

Directors' and Officers' Liability

Private International Law Perspective

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D&O Claims with a Foreign Element – What Needs to be Determined:

- international jurisdiction
- applicable law

The Dispute in a 'D&O Scenario' may Concern:

- director's liability → subject of this presentation
- insurer's liability under a D&O insurance contract
- injured party's right of direct action against the D&O insurer (*actio directa*)



Liability of Directors

- towards third parties
- towards the company and its shareholders

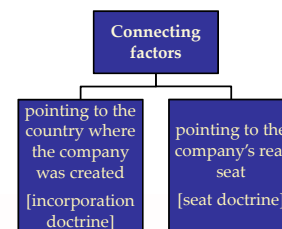
Relevant Conflict of Laws Rules

- Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II)
- Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I)
- national conflict of laws rules



Directors' Liability for the Obligations of the Company

- excluded from the scope of application of the Rome regulations under so-called 'company law exclusions'
- governed by *lex societatis*



Directors' Liability Towards Third Parties (1)

A. Tortious → Rome II regulation

I. General rules (art 4):

1. *lex loci damni* (sec 1), **unless**
2. parties are habitually resident in another country (sec 2) **or**
3. there is a manifestly closer connection with the law of another country (sec 3)

II. Choice of law possible *ex post*; *ex ante* when all parties pursue a commercial activity (art 14)

III. Law applicable to particular non-contractual obligations, eg such arising out of:

1. acts of unfair competition (art 6) → law of the country where competitive relations are, or are likely to be, affected (sec 1)
2. environmental damage (art 7) → the injured party may choose the law of the country in which the damage-causing event occurred

Directors' Liability Towards Third Parties (2)

IV. Exclusions may apply; eg art 1(2):

The regulation does not apply to 'non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation'.

B. Contractual (rare) → Rome I regulation

I. General rule: freedom of choice (*lex voluntatis*) (art 3)

II. Objective connecting factors for various types of contract (arts 4 ff)



Characterisation (Classification)

- allocating a given situation to a certain category in order to find the applicable conflict rule (subsumption under a conflict rule)
- various theories (*lex fori*; *lex causae*; functional; autonomous)

Characterisation performed for the purpose of applying the Rome regulations: non-contractual obligations and contractual obligations need to be **interpreted autonomously**; courts cannot simply fall back on concepts employed by any national (substantive or pre-existing conflict) law.

Rome II, Preamble, recital 11: *'The concept of a non-contractual obligation varies from one Member State to another. Therefore for the purposes of this Regulation non-contractual obligation should be understood as an autonomous concept ...'*

Rome I, Preamble, recital 7: *'The substantive scope and the provisions of this Regulation should be consistent with ... Brussels I and ... Rome II.'*



Directors' Liability for Damage Caused to the Company and the Company's Shareholders

- various bases of liability → various conflict rules
- non-contractual liability → Rome II
contractual liability → Rome I
unless liability falls under a company law exclusion;
in that case → national conflict rules (*lex societatis*)



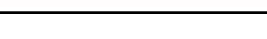
Company Law Exclusions (1)

Rome I regulation is not applicable to:

- *'questions governed by the law of companies and other bodies, corporate or unincorporated, such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies, corporate or unincorporated, and the personal liability of officers and members as such for the obligations of the company or body.'* (art 1(2)(f))

Rome II regulation is not applicable to:

- *'non-contractual obligations arising out of the law of companies and other bodies corporate or unincorporated regarding matters such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies corporate or unincorporated, the personal liability of officers and members as such for the obligations of the company or body and the personal liability of auditors to a company or to its members in the statutory audits of accounting documents.'* (art 1(2)(d))



Company Law Exclusions (2)

It seems that **liability of directors and officers towards the company by virtue of their office, ie liability for breach of obligations that are based on a director's appointment to office, and which arise from a special relationship between the director and the company and do not exist between any other natural or legal persons** (liability inseparable from the director's appointment and linked with the organisational framework of the company) should fall under the company law exclusion and therefore be governed by national conflict of laws rules. This would generally result in this liability being submitted to *lex societatis*.

