 2252-2270, para. 35-128.
[21] *Vid*. Cheshire, North & Fawcett, *Private International Law*, 15th ed., OUP, 2017, p. 885; D. McLean & V. Ruiz Abou-Nigm, *The Conflict of Laws*, 9th ed., Swett & Maxwell, 2016, p. 479.
[22] *Vid*. A. Briggs, *The Conflict of Laws*, 4th ed., Clarendon Law Series, OUP, 2019, p. 274.

precisely identify subjects deserving access to the protection provided by a content-oriented choice-of-law provision of the sort suggested (and/or by substantive anti-SLAPP legislation, for that matter). This is a very delicate issue in an era of "fake news".

Overall, attention should be paid so that undeserving entities and individuals do not benefit from PIL or substantive-law anti-SLAPP protection.

III. PART II: THE PROPOSED ART. 6A ROME II ON THE LAW APPLICABLE TO HUMAN-RIGHTS-RELATED TORTS: ART. 7 IS DEAD, LONG LIVE ARTICLE 7?

Over the last few months, the European Parliament´s draft report on corporate due diligence and corporate accountability (2020/2129(INL)) and the proposal for an EU Directive contained therein have gathered a substantial amount of attention (see, amongst others, blog entries by Geert Van Calster,[23] Gisela Rühl,[24] Jan von Hein,[25] Bastian Brunk,[26] and Chris Thomale).[27] As the debate is far from being exhausted, I would like to contribute my two cents thereto with some further (non-exhaustive and brief) considerations which will be limited to three selected aspects of the proposal´s choice-of-law dimension.

A. A WELCOMED BUT NOT UNIQUE INITIATIVE (COMPARISON WITH THE UN DRAFT TREATY)

Neither Article 6a of Rome II nor the proposal for an EU Directive are isolated initiatives. A so-called draft Treaty on Business and Human Rights ("*Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises*")[28] is currently being prepared by an *Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights*, established in 2014 by the United Nation´s Human Rights Council. Just like it is the case with the EP´s proposal,

[23] https://gavclaw.com/2020/10/02/first-analysis-of-the-european-parliaments-draft-proposal-to-amend-brussels-ia-and-rome-ii-with-a-view-to-corporate-human-rights-due-diligence/

[24] https://conflictoflaws.net/2020/human-rights-in-global-supply-chains-do-we-need-to-amend-the-rome-ii-regulation/

[25] https://conflictoflaws.net/2020/back-to-the-future-re-introducing-the-principle-of-ubiquity-for-business-related-human-rights-claims/

[26] https://conflictoflaws.net/2020/a-step-in-the-right-direction-but-nothing-more-a-critical-note-on-the-draft-directive-on-mandatory-human-rights-due-diligence/

[27] https://conflictoflaws.net/2020/chris-thomale-on-the-ep-draft-report-on-corporate-due-diligence/

[28] https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf

the 2nd revised UN draft Treaty (dated 6th August 2020)[29] contains provisions on international jurisdiction (Article 9, "*Adjudicative Jurisdiction*") and choice of law (Article 11, "*Applicable law*").

Paragraph 1 of the latter establishes the *lex fori* as applicable for "*all matters of substance* […] *not specifically regulated*" by the instrument (as well as, quite naturally, for procedural issues). Then paragraph 2 establishes that "*all matters of substance regarding human rights law relevant to claims before the competent court may, upon the request of the victim of a business-related human rights abuse or its representatives, be governed by the law of another State where: a) the acts or omissions that result in violations of human rights covered under this (Legally Binding Instrument) have occurred; or b) the natural or legal person alleged to have committed the acts or omissions that result in violations of human rights covered under this (Legally Binding Instrument) is domiciled*".

In turn, the proposed Article 6a of Rome II establishes that: "[…] *the law applicable to a non-contractual obligation arising out of the damage sustained shall be the law determined pursuant to Article 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 or on the law of the country in which the parent company has its domicile or, where it does not have a domicile in a Member State, the law of the country where it operates.*"[30]

Putting aside the fact that the material scopes of the EP's and the UN's draft instruments bear differences, the EP´s proposal features a more ambitious choice-of-law approach, which likely reflects the EU´s condition as a "Regional integration organization", and the (likely) bigger degree of private-international-law convergence possible within such framework. Whichever the reasons, the EP´s approach is to be welcomed in at least two senses.

The first sense regards the clarity of victim choice-of-law empowerment. While in the UN proposal the victim is allowed to "*request*" that a given law governs "*all matters of substance regarding human rights law relevant to claims before the competent court*", in the EP´s proposal the choice of the applicable law unequivocally and explicitly belongs to the victim (the "*person seeking compensation for damage*"). A cynical reading of the UN proposal could lead to considering that the prerogative of establishing the applicable law remains with the relevant court, as the fact that the victim may request something does not necessarily mean that the request ought to be granted (Note that paragraph 1 uses "*shall*" while paragraph 2 uses "*may*"). Furthermore, the UN proposal contains a dangerous opening to *renvoi*, which would undermine the victim´s empowerment (and, to a certain degree, foreseeability). Therefore, if the goal of the UN´s provision is to provide for *favor laesi*, a much more explicit language in the sense of conferring the choice-of-law prerogative to the victim would be welcomed.

[29] For comments on the applicable law aspects of the 1st revised draft, see Claire Bright´s note for the BIICL here:https://www.biicl.org/documents/111_comment_on_article_9_applicable_law_of_the_revised_draft_of_the_proposed_business_and_human_rights_treaty.pdf

[30] The proposed text follows the suggestions made in pp. 112ff of the 2019 Study requested by the DROI committee (European Parliament) on Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries: https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf

B. A MORE AMBITIOUS INITIATIVE (THE "DOMICILE OF THE PARENT" CONNECTION, AND LARGER VICTIM CHOICE)

A second sense in which the EP´s choice-of-law approach is to be welcomed is its bold stance in trying to overcome some classic "business & human rights" conundrums by including an ambitious connecting factor, the domicile of the parent company, amongst the possibilities the victim can choose from. Indeed, I personally find this insertion in suggested Art. 6a Rome II very satisfying from a substantive justice (*favor laesi*) point of view: inserting that very connecting factor in Art. 7 Rome II (environmental torts) is one of the main *de lege ferenda* suggestions I considered in my PhD dissertation,[31] in order to correct some of the shortcomings of the latter. While not being the ultimate solution for all the various hurdles victims may face in transnational human-rights or environmental litigation, in terms of content-orientedness this connecting factor is a great addition that addresses the core of the policy debate on "business & human rights". Consequently, I politely dissent with Chris Thomale´s assertion that this connecting factor "*has no convincing rationale*".[32] Moreover, I equally dissent from the contention that a choice between the *lex loci damni* and the *lex loci delicti commissi* is already possible via "*a purposive reading of Art. 4 para 1 and 3 Rome II*". For reasons I have explained elsewhere,[33] I do not share this optimistic reading of Art. 4 as being capable of filling the transnational human-rights gap in Rome II. And even supposing that such interpretation was correct, as draft Art. 6a would make explicit what is contended that can be read into Art. 4, it would significantly increase legal certainty for victims and tortfeasors alike (as otherwise some courts could potentially interpret the latter Article as suggested, while others would not).

Precisely, avoiding a decrease in applicable-law foreseeability seems to be (amongst other concerns) one of the reasons behind Jan von Hein´s suggestion[34] that Art. 6a´s opening of victim´s choice to four different legal systems is excessive, and that not only it should be reduced to two, but that the domicile of the parent should be replaced by its "habitual residence". Possibly the latter is contended not only to respond to systemic coherence with the remainder of Rome II, but also to narrow down options: in Rome II the "habitual residence" of a legal person corresponds only with its "*place of central administration*"; in Brussels I bis its "domicile" corresponds with either "*statutory seat*", "*central administration*" or "*principal place of business*" at the claimant´s choice. Notwithstanding the merits in system-alignment terms of this proposal, arguably, substantive policy rationales (*favor laesi*) ought to take precedence over pure systemic private-international-law considerations. This makes all the more sense if one transposes, *mutatis mutandis*, a classic opinion by P.A. Nielsen on the three domiciles of a corporation under the "Brussels" regime to the choice-of-law realm: "*shopping possibilities are only available because the defendant has decided to organise its business in this way. It therefore seems reasonable to let that organisational structure have* […] *consequences*".[35]

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[31] *Private International Environmental Litigation before EU Courts: Choice of Law as a Tool of Environmental Global Governance*, Université Catholique de Louvain & Universidad de Granada, 2017. An edited and updated version will be published in 2021 in Hart´s "Studies in Private International Law".

[32] https://conflictoflaws.net/2020/chris-thomale-on-the-ep-draft-report-on-corporate-due-diligence/

[33] https://eapil.org/2020/04/28/alvarez-armas-on-the-law-applicable-to-human-rights-related-torts-in-the-eu-as-compared-with-environmental-torts/

[34] https://conflictoflaws.net/2020/chris-thomale-on-the-ep-draft-report-on-corporate-due-diligence/

[35] P. A. Nielsen, "Behind and beyond Brussels I – An Insider´s View", *in* P. Demaret, I. Govaere & D. Hanf (eds.), *30 years of European Legal Studies at the College of Europe (Liber Professorum 1973-74 – 2003-04)*, Cahiers du Collège d´Europe Nº2, Brussels, P.I.E.-Peter Lang, 2005, pp. 241-243.

And even beyond this, at the risk of being overly simplistic, in many instances, complying with four different potentially applicable laws is, actually, in alleged overregulation terms, a "false conflict": it simply entails complying only with the most stringent/restrictive one amongst the four of them (compliance with X+30 entails compliance with X+20, X+10 and X). Without entering into further details, suffice it to say that, while ascertaining these questions *ex post facto* may be difficult for victim´s counsel, it should be less difficult *ex ante* for corporate counsel, leading to prevention.

C. A PERFECTIBLE INITIATIVE (TENSION WITH ARTICLE 7 ROME II)

Personally, the first point that immediately got my attention as soon as I heard about the content of the EP report´s (even before reading it) was the Article 6a *versus* Article 7 Rome II scope-delimitation problem already sketched by Geert Van Calster: when is an environmental tort a human-rights violation too, and when is it not? Should the insertion of Art. 6a crystallize, and Art. 7 remain unchanged, this question is likely to become very contentious, if anything due to the wider range of choices given by the draft Art. 6a, and could potentially end before the CJEU.

What distinguishes say *Mines de Potasse* (which would generally be thought of as "common" environmental-tort situation) from say *Milieudefensie v. Shell* 2008[36] (which would typically fall within the "Business & Human Rights" realm) or *Lluiya v. RWE*[37] (as climate-change litigation finds itself increasingly connected to human-rights considerations)? Is it the geographical location of tortious result either inside or outside the EU? (When environmental torts arise outside the EU from the actions of EU corporations there tends to be little hesitation to assert that we are facing a human-rights tort). Or should we split apart situations involving environmental damage *stricto sensu* (pure ecological damage) from those involving environmental damage *lato sensu* (damage to human life, health and property), considering only the former as coming within Art. 7 and only the latter as coming within Art. 6a? Should we, alternatively, introduce a *ratione personae* distinction, considering that environmental torts caused by corporations of a certain size or operating over a certain geographical scope come within Art. 6a, while environmental torts caused by legal persons falling below the said threshold (or, rarely, by individuals) come within Art. 7?

Overall, how should we draw the boundaries between an environmental occurrence that qualifies as a human-rights violation and one that does not in order to distinguish Art. 6a situations from Art. 7 situations? The answer is simple: we should not. We should consider every single instance of environmental tort a human-rights-relevant scenario and amend Rome II accordingly.

While the discussion is too broad and complex to be treated in depth here, and certainly overflows the realm of private international law, suffice it to say that (putting aside the limited environmental relevance of the Charter of Fundamental Rights of the EU) outside the system of the European Convention of Human Rights (ECHR) there are clear developments towards the recognition of a human right to a healthy or "satisfactory" environment. This is already the case within the systems of the American Convention on Human Rights (Art. 11 of the Additional Protocol to the Convention in the area of Economic, Social and Cultural Rights) and the African Charter on Human and People´s Rights (Art. 24). It is equally the case as well in certain countries,

[36] https://en.milieudefensie.nl/shell-in-nigeria (Not to be confused with the 2019 *Milieudefensie v. Shell* climate-change litigation: http://climatecasechart.com/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/)
[37] https://germanwatch.org/en/huaraz

where the recognition of a fundamental/constitutional right at a domestic level along the same lines is also present. And, moreover, even within the ECHR system, while no human right to a healthy environment exists as such, the case-law of the European Court of Human Rights has recognized environmental dimensions to other rights (Arts. 2 and 8 ECHR, notably). It may therefore be argued that, even under the current legal context, all environmental torts are, to a bigger or lesser extent, human-rights relevant and (save those rare instances where they may be caused by an individual) "business-related".

Ultimately, if any objection could exist nowadays, if/when the ECHR system does evolve towards a broader recognition of a right to a healthy environment, there would be absolutely no reason to maintain an Art. 6a *versus* Art. 7 distinction. Thus, in order to avoid opening a characterization can of worms, it would be appropriate to get "ahead of the curve" in legislative terms and, accordingly, use the proposed Art. 6a text as an all-encompassing new Art. 7.

There may be ways to try to (artificially) delineate the scopes of Articles 7 and 6a in order to preserve a certain *effet utile* to the current Art. 7, such as those suggested above (geographical location of the tortious result, size or nature of the tortfeasor, type of environmental damage involved), or even on the basis of whether situations at stake "trigger" any of the environmental dimensions of ECHR-enshrined rights. But, all in all, I would argue towards using the proposed text as a new Art. 7 which would comprise both non-environmentally-related human-rights torts and, comprehensively, all environmental torts.

Art. 7 is dead, long live Article 7.

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