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Culpa in Contrahendo in European Private International Law: Another Look at Article 12 of the Rome II Regulation

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***Culpa in Contrahendo* in European Private International Law: Another Look at Article 12 of the Rome II Regulation**

*By Najib Hage-Chahine**

Abstract: Precontractual liability is liability that arises out of a harmful conduct that occurs during the formation period of a contract. Where the harmful conduct occurs during international negotiations, a conflict of laws issue arises. The determination of the applicable law to precontractual liability can be a complex and tedious task, which is why the European Legislature has provided a special conflict-of-law rule in Article 12 of the Rome II Regulation on the applicable law to non-contractual obligations. Through this provision, the European Legislature aims to achieve uniformity between EU Member States, while providing an appropriate conflicts rule. The present essay assesses the European Legislature's attempt at codification and offers a commentary of Article 12 of the Rome II Regulation. It comes at a time when the Commission is scheduled to submit a report on the application of the Rome II Regulation to the European Parliament, the Council, and the European Economic and Social Committee. This essay will show that the Legislature has displaced the traditional rules of European private international law by adopting a contractual connecting factor in order to determine the applicable law to a non-contractual obligation. Indeed, the European Legislature has, for the purposes of European private international law, chosen to characterize culpa in contrahendo as non-contractual, but has chosen to determine the applicable law to this non-contractual obligation on the basis of a contractual connecting factor. Thus, Article 12(1) of the Rome II Regulation has, in fact, chosen to submit claims arising out of culpa in contrahendo to the lex contractus in negotio. According to this provision, the applicable law to claims arising out of culpa in contrahendo is the law of the contract that was under negotiation. In spite of its advantages, the rule provided by Article 12 of the Rome II Regulation lacks flexibility. The lack of escape devices and the relative inapplicability of the second paragraph of Article 12 of the Rome II Regulation make this rule a rigid one whose application cannot be displaced whenever it reaches inappropriate results.

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INTRODUCTION

Precontractual liability is liability that arises out of a harmful conduct that occurs during the formation period of a contract.¹ Although the effect

¹ On precontractual liability, see E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217, 221 (1987); Alan Schwartz & Robert E. Scott, *Precontractual Liability and Preliminary Agreements*, 120 HARV. L. REV. 661 (2007); John Klein & Carla Bachechi, *Precontractual Liability and the Duty of Good Faith Negotiation in International Transactions*, 17 HOUS. J. INT'L L. 1 (1994); Nadia E. Nedzel, *A Comparative Study of Good Faith, Fair Dealing, and Precontractual Liability*, 12 TUL. EUR. & CIV. L.F. 97 (1997); Raymond Saleilles, *De la responsabilité précontractuelle*, 6 REVUE TRIMESTRIELLE DE DROIT CIVIL [REV. TRIM. DR. CIV.] 697 (1907); Joanna Schmidt, *La sanction de la faute précontractuelle*, 73 REVUE TRIMESTRIELLE DE DROIT CIVIL [REV. TRIM. DR. CIV.] 46 (1974); PRECONTRACTUAL LIABILITY: REPORTS TO THE XIIITH CONGRESS, INT'L ACAD. OF COMP. LAW, MONTREAL,

of the harm might be felt subsequently to the formation of the contract, the cause of harm is, in principle, temporally situated prior to the conclusion of the contract.² The adjective “precontractual” indicates that this type of liability is linked to the period that precedes the formation of the contract.

Where the harmful conduct occurs during the international negotiations of a contract, a conflict of laws issue arises. This is the case, for example, in the following four situations.

Example 1: Defendant, a U.S. resident, sells his shares in a French company to a French plaintiff. The defendant fails, at the time the contract for the sale of shares is concluded, to disclose to the French plaintiff that the company will stop doing business in the United States. The plaintiff files a suit for damages in France for breach of the precontractual duty to disclose material facts during the conclusion of the contract. This claim raises the issue of determining the law that governs the defendant’s liability. According to French law,³ the defendant is liable for failure to disclose material facts that affect the determination of the shares’ value.⁴ On the other hand, according to U.S. law,⁵ the principle of *caveat emptor* will most likely apply and exonerate the defendant.⁶

Example 2: Defendant, a German resident, offers to buy all the shares of a French plaintiff in an English company. Before a reasonable time has elapsed, the defendant revokes his offer in a letter dispatched in Germany and received in France, where the plaintiff resides. The latter disregards the revocation letter and dispatches his acceptance to the defendant. Having not received an answer, the plaintiff files a suit where he seeks, first to establish the existence of the contract by claiming that he has accepted the offer within a reasonable time, and, alternatively, to obtain damages for unlawful revocation of a binding offer. This case raises two conflict-of-laws issues: the issue of the existence of the contract and the issue of the defendant’s precontractual liability. According to German law,⁷ the

CANADA 18–24 AUGUST, 1990 (Ewoud H. Hondius, ed., 1991) [hereinafter PRECONTRACTUAL LIABILITY: REPORTS TO THE XIIITH CONGRESS].

² However, we will see that one exceptional situation gives rise to precontractual liability that stems from a harmful conduct that occurs after the negotiations have ended. *See infra* Part I(B)(2)(b).

³ France is the place of residence of the plaintiff. It is also the place where the company whose shares are the subject matter of the contract is situated. It might also be argued that this is the place where the injury has manifested itself.

⁴ *See* FRANÇOIS TERRÉ ET AL., *DROIT CIVIL, LES OBLIGATIONS* 233 (2009).

⁵ The U.S. is the place of residence of the defendant. It might also be argued that this is the place where the harmful conduct has manifested itself.

⁶ *See* ANDREW STILTON, *SALE OF SHARES AND BUSINESSES: LAW, PRACTICE & AGREEMENTS* 133 (2d ed. 2006).

⁷ Germany is the place of residence of the defendant. It might also be argued that it is the place where the conduct occurs, since it is the place where the decision to revoke the offer was made.

defendant is bound by his offer and cannot freely revoke it before a reasonable time has passed.⁸ In effect, the plaintiff has effectively accepted the offer and the contract for the sale of shares is formed. Because the defendant is bound by the sale contract, he does not incur any precontractual liability under German rules. According to French law,⁹ the defendant must hold the offer for a reasonable time before he can retract it.¹⁰ However, under French law the revocation of the offer prevents the contract from coming into existence and the defendant's conduct can only give rise to damages.¹¹ Finally, according to U.K.¹² law, the defendant can, in principle, freely revoke his offer without incurring liability.¹³

Example 3: Plaintiff, a French resident, started negotiations with a U.K. defendant for the sale of goods by the French party to the U.K. party. After several weeks of negotiations, the U.K. party abruptly breaks off negotiations. Having incurred costs during the negotiations period, the French party files a claim against the U.K. party in France in order to get compensated for his expenses. The issue is whether French law,¹⁴ which awards damages in the event negotiations are broken off in bad faith,¹⁵ should apply or whether U.K. law, which does not impose a precontractual

⁸ BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Aug. 18, 1896, BUNDESGESETZBLATT, Teil I [BGBL. I] 42, as amended, § 145 (Ger.) and § 147(2).

⁹ France is the place of residence of the plaintiff. It is also, arguably, the place where economic injury arise. It might also be argued that is the place where the conduct occurs, since the decision to revoke the offer is received there.

¹⁰ See, e.g., Cass. 3e civ., June 4, 2009, Bull. civ. III, No. 118, available at <http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000020656565&fastReqId=523728088&fastPos=1>.

¹¹ The French position on the matter is not very clear. While many authors argue for the forced conclusion of the contract whenever the offer was prematurely retracted, the French Cour de Cassation has only awarded damages on the basis of the unlawful revocation of the offer, and has yet to force the conclusion of the contract whenever the plaintiff has accepted the offer after its revocation. On the French position, see TERRÉ ET AL, *supra* note 4, at 117; Patrick Chauvel, *Consentement*, D. 2007, ¶ 135; YVAINÉ BUFFELAN-LANORE & VIRGINIE LARRIBAU-TERNEYRE, *DROIT CIVIL: LES OBLIGATIONS* 745 (12th ed., 2010). On liability arising out of the revocation of the offer in Europe, see Catherine Delforge, *La formation des contrats sous un angle dynamique—Réflexions comparatives*, in *LE PROCESSUS DE FORMATION DU CONTRAT: CONTRIBUTIONS COMPARATIVES ET INTERDISCIPLINAIRES À L'HARMONISATION DU DROIT EUROPÉEN* 139 (Marcel Fontaine, ed. 2002).

¹² The U.K. is the place where the company whose shares are the subject matter of the contemplated contract is situated.

¹³ Under U.K. law, the offer is not binding unless it is contained in an option contract. KONRAD ZWEIGERT & HEIN KÖTZ, *AN INTRODUCTION TO COMPARATIVE LAW* (Tony Weir, trans., 1998).

¹⁴ France is the place of residence of the plaintiff, and, arguably the place where economic injury arises. It might also be argued that it is the place where the harmful conduct occurs, since the decision to break off negotiations is received in France.

¹⁵ See *Chambre commerciale et financière* [Cass. Com.] [Commercial and financial court], Apr. 22 1997, D. 1998, 45, note Patrick Chauvel (Fr.).

duty of good faith during negotiations,¹⁶ should govern the situation, thus exonerating the defendant from liability.

Example 4: Plaintiff, a U.K. resident, started negotiations with an U.S. defendant for the sale of land owned by the U.S. defendant in Germany. After several weeks of negotiations, the American party abruptly breaks off negotiations in a letter dispatched in the United States and received in the U.K. Having incurred costs during the negotiations period, the U.K. party files a claim against the U.S. party in the U.K. in order to receive compensation for his expenses. This claim raises the issue of the determination of the law that governs the defendant's precontractual liability. According to German law,¹⁷ the plaintiff is entitled to damages in the event negotiations are broken off in bad faith.¹⁸ However, U.S.¹⁹ and U.K.²⁰ laws do not, in principle, impose a precontractual duty of good faith during negotiations,²¹ thereby exonerating the defendant from liability.

The determination of the law that governs the defendant's precontractual liability in each of the above-mentioned scenarios encounters two difficulties. First, the determination of the applicable law to precontractual liability is hindered by the difficulty of characterizing this type of liability. Indeed, precontractual liability is subject to several possible characterizations in the different E.U. Member States.²² While it

¹⁶ Stathis Banakas, *Liability for Contractual Negotiations in English Law: Looking for the Litmus Test*, INDRET 1 (Feb. 19, 2009), http://www.indret.com/pdf/605_en_1.pdf; Alberto M. Musy, *The Good Faith Principle in Contract Law and the Precontractual Duty to Disclose: Comparative Analysis of New Differences in Legal Cultures*, 1 GLOBAL JURIST ADVANCES 1, 1, 10 (2001).

¹⁷ Germany is the place where the property is situated.

¹⁸ See Musy, *supra* note 16, at 5.

¹⁹ The U.S. is the place of residence of the defendant. It might also be argued that it is the place where the conduct occurs, since the decision to break off negotiations is made and dispatched to the plaintiff from the U.S.

²⁰ The U.K. is the place of residence of the plaintiff. It is also, arguably the place where economic injury arises. It might also be argued that it is the place where the harmful conduct occurs, since the decision to break off negotiations is received in the U.K.

²¹ For American Law, see *Lafayette Place Assocs. v. Boston Redev. Auth.*, 427 Mass. 509, 517 (1998); *F.D.I.C. v. LeBlanc*, 85 F.3d 815 (1st Cir. 1996); see also STEVEN J. BURTON & ERIC G. ANDERSEN, CONTRACTUAL GOOD FAITH: FORMATION, PERFORMANCE, BREACH, ENFORCEMENT 330 (1995) (stating that "American law imposes no general duty to negotiate a contract in good faith"). For U.K. law, see Banakas, *supra* note 16, at 1; Musy, *supra* note 16; Raphael Powell, *Good Faith in Contracts*, 9 CURRENT LEGAL PROBS. 16, 38 (1956).

²² RICHARD PLENDER & MICHAEL WILDERSPIN, THE EUROPEAN PRIVATE INTERNATIONAL LAW OF OBLIGATIONS 730 (3d ed. 2009). On the various possible characterizations of precontractual liability in Europe, see Dário Moura Vicente, *Precontractual Liability in Private International Law: A Portuguese Perspective*, 67 *Rabels Zeitschrift Für Ausländisches Und Internationales Privatrecht* [Rabel Journal for Foreign and International Private Law] [RabelZ] 699, 710–16 (2003); Nedzel, *supra* note 1, at 97; Ioanna Thoma, *Culpa in Contrahendo in the Rome II Regulation*, 61 *REVUE HELLENIQUE DE DROIT INT'L*

has been characterized as contractual by some jurisdictions,²³ it has been characterized as tortious,²⁴ or even “as an independent kind of liability deriving its force and effect from the law”²⁵ by others. Some jurisdictions, such as Portugal, even adopt a hybrid characterization where, in some instances, precontractual liability can be characterized as contractual while in others it can be considered as tortious.²⁶ The uncertainty accompanying the characterization of precontractual liability hinders uniformity by producing divergent results depending on which characterization is adopted. Because characterization determines the conflict-of-law rule that designates the applicable law,²⁷ the divergent characterizations of precontractual liability lead to the application of divergent laws in the different Member States. This would be the case, for example, in the scenario described by D. Moura Vicente, where “negotiations for the conclusion of a sale contract break down in France and the prospective seller is a German resident.”²⁸ In this case, “French and German law would potentially apply to the precontractual liability arising from these facts.”²⁹ Indeed, the situation is characterized as tortious in France, which means that the application of the French conflict-of-law rule designates French law as the applicable *lex delicti*.³⁰ However, because the situation is characterized as contractual in Germany, the application of the German conflict-of-law rule leads to the application of German law to the defendant’s precontractual liability.³¹ “A concurrence of applicable rules would thus occur,”³² leading to divergent results in the different member states.

Second, the determination of the applicable law to precontractual liability is hindered by the difficulty of determining the relevant contacts in a situation involving precontractual liability.³³ This is especially true for the place of injury, the place of conduct, the place where the parties’

[R.H.D.I.] 669, 674 (2008); PRECONTRACTUAL LIABILITY: REPORTS TO THE XIIITH CONGRESS, *supra* note 1.

²³ PRECONTRACTUAL LIABILITY: REPORTS TO THE XIIITH CONGRESS, *supra* note 1, at 12.

²⁴ This is the case, for example, in France. See Schmidt, *supra* note 1, at 46; PRECONTRACTUAL LIABILITY: REPORTS TO THE XIIITH CONGRESS, *supra* note 1, at 11.

²⁵ This is the case, for example, in Greece. See Thoma, *supra* note 25, at 674.

²⁶ See Moura Vicente, *supra* note 22, at 716.

²⁷ On the issue of characterization, see Ernest G. Lorenzen, *The Qualification, Classification, or Characterization Problem in the Conflict of Laws*, 50 YALE L.J. 743 (1941); Fowler V. Harper, *Torts, Contracts, Property, Status, Characterization, and the Conflict of Laws*, 59 COLUM. L. REV. 440 (1959).

²⁸ Moura Vicente, *supra* note 22, at 716.

²⁹ *Id.*

³⁰ *Id.*; see also, Schmidt, *supra* note 1, at 46.

³¹ Moura Vicente, *supra* note 22, at 716.

³² *Id.*

³³ On these difficulties, see Paul Lagarde, *La culpa in contrahendo à la croisée des règlements communautaires*, in NEW INSTRUMENTS OF PRIVATE INTERNATIONAL LAW, LIBER FAUSTO POCAR 584, 590 (Giuffré 2009).

precontractual relationship was centered, and the place where the parties' contemplated contractual relationship is centered.

- The determination of the place of injury is complicated by the economic nature of the loss that arises out of the defendant's conduct.³⁴
- The place where the harmful conduct occurred is hard to determine because of the type of conduct that causes injury, and because negotiations are usually conducted in the absence of the physical presence of the parties. This is the case, for example, whenever liability arises out of a decision to break off negotiations that is made and dispatched by the defendant in one place and received by the plaintiff in another.³⁵
- The place where the parties' precontractual relationship is centered is hard to determine whenever negotiations are conducted in the absence of the physical presence of the parties—through the telephone or via email.³⁶
- The determination of the place where the parties' contemplated contractual relationship is centered can be hard to determine whenever negotiations did not lead to the conclusion of the contract. In this case, the place where the contract under negotiation would have been concluded and the place where the contract under negotiation would have been performed can be hard to determine.

The difficulties accompanying the determination of the law that governs precontractual liability have prompted the European Legislature to adopt a special conflict-of-law rule in Article 12 of the Rome II Regulation on the applicable law to non-contractual obligations.³⁷ This Regulation falls in line with the European Union's movement of unifying European private international law. Along with the Rome I Regulation on the applicable law to contractual obligations,³⁸ the European Union seeks to achieve uniformity in the realm of private international law of obligations amongst the Member States. While the Rome I Regulation determines the applicable law to contractual obligations, the Rome II Regulation provides the applicable law to claims involving non-contractual obligations.

Article 12 of the Rome II Regulation on the applicable law to non-contractual obligations provides the choice of law rule dealing with *culpa in contrahendo*,³⁹ which is the category that encompasses non-contractual

³⁴ See *infra* Part II(A)(2)(b)(i)(1)(ii).

³⁵ See *infra* Part II(A)(2)(b)(i)(1)(i).

³⁶ See *infra* Part II(A)(2)(b)(i)(1)(iii).

³⁷ Council Regulation 864/2007, art. 12, 2007 O.J. (L 199) 40, 45 (EU).

³⁸ Council Regulation 593/2008, 2008 O.J. (L 177) 6 (EU).

³⁹ The notion of *culpa in contrahendo* was first used by German scholar Rudolf von Jhering to designate fault during the conclusion of a contract. See Rudolf Von Jhering, *De la culpa in contrahendo ou des dommages intérêts dans les conventions nulles ou restées imparfaites*, in *ŒUVRES CHOISIES VOL. II 1* (O. de Meulenaere, trans., 1893).

types of precontractual liability. We will see that the concept of *culpa in contrahendo*, within the meaning of Article 12 of the Rome II Regulation, is narrower than the concept of *precontractual liability*. While the latter encompasses a wide array of cases involving liability that arises out of a party's conduct during the negotiation of a contract,⁴⁰ the former only encompasses certain types of non-contractual liability claims arising out of precontractual dealings.⁴¹

By its placement under Chapter III of the Rome II Regulation, Article 12 has inherited the Regulation's three main features. First, this provision is binding in all member countries "without the need for implementing national legislation in each individual country."⁴² In other words, its application is mandatory in all member countries.⁴³

Second, this provision benefits from universal applicability, which means two things. First, its application "is not dependent on any link with the European Community or any of the Member States, [aside] from the situation being litigated before a court of one of the Member States."⁴⁴ Second, it is applicable even though the designated law might not be the law of a Member State. According to Article 3 of the Rome II Regulation, "[a]ny law specified by this Regulation shall apply whether or not it is the law of a Member State."⁴⁵ It follows that the Regulation will cover situations "occurring both within and outside the Union, which may lead to the application of the law of a non-Member State."⁴⁶ Third, the concepts used by Article 12 of the Rome II Regulation have an autonomous meaning that is to be interpreted consistently with other EU instruments and with ECJ case law.⁴⁷ This autonomy "is essential to ensure the consistent interpretation [of the Regulation] throughout the European Community."⁴⁸

⁴⁰ See *supra* note 1 and accompanying text.

⁴¹ See *infra* Part I(B).

⁴² Symeon C. Symeonides, *Rome II and Tort Conflicts: A Missed Opportunity*, 56 AM. J. COMP. L. 173, 174 (2008).

⁴³ According to the closing sentence of the Rome II Regulation: "[t]his Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community." Council Regulation 864/2007, *supra* note 37, closing sentence.

⁴⁴ PLENDER & WILDERSPIN, *supra* note 22, at 465. However, it should be noted that the fact that the case is being litigated in a Member State means that the situation has at least some connection with the European Community.

⁴⁵ Council Regulation 864/2007, *supra* note 37, art. 3.

⁴⁶ Symeonides, *supra* note 42, at 174.

⁴⁷ See *infra* Part I(B).

⁴⁸ ANDREW DICKINSON, THE ROME II REGULATION: THE LAW APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS 120 (2010). See also Cyril Nourissat, *Le champ d'application du règlement « Rome II »*, in LE RÈGLEMENT COMMUNAUTAIRE « ROME II » SUR LA LOI APPLICABLE AUX OBLIGATIONS NON CONTRACTUELLES 19 (Sabine Corneloup & Natalie Joubert eds., 2008) [hereinafter LE RÈGLEMENT COMMUNAUTAIRE « ROME II »].

A. History Behind The Adoption Of Article 12 Of The Rome II
Regulation⁴⁹

The first suggestion of a conflict-of-law rule for claims arising out of precontractual dealings came from an informal group of private international law experts: the European Group of Private International Law (EGPIL).⁵⁰ This idea was initially suggested in the explanatory documents of the Group's proposal for a European Convention on the Law Applicable to Non-Contractual Obligations adopted at the Group's meeting in 1998.⁵¹ This initial suggestion was followed by the Max Planck Institute for Foreign Private and Private International Law's proposal to include a conflict-of-law rule for claims arising out of precontractual liability in its Comments on the European Commission's Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations.⁵² In July 2003, the Commission provided its first draft proposal for the Rome II Regulation where *culpa in contrahendo* appeared "as an example of non-contractual, [but] non-delictual instances."⁵³ It was subsequently ignored in the Commission's modified proposal⁵⁴ until it resurfaced again in the text of the Common Position,⁵⁵ and was adopted by the Council in 2006.⁵⁶ Finally, the conflict-of-law rule on *culpa in contrahendo* was adopted in Article 12 of Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law

⁴⁹ For more on this issue, see Thoma, *supra* note 22, at 670; Bart Volders, *Culpa in Contrahendo in the Conflict of Laws: A Commentary on Article 12 of the Rome II Regulation*, 9 Y.B. PRIVATE INT'L L. 127, 129 (2007) [hereinafter Volders, *Commentary*]; Bart Volders, *Culpa in Contrahendo in the Conflict of Laws: A First Appraisal of Article 12 of the Rome II Regulation*, 2008.4 NEDERLANDS INTERNATIONAAL PRIVAATRECHT 464, 465 (2008) [hereinafter Volders, *First Appraisal*].

⁵⁰ Thoma, *supra* note 22, at 669–70; Volders, *First Appraisal*, *supra* note 49, at 465.

⁵¹ Thoma, *supra* note 22, at 669; Volders, *First Appraisal*, *supra* note 49, at 465. For the text of this proposal, see *Proposal for a European Convention on the Law Applicable to Non-contractual Obligations*, EUROPEAN GROUP FOR PRIVATE INTERNATIONAL LAW, <http://www.gedip-egpil.eu/documents/gedip-documents-8pe.html> (last visited Sept. 9, 2012).

⁵² Thoma, *supra* note 22, at 669–70; Volders, *First Appraisal*, *supra* note 49, at 465; see also J. BASEDOW ET AL., MAX PLANCK INST. FOR FOREIGN PRIVATE AND PRIVATE INTL. LAW, COMMENTS ON THE EUROPEAN COMMISSION'S GREEN PAPER ON THE CONVERSION OF THE ROME CONVENTION OF 1980 ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS INTO A COMMUNITY INSTRUMENT AND ITS MODERNIZATION 96, 105, 114 (2003) [hereinafter MAX PLANCK INST., COMMENTS], available at http://ec.europa.eu/justice/news/consulting_public/rome_i/contributions/max_planck_institute_foreign_private_international_law_en.pdf. In particular, Article 8.2 of the Proposal which states that "[l]egal consequences resulting from the breaking-off of negotiations shall be governed by the law which would govern the contemplated contract." *Id.* at 114.

⁵³ Thoma, *supra* note 22, at 669–70.

⁵⁴ *Id.*

⁵⁵ The Common Position is a legal instrument by which the Council defines the Union's approach to a particular matter.

⁵⁶ See Council Common Position 22/2006 2006 O.J. (C 289E) 68 (EC).

applicable to non-contractual obligations (Rome II).⁵⁷ Pursuant to Article 32,⁵⁸ the Rome II Regulation went into effect on January 11, 2009, with the consequence that the Regulation will apply “only to events giving rise to damage [occurring after that date] and that the date on which the proceedings seeking compensation for damage were brought or the date on which the applicable law was determined by the court seised have no bearing on determining the scope *ratione temporis* of the Regulation.”⁵⁹

B. Structure Of The Provision

Article 12 of the Rome II Regulation provides a special rule that determines the applicable law to *culpa in contrahendo*. The European Legislature has decided that the general rule provided by Article 4 of the Rome II Regulation⁶⁰ in order to determine the applicable law to non-contractual obligations is inappropriate for determining the applicable law to precontractual liability.⁶¹ The Legislature has, therefore, provided for a more specific rule that is more suitable in this particular case.⁶² In effect, Article 12 of the Rome II Regulation has been placed in a separate chapter that provides special rules for situations that encompass non-contractual obligations arising from unjust enrichment, *negotiorum gestio* and *culpa in*

⁵⁷ Council Regulation 864/2007, *supra* note 37.

⁵⁸ *Id.* art. 32.

⁵⁹ Case C-412/10, *Homawoo v. GMF Assurances*, 2011 E.C.R. I-0000, ¶ 37.

⁶⁰ Article 4 of the Rome II Regulation states:

1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.
2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.
3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a preexisting relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

Council Regulation 864/2007, *supra* note 37, art. 4.

⁶¹ According to Recital 19 of the Rome II Regulation, “[s]pecific rules should be laid down for special torts/delicts where the general rule does not allow a reasonable balance to be struck between the interests at stake.” *Id.* at para. 19.

⁶² According to Recital 29 of the Rome II Regulation, “[p]rovision should be made for special rules where damage is caused by an act other than a tort/delict, such as unjust enrichment, *negotiorum gestio* and *culpa in contrahendo*.” *Id.* at para. 29.

contrahendo.⁶³

According to Article 12 of the Rome II Regulation:

1. The law applicable to a non-contractual obligation arising out of dealings prior to the conclusion of a contract, regardless of whether the contract was actually concluded or not, shall be the law that applies to the contract or that would have been applicable to it had it been entered into.

2. Where the law applicable cannot be determined on the basis of paragraph 1, it shall be:

(a) the law of the country in which the damage occurs, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occurred; or

(b) where the parties have their habitual residence in the same country at the time when the event giving rise to the damage occurs, the law of that country; or

(c) where it is clear from all the circumstances of the case that the non-contractual obligation arising out of dealings prior to the conclusion of a contract is manifestly more closely connected with a country other than that indicated in points (a) and (b), the law of that other country.⁶⁴

Close examination of this provision reveals that the European Legislature has, in the area of precontractual liability, chosen to depart from the traditional rules of private international law in Europe. Conflicts of laws in Europe are traditionally resolved by relying upon a two-step process that requires courts to characterize the issue before implementing the conflict-of-law rule that designates the applicable law. First, the courts must characterize the issue. Upon characterization, the issue will be inserted into a private international law category (i.e. torts, contracts, marriage, successions, property, etc). Second, the courts will apply the conflict-of-law rule that is assigned to the category to which the issue belongs. Each private international law category is assigned a predetermined connecting factor that determines the applicable law whenever the dispute falls within this category. In effect, each private international law category has its own law whose application is triggered whenever the dispute falls within this category. Thus, the category of torts

⁶³ Cf. Gérard Légier, *Enrichissement sans cause, gestion d'affaires et culpa in contrahendo*, in LE RÈGLEMENT COMMUNAUTAIRE «ROME II», *supra* note 48, at 145; Caroline Tubeuf, *Enrichissement sans cause, gestion d'affaires et "culpa in contrahendo,"* 114 REVUE DE DROIT COMMERCIAL BELGE 535 (2008).

⁶⁴ Council Regulation 864/2007, *supra* note 37.

is usually governed by the *lex delicti*—which, according to Article 4 of the Rome II Regulation, is the law of the place of injury⁶⁵—while the category of “contracts” is usually governed by the *lex contractus*—which is determined according to the rules provided by the Rome I Regulation.⁶⁶

In adopting Article 12 of the Rome II Regulation, the European Legislature has chosen to depart from this tradition. Indeed, the European Legislature, which has opted in favor of a non-contractual characterization of *culpa in contrahendo* in European Private International Law (EPIL), has in fact chosen a contractual connecting factor in order to determine the applicable law. Instead of choosing to submit this category to the *lex delicti*, which is the general rule applicable in cases of non-contractual liability, the Legislature has chosen to submit this category to the law of the contract under negotiation.⁶⁷

The present essay offers a two-part commentary of Article 12 of the Rome II Regulation, and comes at a time when the Commission has scheduled to submit a report on the application of the Rome II Regulation to the European Parliament, the Council and the European Economic and Social Committee. The submission of such a report was first provided for by Article 30(1) of the Rome II Regulation. According to this provision, a report on the application of the Rome II Regulation was to have been submitted by the Commission, no later than August 2011. The report was to have been accompanied, if necessary, by proposals to adapt the Rome II Regulation and was to include

a study on the effects of the way in which foreign law is treated in the different jurisdictions and on the extent to which courts in the Member States apply foreign law in practice pursuant to this Regulation; [and] a study on the effects of Article 28 of this Regulation with respect to the Hague Convention of 4 May 1971 on the law applicable to traffic accidents.⁶⁸

⁶⁵ Council Regulation 864/2007, *supra* note 37, art. 4.

⁶⁶ Council Regulation 593/2008, *supra* note 38.

⁶⁷ Cf. Sylvain Bollée, *A la croisée des règlements Rome I et Rome II: la rupture des négociations contractuelles*, 31 D. 2008, 2161. This author states that there is a “union” between the two laws. *See infra* Part II(A).

⁶⁸ Article 30(1) of the Rome II Regulation states that:

1. Not later than 20 August 2011, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation. If necessary, the report shall be accompanied by proposals to adapt this Regulation. The report shall include:

- (i) a study on the effects of the way in which foreign law is treated in the different jurisdictions and on the extent to which courts in the Member States apply foreign law in practice pursuant to this Regulation;
- (ii) a study on the effects of Article 28 of this Regulation with respect to the

In its Application Plan to Implement the Stockholm Programme, the Commission postponed the submission of this report to 2012.⁶⁹ The present essay provides another look at the Legislature's attempt to provide a conflict-of-law rule in the realm of precontractual liability⁷⁰ in the hope that some of the uncertainties that accompany the implementation of this rule will be addressed in the upcoming report.

Part I of this essay will discuss the non-contractual characterization of *culpa in contrahendo* in the Rome II Regulation. Through this characterization, the European Legislature has aimed to put an end to the characterization debate of precontractual liability in the different Member States.⁷¹ Part I(A) of this essay will show that the non-contractual characterization of *culpa in contrahendo* aims to achieve uniformity between the European instruments on Private International law, and falls in line with the ECJ case law on jurisdiction, as well as with the Rome I Regulation on the applicable law to contractual obligations. Part I(B) of this essay will show that the Legislature has intended for *culpa in contrahendo* to have an autonomous meaning that is not to be necessarily interpreted within the meaning of national law. Part I(B) will show that only certain claims arising out of precontractual dealings fall within the material scope of *culpa in contrahendo*.

Part II of this essay will discuss the contractual connecting factor of *culpa in contrahendo* in the Rome II Regulation. Part II(A) will discuss the general rule provided by Article 12(1) of the Rome II Regulation. This part will show that Article 12(1) of the Rome II Regulation has submitted claims arising out of *culpa in contrahendo* to the law of the contract under negotiation or the *lex contractus in negotio*. Depending on whether the contract under negotiation has been concluded or not, the *lex contractus in negotio* is one of two laws. In the first situation, the law that governs the concluded contract also governs the defendant's precontractual liability. In this case, the *lex contractus in negotio* is the *lex contractus finalis* or the law of the definitive contract. In the event the contract was not concluded,

Hague Convention of 4 May 1971 on the law applicable to traffic accidents.

Article 30(1) of Council Regulation 864/2007, *supra* note 37, art. 12.

⁶⁹ *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Delivering an area of freedom, security and justice for Europe's citizens, Action Plan Implementing the Stockholm Programme*, at 25 COM (2010) 171 final (Apr. 20, 2010), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0171:FIN:EN:PDF>.

⁷⁰ Article 12 of the Rome II Regulation was the subject of several commentaries in Europe, see most notably: Bollée, *supra* note 67; DICKINSON, *supra* note 48, ch. 12; Lagarde, *supra* note 33; Légier *supra* note 63; PLENDER & WILDERSPIN, *supra* note 22, ch. 26; Thoma, *supra* note 22; Tubeuf *supra* note 63; Volders, *Commentary*, *supra* note 49; Volders, *First Appraisal*, *supra* note 49.

⁷¹ PLENDER & WILDERSPIN, *supra* note 22, at 730.

the law of the contract whose conclusion was contemplated by the parties during their negotiations governs the defendant's precontractual liability. In this case, the *lex contractus in negotio* is the *lex contractus putativus* or the law of the putative contract. Part II(A) will also offer an appraisal of the application of the *lex contractus in negotio* after pinpointing the difficulties that accompany the determination of the *lex contractus in negotio*. These difficulties stem from the application of a contractual connecting factor to a non-contractual situation.

Part II(B) of this essay will discuss the subsidiary connecting factors provided by Article 12(2) of the Rome II Regulation. This part will show that the application requirement of Article 12(2) of the Rome II Regulation can rarely be met, thus rendering the application of Article 12(1) quasi-exclusive.

I. THE NON-CONTRACTUAL CHARACTERIZATION OF *CULPA IN CONTRAHENDO* IN EPIL

Conflicts of laws in Europe are traditionally resolved by using a two-step process that requires courts to characterize the issue before implementing the conflict-of-law rule that designates the applicable law.⁷² Characterization is, therefore, the first step that a European jurist should take before attempting to resolve a conflict of laws issue.⁷³ Unlike the United States' pragmatic approach to conflicts,⁷⁴ EPIL places a strong emphasis on characterization in order to determine the relevant contact that will, in turn, determine the applicable law.⁷⁵ By adopting a special rule for precontractual liability, the European Legislature intended, at least for EPIL purposes, to put an end to the characterization debate of precontractual liability in Europe.⁷⁶ This debate stems from the various categories in which national jurisdictions of member states include precontractual liability.⁷⁷ The differences in characterization between the different member states ruin uniformity and might lead, in the same situation, to the application of different laws.⁷⁸

⁷² See *supra* notes 64–66, and accompanying text.

⁷³ Volders, *First Appraisal*, *supra* note 49, at 465.

⁷⁴ The pragmatic approach to conflict of laws is “a method of choice-of-law analysis that integrates the important elements of the various modern policy-oriented approaches to conflicts law What is unique about the method advocated here is the insistence on generating arguments on both sides before reaching any conclusions about the proper outcome.” Joseph William Singer, *A Pragmatic Guide to Conflicts*, 70 B.U.L. REV. 731, 818 (1990).

⁷⁵ See *supra* notes 64–66 and accompanying text.

⁷⁶ PLENDER & WILDERSPIN, *supra* note 22, at 730; Bollée, *supra* note 67; Thoma, *supra* note 22; Tubeuf, *supra* note 63.

⁷⁷ See *supra* notes 22–32 and accompanying text.

⁷⁸ See *supra* notes 22–32 and accompanying text.

By inserting a provision on *culpa in contrahendo* in the Rome II Regulation, the European Legislature has chosen to characterize this type of liability as non-contractual.

The non-contractual characterization of *culpa in contrahendo* raises two issues.

The first issue is to determine whether the European Legislature has chosen to characterize all types of precontractual liability in EPIL as non-contractual. According to the European Court of Justice, there are two types of precontractual liability in EPIL: a contractual type of precontractual liability and a non-contractual type of precontractual liability.⁷⁹ The issue is whether the newly adopted provisions on precontractual liability in the Rome I and the Rome II Regulations deviate from the ECJ case law or if, on the contrary, these provisions fall in line with the ECJ case law.⁸⁰ Part I(A) will show that the European Legislature has chosen to be consistent with the ECJ case law and has adopted a uniform characterization of *culpa in contrahendo* in European Private International Law.

The second issue is to determine the type of claims that are characterized as *culpa in contrahendo* in order to trigger the application of Article 12 of the Rome II Regulation. Part I(B) will show that the European Legislature has conferred upon *culpa in contrahendo* an autonomous meaning, which, according to recital 30 of the Rome II Regulation,⁸¹ is not necessarily interpreted within the meaning of national laws.⁸² This means that the contours of the category of *culpa in contrahendo* in the Rome II Regulation should be determined in accordance with the ECJ case law as well as with the regulatory provisions of the European instruments on private international law, and should not vary according to the national views of each member state.⁸³

⁷⁹ See *infra* Part I(A)(1).

⁸⁰ See PLENDER & WILDERSPIN, *supra* note 22, at 731; Tubeuf, *supra* note 63, at 544; Thoma, *supra* note 22, at 678; Volders, *First Appraisal*, *supra* note 49, at 466.

⁸¹ Recital 30 of the Rome II Regulation states

Culpa in contrahendo for the purposes of this Regulation is an autonomous concept and should not necessarily be interpreted within the meaning of national law. It should include the violation of the duty of disclosure and the breakdown of contractual negotiations. Article 12 covers only non-contractual obligations presenting a direct link with the dealings prior to the conclusion of a contract. This means that if, while a contract is being negotiated, a person suffers personal injury, Article 4 or other relevant provisions of this Regulation should apply.

Council Regulation 864/2007, *supra* note 37, at para 30.

⁸² DICKINSON, *supra* note 48 at 525; Légier, *supra* note 63, at 148; PLENDER & WILDERSPIN, *supra* note 22, at 729; Thoma, *supra* note 22, at 676; Tubeuf, *supra* note 63, at 540; Volders, *First Appraisal*, *supra* note 49, at 466.

⁸³ Thoma, *supra* note 22, at 676.

A. The Uniform Characterization of *Culpa in Contrahendo*

By inserting a provision on the applicable law to *culpa in contrahendo* in the Rome II Regulation, the European Legislature has sought to achieve uniformity between the sources of private international law in the European Union. Indeed, the non-contractual characterization of *culpa in contrahendo* in the Rome II Regulation falls in line with the ECJ case law on jurisdiction, as well as with the Rome I Regulation on the applicable law to contractual obligations.

1. *The ECJ Case Law on Jurisdiction*

The non-contractual characterization of precontractual liability in the Rome II Regulation falls in line with the ECJ case law on the Brussels Convention of September 27, 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1968 Brussels Convention).⁸⁴ In its *Tacconi* judgment of September 17, 2002,⁸⁵ the ECJ has expressly characterized precontractual liability arising out of the unjustified breaking off of negotiations as a non-contractual type of liability. In this case, the Corte Suprema di Cassazione (Italian Supreme Court of Cassation) referred to the ECJ a question concerning the interpretation of Article 2,⁸⁶ the first subparagraph of Article 5(1),⁸⁷ and Article 5(3)⁸⁸ of the 1968 Brussels

⁸⁴ Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968 [hereinafter 1968 Brussels Convention]. This convention has been replaced by the Brussels I Regulation No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters. This regulation governs the jurisdiction of courts of Member States in civil and commercial matters, as well as the rules governing the recognition of foreign judgments in member states. Council Regulation 44/2001, 2000 O.J. (L 12/1) 1 (EC).

⁸⁵ Case C-334/00, *Fonderie Officine Meccaniche Tacconi SpA v Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS)*, 2002 E.C.R., I-7357, I-7396.

⁸⁶ Article 2 of the 1968 Brussels Convention states that

subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State.

Persons who are not nationals of the State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.

1968 Brussels Convention, *supra* note 84, art. 2.

⁸⁷ Article 5(1) of the Convention states that

A person domiciled in a Contracting State may, in another Contracting State, be sued:

1. in matters relating to a contract, in the courts for the place of performance of the obligation in question; in matters relating to individual contracts of employment, this place is that where the employee habitually carries out his work, or if the employee does not habitually carry out his work in any one country, the employer may also be sued in the courts for the place where the

Convention.⁸⁹ In order to determine which court had jurisdiction to settle the dispute, the Italian court sought to ascertain the proper characterization of an action in precontractual liability.⁹⁰ The ECJ had to determine whether such an action fell within the scope of “matters relating to delict or quasi-delict” under Article 5(3) of the Convention⁹¹—which gives jurisdiction to the courts of the place where the harmful event occurred—or whether such an action fell within the scope of “matters relating to a contract” under Article 5(1) of the Convention⁹²—which gives jurisdiction to the courts of the place of performance of the obligation.⁹³

The ECJ chose to characterize the issue as non-contractual. According to the ECJ, the claim to recover the damage allegedly caused by the unjustified breaking off of negotiations is in “the absence of obligations freely assumed by one party towards another on the occasion of negotiations with a view to the formation of a contract . . . a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the [1968] Brussels Convention.”⁹⁴

The analysis of the above-mentioned holding reveals that the ECJ distinguishes between two types of precontractual liability. The ECJ seems to distinguish between the situation where one of the parties has not freely assumed obligations towards the other on the occasion of the negotiation of a contract, and the situation where one party has freely assumed obligations towards another on the occasion of such negotiations. While in the first instance, the defendant’s liability is characterized as *non-contractual*, liability that arises out of the breach of a freely assumed obligation by one party towards another on the occasion of the negotiations with a view to the formation of a contract is a type of *contractual* liability.⁹⁵ According to the

business which engaged the employee was or is now situated

Id. art. 5(1).

⁸⁸ Article 5(3) of the Convention states that: “A person domiciled in a Contracting State may, in another Contracting State, be sued: . . . 3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred.” *Id.* art.5(3).

⁸⁹ See Case C-334/00, *Fonderie Officine Meccaniche Tacconi SpA v. Heinrich Wagner Sinto Maschinenfabrik GmbH*, Opinion of Mr. Advocate General Geelhoed, 2002 E.C.R. I-07357, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62000C0334:EN:PDF>.

⁹⁰ *Id.*

⁹¹ See *supra* note 88.

⁹² See *supra* note 87.

⁹³ See Case C-334/00, *Fonderie Officine Meccaniche Tacconi SpA v. Heinrich Wagner Sinto Maschinenfabrik GmbH*, Opinion of Mr. Advocate General Geelhoed, 2002 E.C.R. I-07357, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62000C0334:EN:PDF>.

⁹⁴ *Id.* ¶ 27.

⁹⁵ In support of this reading of the *Tacconi* holding, see: *Volders, First Appraisal, supra* note 49, at 465; *Thoma, supra* note 22, at 676; *Tubeuf, supra* note 63, at 544.

Tacconi judgment, liability that arises during the negotiation period of a contract is a non-contractual type of liability, unless it arises out of the breach of a freely assumed obligation by one party towards another on the occasion of negotiations with a view to the formation of a contract.⁹⁶

Contrary to what has been argued by a number of scholars,⁹⁷ Article 12 of the Rome II Regulation does not depart from the *Tacconi* judgment. We do not share the view that “pursuant to the new . . . Rome I and Rome II Regulations, all liability claims arising out of pre-contractual relationship between the parties, albeit a claim arising out of a *culpa in contrahendo* within the meaning of Article 12 Rome II or not, are to be characterized as non-contractual.”⁹⁸ On the contrary, it would seem that the characterization of precontractual liability in the Rome I and Rome II Regulations falls in line with the ECJ’s holding for the following reasons.

First, Recital 7 of the Rome I Regulation⁹⁹ and Recital 7 of the Rome II Regulation¹⁰⁰ clearly state that the substantive scope and the provisions of each Regulation “should be consistent with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I).” It follows that the provisions on the applicable law to precontractual liability in each Regulation are to be construed in accordance with the ECJ case law on the matter. In effect, the conflict-of-law rule provided by Article 12 of the Rome II Regulation ought to be aligned with the *Tacconi* judgment.¹⁰¹

Second, Article 12 of the Rome II Regulation determines the applicable law to “non-contractual obligations arising out of dealings prior

⁹⁶ See *infra* Part I(B)(1). For additional commentaries on the *Tacconi* judgment, see Jiří Valdhans, *The Pitfall of Interpreting Rome II Regulation Consistently with Brussels I Regulation*, 2009.2 JURISPRUDENCIA 229 (2009); Michael Bonnel, *Precontractual Liability, the Brussels Jurisdiction Convention and . . . the Unidroit Principles*, in MÉLANGES OFFERTS À MARCEL FONTAINE 359 (2003); R. Libchaber, *Commentaire de C.J.C.E., 17 Septembre 2002, Tacconi*, DEFRÉNOIS 254 (2003); Anne Marmisse, *Jurisprudence de la CJCE relative à la Convention de Bruxelles du 27 septembre 1968 (CJCE Fonderie Officine Meccaniche Tacconi Spa c/ Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS), 17 sept. 2002, aff. C-334-00)*, RTD COM. 207 (2003); Thoma, *supra* note 22, at 676.

⁹⁷ PLENDER & WILDERSPIN, *supra* note 22, at 731; Tubeuf, *supra* note 63, at 544.

⁹⁸ This view was initially expressed by Bart Volders in his article entitled *Culpa in Contrahendo in the Conflict of Laws: A commentary on Article 12 of the Rome II Regulation*, *supra* note 49, at 130. However, in a subsequent article, the author seems to have clarified his position on the matter. According to the author, “it seems, however, fair, to presume that, despite the plain language of the Rome I Regulation, the European Legislature did not intend to infringe upon the principle of party autonomy in precontractual relations but instead ought to align its new conflict rules with the *Tacconi* judgement of the European Court of Justice.” Volders, *First Appraisal*, *supra* note 49, at 466.

⁹⁹ Council Regulation 593/2008, *supra* note 38, para 7 (internal citations omitted).

¹⁰⁰ Council Regulation 864/2007, *supra* note 37, para 7 (internal citations omitted).

¹⁰¹ In support of this view, see Volders, *First Appraisal*, *supra* note 49, at 466.

to the conclusion of a contract.”¹⁰² The wording of Article 12 of the Rome II Regulation suggests that there are two types of obligations at the negotiation stage: contractual obligations and non-contractual obligations, and that only the latter type of obligations are covered by Article 12 of the Rome II Regulation. It would seem that the European Legislature has taken into account the existence of two types of precontractual liability in the realm of conflict of laws: a contractual type of precontractual liability and a non-contractual type of precontractual liability. Article 12 of the Rome II Regulation determines the applicable law to the non-contractual type of precontractual liability. We will see that this provision determines the applicable law to precontractual liability that does not arise out of the breach of a freely assumed obligation by one party towards another on the occasion of negotiations with a view to the formation of a contract.¹⁰³ In other words, Article 12 of the Rome II Regulation determines the applicable law to the type of precontractual liability that has been characterized as non-contractual by the ECJ in the *Tacconi* judgment.

Third, the Rome I Regulation on the applicable law to contractual obligations, which has expressly excluded “obligations arising out of dealings prior to the conclusion of a contract” from its scope,¹⁰⁴ has excluded such obligations only insofar as they fall within the material scope of Article 12 of the Rome II Regulation.¹⁰⁵ Through this provision, the European Legislature did not intend to characterize all claims arising out of precontractual dealings as non-contractual,¹⁰⁶ but only intended to preserve the material scope of Article 12 of the Rome II Regulation. This provision has only excluded from its scope *culpa in contrahendo* as it is defined by Article 12 of the Rome II Regulation. Thus, precontractual liability that has been characterized as contractual by the *Tacconi* judgment still falls within the scope of the Rome I Regulation, while precontractual liability that has been characterized as non-contractual by the *Tacconi* judgment falls outside the scope of this Regulation.¹⁰⁷

Fourth, the ECJ has chosen to characterize certain claims arising out of precontractual dealings as contractual in order to take into account the existence of promises made by the parties at the negotiation stage. The contractual characterization of such claims takes into account the right of the parties to freely organize their precontractual relationship. Practically, the parties have the right to organize their precontractual relationship through the conclusion of a preliminary agreement that determines the rights and obligations of each party at the negotiation stage. The

¹⁰² Council Regulation 864/2007, *supra* note 37, art. 12.

¹⁰³ *See infra* Part I(B)(1).

¹⁰⁴ Council Regulation 593/2008, *supra* note 38, art. 1.

¹⁰⁵ *See infra* Part I(A)(2).

¹⁰⁶ *Contra* PLENDER AND WILDERSPIN, *supra* note 22, at 731.

¹⁰⁷ In support of this view, see Thoma, *supra* note 22, at 678.

contractual characterization of liability claims arising out of the breach of such a preliminary agreement ought to be upheld in the realm of conflict of laws.¹⁰⁸ Such a characterization ensures that the issue of precontractual liability arising out of the breach of a preliminary agreement is submitted to the law that governs the preliminary agreement itself. To hold otherwise would thwart the parties' expectations by submitting the plaintiff's claim to the law that is determined on the basis of Article 12 of the Rome II Regulation. In such a case, the application of the rule provided by Article 12(1) of the Rome II Regulation to the parties' preliminary agreement will submit liability arising out of the breach of such an agreement to the law of the contract under negotiation. The application of this provision would subject the parties' *existing* relationship under the current preliminary agreement to the law of their *contemplated* relationship. The parties will be unfairly surprised by the application of the law governing another contract to their preliminary agreement. This outcome is "at square with the principle of party autonomy, pursuant to which the parties can not only freely structure and organize their contractual relationship, but also their precontractual dealings."¹⁰⁹ Thus, we cannot assume that the European Legislature, has intended "to infringe upon the principle of party autonomy in precontractual relations"¹¹⁰ in the realm of conflict of laws.

In effect, the Rome I and Rome II Regulations fall in line with the ECJ case law on jurisdiction. Indeed, whenever precontractual liability does not arise out of the breach of a contractual obligation concluded at the occasion of negotiations with a view to the formation of a contract, it is characterized as non-contractual, and falls within the scope of the Rome II Regulation. Inversely, whenever precontractual liability arises out of the breach of such an obligation it is characterized as contractual and falls within the scope of the Rome I Regulation.¹¹¹

2. *The Rome I Regulation*

The Rome I Regulation on the applicable law to contractual obligations has expressly excluded "obligations arising out of dealings prior to the conclusion of a contract" from its scope.¹¹² While such obligations are expressly excluded from the scope of the Rome I Regulation, an issue arises as to the extent of this exclusion.

¹⁰⁸ See *infra* Part I(B)(1).

¹⁰⁹ Volders, *First Appraisal*, *supra* note 49, at 466.

¹¹⁰ *Id.*

¹¹¹ In support of this view, see Thoma, *supra* note 22, at 678.

¹¹² Council Regulation 593/2008, *supra* note 38, art. 1.

a. The Exclusion of *Culpa in Contrahendo* From the Scope of the Rome I Regulation

It is widely acknowledged that the Rome I Regulation on the applicable law to contractual obligations and the Rome II Regulation on the applicable law to non-contractual obligations “must be construed together so that the scope of each excludes the other.”¹¹³ Indeed, “every obligation in civil and commercial matters is either contractual or non-contractual for the purposes of determining the choice of law regime in EPIL, and it cannot be both.”¹¹⁴ Furthermore, “the concept of non-contractual obligations is residual.”¹¹⁵ This concept is defined negatively and encompasses the obligations that are not contractual.¹¹⁶ It follows that obligations related to commercial and civil matters that are excluded from the scope of the Rome I Regulation on the applicable law to contractual obligations are characterized as non-contractual and fall, necessarily, within the scope of the Rome II Regulation on the applicable law to non-contractual obligations.¹¹⁷ This is the case of *culpa in contrahendo* in EPIL which has been expressly excluded from the scope of the Rome I Regulation, thereby falling within the scope of the Rome II Regulation. Indeed, Article 1 of the Rome I Regulation has expressly excluded from its scope “obligations arising out of dealings prior to the conclusion of a contract,”¹¹⁸ while Recital 10 of the Rome I Regulation states that “[o]bligations arising out of dealings prior to the conclusion of the contract are covered by Article 12 of Regulation (EC) No 864/2007. Such obligations should therefore be excluded from the scope of this Regulation.”¹¹⁹

b. The Extent of the Exclusion

While Article 1 of the Rome I Regulation has expressly excluded “obligations arising out of dealings prior to the conclusion of a contract” from its scope, Article 12 of the Rome II Regulation only covers “*non-contractual* obligation[s] arising out of dealings prior to the conclusion of a contract.”¹²⁰ The divergent wording of the Rome I and the Rome II Regulation gives rise to confusion regarding the characterization of precontractual liability in EPIL. Article 1 of the Rome I Regulation gives

¹¹³ Andrew Scott, *The Scope of Non-Contractual Obligations*, in THE ROME II REGULATION ON THE LAW APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS, A NEW INTERNATIONAL LITIGATION REGIME 61 (John Ahern & William Binchy eds., 2009); DICKINSON, *supra* note 48, at 3.104.

¹¹⁴ Scott, *supra* note 113, at 59.

¹¹⁵ *Id.* at 61; *see also* Lagarde, *supra* note 33, at 585.

¹¹⁶ Scott, *supra* note 113, at 61.

¹¹⁷ DICKINSON, *supra* note 48, at 3.104.

¹¹⁸ Council Regulation 593/2008, *supra* note 38, art. 1.

¹¹⁹ *Id.* at para. 10.

¹²⁰ Council Regulation 864/2007, *supra* note 37, art 12(1) (emphasis added).

rise to two possible interpretations.

According to the first interpretation, Article 1 of the Rome I Regulation has excluded from its scope all liability claims arising out of precontractual dealings. In effect, “all liability claims arising out of a precontractual relationship between the parties, albeit a claim arising out of a *culpa in contrahendo* within the meaning of Article 12 of the Rome II Regulation or not, are to be characterized as non-contractual.”¹²¹ This interpretation has the merit of ensuring uniformity of characterization since it characterizes all types of precontractual liability as non-contractual. However, it is at odds with the ECJ case-law on jurisdiction,¹²² as well as with the principle of party autonomy, which allows the parties to organize their precontractual relationship through the conclusion of preliminary agreements.¹²³

According to the second interpretation, Article 1 of the Rome I Regulation has excluded obligations arising out of dealings prior to the conclusion of a contract only insofar as they fall within the material scope of Article 12 of the Rome II Regulation.¹²⁴ In effect, the Rome I Regulation has only excluded from its scope non-contractual obligations arising out of dealings prior to the conclusion of a contract. However, contractual liability claims arising out of a precontractual relationship fall within the scope of the Rome I Regulation. While this interpretation reintroduces diversity where the Legislature has aimed to ensure uniformity, we believe it to be exact for two reasons. First, Article 1 of the Rome I Regulation only excludes from the scope of the Rome I Regulation “obligations arising out of dealings prior to the conclusion of a contract.”¹²⁵ It follows that liability claims arising out of the breach of contractual obligations that derive from a contract that is concluded in anticipation of the ultimate agreement, such as obligations arising out of a preliminary agreement¹²⁶, do not fall within the scope of the exclusion of Article 1 of the Rome I Regulation.¹²⁷ Second, Recital 10 of the Rome I Regulation states that “[o]bligations arising out of dealings prior to the conclusion of the contract are covered by Article 12 of Regulation (EC) No 864/2007. Such obligations should therefore be excluded from the scope of this

¹²¹ This view was expressed by B. Volders in a first article entitled *Culpa in Contrahendo in the Conflict of Laws: A commentary on Article 12 of the Rome II Regulation*. See Volders, *Commentary*, *supra* note 49, at 130. The author has clarified his position in a subsequent article. See *supra* note 98. In support of this view, see PLENDER AND WILDERSPIN, *supra* note 22, at 731.

¹²² See *supra* Part I(A)(1).

¹²³ Volders, *First Appraisal*, *supra* note 49, at 466.

¹²⁴ See Bollée, *supra* note 67, at 2163.

¹²⁵ Council Regulation 593/2008, *supra* note 38, art. 1.

¹²⁶ For a list of contractual obligations that are concluded at the precontractual stage see *infra* Part I(B)(1)(b).

¹²⁷ Bollée, *supra* note 67, at 2163.

Regulation.”¹²⁸ This Recital implies that Article 1 of the Rome I Regulation only intended to preserve the material scope of Article 12 of the Rome II Regulation, by excluding from the scope of the Rome I Regulation claims of precontractual liability that are covered by Article 12 of the Rome II Regulation. In other words, we have to determine the contours of the category of *culpa in contrahendo* as it is defined by Article 12 of the Rome II Regulation in order to determine which claims fall outside the scope of the Rome I Regulation.

B. The Autonomous Characterization of *Culpa in Contrahendo*

Recital 30 of the Rome II Regulation has conferred upon the concept of *culpa in contrahendo* an autonomous meaning that is not necessarily interpreted within the meaning of national law. According to Recital 30 of the Rome II Regulation,

[c]ulpa in contrahendo for the purposes of this Regulation is an autonomous concept and should not necessarily be interpreted within the meaning of national law. It should include the violation of the duty of disclosure and the breakdown of contractual negotiations. Article 12 covers only non-contractual obligations presenting a direct link with the dealings prior to the conclusion of a contract. This means that if, while a contract is being negotiated, a person suffers personal injury, Article 4 or other relevant provisions of this Regulation should apply.”¹²⁹

The autonomous meaning conferred upon *culpa in contrahendo* raises the issue of the substantive scope of Article 12 of the Rome II Regulation. In order to determine which matters fall within the scope of this article, we must determine the contours of the category of *culpa in contrahendo* in the Rome II Regulation.

Three guidelines must be followed in order to determine the substantive scope of Article 12 of the Rome II Regulation: (1) The substantive scope of Article 12 of the Rome II Regulation must be determined in accordance with the ECJ case law on jurisdiction as well as with the regulatory provisions of the European instruments on Private International law.¹³⁰ (2) The substantive scope of Article 12 of the Rome II Regulation must be construed in accordance with the substantive scope of

¹²⁸ Council Regulation 593/2008, *supra* note 38, at para 10.

¹²⁹ Council Regulation 864/2007, *supra* note 37, at para. 30.

¹³⁰ According to Recital 7 of the Rome II Regulation, “[t]he substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (5) (Brussels I) and the instruments dealing with the law applicable to contractual obligations.” Council Regulation 864/2007, *supra* note 37, at Recital 7.

the Rome I Regulation so that the scope of each regulation excludes the other. In effect, Article 12 of the Rome II Regulation only encompasses precontractual liability that has been excluded by the Rome I Regulation. (3) The substantive scope of Article 12 of the Rome II Regulation must be determined in accordance with the guideline provided by Recital 30 of the Rome II Regulation.

The analysis of Article 12 of the Rome II Regulation in light of the above-mentioned guidelines reveals that this provision does not cover all types of precontractual liability. The scope of this provision is limited to the following matters: (1) Article 12 of the Rome II Regulation only covers “non-contractual obligations;”¹³¹ and (2) Article 12 of the Rome II Regulation only covers non-contractual obligations that present a direct link with the dealings prior to the conclusion of a contract.

1. Culpa in Contrahendo Does Not Encompass the Breach of Contractual Obligations Concluded at the Occasion of Negotiations With a View to The Formation of a Contract

The wording of Article 12 of the Rome II Regulation suggests that there are two types of obligations that arise at the negotiation stage: contractual obligations, and non-contractual obligations. Accordingly, there are two types of precontractual liability in EPIL: a contractual type of precontractual liability that arises out of the breach of a contractual obligation, and a non-contractual type of precontractual liability that does not arise out of the breach of a contractual obligation. Article 12 of the Rome II Regulation only covers the latter type of precontractual liability.¹³²

Four reasons justify the exclusion of precontractual liability arising out of the breach of contractual obligations from the scope of Article 12 of the Rome II Regulation.

First, Article 12 of the Rome II Regulation determines the applicable law to “non-contractual obligations arising out of dealings prior to the conclusion of a contract.”¹³³ The wording of this Article suggests that *contractual* obligations concluded at the occasion of negotiations with a view to the formation of an ultimate agreement have been expressly excluded from its scope.

Second, Article 1 of the Rome I Regulation has excluded “obligations arising out of dealings prior to the conclusion of a contract,”¹³⁴ only insofar as they fall within the material scope of Article 12 of the Rome II Regulation.¹³⁵ The Rome I Regulation has only excluded from its scope

¹³¹ Council Regulation 864/2007, *supra* note 37.

¹³² See Thoma, *supra* note 22, at 678.

¹³³ Council Regulation 864/2007, *supra* note 37.

¹³⁴ Council Regulation 593/2008, *supra* note 38, art. 1(2)(i).

¹³⁵ See *supra* Part I(A)(2)(b).

non-contractual obligations arising out of dealings prior to the conclusion of a contract. This Regulation determines the applicable law to claims arising out of the breach of contractual obligations concluded at the occasion of negotiations with a view to the conclusion of a contract.

Third, the application of Article 12 of the Rome II Regulation to contractual obligations concluded at the occasion of negotiations with a view to the conclusion of a contract will thwart the parties' expectations regarding the applicable law. This is especially true whenever the parties have entered into a preliminary agreement that organizes their negotiations. In such a case, the application of the rule provided by Article 12(1) of the Rome II Regulation to the parties' preliminary agreement will submit liability arising out of the breach of such an agreement to the law of the contract under negotiation. The application of this provision would subject the parties' *existing* relationship under the current preliminary agreement to the law of their *contemplated* relationship, which would deprive them of the right to rely on the law that governs their preliminary agreement.

Fourth, contractual obligations concluded at the occasion of negotiations with a view to the conclusion of a contract must be excluded from the scope of the Rome II Regulation in order to grant the parties, who are not pursuing a commercial activity, the freedom to choose the law that governs their preliminary agreements. Contrary to obligations that fall within the scope of the Rome I Regulation, obligations that fall within the scope of the Rome II Regulation are governed by the law that is chosen by the parties, who are not pursuing a commercial activity, only when this choice is made *after* the event giving rise to the damage occurred. By submitting preliminary agreements to the rules provided by the Rome II Regulation, we preclude the parties, who are not pursuing a commercial activity, from choosing the applicable law to their preliminary agreement. In effect, a choice of law clause that is inserted in a preliminary agreement, concluded between parties who are not pursuing a commercial activity, becomes inefficient. Such a limitation on party choice is inadmissible whenever the parties have chosen to organize their precontractual relationship by entering into a preliminary agreement. Therefore, contractual obligations concluded at the occasion of negotiations with a view to the conclusion of a contract must be excluded from the scope of the Rome II Regulation. Such obligations are governed by the rules provided by the Rome I Regulation which allow all parties to choose the applicable law without any restrictions.

Thus, contractual obligations concluded at the occasion of negotiations with a view to the formation of an ultimate agreement ought to be excluded from the scope of Article 12 of the Rome II Regulation. However, the concepts of contractual and non-contractual obligations have yet to be defined in the realm of conflict of laws in EPIL: the European Legislature

did not provide a definition of the concepts of contractual and non-contractual obligations in the Rome I and Rome II Regulation,¹³⁶ and the ECJ has yet to define the type of obligations that are excluded from the scope of Article 12 of the Rome II Regulation. It is only in the realm of conflict of jurisdictions between the E.U. Member States that the ECJ has defined the concepts of contractual and non-contractual matters. This is the case for claims arising out of precontractual liability, where the *Tacconi* judgment has, in the realm of conflict of jurisdictions, characterized two types of precontractual liability. The first type of liability is a *contractual* type of liability that arises out of the breach of an obligation “freely assumed by one party towards the other on the occasion of negotiations with a view to the formation of a contract.”¹³⁷ The second type of liability is a *non-contractual* type of liability that does not arise out of the breach of such a freely assumed obligation.¹³⁸ While this distinction has been established in the realm of conflict of jurisdictions between the EU Member States, we will show that it can be extended to the realm of conflict of laws, and that it should be used to determine the type of precontractual liability that is excluded from the scope of Article 12 of the Rome II Regulation. In effect, Article 12 of the Rome II Regulation does not cover liability that arises out of the breach of *a freely assumed obligation by one party towards the other on the occasion of negotiations with a view to the formation of a contract* (a). Thus, liability that arises from the breach of a preliminary agreement or of an obligation arising out of a sollicitation is excluded from the scope of Article 12 of the Rome II Regulation (b).

a. The Definition of the Excluded Contractual Obligations

The concept of a “freely assumed obligation by one party towards another” is used by the ECJ in order to determine what matters are, according to Article 5(1) of the Brussels I Regulation, “related to a contract.”¹³⁹ According to the ECJ, whenever the issue involves a freely assumed obligation by one party towards the other, it constitutes a contractual matter that triggers the application of Article 5(1) of the Brussels I Regulation.¹⁴⁰ Inversely, whenever the issue does not involve a

¹³⁶ DICKINSON, *supra* note 48, at 3.104.

¹³⁷ Case C-334/00, *Fonderie Officine Meccaniche Tacconi SpA v. Heinrich Wagner Sinto Maschinenfabrik GmbH*, Judgment of the Court, 2002 E.C.R. I-07357, ¶ 27. *See supra* Part I(A)(1).

¹³⁸ *See supra* Part I(A)(1).

¹³⁹ Council Regulation 44/2001, *supra* note 84, art. 5(1).

¹⁴⁰ *See* Case C-26/91, *Jakob Handte & Co. GmbH v Traitements Mécano-chimiques des Surfaces SA*, 1992 E.C.R. I-03967; *see also* H. Gaudement-Tallon, *REV. CRIT. DIP* 1989 730; J.-M. Bischoff, *obs.*, *JDI* 1993 469; J. Kullmann, *obs.*, *D.* 1993. *Somm.* 214; P. Jourdain, *obs.*, *RTD Civ.* 1993, 131; T. Azzi, *Bruxelles I, Rome I, Rome II: regard sur la qualification en droit international privé communautaire*, *D.* 2009, 1621.

freely assumed obligation by one party towards the other, it constitutes a non-contractual matter that triggers the application of Article 5(3) of the Brussels I Regulation.¹⁴¹ It follows that the existence or the absence of a “freely assumed obligation by one party towards the other” determines whether the issue constitutes a contractual matter or a non-contractual matter for the purposes of applying the Brussels I Regulation.

While the ECJ has defined the notions of contractual and non-contractual matters in the Brussels I Regulation, it has yet to define the concepts of contractual obligations in the Rome I Regulation and of non-contractual obligations in the Rome II Regulation. This lack of definition has caused scholars to wonder whether the concepts of contractual obligations in the Rome I Regulation and of non-contractual obligations in the Rome II Regulation amount to the concepts of contractual and non-contractual matters as defined by the ECJ case law on jurisdiction.¹⁴² The answer to this question has a direct impact on the applicable law to precontractual liability in EPIL. Because Article 12 of the Rome II Regulation is only applicable to non-contractual obligations arising out of dealings prior to the conclusion of a contract, we must determine whether such obligations amount to non-contractual matters as defined by the ECJ case law on jurisdiction or not. Some scholars have argued that the “diverging *ratio legis* of these instruments constitutes a barrier to a common notion”¹⁴³ of the non-contractual area in the Brussels I Regulation, which determines the procedural rules in EPIL, and the Rome II Regulation, which determines the conflict-of-law rules in a non-contractual situation.¹⁴⁴ Others have argued that “convergences are possible despite the different objectives and scheme of the [European] Regulations.”¹⁴⁵ Without venturing into detailed argumentation, we believe that the concept of non-contractual obligations in the Rome II Regulation amounts to the concept of non-contractual matters in the Brussels I Regulation, and that Article 12 of the Rome II Regulation does not cover liability arising out of the breach of a freely assumed obligation by one party towards the other on the occasion of negotiations with a view to the formation of a contract for the following

¹⁴¹ Case 189/97, *Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst & Co.*, 1988 E.C.R. I-05565; B. Audit, obs., D. 1989. Somm. 254; H. Gaudemet-Tallon, note, REV.CRIT. DIP 1989 215; A. Huet, obs., JDI 1989 457; see also Azzi, *supra* note 140.

¹⁴² See Marta Pertegas, *The notion of contractual obligation in Brussels I and Rome I*, in ENFORCEMENT OF INTERNATIONAL CONTRACTS IN THE EUROPEAN UNION, CONVERGENCE AND DIVERGENCE BETWEEN BRUSSELS I AND ROME I 175 (J. Meeusen, et al., eds., 2004); Azzi, *supra* note 140; Scott, *supra* note 113, at 57; Valdhans, *supra* note 96, at 229–44.

¹⁴³ Pertegas, *supra* note 142, at 176.

¹⁴⁴ See M.-L. Niboyet & G. de Geouffre de La Pradelle, DROIT INTERNATIONAL PRIVÉ § 252 (2007); B. Haftel, *La notion de matière contractuelle en droit international privé* ¶ 44 (2008) (unpublished Phd. thesis, Université Panthéon-Assas, Paris II) (on file with author).

¹⁴⁵ Pertegas, *supra* note 142, at 176; see also Azzi, *supra* note 140, at 1621–22; PLENDER & WILDERSPIN, *supra* note 22, at 738.

reasons.

First, Recital 7 of the Rome II Regulation clearly states that

the substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (5) (Brussels I) and the instruments dealing with the law applicable to contractual obligations.¹⁴⁶

It follows that the common concepts used by the instruments of European Private International Law must be construed consistently. Ensuring consistency between the European Regulations on Private International Law requires that all common concepts be given a common meaning.¹⁴⁷ Thus, the concept of contractual obligations must amount to the concept of contractual matters as it is defined by the ECJ case law on jurisdiction. The latter appears to be a wider concept that seems to include the former.¹⁴⁸ In effect, a “contractual obligation” is necessarily “a matter relating to contract”. However, since the concept of “matters relating to contract” is, according to the ECJ, “not to be understood as covering a situation in which there is no obligation freely assumed by one party towards the other,”¹⁴⁹ it follows that a “contractual obligation” is necessarily a freely assumed obligation by one party towards another. Inversely, a “non-contractual obligation” constitutes a “non-contractual matter” and is not a freely assumed obligation by one party towards the other.

Second, by characterizing *culpa in contrahendo* as non-contractual in the realm of conflict of laws, the European Legislature has chosen to be consistent with the characterization of precontractual liability in matters related to jurisdiction.¹⁵⁰ The non-contractual characterization of *culpa in contrahendo* in the Rome II Regulation pleads in favor of a uniform characterization of all common concepts between the European Regulations on Private International Law.¹⁵¹ Such a uniform characterization is “more natural, simpler and more coherent.”¹⁵² It is also consistent with the Legislature’s objective of providing uniform rules of private international law in the EU.

Third, the uniform characterization of the contractual and non-

¹⁴⁶ Council Regulation 864/2007, *supra* note 37.

¹⁴⁷ Azzi, *supra* note 140, at 1622; Volders, *supra* note 49, at 464.

¹⁴⁸ Pertegas, *supra* note 142, at 181.

¹⁴⁹ Case C-26/91, Jakob Handte & Co. GmbH v Traitements Mécano-chimiques des Surfaces SA, 1992 E.C.R. I-03967.

¹⁵⁰ Azzi, *supra* note 140, at 1622.

¹⁵¹ This view is expressed by Azzi. *See id.*

¹⁵² *Id.*

contractual areas in EPIL does not necessarily hinder the divergent objectives each Regulation aims to achieve. The difference that separates the rules provided by each regulation does not stem from the characterization of the issue, but from the connecting factors that are designated by the Legislature.¹⁵³ It can be argued that while the Brussels I Regulation aims to improve the proper administration of justice, the Rome I and Rome II Regulation aim to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments in the area of obligations.¹⁵⁴ However, these objectives can be met through the choice of connecting factors and not necessarily through characterization.¹⁵⁵ In effect, the state whose courts have jurisdiction by application of the Brussels I Regulation is not necessarily the state whose law governs the issue by application of the rules provided by the Rome I and Rome II Regulations.¹⁵⁶

Fourth, the exclusion of freely assumed obligations by one party towards the other from the scope of Article 12 of the Rome II Regulation aims to protect the parties' expectations as to the applicable law.¹⁵⁷ To hold otherwise, would subject the parties' *existing* contractual relationship to the law of their *contemplated* contractual relationship, by application of the *lex contractus in negotio*. The parties will be unfairly surprised by the application of the law governing another contract to their current contractual relationship. Thus, obligations that arise out of a promise made by one of the parties to the other ought to be excluded from the scope of Article 12 of the Rome II Regulation.

Fifth, the exclusion of freely assumed obligations by one party towards the other from the scope of Article 12 of the Rome II Regulation protects party autonomy by submitting obligations arising out of a promise made by one party towards the other to its own law. In effect, a freely assumed obligation by one party towards another on the occasion of negotiations with a view to the formation of a contract is governed by its own law and

¹⁵³ *Id.*

¹⁵⁴ This objective is stated in Recital 6 of the Rome I and in Recital 6 of the Rome II Regulation. According to both Recitals:

The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought.

Council Regulation 593/2008, *supra* note 38, at para. 6; Council Regulation 864/2007, *supra* note 37, at para. 6.

¹⁵⁵ *Azzi, supra* note 140.

¹⁵⁶ *Id.*

¹⁵⁷ *See infra* Part II(A).

not by the law that governs the ultimate agreement it precedes.

Finally, the concept of a “freely assumed obligation” draws a clear line between contractual obligations and non-contractual obligations. Such a clear-cut criterium is “easily identifiable and reasonably foreseeable for the parties to the dispute.”¹⁵⁸ Moreover, it helps define the concept of “contractual obligations” narrowly which confers upon Article 12 of the Rome II Regulation a larger scope. It is important that this article encompass the vast majority of precontractual liability cases in order to reach uniformity in the realm of conflict of laws between the Member States.

It should be noted that the concept of a “freely assumed obligation by one party towards another” has raised many objections from German scholars who have considered it too narrow for purposes of private international law.¹⁵⁹ In their view, “it is sufficient [in order to characterize the situation as contractual] for one of the parties to create the expectation of fulfillment of certain obligations and for the other party to rely on it, without necessarily freely assuming such obligations.”¹⁶⁰ Despite the German critique of the judgment, the narrow exception provided by the ECJ ought to be upheld. We cannot allow “the characterization of the ensuing precontractual liability to vary according to how the various national laws characterize the issue.”¹⁶¹ The German view on the matter cannot be upheld only because it reflects the German position on characterization. To hold otherwise would violate “the principle that the key concepts of EPIL are given an autonomous meaning,”¹⁶² and would introduce diversity where the Legislature has sought to achieve uniformity. It follows that Article 12 of the Rome II Regulation does not cover liability arising out of the breach of a freely assumed obligation by one party towards the other on the occasion of negotiations with a view to the formation of a contract.

b. The List of Excluded Contractual Obligations

There are two types of freely assumed obligations by one party towards the other on the occasion of negotiations with a view to the formation of a contract: obligations that arise from preliminary agreements, and obligations that arise from sollicitation.

i. Preliminary Agreements

According to Professor Farnsworth, the term “preliminary agreement” can refer to “any agreement, whether or not legally enforceable, that is

¹⁵⁸ Pertegas, *supra* note 142, at 184.

¹⁵⁹ See Thoma, *supra* note 22, at 676; Lagarde, *supra* note 33, at 587.

¹⁶⁰ Thoma, *supra* note 22, at 676; see also Lagarde, *supra* note 33, at 587.

¹⁶¹ PLENDER & WILDERSPIN, *supra* note 22, at 731.

¹⁶² *Id.*

made during negotiations in anticipation of some later agreement that will be the culmination of the negotiations.”¹⁶³ There are various types of preliminary agreements that are concluded on the occasion of negotiations.¹⁶⁴ “These agreements appear under a variety of names including ‘letters of intent,’ ‘commitment letters,’ ‘binders,’ ‘agreements in principle,’ ‘memoranda of understandings,’ and ‘heads of agreement.’”¹⁶⁵ According to Professor J. Schmidt-Szalewski, preliminary agreements can be divided into two categories: preliminary agreements that affect the negotiations, and preliminary agreements that affect the conclusion of the ultimate agreement.¹⁶⁶

Professor J. Schmidt-Szalewski mentions two types of preliminary agreements that affect negotiations: preliminary agreements that organize the negotiations and preliminary agreements that impose on the parties an obligation to negotiate.¹⁶⁷

Preliminary agreements that organize negotiations provide the rules that the parties must follow during the course of dealings prior to the conclusion of a contract.¹⁶⁸ Such preliminary agreements only aim to organize the negotiation procedure and do not determine the outcome of negotiations.¹⁶⁹ Parties can agree to organize their negotiations through specific bargaining rules that impose various obligations at the negotiation stage. The parties can agree to be bound, for example, by the following precontractual obligations: an obligation of confidentiality, an obligation of disclosure, an obligation of exclusivity, an obligation to respect certain deadlines, and an obligation of loyalty.¹⁷⁰

Preliminary agreements that impose an obligation to negotiate can either impose an obligation to enter into negotiation or an obligation to continue negotiations.¹⁷¹ The first type of preliminary agreement encompasses agreements to start negotiations and “preferential agreements.”¹⁷² A “preferential agreement” is an agreement whereby one party agrees to offer the conclusion of a contract exclusively to the other party in the event he decides to enter into negotiations.¹⁷³ It differs from the agreement to start negotiations inasmuch as the first type of preliminary

¹⁶³ Farnsworth, *supra* note 1, at 249–50.

¹⁶⁴ *Id.* at 250.

¹⁶⁵ *Id.*

¹⁶⁶ Joanna Schmidt-Szalewski, *La force obligatoire à l'épreuve des avant-contracts*, RTD Civ. 2000 25, 26, For a similar distinction, see Bollée, *supra* note 67, at 2163–64.

¹⁶⁷ Schmidt-Szalewski, *supra* note 166, at 26; Bollée, *supra* note 67, at 2163–64.

¹⁶⁸ Schmidt-Szalewski, *supra* note 166, at 26.

¹⁶⁹ Bollée, *supra* note 67, at 2163–64.

¹⁷⁰ For a list of such obligations, see Schmidt-Szalewski, *supra* note 166, at 26.

¹⁷¹ Schmidt-Szalewski, *supra* note 166, at 28.

¹⁷² *Id.*

¹⁷³ TERRÉ, *supra* note 4, at 195; Schmidt-Szalewski, *supra* note 166, at 28.

agreement does not confer upon the party a preferential right to the conclusion of the contract.

While preliminary agreements that impose an obligation to enter into negotiation signal the beginning of negotiations, preliminary agreements that impose an obligation to continue the negotiations mark a “pause in the negotiations,”¹⁷⁴ and set out all the terms that have been agreed upon so far by the parties, who agree to continue the negotiations in order to reach the ultimate agreement.¹⁷⁵ Two types of such agreements have been described by Professor Farnsworth: the “agreement with open terms” and the “agreement to negotiate.”¹⁷⁶ The “agreement with open terms” “sets out most of the terms of the deal, and the parties agree to be bound by these terms. But they undertake to continue negotiating on other matters to reach agreement on some terms that are left open but that will be contained in the ultimate agreement.”¹⁷⁷ This agreement has two legal effects on the parties. First, the parties have an obligation to negotiate in good faith and can incur liability if failure to reach agreement on those open terms results from a breach of that obligation.¹⁷⁸ Second, if, “despite continued negotiation by both parties, no agreement is reached on those open terms so that there is no ultimate agreement, the parties are bound by their original agreement, and the other matters are governed by whatever terms a court will supply.”¹⁷⁹ The “agreement to negotiate” is an agreement where the parties “set out specific substantive terms of the deal but . . . do not agree to be bound as to these terms.”¹⁸⁰ In contrast with the preliminary agreement with open terms, the parties are only bound by their obligation to negotiate in good faith.¹⁸¹ Therefore, “if, despite negotiation by both parties, ultimate agreement is not reached, the parties are not bound by any agreement.”¹⁸² However, they might incur liability in the event of a breach of their obligation to negotiate in good faith.¹⁸³

Preliminary agreements that affect the conclusion of the ultimate agreement “bring the parties closer to the ultimate agreement.”¹⁸⁴ These agreements affect the outcome of negotiations by “securing consent to the ultimate agreement.”¹⁸⁵ According to Professor Schmidt-Szalewski, there

¹⁷⁴ TERRÉ, *supra* note 4, at 187.

¹⁷⁵ Bollée, *supra* note 67 at 2163–64; Schmidt- Szalewski, *supra* note 166, at 28.

¹⁷⁶ Farnsworth, *supra* note 1, at 250–51.

¹⁷⁷ *Id.* at 250.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 251.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ TERRÉ, *supra* note 4, at 190.

¹⁸⁵ Schmidt-Szalewski, *supra* note 166, at 31.

are two types of preliminary agreements that affect the conclusion of the ultimate agreement.¹⁸⁶ The first type of preliminary agreement is an “option contract” whereby one party has already given his consent to the ultimate agreement and agrees to hold the offer for a certain period of time while awaiting for the acceptance of the other party.¹⁸⁷ This type of agreement differs from the “preferential agreement” inasmuch as the party who is bound by the latter has only agreed to make an offer to the other party in *the event he decides to enter into negotiations*.¹⁸⁸ The second type of preliminary agreement is an agreement whereby both parties agree to conclude the ultimate agreement but postpone the formation of the contract upon the completion of a particular formality.¹⁸⁹

The applicable law to liability arising out of the breach of a preliminary agreement has not been expressly determined by the Rome I and Rome II Regulations. The Legislature’s silence has given rise to hesitation regarding the applicable law. Four possible solutions have been advanced.

According to the first theory, liability arising out of the breach of a preliminary agreement is excluded from the scope of the Rome I Regulation and falls within the scope of Article 12 of the Rome II Regulation. This interpretation cannot be upheld for two reasons. First, it contradicts the wording of Article 12 of the Rome II Regulation which only applies to “non-contractual obligations.”¹⁹⁰ We have shown that freely assumed obligations by one party towards another on the occasion of negotiations with a view to the formation of a contract are excluded from the scope of Article 12 of the Rome II Regulation.¹⁹¹ Second, this interpretation thwarts the parties’ justified expectations by submitting the contractual relationship that they have established through the conclusion of a preliminary agreement, to the law that governs the contractual relationship that they were contemplating at the time the preliminary agreement was concluded.

A second theory excludes liability arising out of the breach of a preliminary agreement from the scope of the Rome I Regulation and from the scope of the Rome II Regulation. According to this theory, liability arising out of the breach of a preliminary agreement is not covered by either

¹⁸⁶ *Id.*; see also: TERRÉ, *supra* note 4, at 190.

¹⁸⁷ TERRÉ, *supra* note 4, at 191; Schmidt-Szalewski, *supra* note 166, at 31.

¹⁸⁸ TERRÉ, *supra* note 4 at 195.

¹⁸⁹ *Id.* See also Farnsworth *supra* note 1, at 251 where the author describes the “agreement to engage in a transaction” which “involves a commitment by one or both parties to do something such as buy, sell, or lend in the future.” This agreement binds one of the parties to carry through the transaction, but “postpones preparation and execution of the requisite documents and the attendant expense for such items as legal fees, indemnities, and taxes.”

¹⁹⁰ See *supra* Part I(B)(1)(a).

¹⁹¹ See *supra* Part I(B)(1)(a).

one of the two European Regulations, but by the applicable law to contractual obligations in the relevant jurisdiction. This law is determined according to the national conflict-of-law rules of the court where the claim has been brought.¹⁹² This interpretation cannot be upheld for two reasons. First, it reintroduces diversity where the European Legislature has sought to achieve uniformity. Second, the Rome I Regulation did not exclude preliminary agreements from its scope. Article 1 of the Rome I Regulation has excluded “obligations arising out of dealings prior to the conclusion of a contract,”¹⁹³ only in so far as they fall within the material scope of Article 12 of the Rome II Regulation.¹⁹⁴ The Rome I Regulation has only excluded from its scope non-contractual obligations arising out of dealings prior to the conclusion of the contract.

A third theory submits liability arising out of the breach of a preliminary agreement to the rules provided by the Rome I Regulation, but considers that every agreement that aims at the conclusion of another contract should not be viewed as an independent contract but as an “outgrowth of the contemplated contract”¹⁹⁵ and should, therefore, be governed by the applicable law to the contract under negotiation.¹⁹⁶ It is argued that this outcome reaches a coherent result whereby the issues of the existence of the ultimate agreement and of liability arising out of the breach of a preliminary agreement are governed by the same law, namely the law of the contract under negotiation.¹⁹⁷

According to Professor Bollée, incoherence might arise whenever the issues of the existence of the ultimate agreement and of the liability arising out of the breach of a preliminary agreement are governed by two different laws that treat both issues differently.¹⁹⁸ This would be the case, for example, whenever the parties have concluded an option contract, whereby the promisor promises to hold the offer for a certain period of time. The revocation by the promisor of the option contract before the time period elapses raises two issues. First, it raises the issue of whether the acceptance that was issued by the other party after the revocation of the promise has given birth to the ultimate agreement. Second, it raises the issue of the promisor’s liability for unlawful revocation of the promise. The application of the law that governs the ultimate agreement in the first instance, and the application of the law that governs the preliminary agreement in the second instance, will reach incoherent results whenever the two laws treat both issues differently. This would be the case, for example, whenever the law

¹⁹² Lagarde, *supra* note 33, at 584.

¹⁹³ Council Regulation 593/2008, *supra* note 38, art. 1(i).

¹⁹⁴ *See supra* Part I(A)(2)(b).

¹⁹⁵ *Cf.* Haftel, *supra* note 144.

¹⁹⁶ Bollée, *supra* note 67, at 2163.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

that governs the ultimate agreement states that the contract did not come into existence and that the defendant is precontractually liable for unlawfully revoking his promise, while the law that governs the preliminary agreement states that the ultimate agreement has been concluded, thereby exonerating the defendant from liability. In order to eliminate incoherence, authors have suggested submitting all issues to the law that governs the ultimate agreement.¹⁹⁹ This law is applicable to the existence of the ultimate agreement by virtue of Article 10(1) of the Rome I Regulation,²⁰⁰ and should, therefore, also govern liability arising out of the breach of a preliminary agreement.

In spite of this last argument, this third theory cannot be upheld for three reasons. First, this theory is without legal basis. Nothing in the Rome I Regulation indicates that preliminary agreements are to be automatically governed by the applicable law to the ultimate agreement. The application of this law is only possible through a very loose interpretation of the rules provided by Article 4 of the Rome I Regulation.²⁰¹

Second, it thwarts the expectations of the parties who do not expect the law that governs their contemplated contractual relationship to govern their preliminary agreement. Indeed, parties who have concluded a preliminary agreement have shaped their behavior, at the precontractual stage, on the basis of their preliminary agreement and have taken into consideration the applicable law to such an agreement. Unless the parties have specifically submitted their preliminary agreement to the law that governs their ultimate agreement, the former is governed by a law that is to be determined irrespective of the law of the contract under negotiation.

Third, while it is true that, in some situations, the issues of the existence of the ultimate agreement and of liability arising out of the breach of a preliminary agreement are intertwined—especially when the parties have concluded a preliminary agreement that affects the conclusion of the ultimate agreement or a preferential agreement—it is wrong to assume that the application of the law that governs the ultimate agreement to both issues reaches the more appropriate result. On the contrary, it would seem that, in this particular situation, the application of the law that governs the preliminary agreement is the more appropriate law.

First, the application of this law to the liability arising out of the breach of the preliminary agreement is the naturally applicable law to this type of liability. Indeed, the parties who have organized their precontractual relationship through the conclusion of a preliminary agreement expect their behavior to be regulated by the law that governs it. They have relied on the provisions of this law in order to gauge the effects

¹⁹⁹ *Id*; Haftel, *supra* note 144.

²⁰⁰ Council Regulation 593/2008, *supra* note 38, art. 10(1).

²⁰¹ On this interpretation, see Bollée, *supra* note 67, at 2163.

of their actions.

Second, the application of this law to the existence of the contract conforms to the will of the parties. By entering into a preliminary agreement that affects the conclusion of the ultimate agreement, the parties have organized the formation of the future contract. Their preliminary agreement has determined the conditions that are required for the conclusion of the contract. In other words, they have laid down the rules that govern the formation of the ultimate agreement, in their preliminary agreement. Therefore, it is only natural for the law that governs the preliminary agreement to govern the existence of the ultimate agreement. Parties that have entered into a preliminary agreement affecting the conclusion of the ultimate agreement have implicitly displaced the default rule provided by Article 10(1) of the Rome I Regulation.²⁰² The conclusion of a preliminary agreement implies that the parties have chosen to submit the existence of the ultimate agreement to the law that governs the preliminary agreement itself. In effect, the conclusion of a preliminary agreement that affects the conclusion of the ultimate agreement amounts to an implicit choice of law by the parties: by entering into such a preliminary agreement, the parties have implicitly chosen to displace the application of the law of the contract under negotiation, and have submitted the existence of the ultimate agreement to the law that governs their preliminary agreement.²⁰³ To hold otherwise would go against the principle of party autonomy which allows the parties to freely organize their precontractual relationship, and which, according to Recital 11 of the Rome I Regulation, constitutes “one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations.”²⁰⁴ For the above-mentioned reasons, we cannot subscribe to the automatic application of the law of the contract under negotiation to the liability arising out of the breach of a preliminary agreement.

A fourth possible theory would be to submit liability arising out of the breach of a preliminary agreement to the law that governs the preliminary agreement itself. Despite the wording of Article 1 of the Rome I Regulation, this law is determined on the basis of the rules provided by the Rome I Regulation.²⁰⁵ Indeed, Article 1 of the Rome I Regulation only

²⁰² According to this provision, “the existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid.” Council Regulation 593/2008, *supra* note 38, art. 10(1).

²⁰³ Article 3(1) of the Rome I Regulation states that the choice of law by the parties can either “be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case.” *Id.* art. 3 (1). It follows that whenever the parties have concluded a preliminary agreement, the circumstances of the case clearly demonstrate that they have chosen to submit the existence of the ultimate agreement to the law that governs their preliminary agreement.

²⁰⁴ *Id.* at para. 11.

²⁰⁵ See Thoma, *supra* note 22, at 678.

excludes from its scope precontractual liability as it is defined by Article 12 of the Rome II Regulation, and did not exclude from its scope liability arising out of the breach of a preliminary agreement. Therefore, the applicable law to liability arising out of the breach of a preliminary agreement is either chosen by the parties in the preliminary agreement itself, or determined on the basis of Article 4 of the Rome I Regulation.

Whenever the parties have inserted a choice of law clause in their preliminary agreement, the law that is chosen by the parties governs the liability arising out of the breach of the preliminary agreement.²⁰⁶

Whenever the parties have not inserted a choice of law clause in their preliminary agreement, this law is determined on the basis of Article 4 of the Rome I Regulation. This Article provides for the application of the law of the habitual residence of the debtor of the characteristic performance of the contract, unless it is clear from all the circumstances of the case that the contract is manifestly more closely connected to the law of another country, or unless the debtor of the characteristic performance of the contract cannot be determined.²⁰⁷ In order to determine the law that governs liability arising out of the breach of a preliminary agreement, we must distinguish the situation where the debtor of the characteristic performance of the preliminary agreement cannot be determined from the situation where the debtor of the characteristic performance of the preliminary agreement can be determined.

Whenever the debtor of the characteristic performance of the preliminary agreement cannot be determined, the applicable law is determined on the basis of the escape clause provided by Article 4(4) of the Rome I Regulation. This would be the case, for example, whenever the parties have concluded a preliminary agreement that organizes negotiations.²⁰⁸ In this situation, both parties agree to be bound by the same types of obligations and it is not possible to determine the debtor of the characteristic performance of the contract. According to Article 4(4) of the Rome I Regulation, “the contract shall be governed by the law of the country with which it is most closely connected.”²⁰⁹ It should be noted that the employment of this escape clause, in this situation, will most likely lead to the application of the law that governs the ultimate agreement. Recital 21 of the Rome I Regulation states that

[i]n the absence of choice, where the applicable law cannot be determined either on the basis of the fact that the contract can be categorized as one of the specified types or as being the law of the country of habitual residence of the party required to effect the

²⁰⁶ Council Regulation 593/2008, *supra* note 38, art. 3.

²⁰⁷ For the text of this provision, see *infra* note 264.

²⁰⁸ Bollée, *supra* note 67, at 2163.

²⁰⁹ Council Regulation 593/2008, *supra* note 38, art. 4(4).

characteristic performance of the contract, the contract should be governed by the law of the country with which it is most closely connected. In order to determine that country, account should be taken, *inter alia*, of whether the contract in question has a very close relationship with another contract or contracts.”²¹⁰

In effect, courts will most likely find that the preliminary agreement has a very close relationship to the ultimate agreement, leading, in most cases, to the application of the law that governs the ultimate agreement. However, the application of the law that governs the ultimate agreement is not automatic and depends on a factual analysis of the relevant contacts of the particular case. Indeed, Recital 21 of the Rome I Regulation only provides guidelines that help courts determine the relevant contacts and does not impose the application of the law that governs the ultimate agreement.

Whenever the debtor of the characteristic performance of the preliminary agreement can be determined, the law that governs the preliminary agreement can either coincide with the law that governs the ultimate agreement or not. The law that governs the preliminary agreement does not coincide with the law that governs the ultimate agreement whenever the debtor of the characteristic performance of the preliminary agreement is not the debtor of the characteristic performance of the ultimate agreement.²¹¹ This would be the case, for example, whenever the prospective buyer of goods has promised to hold his offer to buy the goods for a certain period of time in an option contract. In this situation, the debtor of the characteristic performance of the option contract is the prospective buyer, while the debtor of the characteristic performance of the ultimate sale agreement is the prospective seller.

The law that governs the preliminary agreement coincides with the law that governs the ultimate agreement in two situations. First, it coincides with the law of the ultimate agreement whenever the debtor of the characteristic performance of the preliminary agreement is the debtor of the characteristic performance of the ultimate agreement. This would be the case, for example, whenever the parties have concluded an agreement with open terms, whereby the characteristic performance of this agreement coincides with the characteristic performance of the ultimate agreement.²¹² Second, the law that governs the preliminary agreement coincides with the law of the ultimate agreement whenever the employment of the escape clause provided by Article 4(3) of the Rome I Regulation leads to the application of the law of the ultimate agreement. According to this provision, “where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that

²¹⁰ *Id.* para 21 (emphasis added).

²¹¹ Unless both debtors share the same place of habitual residence.

²¹² Bollée, *supra* note 67, at 2163.

indicated in paragraphs 1 or 2, the law of that other country shall apply”.²¹³ It should be noted that the employment of the escape clause will, in most cases, lead to the application of the law that governs the ultimate agreement. According to Recital 20 of the Rome I Regulation,

where the contract is manifestly more closely connected with a country other than that indicated in Article 4(1) or (2), an escape clause should provide that the law of that other country is to apply. In order to determine that country, account should be taken, *inter alia*, of whether the contract in question has a very close relationship with another contract or contracts.”²¹⁴

However, the application of this law is not automatic. The employment of the escape clause is exceptional and can lead to the application of a different law whenever the factual situation is more closely connected to another law. Recital 20 of the Rome I Regulation only provides indications as to the relevant contacts that ought to be considered and does not impose the application of the law of the ultimate agreement.

ii. Pollicitation

The wording of the *Tacconi* holding seems to suggest that “whilst Article 5(1) of the Brussels I Regulation requires an obligation freely assumed by one party towards the other, it does not require a contract to have been concluded.”²¹⁵ The concept of a freely assumed obligation by one party towards the other does not only encompass obligations that arise out of a concluded agreement between the parties, but seems to encompass obligations arising out of a unilateral act as well. “Unilateral acts may be generally defined as acts that are the manifestation of the will of one person.”²¹⁶ A unilateral act can be a source of obligations whenever one person has manifested his will to be bound by a promise that has not been accepted by the other. It differs from a contract inasmuch as the latter requires a meeting of the minds, whereby one of the parties promises to do something to the other party who accepts the former’s promise.

A literal interpretation of the concept of a freely assumed obligation by one party towards the other would exclude liability that stems from the breach of an obligation arising out of a unilateral act from the scope of the Rome II Regulation.²¹⁷ Moreover, it would seem that “unilateral acts

²¹³ Article 4(3) of Council Regulation 593/2008, 2008 O.J. (L 177) 6 (EU).

²¹⁴ Recital 20 of Council Regulation 593/2008, 2008 O.J. (L 177) 6 (EU).(emphasis added).

²¹⁵ Scott, *supra* note 113, at 62.

²¹⁶ Monika Pauknerová, *Law Applicable to Unilateral Juridical Acts and Uniform Conflict-of-law Rules*, 6 J. of COMP. L. 125, 126 (2011).

²¹⁷ In support of this view, see Matthias Lehmann, *Der Anwendungsbereich der Rom I—Verordnung—Vertragsbegriff und vorvertragliche Rechtsverhältnisse*, in EIN NEUES

intended to have legal effect relating to an existing or contemplated contract” fall within the scope of the Rome I Regulation.²¹⁸ Indeed, Article 11 of the Rome I Regulation expressly provides the applicable law to the formal validity of such acts.²¹⁹ Thus, it appears that liability that stems from the breach of an obligation arising out of a unilateral act that is undertaken at the precontractual stage and that is intended to have a legal effect on the contemplated contract is excluded from the scope of Article 12 of the Rome II Regulation. This type of liability is governed by the rules provided by the Rome I Regulation.²²⁰

At the negotiation stage, a unilateral act intended to have legal effect on the contemplated contract constitutes a “pollicitation.” Pollicitation can be defined as a type of offer whereby the pollicitor promises to hold the offer for a certain period of time. Pollicitation differs from a regular offer because it is characterized by the promise of the pollicitor to hold the offer for a certain period of time. It also differs from an option contract because the pollicitor does not seek the offeree’s consent as to the obligation to hold the offer. It is a unilateral act that binds the pollicitor in the absence of an agreement between the two parties.²²¹

While the revocation of the offer falls within the scope of Article 12 of the Rome II Regulation,²²² the revocation of a pollicitation is not covered by this provision. The obligation arising out of a pollicitation cannot be characterized as non-contractual because it is freely assumed by one party towards the other. Thus, liability arising out of the breach of such an obligation falls within the scope of the Rome I Regulation.

The applicable law to liability arising out of the breach of a

INTERNATIONALES VERTRAGSRECHT FÜR EUROPA 28 (Franco Ferrari & Stefan Leible, eds., 2007).

²¹⁸ See Pauknerová, *supra* note 216, at 132.

²¹⁹ According to Article 11(3) of the Rome I Regulation,

a unilateral act intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the formal requirements of the law which governs or would govern the contract in substance under this Regulation, or of the law of the country where the act was done, or of the law of the country where the person by whom it was done had his habitual residence at that time.

Council Regulation 593/2008, *supra* note 38, art. 11.

²²⁰ In support of this view, see Lehmann, *supra* note 217, at 28.

²²¹ Many French scholars argue for the existence of pollicitation. See, e.g., Marie-Laure Izorche, *L’avènement de l’engagement unilatéral en droit privé contemporain* (1995) (unpublished thesis Aix-en-Provence) (on file with author); Jacques Flour et al., *LES OBLIGATIONS*, 1: *L’ACTE JURIDIQUE* 143 (E. Savaux & Armand Colin, eds., 14th ed. 2010). It is already recognized by Article 179 of the Lebanese Code of Obligations and Contracts, which clearly distinguishes the offer from pollicitation. See Code of Obligations and Contracts 1932, art. 179.

²²² See *infra* Part I(B)(2).

pollicitation has not been expressly determined by the Rome I Regulation. We must determine this law through the application of the general rules provided by the Rome I Regulation. However, this law cannot be chosen unilaterally by the pollicitor. A choice of law clause is only valid when both parties have agreed on the applicable law.

It follows that the applicable law to liability arising out of the breach of a pollicitation is determined on the basis of Article 4 of the Rome I Regulation. In principle, liability arising out of the breach of pollicitation is governed by the law of the habitual residence of the pollicitor, unless the application of this law is displaced in favor of the application of the law of the contract under negotiation.

Liability arising out of the breach of a pollicitation is, in principle, determined on the basis of Article 4(2) of the Rome I Regulation.²²³ The implementation of this rule leads to the application of the law of the habitual residence of the debtor of the characteristic performance of the unilateral act. Because the promise to hold the offer is the characteristic performance of the pollicitation, liability arising out of the breach of a pollicitation would be governed by the law of the habitual residence of the pollicitor. It follows that liability arising out of the breach of the pollicitation is governed by the law that governs the pollicitation itself, irrespective of the law that governs the contemplated contract. The absence of an agreement between parties does not preclude the application of the Rome I Regulation to the pollicitation.

Technically, the rules provided by the Rome I Regulation are perfectly compatible with a freely assumed obligation by one party towards the other that does not arise out of an agreement between the two parties.²²⁴ However, the application of the law that governs the pollicitation incurs two criticisms. First, it might lead to incoherent results whenever the revocation of the pollicitation affects the existence of the contemplated contract and the defendant's precontractual liability.²²⁵ In this situation, the existence of the contract would be governed by the law of the contract under negotiation, while liability arising out of the breach of the pollicitation is governed by the law of the habitual residence of the pollicitor. Incoherence might arise whenever the two laws treat the issue of the existence of the contract differently. Second, the application of the law of the pollicitation

²²³ For the text of this provision, see *infra* note 264.

²²⁴ See Lehman, *supra* note 217, at 132. In support of the view that the rules provided by the Rome Convention on the applicable law to contractual obligations do not require the existence of an agreement, see Scott, *supra* note 113, at 66. It should be noted, however, that the pollicitor cannot unilaterally submit the pollicitation to the law of his choice. According to Article 3 of the Rome I Regulation, “[a] contract shall be governed by the law chosen by the parties.” Council Regulation 593/2008, *supra* note 38, art. 3(1). Thus, the choice of law clause needs to be accepted by the other party.

²²⁵ See *infra* Part II(A)(2)(a)(i).

might be unfair to the other party who did not foresee the application of the law of a unilateral act to which he did not consent.

Whenever the application of the law of the habitual residence of the pollicitor leads to inappropriate results, it would be more appropriate to displace the application of the law of the habitual residence of the pollicitor through the use of the escape clause provided by Article 4(3) of the Rome I Regulation, and to submit liability arising out of the breach of the pollicitation to the law of the contemplated contract. While the escape clause provided by Article 4(3) of the Rome I Regulation does not allow the automatic application of the law of the contemplated contract, this law ought to be designated for three reasons. First, Article 11(3) of the Rome I Regulation designates the “law which governs or would govern the contract in substance under this Regulation”²²⁶ as one of the applicable laws to the formal validity of “unilateral act intended to have legal effect relating to an existing or contemplated contract.”²²⁷ Nothing precludes us from extending, through the use of the escape clause provided by Article 4(3) of the Rome I Regulation, the application of this law to the liability arising out of the breach of a pollicitation.²²⁸ In fact, it has been argued that “unless otherwise provided in Rome I, the *lex causae* governs any issue in a contract, at least of private law character.”²²⁹ Second, the application of this law helps eliminate incoherence by avoiding *dépeçage*.²³⁰ In effect, the issues of contract existence and of precontractual liability would be governed by the same law whenever the pollicitor has revoked his pollicitation. Third, the application of the law of the contemplated contract would help submit all types of precontractual liability that do not arise out of the breach of a preliminary agreement to the same law. In effect, liability arising out of the breach of a pollicitation and liability arising out of the revocation of an offer are, in principle, governed by the same law.²³¹

²²⁶ Council Regulation 593/2008, *supra* note 38, art. 11(3).

²²⁷ *Id.* See also *infra* note 254.

²²⁸ See also Recital 20 of Council Regulation 593/2008, which states that

where the contract is manifestly more closely connected with a country other than that indicated in Article 4(1) or (2), an escape clause should provide that the law of that other country is to apply. In order to determine that country, account should be taken, *inter alia*, of whether the contract in question has a very close relationship with another contract or contracts.”

Council Regulation 593/2008, *supra* note 38, para. 20 (emphasis added).

²²⁹ Pauknerová, *supra* note 216, at 132.

²³⁰ See *infra* Parts II(A)(2)(a)(i)–(ii).

²³¹ It should be noted, however, that although liability arising out of the revocation of an offer and liability arising out of the breach of a pollicitation are, in principle, governed by the same law, there are still notable differences between the two situations. Indeed, the applicable law that governs liability arising out of the revocation of the offer is determined on the basis of Article 12 of the Rome II Regulation, while liability arising out of the breach

It follows that Article 12 of the Rome II Regulation does not cover freely assumed obligations by one party towards the other on the occasion of the negotiations. However, that does not mean that Article 12 covers all types of non-contractual obligations that arise at the negotiation stage. It only covers matters presenting a direct link with the dealings prior to the conclusion of a contract.

2. *Culpa in Contrahendo Only Encompasses Non-Contractual Obligations Presenting a Direct Link with the Dealings Prior to the Conclusion of a Contract*

In order to determine the material scope of Article 12 of the Rome II Regulation, we have to construe the wording of this provision in accordance with Recital 30 of the same Regulation. According to Recital 30 of the Rome II Regulation,

Culpa in contrahendo for the purposes of this Regulation is an autonomous concept and should not necessarily be interpreted within the meaning of national law. It should include the violation of the duty of disclosure and the breakdown of contractual negotiations. Article 12 covers only non-contractual obligations presenting a direct link with the dealings prior to the conclusion of a contract. This means that if, while a contract is being negotiated, a person suffers personal injury, Article 4 or other relevant provisions of this Regulation should apply.²³²

In light of this Recital, we are able to determine which non-contractual obligations are excluded from the scope of Article 12 of the Rome II Regulation, and which non-contractual obligations fall within its scope.

a. *The Excluded Non-Contractual Obligations*

Recital 30 of the Rome II Regulation expressly excludes from the scope of Article 12 of the Rome II Regulation the situations where the negotiations only provide the contextual frame for the injury.²³³ According to this Recital, a physical injury that occurs at the negotiation stage is not directly linked with the dealings prior to the conclusion of a contract. In this situation, the defendant's liability cannot be characterized as precontractual, for the purposes of the Rome II Regulation, but falls within the scope of the general rule provided by Article 4 of the Rome II Regulation.

of a pollicitation is determined on the basis of the Rome I Regulation, which means that the first law might be determined on the basis of Article 12 (2) whenever the *lex contractus in negotio* cannot be determined.

²³² Council Regulation 864/2007, *supra* note 37, at para. 30.

²³³ DICKINSON, *supra* note 48, at 526; Thoma, *supra* note 22, at 679; Volders *First Appraisal*, *supra* note 49, at 466.

By excluding this type of liability from the scope of Article 12 of the Rome II Regulation, the European Legislature, no doubt, had in mind the *Bananenschale* case of the German Supreme Court,²³⁴ in which the court held that a customer who had slipped on a banana skin in a department store is entitled to compensation under the doctrine of *culpa in contrahendo*.²³⁵

b. The Covered Non-Contractual Obligations

The concept of a non-contractual obligation “arising out of dealings prior to the conclusion of a contract” and presenting a direct link with such dealings has not been defined in EPIL. Pending a definition of this concept, we believe that Article 12 of the Rome II Regulation covers two types of situations: (1) liability arising out of a conduct that affects the formation of the contract under negotiation; and (2) liability arising out of the breach of a non-contractual duty or obligation whose existence is due to the dealings prior to the conclusion of a contract.

i. *Liability Arising Out of a Harmful Conduct That Affects the Formation of the Contract Under Negotiation*

Article 12 of the Rome II Regulation covers liability that arises out of a harmful conduct that affects the conclusion of the contract. This conduct, which occurs prior to the conclusion of the contract, affects the formation of the contract in two ways. It can either provoke the formation of the contract or prevent it from entering into existence.²³⁶

Culpa in contrahendo that provokes the formation of the contract encompasses two situations. First, it encompasses the situation where *culpa in contrahendo* provokes the conclusion of an invalid contract. This is the case, for example, whenever the contract has been formed through duress, misrepresentations or, because of the “breach of a duty to disclose.”²³⁷ In this situation, the contract would not have come into existence had the harmful conduct not occurred.

Second, it encompasses the situation where the defendant’s conduct has affected the substantial terms of the contract without necessarily leading to its invalidity. In this situation, the contract would have still come into existence had the harmful conduct not occurred, albeit on different terms.

²³⁴ See PRECONTRACTUAL LIABILITY: REPORTS TO THE XIIITH CONGRESS, *supra* note 1, at 21.

²³⁵ DICKINSON, *supra* note 48, at 527; Volders, *First Appraisal*, *supra* note 49, at 466, note 30; Lagarde, *supra* note 33, at 591–92.

²³⁶ For a similar distinction, see J. Schmidt, *La sanction de la faute précontractuelle*, RTD Civ. 1974 46; PLENDER & WILDERSPIN, *supra* note 22, at 732. See also DICKINSON, *supra* note 48, at 529, where the author distinguishes between “situations in which a contract has actually been concluded” from situations where the “claim is based on conduct of the defendant that has prevented a contract from being concluded.”

²³⁷ DICKINSON, *supra* note 48, at 526.

The defendant's conduct has provoked the conclusion of a contract that is less favorable to the plaintiff. This situation encompasses the violation of a duty to disclose whereby full disclosure would have led to the conclusion of a different contract. It also encompasses the situation whereby misrepresentations or duress do not lead to the invalidity of the contract but to an alteration of its terms.²³⁸

Culpa in contrahendo that prevents the formation of the contract includes situations whereby the contract did not come into existence because of the defendant's conduct. This is the case whenever the defendant has unlawfully revoked his offer (Example 2 of the Introduction), or has broken off negotiations in bad faith (Examples 3 and 4 of the Introduction). This last situation is provided by Recital 30 of the Rome II Regulation, which states that Article 12 of the same Regulation should include "the breakdown of contractual negotiations."²³⁹

ii. *Liability Arising Out of the Violation of Non-Contractual Duties and Obligations Whose Existence Is Due to the Dealings Prior to the Conclusion of a Contract*

In some instances, one of the laws in conflict will place non-contractual duties and obligations upon the parties at the negotiation stage. This is the case, for example, whenever one of the laws in conflict places upon the parties a precontractual duty to disclose, a precontractual duty of confidentiality, or a precontractual duty of good faith. Liability arising out of the breach of such duties and obligations is covered by Article 12 of the Rome II Regulation.

These precontractual duties and obligations are characterized by two specific traits. First, they are automatically placed upon parties who enter into negotiations. Their existence is linked to that of dealings prior to the conclusion of the contract. Such duties and obligations ought to be distinguished from obligations arising out of preliminary agreements. While an obligation that arises out of a preliminary agreement draws its existence from the preliminary agreement that binds the parties, an obligation arising from the mere fact that parties have entered into a negotiation only exists because the parties have established a precontractual relationship.

Second, in some exceptional instances, the lifespan of some of those duties and obligations exceeds the timeframe of the negotiations. In effect, some of these duties and obligations come into existence at the negotiation stage but continue to be placed on the negotiating parties even after the negotiations have ended. This is the case, for example, whenever national

²³⁸ See Schmidt, *supra* note 1, at 46.

²³⁹ Council Regulation 864/2007, *supra* note 37, at para. 30.

laws place upon the parties a precontractual obligation of confidentiality.²⁴⁰ While this obligation comes into existence at the negotiation stage, it continues to bind the parties after the negotiations have ended. Thus, liability arising out of the breach of a precontractual obligation of confidentiality falls within the scope of Article 12 of the Rome II Regulation, even though such a breach might have occurred after the negotiations have been broken off or after the contract under negotiation has been concluded.

While this solution can seem a bit unorthodox, it ought to be upheld for two reasons. First, it is in accordance with the wording of Article 12 of the Rome II Regulation. Indeed, this provision covers “non-contractual obligations arising out of dealings prior to the conclusion of a contract.”²⁴¹ The Legislature did not limit the material scope of this article to liability arising out of a harmful conduct that occurs prior to the conclusion of a contract. The application of Article 12 of the Rome II Regulation can be triggered by the breach of a non-contractual obligation that has come into existence during the parties’ negotiations even though such an obligation has been breached at a later time. Second, this solution helps achieve unity and predictability by submitting all aspects of *culpa in contrahendo* to the same law. It should, however, be noted that this situation, is, to our knowledge, the only situation whereby the defendant’s precontractual liability does not arise out of a conduct that occurs during the negotiations of a contract.

In summary, there are two types of precontractual liability in EPIL: a contractual type of liability and a non-contractual type of precontractual liability. Article 12 of the Rome II Regulation only covers two types of non-contractual precontractual liability. First, it covers liability arising out of a conduct that has either provoked or prevented the formation of the contract under negotiation. Second, it covers, liability arising out of the breach of a non-contractual precontractual duty or obligation that has come into existence at the negotiation stage. These two types of non-contractual liability are governed by a law that is determined on the basis of a contractual connecting factor.

²⁴⁰ See, e.g., Wet betreffende de precontractuele informatie bij commerciële samenwerkingsovereenkomsten [Law on pre contractual information in commercial cooperation agreements], Dec. 19, 2005, Belgisch staatsblad [B.S.] [Official Gazette of Belgium], Jan. 18, 2006, available in English at http://www.eff-franchise.com/IMG/pdf/Belgium_-_Franchise_Legislation_on_Precontractual_.pdf (providing, under Article 6, “the parties are held to the confidentiality of the information that they obtain in view of the conclusion of the agreement of commercial partnership, and may not use this information, directly or indirectly, outside of the agreement of commercial partnership to be concluded.”).

²⁴¹ Council Regulation 864/2007, *supra* note 37, art 12(1).

II. THE CONTRACTUAL CONNECTING FACTOR OF *CULPA IN CONTRAHENDO* IN EPIL

While the controversy caused by the non-contractual characterization of precontractual liability is lively,²⁴² its scope is limited by the Legislature's choice of applicable law.²⁴³ Two sets of rules have been provided by the Legislature in Article 12 of the Rome II Regulation: a general rule and a subsidiary set of connecting factors.²⁴⁴ These rules are not mandatory and can be displaced by the parties who are given the possibility to submit their precontractual liability to a law of their choice.²⁴⁵ Article 14 of the Rome II Regulation allows the parties to submit non-contractual obligations to the law of their choice "by an agreement entered into after the event giving rise to the damage occurred" or "where all the parties are pursuing a commercial activity; by an agreement freely negotiated before the event giving rise to the damage occurred."²⁴⁶ Because *culpa in contrahendo* is a type of non-contractual liability that falls within the scope of the Rome II Regulation on the applicable law to non-contractual obligations,²⁴⁷ the parties can, on the basis of Article 14 of the Rome II Regulation, decide to submit claims arising out of *culpa in contrahendo* to a law that they have chosen.

This possibility is available to the parties whenever either one of the following two conditions is met. First, the parties have the possibility to submit claims arising out of *culpa in contrahendo* to the law of their choice, after the harmful conduct giving rise to the damage has occurred. In this situation, the parties will agree to submit their precontractual relationship to a retrospective law that will govern a situation that has occurred prior to the party's agreement on the choice of law. Second, the parties can submit their precontractual relationship to the law of their choice at the beginning of their negotiations. This possibility is only open to parties that are pursuing a commercial activity through their negotiations. This second option is very convenient to sophisticated parties who are negotiating a complex business transaction over a long period of time.²⁴⁸

In effect, Article 12 of the Rome II Regulation provides the default

²⁴² This characterization has been severely criticized by German scholars. Cf. Thoma, *supra* note 22, at 676–78; Lagarde, *supra* note 33, at 587.

²⁴³ Lagarde, *supra* note 33, at 591.

²⁴⁴ Volders, *First Appraisal*, *supra* note 49, at 466; PLENDER AND WILDERSPIN, *supra* note 22, at 736; Lagarde, *supra* note 33, at 589–91; Thoma, *supra* note 22, at 681; Olivera Boskovic, *Règlement Rome II (Obligations non contractuelles)*, RDI 2010, 95, at 95–97.

²⁴⁵ See Pierre-Yves Gautier, *Les aspects internationaux de la négociation*, RTD Com. 493 (1998); Olivera Boskovic, *L'autonomie de la volonté dans le règlement Rome II*, D. 1639 (2009); Thoma, *supra* note 22, at 682.

²⁴⁶ Council Regulation 864/2007, *supra* note 37, art. 14.

²⁴⁷ See *supra* Part I.

²⁴⁸ See Gautier, *supra* note 245.

rules that apply to claims arising out of *culpa in contrahendo* whenever the parties did not choose to submit such claims to the law of their choice. The first limb of Article 12 of the Rome II Regulation provides the *general rule* applicable to claims arising out of *culpa in contrahendo*. According to Article 12(1) of the Rome II Regulation

the law applicable to a non-contractual obligation arising out of dealings prior to the conclusion of the contract, regardless of whether the contract has been concluded or not, shall be the law that applies to the contract or that would have been applicable to it had it been entered into.²⁴⁹

By inserting this provision, the European Legislature has chosen to submit claims arising out of *culpa in contrahendo* to the *lex contractus in negotio*, which is the law of the contract under negotiation, instead of the *lex delicti*, which is the law normally applicable to non-contractual obligations.²⁵⁰

The second limb of Article 12 of the Rome II Regulation provides an *auxiliary* rule, which determines *subsidiary* torts contacts that apply whenever the *lex contractus in negotio* cannot be determined.

A. The General Application of the *Lex Contractus in Negotio* to Claims
Arising out of *Culpa in Contrahendo*

The first limb of Article 12 of the Rome II Regulation submits claims arising out of *culpa in contrahendo* to the *lex contractus in negotio*, which is the law of the contract under negotiation.²⁵¹ Because the *lex contractus in negotio* governs a non-contractual situation, it plays the role that is usually assigned to the *lex delicti*. In effect, the European Legislature has *borrowed* the connecting factor of another EPIL category. Through this course of action, the European Legislature was able to maintain the non-contractual characterization of *culpa in contrahendo* while determining the applicable law on the basis of a contractual connecting factor.

In order to evaluate the Legislature's choice to submit claims arising out of *culpa in contrahendo* to the *lex contractus in negotio*, we must, first, determine the applicable *lex contractus in negotio*.

1. *The Determination of the Lex Contractus in Negotio*

Paragraph 1 of Article 12 of the Rome II Regulation states that:

²⁴⁹ Council Regulation 864/2007, *supra* note 37.

²⁵⁰ The *lex contractus in negotio* is the law of the contract under negotiation.

²⁵¹ This idea was initially suggested in France by Pierre Bourel. See PIERRE BOUREL, LES CONFLITS DE LOI EN MATIÈRE D'OBLIGATIONS EXTRA-CONTRACTUELLES (1961). It has also been suggested by the Max Planck Institute Max Planck Institute for Foreign Private and Private International Law. See MAX PLANCK INST., COMMENTS, *supra* note 52, at 96.

The law applicable to a non-contractual obligation arising out of dealings prior to the conclusion of a contract, regardless of whether the contract was actually concluded or not, shall be the law that applies to the contract or that would have been applicable to it had it been entered into.²⁵²

Although Article 12(1) of the Rome II Regulation does not distinguish between the situation where the contract under negotiation was actually concluded and the situation where the contemplated contract was not entered into, the determination of the *lex contractus in negotio* is greatly affected by the outcome of the parties' negotiations. Depending on whether the contract under negotiation was actually concluded or not, the *lex contractus in negotio* will be the law of the concluded contract—the *lex contractus finalis*—or the law of the putative contract—the *lex contractus putativus*.

a. The *Lex Contractus in Negotio* is the *Lex Contractus Finalis*

Where *culpa in contrahendo* does not prevent the formation of the contract, the applicable law to the precontractual liability arising out of the defendant's conduct is the law that governs the concluded contract. This is usually the case when the defendant's behavior has wrongfully provoked the formation of an invalid contract or has altered some of its terms (see Example 1 of the Introduction). This is the case, for example, when the contract has been concluded through misrepresentations, breach of a duty to disclose certain material facts, intimidation or duress.²⁵³ Whenever this situation arises, the law that governs the defendant's precontractual liability is the law that governs the concluded contract or the *lex contractus finalis*.²⁵⁴

The *lex contractus finalis* is determined by reference to the Rome I Regulation on the applicable law to contractual obligations. Unless the concluded contract is a contract of carriage, a consumer contract, an insurance contract or an employment contract,²⁵⁵ the *lex contractus finalis* is

²⁵² Council Regulation 864/2007, *supra* note 37, art. 12(1).

²⁵³ See DICKINSON, *supra* note 48 at 526; Schmidt, *supra* note 1, at 46.

²⁵⁴ It should be noted that Article 10(1) of the Rome I Regulation submits the validity of the contract to the law which would govern it if the contract were valid. According to Article 10(1) of the Rome I Regulation, "[t]he existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid." Council Regulation 593/2008, *supra* note 38, art. 10(1).

²⁵⁵ The law that governs these contracts is determined on the basis of special rules provided by Articles 5–8 of the Rome I Regulation. According to Plender & Wilderspin,

the rules applicable to the categories of contracts falling within the scope of those articles derogate both from art.3 of the Regulation, since they restrict party autonomy to some extent, and art.4, since each of them establishes a different

either directly chosen by the parties or determined by Article 4 of the Rome I Regulation in the absence of such a choice.

i. The Lex Contractus Finalis is Chosen by the Parties

According to Article 3 of the Rome I Regulation, the *lex contractus* can be chosen by the parties.²⁵⁶ This situation ought to be distinguished from the one described by Article 14 of the Rome II Regulation, which authorizes the parties to submit the non-contractual obligation arising out of precontractual liability to the law of their choice.²⁵⁷ In the first situation, the parties have chosen to submit their contractual relationship to the law of their choice. In the second situation, the parties have specifically submitted their precontractual relationship to the law of their choice.²⁵⁸ The distinction between the two afore-mentioned situations is fundamental. While Article 12 of the Rome II Regulation governs the parties' precontractual relationship in the first instance, its application is excluded in the second scenario. It should be noted that the parties have the possibility to submit their precontractual relationship to one law, and their contractual relationship to another.²⁵⁹

method for selecting the applicable law in the absence of party choice.

PLENDER & WILDERSPIN, *supra* note 22, at 176–77.

²⁵⁶ Article 3(1) of the Rome I Regulation states that

A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.

Council Regulation 593/2008, *supra* note 38, art. 3. On party autonomy in the Rome I Regulation, see PLENDER & WILDERSPIN, *supra* note 22, at 176–77.

²⁵⁷ According to Article 14(1) of the Rome II Regulation

The parties may agree to submit non-contractual obligations to the law of their choice:

(a) by an agreement entered into after the event giving rise to the damage occurred;

or

(b) where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred.

The choice shall be expressed or demonstrated with reasonable certainty by the circumstances of the case and shall not prejudice the rights of third parties.

Council Regulation 864/2007, *supra* note 37, art. 14(1).

²⁵⁸ See Gautier, *supra* note 245; Boskovic, *supra* note 245.

²⁵⁹ See Bollée, *supra* note 67, at 2163.

The law that is chosen by the parties to govern their contractual relationship raises two issues whenever its application is extended to their precontractual relationship.

First, the choice of law by the parties raises the issue of the validity of the choice of law clause. Whenever *culpa in contrahendo* has provoked the conclusion of the contract through misrepresentation or duress, it is very likely that it has also provoked the conclusion of the choice of law clause. In such a case, the issue of the validity of the choice of law clause must be resolved prior to the determination of the applicable law to precontractual liability. According to Article 3(5) of the Rome I Regulation, this issue is to be resolved in accordance with the provisions of Articles 10, 11, and 13 of the same Regulation.²⁶⁰

Second, an unresolved issue arises whenever the parties have chosen to submit different parts of the concluded contract to different laws. Article 3(1) of the Rome I Regulation²⁶¹ allows voluntary *dépeçage*²⁶² of the contract by the parties who can agree to submit only part of the contract to the law of their choice. According to this provision, the parties can choose a law to govern one part of their contract while the other part will be governed by another law that is either chosen by them or left undetermined. Whenever the parties have resorted to the voluntary *dépeçage* of the contract, an issue arises as to the determination of the law that ought to govern their precontractual relationship.

The Rome II Regulation does not provide the answer to this question. It would seem that this issue can be resolved in one of three ways. The first solution would be to disregard the parties' choice of law whenever they submit their contract to different laws, and apply the rules provided by Article 4 of the Rome I Regulation, which determine the law that governs the concluded contract in the absence of a choice of law by the parties. The second solution would be to submit precontractual liability to the law that governs the existence or the validity of the concluded contract because of the very close correlation between the contract's validity and the defendant's precontractual liability.²⁶³ The third possibility would be to consider that the *lex contractus in negotio* cannot be determined and to determine the applicable law to *culpa in contrahendo* on the basis of Article 12(2) of the Rome II Regulation.

²⁶⁰ “The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 10, 11 and 13.” Council Regulation 593/2008, *supra* note 38, art. 3(5).

²⁶¹ See DICKINSON, *supra* note 48, at 526; Schmidt, *supra* note 1, at 46.

²⁶² *Dépeçage* refers to the concept whereby different issues within a particular case may be governed by the laws of different states. According to Black's Law Dictionary, *dépeçage* designates “a court's application of different state laws to different issues in a legal dispute; choice of law on an issue-by-issue basis.” BLACK'S LAW DICTIONARY (2009).

²⁶³ See *infra* Part II(A)(2)(a).

ii. *The Lex Contractus Finalis in the Absence of a Choice of Law by the Parties*

In the absence of a choice of law by the parties, Article 4 of the Rome I Regulation provides the applicable law.²⁶⁴ This provision establishes a “general regime for determining the applicable law in the absence of party

²⁶⁴ Article 4 of the Rome I Regulation states that

1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows:

(a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence;

(b) a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence;

(c) a contract relating to a right *in rem* in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated;

(d) notwithstanding point (c), a tenancy of immovable property concluded for temporary private use for a period of no more than six consecutive months shall be governed by the law of the country where the landlord has his habitual residence, provided that the tenant is a natural person and has his habitual residence in the same country;

(e) a franchise contract shall be governed by the law of the country where the franchisee has his habitual residence;

(f) a distribution contract shall be governed by the law of the country where the distributor has his habitual residence;

(g) a contract for the sale of goods by auction shall be governed by the law of the country where the auction takes place, if such a place can be determined;

(h) a contract concluded within a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments, as defined by Article 4(1), point (17) of Directive 2004/39/EC, in accordance with non-discretionary rules and governed by a single law, shall be governed by that law.

2. Where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points (a) to (h) of paragraph 1, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.

3. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.

4. Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected.

Council Regulation 593/2008, *supra* note 38, art. 4.

choice.”²⁶⁵ Its application is without prejudice to Articles 5,²⁶⁶ 6,²⁶⁷ 7,²⁶⁸ and 8²⁶⁹ of the Rome I Regulation, “which establish special rules for selecting the applicable law in the case of contracts of carriage, consumer contracts, insurance contracts and employment contracts.”²⁷⁰

Article 4 of the Rome I Regulation establishes a system of jurisdiction-selecting rules²⁷¹ that can be displaced in favor of the law that has the closest connection to the contract.

(1) The Jurisdiction-Selecting Rules

Article 4 of the Rome I Regulation provides a general rule and “specific rules that determine the applicable law in eight types of contracts.”²⁷² The general rule is provided by paragraph 2 of Article 4 of the Rome I Regulation, and applies whenever the contract in question does not fall within the list of contracts enumerated by paragraph 1, or where the elements of the contract would be covered by more than one special rule provided for in paragraph 1.²⁷³ According to paragraph 2 of Article 4 of the Rome I Regulation, the contract is governed by the law of the “country of the habitual residence of the party required to effect the characteristic performance of the contract.”²⁷⁴ In other words, the contract is governed by the law of the habitual residence²⁷⁵ of the debtor of the characteristic performance.²⁷⁶

²⁶⁵ PLENDER & WILDERSPIN, *supra* note 22, at 176–77.

²⁶⁶ Article 5 of the Rome I Regulation provides the applicable law to contacts of carriage. *Id.* art. 5.

²⁶⁷ Article 6 of the Rome I Regulation provides the applicable law to consumer contracts. *Id.* art. 6.

²⁶⁸ Article 7 of the Rome I Regulation provides the applicable law to insurance contracts. *Id.* art. 7.

²⁶⁹ Article 8 of the Rome I Regulation provides the applicable to individual employment contracts. *Id.* art. 8.

²⁷⁰ PLENDER & WILDERSPIN, *supra* note 22, at 176–77.

²⁷¹ A jurisdiction-selecting rule is a choice of law rule that designates the applicable law “on the basis of the physical contacts of the involved states (‘jurisdiction-selection’), without regard to the content of their substantive laws.” Symeonides, *supra* note 42, at 181. It should not be confused with the choice of jurisdiction rule that determines the competence of the seized court in matters related to conflicts of jurisdictions.

²⁷² PLENDER & WILDERSPIN, *supra* note 22, at 176–77. For the text of the provision, *see supra* note 264.

²⁷³ *See supra*, note 264.

²⁷⁴ Council Regulation 593/2008, *supra* note 38, art. 4(2).

²⁷⁵ Article 19 of the Rome I Regulation and Article 23 of the Rome II Regulation define the habitual residence of companies and other bodies, corporate or unincorporated, as the place of central administration and the habitual residence of a natural person acting in the course of his business activity as his principal place of business. Council Regulation 593/2008, *supra* note 38, art. 19; Council Regulation 864/2007, *supra* note 37, art. 23.

²⁷⁶ The concept of characteristic performance is defined as being the performance for

The application of this general rule is set aside whenever the concluded contract falls within one of the categories enumerated by paragraph 1. In this situation, the specific rules enumerated by this paragraph determine the applicable law.²⁷⁷

(2) The Law That Has the Closest Connection to the Contract

Articles 4(3) and 4(4) of the Rome I Regulation provide a “residual role for the connecting factor of the closest connection to the contract”.²⁷⁸ According to Article 4 of the Rome I Regulation, the law that has the closest connection to the contract should apply in two situations.

First, courts may determine the applicable law to the contract by searching for the closest connection whenever the *lex contractus* cannot be determined by virtue of Articles 4(1) and 4(2) of the Rome I Regulation. Indeed, Article 4(4) of the Rome I Regulation states that “[w]here the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected.”²⁷⁹

Second, Article 4(3) of the Rome I Regulation provides an escape clause that allows departure from the rules established in paragraphs 1 and 2 of Article 4 of the Rome I Regulation. According to this provision, “[w]here it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.”²⁸⁰ In effect, whenever it appears that the contract might be more closely connected to another country than to the country of the habitual residence of the debtor of the characteristic performance, the law of that country shall apply. This mechanism is similar to the presumption method adopted by the Second Restatement. However, the application of this escape clause should be used in certain cases and only where it is manifestly clear that the contract is

which payment is due. While such a criterion can help define most characteristic performances, it is insufficient for identifying the characteristic performance when no payment is due. See Andrea Bonomi, *The Rome I Regulation on the Law Applicable to Contractual Obligations—Some General Remarks*, 10 YEARBOOK OF PRIVATE INTERNATIONAL LAW 165 (2008); Pedro A. De Miguel Asensio, *Applicable Law in the Absence of Choice to Contracts Relating to Intellectual or Industrial Property Rights*, 10 YEARBOOK OF PRIVATE INTERNATIONAL LAW 199 (2008); PLENDER & WILDERSPIN, *supra* note 22, at 188.

²⁷⁷ It should be noted that, in most of the cases falling under paragraph 1 of Article 4 of the Rome I Regulation, the application of the special rule leads to the result that would have been reached by the application of the general rule contained in paragraph 2. See PLENDER & WILDERSPIN, *supra* note 22, at 178.

²⁷⁸ *Id.* at 194.

²⁷⁹ Council Regulation 593/2008, *supra* note 38, art. 4(4).

²⁸⁰ *Id.* art. 4(3). For the full text of this article, see *supra* note 60.

more closely connected to the law of another country.²⁸¹

In summary, whenever the contract has been concluded, the *lex contractus in negotio* might be one of five laws: (1) the law that is designated on the basis of Articles 5–8 of the Rome I Regulation whenever the concluded contract falls into one of the categories of contracts enumerated by these Articles; (2) the law chosen by the parties to govern the concluded contract; (3) the law provided by Article 4(1) of the Rome I regulation whenever the contract falls into one of the categories of contracts enumerated by this paragraph; (4) the law of the habitual residence of the debtor of the characteristic performance; or (5) the law that has the closest connection to the contract. On the other hand, whenever the contract under negotiation did not come into existence, the *lex contractus in negotio* is the *lex contractus putativus*.

b. The *Lex Contractus in Negotio* is the *Lex Contractus Putativus*

Where the contract under negotiation did not come into existence, the law that governs the defendant's precontractual liability is the law of the putative contract²⁸² or the *lex contractus putativus*. This is usually the case when *culpa in contrahendo* has prevented the conclusion of the contract under negotiation. In this situation, the defendant's behavior will have prevented the contract under negotiation from coming into existence. This is the case, for example, when the defendant has broken off negotiations in bad faith (Examples 3 and 4 of the Introduction), or when he has prematurely revoked his offer (Example 2 of the Introduction).²⁸³ Whenever such situations arise, the law that governs the defendant's precontractual liability is the law of the contract under negotiation had it been entered into.

The application of the law of the putative contract to the parties' precontractual relationship raises three issues. First, this law can never result from the application of a choice of law clause that was contained in a draft contract which has been rejected.²⁸⁴ The absence of an agreement on the applicable law is evident in this situation and we cannot apply the law designated by a choice of law clause that was proposed by one party during negotiations and that has not been accepted by the other. To hold otherwise, would unfairly surprise the party who did not agree to the choice of law clause proposed by the other. The application of the choice of law clause is especially unfair whenever the disagreement over the choice of

²⁸¹ PLENDER & WILDERSPIN, *supra* note 22, at 196.

²⁸² The term "law of the putative contract" is used by several scholars. See, e.g., H. Muir Watt, *De la loi applicable à un contrat tacitement accepté*, Rev. Crit. DIP 1995 300, 304–05 (referring to "la loi putative du contrat"); Gautier, *supra* note 245 at 496; Volders, *First Appraisal*, *supra* note 49, at 467; Thoma, *supra* note 22, at 681.

²⁸³ See DICKINSON, *supra* note 48, at 526; Schmidt, *supra* note 1, at 46.

²⁸⁴ PLENDER AND WILDERSPIN, *supra* note 22, at 736–37; Bollée, *supra* note 67, at 2165.

law clause has triggered the break off of negotiations.²⁸⁵ It follows that the applicable law to the putative contract should always be determined on the basis of Article 4 of the Rome I Regulation.²⁸⁶

Second, the *lex contractus putativus* raises the issue of the determination of the debtor of the characteristic performance of the contract. While the determination of the debtor of the characteristic performance of the contract is relatively easy in cases where *culpa in contrahendo* does not prevent the conclusion of the negotiated contract, this determination, while still possible, can prove to be somewhat problematic whenever the negotiations are broken off at an early stage.²⁸⁷

Third, the *lex contractus putativus* raises objections as to its legitimate application. Indeed, the parties in an international negotiation did not agree to the contract and yet find their relationship governed by the law of a contract to which they did not adhere. This is especially unfair to the defendant who has expressly rejected the contract under negotiation by breaking off negotiations (Examples 3 and 4 of the Introduction) or by revoking the offer (Example 2 of the Introduction). In such cases, the application of the *lex contractus putativus* appears to be purely fictitious and with no apparent legitimacy.²⁸⁸ On the other hand, it might also be argued that the plaintiff has reasonably relied on the conclusion of the contract and therefore has a legitimate right to the application of the law that would have governed the contract had it been entered into.²⁸⁹

In summary, the *lex contractus putativus* is one of four laws: (1) the law provided by Articles 5, 6, 7, 8 of the Rome I Regulation whenever the contemplated contract falls into one of the categories of contracts that are designated by one of these Articles; (2) the law provided by Article 4(1) of the Rome I regulation whenever the contemplated contract falls into one of the categories of contracts enumerated by this paragraph; (3) the law of the

²⁸⁵ PLENDER AND WILDERSPIN, *supra* note 22, at 736–37.

²⁸⁶ It should be noted, however, that some scholars have argued for the application, in this case, of the rules provided by Article 12(2) of the Rome II Regulation. Such a solution seems to contradict the wording of the text, which subjects the application of these rules to situations where the *lex contractus putativus* cannot be determined. This is clearly not the case whenever a draft contract contains a choice of law clause that has not been accepted by both parties. In that case, the applicable law must be determined on the basis of Article 4 of the Rome I regulation. This view is supported by Plender and Wilderspin who argue that “any choice of law clause proposed by one party but not accepted by the other is clearly irrelevant as a pointer to the applicable law [. . .] Thus, provided that it is possible to ascertain the law applicable to the putative contract by objective means, that law should be applicable to the question of precontractual liability.” PLENDER & WILDERSPIN, *supra* note 22, at 737; *see also*, Bollée, *supra* note 67, at ¶ 8.

²⁸⁷ *See infra* Part II(B)(2).

²⁸⁸ *Contra* Légier, *supra* note 63 (determining that the application of the law of the contemplated contract to be in line with Articles 10 and 11 of the Rome II Regulation as well as with the national laws of some of the member states).

²⁸⁹ *See infra* Part II(A)(2)(a).

habitual residence of the debtor of the contemplated characteristic performance; or (4) the law that would have had the closest connection to the contract had it been entered into.

The *lex contractus putativus* ought to be distinguished from the *lex contractus finalis* for the following reasons. First, the *lex contractus putativus* applies whenever the contract under negotiation did not come into existence, while the *lex contractus finalis* applies whenever the contract under negotiation has been concluded. Second, the *lex contractus putativus* can never result from the application of a choice of law clause that is contained in the draft contract which has been rejected, while the *lex contractus finalis* can be designated by the choice of law clause contained in the concluded contract.²⁹⁰ Third, the law of the place of residence of the debtor of the characteristic performance might prove to be harder to identify when it is the *lex contractus putativus*.²⁹¹

2. The Appraisal of the Lex Contractus in Negotio

By submitting claims arising out of precontractual liability to the *lex contractus in negotio*, the European Legislature has sought to unify and simplify the determination of the applicable law. In order to offer an assessment of the rule provided by Article 12(1) of the Rome II Regulation, we must first analyze the results reached by its application.

a. The Analysis of the Results Reached by Application of the *Lex Contractus in Negotio*.

Article 12(1) of the Rome II Regulation has chosen to submit claims arising out of *culpa in contrahendo* to the *lex contractus in negotio*. The issue that we aim to discuss in this part of the essay is whether the rule provided by Article 12(1) of the Rome II Regulation reaches favorable results every time a claim involving *culpa in contrahendo* is brought before a court of a member state. Our aim is not to offer an appraisal of the application of the *lex contractus in negotio* in every possible scenario where the plaintiff seeks to establish the defendant's precontractual liability, but to determine whether the need to displace the *lex contractus in negotio* ever arises.

A priori, it might be argued that it is completely inappropriate to determine the precontractual liability of the defendant by application of the law of the contract under negotiation for two reasons. First, the application of the *lex contractus finalis* to the defendant's precontractual liability might upset the parties' expectations. It might be argued that the parties could not have foreseen, at the time the contract was under negotiation, the application of the law governing their contractual relationship to their

²⁹⁰ See *supra* Part II(A)(1)(a).

²⁹¹ See *infra* Part II(B)(2).

precontractual relationship. In this situation, the *lex contractus finalis* operates retrospectively, as it applies to a situation that has, chronologically, preceded the existence of the contract.

Second, the application of the *lex contractus putativus* to the defendant's precontractual liability whenever the contract under negotiation was not entered into might appear to be even more inappropriate. In this situation the parties' precontractual relationship is governed by the applicable law to a fictitious contract. The contract under negotiation did not come into existence and yet its law governs the defendant's precontractual liability. This is especially unfair to the defendant who has expressly rejected the contract under negotiation by breaking off negotiations (Examples 3 and 4 of the Introduction) or by revoking his offer (Example 2 of the Introduction). In this case, the application of the *lex contractus putativus* appears to be purely fictitious with no apparent legitimacy.²⁹²

Although these arguments might seem logical, their generalization ought to be avoided. While it is true that in some situations the application of the rule provided by Article 12(1) of the Rome II Regulation might unfairly surprise the parties, we cannot assume that the application of the *lex contractus in negotio* reaches inappropriate results every time a court is faced with a claim arising out of precontractual liability. In order to determine the efficiency of the rule we must, according to S. Symeonides, "examine the results the rule produces in several typical patterns formed by the aggregation or disbursement of the pertinent contacts . . . and the content of the laws of each contact state."²⁹³ Therefore, we will examine the results reached by the application of the *lex contractus in negotio* in two situations: the situation where the validity of the contract affects the defendant's precontractual liability and the situation where the two issues are not intertwined.

i. The Results Reached by the Application of the Lex Contractus in Negotio Whenever the Existence or the Validity of the Contract Affects the Defendant's Precontractual Liability

Whenever the validity or the existence of the contract affects the defendant's precontractual liability, the two issues ought to be governed by the same law. This situation arises whenever the laws in conflict take different positions as to the validity or the existence of the contract. In this situation, displacing the *lex contractus in negotio* ought to be discouraged

²⁹² *Contra* Légier, *supra* note 63, at 155. The author finds the application of the law of the contemplated contract to be in line with Articles 10 and 11 of the Rome II Regulation as well as with the national laws of some of the member states. It can also be argued that, in this situation, the plaintiff has reasonably relied on the conclusion of the contract and, therefore, has a legitimate right to the application of its law.

²⁹³ Symeonides, *supra* note 42, at 188.

as it might lead to incoherent and unfair results. Two examples help illustrate this point:

Example A: The first example is an example of *culpa in contrahendo* that has provoked the formation of the contract through misrepresentations (see Example 1 of the Introduction) or duress. This is a case where the plaintiff seeks to void the contract *and* seeks damages for the defendant's wrongful behavior. In this situation, the laws that are in conflict provide for different rules as to the validity of the contract and as to the defendant's precontractual liability. According to the first law, the contract is invalid and the defendant is liable for harm caused by the conclusion of the invalid contract. According to the second law, the contract is valid and the defendant is exonerated from any liability. In this situation, each law has established a coherent system where the validity of the contract affects the defendant's liability. Indeed, under the first law (law of state A), the invalidity of the contract is usually accompanied by the defendant's liability. On the other hand, application of the second law (law of state B) will validate the contract, thus exonerating the defendant from liability. The use of *dépeçage* in this case will lead to one of two incoherent results that upset the carefully established balance of the provisions of the two laws in conflict.

Under the first result, the contract is void by application of the first law (law of state A) to the issue of validity; but the defendant will escape liability by application of the second law (law of state B) to the issue of precontractual liability. The simultaneous application of these two laws will establish an incoherent situation between the parties. Under this result, the contract is void although the defendant's conduct that has provoked its conclusion is lawful. Such a result ought to be avoided as it frustrates the interests of both states whose laws are in conflict as well as the parties' expectations.

First, this result will frustrate the deterrence interests of state A. This state has an interest in deterring unlawful conducts that provoke the formation of an invalid contract. According to the law of state A, the invalidity of the contract does not suffice, by itself, to reach the desired level of deterrence, which is why the defendant is held precontractually liable for his conduct. The application of state B's law will greatly hinder state A's deterrence interests by exonerating the defendant from precontractual liability. Furthermore, state A's interest in compensating the plaintiff whose expectations have been thwarted by the defendant's conduct, will be severely impaired by the application of state B's law. In effect, the plaintiff will be deprived of the benefits of the contract and of the benefits of liability.

Second, state B's interest in validating the contract is severely impaired by the application of state A's law. State B exonerates the defendant from precontractual liability and provides a conduct-liberating rule that salvages the contract. It has provided a conduct-liberating rule at

the negotiation stage in order to encourage commercial transactions between the two parties. The application of state A's law to the validity of the contract severely impairs, state B's interest in liberating the parties' conduct during negotiations.

Third, this result is unfair to both parties. While the plaintiff will be deprived of the benefits of the contract without reaping the benefits of liability, the defendant is deprived of the benefits of the contract for acting in conformity with the law that governs his precontractual liability. In effect, the defendant will be deprived of the benefits of the contract for acting lawfully!

Under the second result, the contract is deemed valid by application of the second law (law of state B) but the defendant will be held liable by application of the first law (law of state A). The simultaneous application of these two laws will establish an incoherent situation between the parties. Under this result, the contract is valid although the defendant's conduct that has provoked its conclusion is unlawful. Such a result ought to be avoided as it frustrates the interests of both states whose laws are in conflict as well as the parties' expectations.

First, this result severely impairs state B's conduct-liberating interests at the negotiation stage. State B wants to encourage commercial initiatives by giving the parties the freedom to negotiate without constraints. However, the application of State A's law to the defendant's precontractual liability goes against state B's conduct-liberating policies. What is given by one hand is taken away by the other. The application of state A's law to the defendant's precontractual liability will have the opposite effects. Aware of his potential precontractual liability, the defendant will think twice before initiating negotiations, which will hinder state B's conduct-liberating policies.

Second, this result will greatly hinder state A's interest in regulating contract formation. This state has an interest in invalidating contracts that were wrongfully concluded. The reason behind the defendant's precontractual liability is to deter the formation of wrongfully concluded contracts, in order to protect the plaintiff from the effects of a contract that is deemed unfair. The application of state B's law to the validity of the contract severely impairs the protection bestowed upon the plaintiff who is, according to state A, still bound by an unlawful contract.

Third, this result is extremely unfair to the defendant who will be bound to a contract that was legally concluded, while being liable to the plaintiff for a conduct that has been deemed unlawful by the other law. On the other hand, this result unfairly benefits the plaintiff who will retain the benefit of the contract in addition to the benefits of liability.

Example B: The second example is an example of *culpa in contrahendo* that prevents the contract under negotiation from coming into

existence.²⁹⁴ This is the case, for example, when the defendant revokes his offer and the plaintiff seeks to confirm the existence of the contract in spite of the defendant's revocation, while, subsidiarily, seeking damages from the defendant who has revoked his offer (Example 2 of the Introduction). In this situation, the laws that are in conflict provide for different rules as to the effects of the offer's revocation and as to the defendant's precontractual liability. According to the first law (law of state C), the revocation of the offer does not prevent the contract from coming into existence, while according to the second law (law of state D), the revocation of the offer prevents the formation of the contract but renders the defendant liable. In this situation, each law has established a coherent system whereby the formation of the contract affects the defendant's liability. Under the law of state C, the formation of the contract exonerates the defendant from precontractual liability. On the other hand, application of the law of state D precludes the formation of the contract while rendering the defendant liable. The use of *dépeçage* in this case will lead to one of two incoherent results that upset the carefully established balance of the provisions of each law.

Under the first result, the contract is valid by application of the law of state C, while the defendant will be held liable by application of the law of state D. In this situation, the use of *dépeçage*, renders the defendant liable for preventing the conclusion of a contract that has been deemed concluded by the same court. This absurd result alone ought to discourage the use of *dépeçage* in this case. It should be noted that this result is purely theoretical and can never be reached in practice.²⁹⁵

Under the second result, the revocation of the offer prevents the conclusion of the contract by application of the law of state D, whilst the defendant is exonerated from liability by application of the law of state C. This result ought to be rejected for the following reasons.

First, this result frustrates the interests of both states whose laws are in conflict. State D has an interest in protecting the plaintiff by deterring the unlawful revocation of the offer. While this state does not want to ensure the formation of the contract, it seeks to enforce its conduct-regulating policies at the negotiation stage by holding the defendant liable for unlawfully revoking his offer. The application of the law of state C to the defendant's precontractual liability severely impairs these interests. Moreover, the application of the law of state C to the defendant's precontractual liability goes against state C's own interests. Indeed, this state seeks to protect the plaintiff by binding the offeror to the contract he has offered to conclude. The law of state C only excludes the defendant's *precontractual* liability because it deems he is *contractually* liable towards

²⁹⁴ Although technically in this case *culpa in contrahendo* has not prevented the contract from coming into existence under one of the laws in conflict.

²⁹⁵ Usually, the seized court will not examine the plaintiff's subsidiary claim whenever it has ruled in his favor on the first claim.

the plaintiff. In effect, the interests of this state will be better served by the application of the law of state D to the defendant's precontractual liability.

Second, this result is completely unfair to the plaintiff, who is deprived of the benefits of the contract and of compensation, even though he is the party whose protection is sought by the two laws. On the other hand, the defendant is unrightfully exonerated of liability. Although his conduct is considered to be unlawful by the two laws that are in conflict, it is validated by the untimely use of *dépeçage*.

In summary, the use of *dépeçage* will benefit the wrongdoer, to the detriment of the interests of the states whose laws are in conflict, and to the detriment of the plaintiff who has a legitimate right to benefit from the protection that is bestowed upon him by these laws. Thus, it would be inappropriate to displace the application of the *lex contractus in negotio* whenever the defendant's precontractual liability is affected by the issue of contract validity.

*ii. The Results Reached by the Application of the Lex Contractus in
Negotio Whenever the Existence or the Validity of the Contract Does Not
Affect the Defendant's Precontractual Liability*

The existence or validity of the contract is not at issue whenever the laws in conflict provide the same answer to the question of the contract's existence or validity. Two examples help illustrate this scenario.

The first example is an example of *culpa in contrahendo* that has altered the terms of the concluded contract without affecting its validity (Example 1 of the Introduction). In this case, the contract is deemed valid by the laws of the two countries closely connected to the issue, but only one of the laws in conflict awards damages to the plaintiff.²⁹⁶

The second example is an example of *culpa in contrahendo* that has prevented the formation of the contract by the breaking off of negotiations (Examples 3 and 4 of the Introduction). In this case, both laws in conflict consider the contract to be non-existent, but only one of the laws in conflict awards damages to the plaintiff for the breach of the precontractual duty of good faith.

In order to determine whether the application of the *lex contractus in negotio* reaches favorable results in the above-mentioned scenarios, we must evaluate its application in three cases: the case where the *lex contractus in negotio* is chosen by the parties, the case where the *lex contractus in negotio* is determined on the basis of Article 4 of the Rome I Regulation,²⁹⁷ and the case where it is determined by employment of the

²⁹⁶ This would be the case in France where the defendant can be held liable for misrepresentations that alter the terms of the contract without voiding it. TERRÉ, *supra* note 4, at 238.

²⁹⁷ See *supra* Part II(A)(1).

escape clause.

(1) The Results Reached by Application of the *Lex Contractus in Negotio*
That Is Chosen by the Parties

Whenever the *lex contractus in negotio* is the law chosen by the parties to govern their contractual relationship, the issue is whether such a law is equally appropriate to govern their precontractual relationship. This situation only arises whenever the contract under negotiation has already been entered into and the parties have chosen to submit their contract to a law of their choice.²⁹⁸ Because of the freedom given to the parties in the choice of the law that governs the concluded contract, the results reached by application of this law to precontractual liability can vary greatly. While the application of the choice of law clause to precontractual liability can produce favorable results, it can also result in an inappropriate outcome. The main argument against the application of the choice of law clause provided in the contract is that the parties did not intend to submit their precontractual relationship to such a law, but have only chosen this law to govern their contractual relationship. This situation is not to be confused with the one described in Article 14 of the Rome II Regulation. According to this article, the parties have the possibility to submit their *precontractual* relationship to the law of their choice either before or after the event giving rise to the damage occurs.²⁹⁹ Whenever the parties have not expressly chosen to submit their precontractual liability to the law of their choice, we cannot assume that they have intended to submit their precontractual relationship to the law that governs their contractual relationship. This is especially true whenever the parties did not even consider the issue of precontractual liability.³⁰⁰ Furthermore, the choice of law clause contained in the contract might lead to the application of the law of a state that is very loosely connected to the parties' precontractual relationship. This is the

²⁹⁸ See *supra* Part II(A)(1).

²⁹⁹ According to Article 14(1) of the Rome II Regulation:

The parties may agree to submit non-contractual obligations to the law of their choice:

(a) by an agreement entered into after the event giving rise to the damage occurred;

or

(b) where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred.”

Council Regulation 864/2007, *supra* note 37, art. 14(1).

³⁰⁰ It should be noted that, whenever the validity of the contract and the precontractual liability of the defendant are intertwined, the application of the choice of law clause will not unfairly surprise the parties who have agreed to submit the validity of the contract to this law.

case, for example, whenever the parties choose to submit their contract to the law of the place of performance, which does not coincide with either party's place of residence, the place of harm, the place of the conduct or the place where the parties' precontractual relationship is centered. In this situation, all the relevant contacts³⁰¹ are not located in the country of performance of the contract, which is, arguably, less interested in regulating the parties' precontractual liability than the law of the state of the habitual residence of one of the parties.³⁰²

(2) The Results Reached by Application of *Lex Contractus in Negotio* That Is Not Chosen by the Parties

When the parties did not,³⁰³ or could not,³⁰⁴ choose to submit the contract under negotiation to a particular law, the *lex contractus in negotio* is to be determined on the basis of Article 4 of the Rome I Regulation. This law can be determined either on the basis of paragraphs 1, 2, 3 or 4 of Article 4 of the Rome I Regulation.³⁰⁵ Article 4 of the Rome I Regulation determines the applicable law whether the contract under negotiation has been concluded or not. However, assessing the results of the application of the *lex contractus in negotio* in all these situations would prove too long a task for the purposes of this essay. Therefore, we have decided to evaluate the need to displace the application of the *lex contractus in negotio* only in the situation where the defendant has broken off negotiations, thus preventing the parties' contemplated contract from coming into existence. In this situation, the *lex contractus in negotio* is the *lex contractus putativus*, or the law of the putative contract.

We will assess the results of the application of the *lex contractus putativus* in two situations. The first situation is the one where the contemplated contract is governed by the rule provided by Article 4(2) of the Rome I Regulation. The second situation is the one described by Example 4 of the Introduction,³⁰⁶ and where the contemplated contract is a contract for the sale of land.

(a) *The Results Reached by Application of the Lex Contractus In Negotio That Is Determined on the Basis of Article 4(2) of the Rome I Regulation*

When the contemplated contract is governed by the rule provided by

³⁰¹ The place of the conduct, the place of injury, the place of negotiation, and the place of the respective residences of the parties. See *supra* Part II(A)(1).

³⁰² Unless it is argued that, since the defendant's conduct has altered the conditions of performance of the contract, the place of performance has a conduct-regulating interest.

³⁰³ When the contract under negotiation has been concluded.

³⁰⁴ When the contract under negotiation has not been concluded.

³⁰⁵ See *supra* Part II(A)(1).

³⁰⁶ See *supra* Introduction.

Article 4(2) of the Rome I Regulation, the law that governs the parties' precontractual liability is the law of the habitual residence of the debtor of the characteristic performance of the contemplated contract.³⁰⁷

The application of the rule provided by Article 4(2) of the Rome I Regulation reaches favorable results in the following cases. (1) The case where both parties are residents of the same country. This situation is often characterized as a false conflict usually governed by the law of the common residence of the parties.³⁰⁸ (2) The case where the defendant is residing in a country that holds him liable for precontractual liability, whereas the plaintiff is residing in a country that exonerates the defendant. This case is usually characterized as an unprovided-for case, to which the law of the residence of the debtor of the characteristic performance might be well suited. Indeed, the application of this law is fair to both parties who should have relied on its application whenever they are conducting business. (3) It might also be argued that the rule provided by Article 12(1) of the Rome II Regulation is equally suitable in true conflicts situations where all the conflicting laws have an interest in the application of their respective laws.³⁰⁹ It might be argued that the law of the place of residence of the debtor of the characteristic performance of the contract coincides with the parties' expectations. On one hand, the debtor has, most likely, relied on the law of his habitual residence in order to conduct his business, while, on the other hand, the creditor, who is likely seeking the services of the debtor, should be aware of the potential application of the law of the debtor's habitual residence.³¹⁰ While this argument can be made in most cases involving a true conflict situation, it has been argued that the application of the *lex contractus in negotio*

could impose on one of the contracting parties the stricter requirements of the law of the place of habitual residence of the other contracting party in the precontractual stage despite the fact that the contract may not be eventually concluded or has not been concluded. Such outcome is neither fair nor efficient as it creates legal obstacles to the initiative of the parties to engage in contractual negotiations.³¹¹

This might be the case in the scenario described by Example 3 of the Introduction. In this example, a U.K. resident has broken off negotiations with a French resident who is the debtor of the characteristic performance

³⁰⁷ See *supra* Part II(A)(1).

³⁰⁸ See *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963).

³⁰⁹ The distinction between, false conflicts, true conflicts, and unprovided-for cases was first suggested by Brainerd Currie. For a summary of Currie's theories, see WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, *UNDERSTANDING CONFLICT OF LAWS* § 78 (2002).

³¹⁰ See Moura Vicente, *supra* note 22, at 713.

³¹¹ Thoma, *supra* note 22, at 682.

of the contract. This is a true conflict situation whereby each law in conflict can claim jurisdiction. According to U.K. law, which does not impose a precontractual duty of good faith,³¹² the defendant is not liable, while under French law the defendant is liable for the violation of the precontractual duty of good faith.³¹³ According to article 4(2) of the Rome I Regulation, this issue is governed by French law, which is the law of the habitual residence of the debtor of the characteristic performance of the contract. While this law has an interest in regulating the parties' conduct during the negotiations of a contract and in protecting its residents from an abrupt break off of negotiations, the application of French law is objectionable for the following reasons.

First, the U.K. has an "aleatory view" of negotiations: "a party that enters negotiations in the hope of the gain that will result from the final agreement bears the risk of whatever loss results if the other party breaks off the negotiations".³¹⁴ According to Professor Farnsworth, "this aleatory view of negotiations rests on a concern that limiting the freedom of negotiation might discourage parties from entering negotiations."³¹⁵ In this instance, the defendant has probably broken off negotiations because he has received a better offer from another seller. To hold him liable for seeking to optimize his profits would severely impair the U.K.'s conduct-liberating interests. Indeed, the U.K.'s policy of optimizing the distribution of riches will be greatly hindered by the application of French law.

Second, while France may have an interest in deterring the break off of negotiations in bad faith and in protecting its residents from economic loss, we cannot impose on one contracting party the stricter requirements of the law of the place of residency of the other party, when the contract under negotiation has not been concluded. To hold otherwise would violate the rules of comity and allow one country to extend its imperialistic views to non-residents.

Third, the application of the *lex contractus in negotio* is unfair to the defendant who has relied in good faith on the law of his residence in order to break off negotiations. While it might be argued that he should have foreseen the application of the law of the habitual residence of the debtor of the characteristic performance of the contemplated contract, it would be unfair to subject him to the law of a contract that he has expressly rejected.

Fourth, the plaintiff's expectations are not completely thwarted by the displacement of the law of the contract under negotiation. As a business man, he has to bear the risks of his endeavors. While he may have a right to rely on the law of his habitual residence, he cannot be unfairly surprised by

³¹² Cf. Banakas, *supra* note 16; Musy, *supra* note 16; Powell, *supra* note 21, at 38.

³¹³ Chambre commerciale et financière [Cass. Com.] [Commercial and financial court], 22 avril 1997, D. 1998, 45, note Patrick Chauvel (Fr.); Schmidt *supra* note 1, at 46.

³¹⁴ Farnsworth, *supra* note 1, at 221.

³¹⁵ *Id.*

the application of the law of the habitual residence of the person he is conducting business with and coincidentally, the law of the place of performance of the contemplated contract.

While the above-mentioned example illustrates some of the unfair results to which the application of the rule provided by Article 12(1) might lead, it does not provide conclusive evidence in favor of displacing the *lex contractus in negotio*. In fact, an argument can always be made in favor of the application of the *lex contractus in negotio* whenever it is the law of the habitual residence of the debtor of the characteristic performance. This hesitation stems from the choice of contact that is used to determine the applicable law whenever the *lex contractus in negotio* is determined on the basis of Article 4(2) of the Rome I Regulation. Whatever view is taken as to the appropriateness of the *lex contractus in negotio* when it is determined on the basis of Article 4(2) of the Rome I Regulation, this next situation will provide conclusive evidence in favor of the need to provide escape devices that allow the displacement of the *lex contractus in negotio*.

*(b) The Results Reached by the Application of the Lex Contractus in
Negotio That Is Determined on the Basis of Article 4(1)(c) of the Rome I
Regulation*

Example 4 of the introduction gives a clear illustration of the deficiencies of the *lex contractus in negotio*. In this situation, the American defendant has broken off negotiations with a U.K. plaintiff for the sale of land located in Germany. Because the parties' contemplated contract is a contract for the sale of land, it falls within one of the categories of contracts enumerated by paragraph 1 of Article 4 of the Rome I Regulation and is governed by German law which is the "law of the country where the property is situated."³¹⁶ Thus, according to German law, the defendant is liable for breaking off the negotiations in bad faith.³¹⁷

The application of German law in this case is completely inappropriate and should be displaced for the following reasons.

First, Germany has arguably no interest in regulating a case of precontractual liability which does not involve any of its residents and which has occurred entirely outside of its borders. While Germany might have an interest in deterring a conduct that occurs within its borders or in compensating a German victim that suffers an injury from the break off of negotiations, it has no interest in applying its law when all the negotiating parties are not residents of Germany and when the negotiations are held entirely outside of Germany. Moreover, Germany has no immediate reason to deter a conduct that has occurred outside its borders and that has caused

³¹⁶ Council Regulation 593/2008, *supra* note 38, art. 4(1).

³¹⁷ Cf. Banakas, *supra* note 16; Musy, *supra* note 16.

an injury to a non-resident of Germany.³¹⁸ In this case, the application of German law is triggered by a completely fictitious contact that bares no relationship to the issue at hand. Indeed, the application of German law is triggered by the *situs* of a property that was to be the subject matter of a contemplated contract that never came into existence.

Second, while it might be argued that, by imposing a precontractual duty of good faith on the parties, Germany has an interest in protecting the owners of German property during the negotiations of a contract for the sale of land located in Germany, the application of German law in this particular situation harms the defendant who owns the land. In this particular case, the party that broke off the negotiations is the owner of the property, whose protection is sought by German Legislature. In effect, the application of German law goes against its protective policies, by rendering liable the very person it has sought to protect. The present case ought to be distinguished from the situation where the potential buyer of land breaks off negotiations with the owner. In this latter situation, the application of German law renders the potential buyer of land liable towards the owner, thus protecting the owner of land in Germany from injury arising out of the breach of the precontractual duty of good faith.

Third, whatever view is taken as to the existence of German interests in this case, it cannot be argued that Germany's interests outweigh the interests of the United Kingdom or the United States. On the contrary, the application of German law severely impairs the interests of the countries of residence of both parties. Indeed, both, the United Kingdom and the United States do not impose a precontractual duty of good faith during the negotiations of a contract.³¹⁹ Both countries have an interest in liberating conduct during negotiations and in encouraging commercial initiatives. It would be unwise to allow Germany to impose its policies on other states when the situation is so loosely connected to Germany.

Fourth, the application of German law frustrates the parties' justified expectations. The defendant is unfairly surprised by the application of German law in this situation. He has relied on the law of the place of his habitual residence in order to break off negotiations. While he may have foreseen the applicability of the law of the habitual residence of the potential buyer of land, he did not account for the application of the law of the *situs* of a property whose ownership is not an issue in this case. We cannot expect the defendant's precontractual liability to be governed by the law of the place where he owns property when the ownership of this

³¹⁸ And who is not of German nationality.

³¹⁹ For U.S. Law, see *Lafayette Place Assocs. v. Boston Redevelopment Auth.*, 427 Mass 509, 517 (1998); *see also*, *F.D.I.C. v. LeBlanc*, 85 F.3d 815 (1st Cir. 1996); BURTON & ANDERSON, *supra* note 21, at 330 (stating that "American law imposes no general duty to negotiate a contract in good faith"). For U.K. law, see *Banakas*, *supra* note 16; *see also*, *Musy*, *supra* note 16; *Powell*, *supra* note 21.

property is not the subject matter of the plaintiff's claim.³²⁰ In this particular situation, both parties agree that the ownership of land did not switch hands. The issue relates to the legality of the defendant's behavior during the negotiations of a contract. There is no reason to link this issue to the subject matter of a contract that never came into existence. To hold otherwise would require the seller of land to inquire about the law of every state where he owns land for sale. While it might not seem like a heavy burden whenever the sale of land constitutes a one-time occurrence, it might seriously inconvenience realty companies that are based in one country but own land in several others. It might also cause an inconvenience to the defendant that specializes in multiple activities. For instance, a defendant that sells land and offers construction services will have to behave differently depending on the subject matter of the contract under negotiation. Indeed, the applicable law to the defendant's precontractual liability whenever the subject matter of the contract is the sale of land is the law of the *situs* of the property, while the applicable law to precontractual liability arising out of the negotiations of a construction contract is the law of the habitual residence of the defendant.³²¹ Thus, the same potential debtor might have to behave differently based on the subject matter of the contract under negotiation. To put the burden of inquiring about the contents of so many laws on the same defendant can prove to be excessive.

Fifth, the plaintiff has no right to rely on German law in order to get compensation. According to U.K. law, which is the law of the plaintiff's habitual residence and, arguably, the law where the injury has manifested itself, he has no right to compensation. The plaintiff has no right to the application of the law of a place where he does not own property and where he does virtually no business. Thus, the application of the *lex contractus in negotio* is completely inappropriate in this situation and should be displaced. This last scenario presents a compelling argument in favor of the displacement of the *lex contractus in negotio*.

(c) *The Results Reached by Application of the Lex Contractus In Negotio That Is Determined on the Basis of the Escape Clause*

Whenever the *lex contractus in negotio* is determined on the basis of the escape clause provided by Article 4 of the Rome I Regulation, it is the law of the country that has the closest connection to the contract.³²² The employment of the escape clause provided by Article 4 of the Rome I Regulation has two major flaws.

³²⁰ In this situation, the issue is the defendant's precontractual liability. Both parties have agreed that the contract has not been concluded.

³²¹ Article 4(1) b of the Rome I Regulation states that: "a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence." Council Regulation 593/2008, *supra* note 38, art. 4(1).

³²² See *supra* Part II(A)(1).

First, the employment of the escape clause requires the seised court to search for the law of the country that has the closest connection to the contract under negotiation, which does not necessarily coincide with the country that has the closest connection to the non-contractual obligation arising out of dealings prior to the conclusion of the contract. Instead of searching for the law of the country that has the closest connection to the parties' precontractual relationship, courts will have to identify the law that has the closest connection to a contemplated contract that never came into existence. In effect, courts might disregard factors like the place of injury, the place of conduct, and the place where the parties' precontractual relationship is centered, in favor of irrelevant factors such as the place of performance of the contemplated contract in order to determine the applicable law to claims arising out of *culpa in contrahendo*.

Second, the employment of the escape clause provided by Article 4 of the Rome II Regulation reaches random results. While it might reach favorable results in cases where the relevant contacts of both the contract under negotiation and of the non-contractual obligation arising out of dealings prior to the conclusion of the contract coincide, it will most likely produce inappropriate results whenever the respective relevant contacts are divergent.

b. The Advantages and Disadvantages of the Application of the *Lex Contractus in Negotio*

While the application of the *lex contractus in negotio* has its advantages, the rule provided by Article 12(1) of the Rome II Regulation has one major flaw: it lacks flexibility. Although, the European Legislature has allowed the parties to displace the *lex contractus in negotio*,³²³ it has failed to provide the courts with the necessary means to set aside its application whenever it reaches inappropriate results.

i. *The Advantages Of The Application Of The Lex Contractus In Negotio*

Applying the law of the contract under negotiation to the liability that arises out of precontractual dealings has three benefits. First, the application of the *lex contractus in negotio* reduces the uncertainty that accompanies the application of the *lex delicti*. Second, it helps avoid unnecessary *dépeçage*. Third, it affords the weaker bargaining party with the protection of a more protective law.

(1) Application of the *Lex Contractus in Negotio* Reduces the Uncertainty that Accompanies the Application of the *Lex Delicti*

According to section 145 of the Second Restatement on Conflict of

³²³ See *supra* text accompanying notes 298–302.

Laws, four contacts are usually relevant in torts cases: (1) the place of the conduct; (2) the place of injury; (3) the place where the parties' relationship is centered; and (4) the place of residence of the parties.³²⁴ These contacts are traditionally used in order to determine the *lex delicti* that governs a non-contractual obligation. Where the case is one of precontractual liability, the localization of the place of conduct, the place of injury and the place where the relationship is centered becomes a tedious and complex task that ruins the uniformity sought by the Legislature.³²⁵ Had the Legislature chosen to submit claims arising out of *culpa in contrahendo* to the *lex delicti*, courts would be faced with the tedious task of locating the various torts contacts. The application of the *lex contractus in negotio* in cases of precontractual liability reduces the uncertainty that accompanies the determination of such contacts,³²⁶ and provides legal certainty to the parties.³²⁷

(a) *The Place of Conduct*

In cases of precontractual liability, difficulties arise as to the localization of the conduct that causes harm. This is the case, for example, whenever liability arises out of the unjustified break off of negotiations (Examples 3 and 4 of the Introduction). In this case, the harmful conduct is the break off of negotiations. The place of the decision to break off negotiations is not easy to determine whenever this decision is made by the defendant in one place and comes to the attention of the plaintiff in another. In this case, it might be argued that the harmful conduct occurs in one of three places: (1) the place where the defendant was first aware of his intention not to continue the negotiations;³²⁸ (2) the place where the defendant has dispatched his decision to break off negotiations to the plaintiff; or (3) the place where the plaintiff has become aware of the defendant's decision. The same problem arises whenever liability arises out of the revocation of the offer by the defendant (Example 2 of the Introduction). In this case, the defendant's decision to revoke the offer might have been contained in a letter that was dispatched in one place and received in another, while the intention to mislead the other party might have exteriorized in yet another forum. In such cases, application of the *lex contractus in negotio* relieves the courts from the tedious task of locating the place of conduct and helps achieve uniformity between the member states.

³²⁴ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(2) (1971).

³²⁵ See Lagarde, *supra* note 33, at 590.

³²⁶ See *id.*

³²⁷ Thoma, *supra* note 22, at 682.

³²⁸ See Lagarde, *supra* note 33, at 590.

(b) *The Place of Injury*

The place of injury can be difficult to determine because of the type of injury sustained by the plaintiff.³²⁹ *Culpa in contrahendo* can cause two types of injuries. First, *culpa in contrahendo* can cause an economic loss to the plaintiff. The Rome II Regulation excludes physical harm from the scope of Article 12 of the Rome II Regulation.³³⁰ Thus, losses that usually arise out of precontractual liability are, in most cases, purely economic.³³¹ The place where financial loss has occurred is difficult to locate and has not been determined by the European Legislature. Case law in the Member States does not provide a uniform solution. Courts have decided that financial losses can occur in one of four places: (1) the place where the decision to break off negotiations was received;³³² (2) the place where the contract under negotiation would have been performed had it been concluded;³³³ (3) the place where the non-blameworthy party acted on the other party's misstatements;³³⁴ or (4) the place where the victim has its place of residence.³³⁵

Second, the plaintiff might suffer harm to his reputation or to his image as a result of the defendant's conduct. Localization of such interests is equally problematic³³⁶ as the harm might be considered to have occurred either at: (1) the place of residence of the plaintiff;³³⁷ (2) at the place where the plaintiff's reputation might be abused;³³⁸ or (3) wherever the plaintiff does business.³³⁹ Application of the *lex contractus in negotio*, allows courts to bypass the preliminary step of locating the place of injury and helps avoid complications in the determination of the applicable law that would have, otherwise, ruined uniformity had the Legislature chosen to submit claims arising out of *culpa in contrahendo* to the *lex delicti*.

³²⁹ See PLENDER AND WILDERSPIN, *supra* note 22, at 739, Lagarde, *supra* note 33, at 590.

³³⁰ See *supra* Part I(B)(2)(a).

³³¹ On the type of injury arising from precontractual liability, see W. H. VAN BOOM ET AL., *PURE ECONOMIC LOSS* (2004); O. Deshayes, *Le dommage précontractuel*, *RTD Com.* 2004 187.

³³² André Huet, *Chronique de jurisprudence française*, *JDI* 2003, 146, *citing* C.A. Rennes, *Bull.* July 1993 463; J.-J. Daigre, *JCP* 1993 IV 1520.

³³³ Huet, *supra* note 332, at 146.

³³⁴ PLENDER & WILDERSPIN, *supra* note 22, at 524.

³³⁵ See *Global Fin. Corp. v. Triarc Corp.*, 715 N.E.2d 482 (N.Y. 1999); *Lang v. Paine, Webber, Jackson & Curtis, Inc.*, 582 F. Supp. 1421 (S.D.N.Y. 1984).

³³⁶ See Joseph William Singer, *Publicity Rights and the Conflict of Laws: Tribal Court Jurisdiction in the Crazy Horse Case*, 41 *S.D. L. REV.* 1, 5 (1996).

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ PLENDER & WILDERSPIN, *supra* note 22, at 524.

(c) *The Place of the Parties' Precontractual Relationship*

Parties to a negotiation enter into a factual relationship defined by their negotiations. The parties' precontractual relationship can be difficult to determine whenever negotiations are conducted in the absence of the physical presence of the parties: through the telephone, or via email. This is especially true for the place of negotiation of the contract which can be hard to identify whenever the parties did not meet at the precontractual stage.

The above-mentioned difficulties are resolved by the application of the *lex contractus in negotio*.³⁴⁰ Indeed, the application of the law of the contract under negotiation relieves courts from the burden of locating the various tortious contacts in international negotiations and helps achieve legal certainty through predictable and uniform results between the different Member States.³⁴¹

(2) Application of the *Lex Contractus in Negotio* Eliminates Incoherence by Avoiding *Dépeçage*³⁴²

Application of the law of the *contract under negotiation* to claims of precontractual liability helps eliminate incoherence by avoiding *dépeçage*. According to D. Moura Vicente, "when adjudicating a claim of precontractual liability involving foreign elements, a court may face certain incidental questions also affected by foreign elements, such as the existence or the validity of an international contract."³⁴³ In some cases, "compensation of damages arising out of *culpa in contrahendo* presupposes that the contract was either invalid or had not yet come into existence."³⁴⁴ Issues relating to the existence or to the validity of the contract are, according to Article 10 of the Rome I Regulation, governed by the law of the contract if it were valid.³⁴⁵ By submitting claims arising out of *culpa in contrahendo* to the law of the contract under negotiation, the European Legislature has in fact submitted all issues related to the contract under negotiation to the same law. In effect, when a court is confronted with the two issues it will rule on the existence (or on the validity) of the contract and on the claim for damages by applying the same law. The application of two different laws to both issues might lead to unacceptable results. This

³⁴⁰ Lagarde, *supra* note 33, at 590.

³⁴¹ Cf. Thoma, *supra* note 22, at 682.

³⁴² According to Black's Law Dictionary, *dépeçage* designates "a court's application of different state laws to different issues in a legal dispute; choice of law on an issue-by-issue basis." BLACK'S LAW DICTIONARY (2009).

³⁴³ For a similar example, see Moura Vicente, *supra* note 16, at 718.

³⁴⁴ *Id.*

³⁴⁵ Article 10(1) of the Rome I Regulation states that: "[t]he existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid." Council Regulation 593/2008, *supra* note 38, art. 10(1).

would be the case for example, if the law designated to govern the issue of precontractual liability considers that the contract under negotiation has been concluded, and that the defendant is exonerated from precontractual liability, while the law designated to govern the validity of the contract states that the contract has not been formed, and holds the defendant precontractually liable.³⁴⁶ The implementation of *dépeçage* in this situation thwarts the interests of both States whose laws are in conflict, as well as the expectations of both parties.³⁴⁷

(3) Application of the *Lex Contractus in Negotio* Affords Protection to the Party in the Weaker Bargaining Position

The rule of Article 12(1) enables “the application of the [favorable] laws designated by Articles 6 and 8 of the Rome I Regulation”.³⁴⁸ Because the law of the contract under negotiation is to be determined pursuant to the rules of the Rome I Regulation, “the particular protection this instrument provides to certain consumer and individual employment contracts similarly extends to the precontractual bargaining period of the contract”.³⁴⁹ According to B. Volders, “the presumed economic weaker contracting parties are accordingly granted legal protection also prior [to their] entering into a final agreement.”³⁵⁰ Such an outcome is in accordance with national legislations that afford protection to the consumer or to the employee during the precontractual period.

ii. *The Inflexibility of the Rule Provided by Article 12(1) of the Rome II Regulation*

In spite of its advantages, the rule provided by Article 12(1) of the Rome II Regulation lacks flexibility. The European Legislature did not expressly provide for any escape devices in the event the application of the *lex contractus in negotio* reaches inappropriate results.³⁵¹ While the European Legislature might have provided escape clauses in several provisions of the Rome I and the Rome II Regulations, the Legislature did not insert an escape clause in Article 12(1) of the Rome II Regulation. The Legislature’s silence has led to the creation of a rigid rule, which lacks flexibility. On one hand, the conceptual devices employed by American

³⁴⁶ See *supra* Part II(A)(2)(a)(i); see also Moura Vicente, *supra* note 16, at 718.

³⁴⁷ See *supra* Part II(A)(2)(a)(i); see also Moura Vicente, *supra* note 16, at 718.

³⁴⁸ Thoma, *supra* note 22, at 682; see also Volders, *First Appraisal*, *supra* note 49, at 467; DICKINSON, *supra* note 48, at 534.

³⁴⁹ Volders, *First Appraisal*, *supra* note 49, at 467.

³⁵⁰ *Id.*

³⁵¹ It should be noted that according to Article 16 of the Rome II Regulation, the *lex contractus in negotio* can be displaced by application of the mandatory provisions of the law of the forum. However, this article does not provide an escape clause that can be employed to displace the *lex contractus in negotio* every time it reaches inappropriate results.

courts in order to escape the egregious results of the First Restatement do not work in EPIL; on the other hand, the three remaining escape possibilities have to be borrowed from other provisions at the expense of a manifest disregard to the express wording of the rules.

(1) The Inapplicability of American Escape Devices in EPIL

In order to escape the egregious results of the First Restatement's vested rights theory, American courts mainly employ three conceptual escape devices: (1) characterization; (2) *renvoi*; and (3) public policy.³⁵² While these escape devices have had success in the United States, they cannot be used in order to displace the *lex contractus in negotio* in EPIL.

(a) *Characterization*

In order to escape the rigid rule of the *lex loci delicti*, American courts recharacterized "the issue for decision, as a non-tort issue in order to use another First Restatement rule and generate a better result."³⁵³ While recharacterization might have yielded some good results in the United States, it is highly unlikely that those same results can be reached in EPIL, where the category of *culpa in contrahendo* has an autonomous meaning.³⁵⁴ This autonomy has been bestowed upon *culpa in contrahendo* for the specific purpose of putting an end to the characterization issue of this type of liability in Europe.³⁵⁵ It is highly unlikely that a European court will be able to recharacterize an issue of *culpa in contrahendo*, without any intervention by the ECJ.

(b) *Renvoi*

American courts have used *renvoi*³⁵⁶ in order to apply the conflicts rules of a foreign law designated by one of the conflicts rules of the forum. Although application of *renvoi* has helped American courts escape some of the rigid rules of the First Restatement,³⁵⁷ its application is excluded by Article 24 of the Rome II Regulation which states that "the application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private

³⁵² RICHMAN & REYNOLDS, *supra* note 309, § 65.

³⁵³ *Id.*; see also *Grant v. McAuliffe*, 41 Cal.2d 859 (1953) (where the court used the substance/procedure distinction to recharacterize the issue); *Haumschild v. Continental Casualty Co.*, 95 N.W.2d 814 (1959) (where the court recharacterized a torts issue into a status issue and applied the law of the marital domicile).

³⁵⁴ See *supra* Part I(B).

³⁵⁵ See *supra* Part I(B).

³⁵⁶ *Renvoi* is defined as "the doctrine under which a court in resorting to foreign law adopts as well the foreign law's conflict-of-laws principles, which may in turn refer the court back to the law of the forum." BLACK'S LAW DICTIONARY 1412 (2009).

³⁵⁷ See *Haumschild*, 95 N.W.2d 814.

international law.”³⁵⁸ Furthermore, its application would be useless whenever the foreign law designated by the Rome II Regulation is the law of a member state that applies the conflict-of-law rule provided by Article 12 of the Rome II Regulation.

(c) *Public Policy*

The public policy exception is the only safeguard a Member State’s court can use in order to escape the rigid rule of Article 12(1) of the Rome II Regulation. Article 26 of the Rome II Regulation states that “the application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.”³⁵⁹ While this article provides for the application of the public policy exception, it also limits its application to cases where the applicable law is “manifestly incompatible with the public policy of the forum.”³⁶⁰ According to Recital 32 of the Rome II Regulation, “considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions.”³⁶¹ In other words, the setting aside of the applicable law for the violation of public policy of the forum is rare. This is especially true in civil and commercial matters such as precontractual liability. It follows that the regular safeguards employed by American courts to counter the effects of the First Restatement do not have the same prophylactic effects in EPIL.

(2) The Inapplicability of Borrowed Escape Devices

Because Article 12(1) of the Rome II Regulation does not expressly provide escape devices, courts of Member States might be inclined to borrow the escape devices provided by the European Legislature in other dispositions. Specifically, courts might be inclined to borrow the escape devices provided by the following three articles: Article 4(3) of the Rome I Regulation; Article 10(2) of the Rome I Regulation; and Article 12(2) of the Rome II Regulation.

(a) *The Escape Clause Provided by Article 4(3) of the Rome I Regulation*

Article 4 of the Rome I Regulation provides an escape clause that is applicable whenever the contract is, manifestly, more closely connected to

³⁵⁸ See Council Regulation 864/2007, *supra* note 37, art. 24.

³⁵⁹ *Id.* art. 26.

³⁶⁰ *Id.*

³⁶¹ *Id.* at para. 32.

another country.³⁶² Although, this provision introduces flexibility, its application is restricted to the determination of the applicable law to the contract itself and cannot be used to determine the applicable law to the parties' precontractual relationship.³⁶³ According to Article 4(3), "where it is clear from all the circumstances of the case that the *contract* is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply."³⁶⁴ The escape clause provided by this Article allows courts to displace the law designated by paragraphs 1 or 2 of Article 4 of the Rome I Regulation only when the *contract* itself is manifestly more closely connected with another country. Such an escape device cannot be used to displace the law designated by the afore-mentioned paragraphs whenever the *non-contractual obligation arising out of dealings prior to the conclusion of a contract* appears to be more closely connected with another country. To hold otherwise, would go against the wording of Article 4(3) of the Rome I Regulation, which clearly states that courts base their analysis on the *contract* itself and not on the parties' precontractual relationship.³⁶⁵

(b) The Rule Provided by Article 10(2) of The Rome I Regulation

Article 10(2) of the Rome I Regulation allows a party, in order to determine that he did not consent to the formation of the contract, to rely upon the law of the country in which he has his habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the *lex contractus*, thus setting aside the application of the law that would normally govern the contract.³⁶⁶ Although this provision was initially introduced to resolve the problem of "the implications of silence by one party as to the formation of the contract,"³⁶⁷ recent scholarly writings have called for its application in order to prevent unfair results in cases of precontractual liability.³⁶⁸ According to some authors, the application of this provision might be particularly appropriate "in order to provide an escape clause to the party who could not reasonably expect to have his precontractual behavior regulated by a law

³⁶² Council Regulation 593/2008, *supra* note 38, art 4(3).

³⁶³ Lagarde, *supra* note 33, at 593, note 39.

³⁶⁴ Council Regulation 593/2008, *supra* note 38, at Article 4(3) (emphasis added).

³⁶⁵ *See id.* art. 4(3).

³⁶⁶ According to this article: "[A] party, in order to establish that he did not consent, may rely upon the law of the country in which he has his habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in paragraph 1." *Id.* art. 10(2).

³⁶⁷ PLENDER & WILDERSPIN, *supra* note 22, at 422.

³⁶⁸ Volders, *First Appraisal*, *supra* note 49, at 467; Thoma, *supra* note 22, at 682; Tubeuf, *supra* note 63, at 547; Gautier, *supra* note 245, at 13; MAX PLANCK INST., COMMENTS, *supra* note 52, at 96.

other than his.”³⁶⁹ This would be the case, for example, whenever a defendant has relied on the law of his residence that does not impose a precontractual duty of good faith and fair dealings in order to put an end to negotiations, which according to the *lex contractus in negotio*, he had no right to break.³⁷⁰

While some scholars have argued for the application of this provision, the fact remains that the wording of this provision prevents its application to claims arising out of precontractual liability.³⁷¹ Indeed, Article 10(2) of the Rome I Regulation affords protection to the party who has relied on the law of his residence “in order to establish that he did not consent.”³⁷² The wording of this provision excludes its application whenever the party’s aim is to escape liability. We cannot assume that the Legislature intended to extend the application of this provision to cases of *culpa in contrahendo*. On the contrary, it is precisely because the Legislature did not expressly extend the application of this provision to cases of *culpa in contrahendo* that this possibility should not be open to the defendant.³⁷³ Indeed, Article 10(2) of the Rome I Regulation was promulgated subsequently to Article 12 of the Rome II Regulation. Had the Legislature chosen to extend the application of this provision to cases of *culpa in contrahendo* he would have followed the example set by the Proposal of the Max Planck Institute for a Council Regulation on the Law Applicable to Contractual Obligations, and inserted an express provision authorizing the defendant to “rely upon the law of the country in which he has his habitual residence to establish that [. . .] he was under no obligation arising from the negotiations.”³⁷⁴ Therefore, we cannot allow courts of member states to displace the *lex contractus in negotio* on the basis of Article 10(2) of the Rome I Regulation.³⁷⁵

³⁶⁹ Thoma, *supra* note 22, at 683.

³⁷⁰ For examples of this situation, see Volders, *First Appraisal*, *supra* note 49, at 467; Plender and Wilderspin, *supra* note 22, at 737. See also Example 3 of the Introduction.

³⁷¹ In support of this view, see PLENDER AND WILDERSPIN, *supra* note 22, at 737–38.

³⁷² Council Regulation 593/2008, *supra* note 38, art. 10(2).

³⁷³ See PLENDER & WILDERSPIN, *supra* note 22, at 737–38.

³⁷⁴ MAX PLANCK INST., COMMENTS, *supra* note 52, at 114. According to this proposal:

[A] party may rely upon the law of the country in which he has his habitual residence to establish that: (a) he did not consent, or (b) that he was under no obligation arising from the negotiations if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in the preceding paragraphs.

Id.

³⁷⁵ Whatever view is taken, the interpretation of this provision depends “on a normative reading of the provisions of the two Regulations and it will ultimately need to be tested by the national courts and the ECJ.” Thoma, *supra* note 22, at 683.

(c) *The Escape Clause Provided by Article 12(2)(c) of the Rome II Regulation*

Article 12(2)(c) of the Rome II Regulation provides an escape clause that is applicable whenever it is clear from all the circumstances of the case that the non-contractual obligation arising out of dealings prior to the conclusion of a contract is manifestly more closely connected with a country other than the country designated by paragraph 2 of this provision.³⁷⁶ Although this provision seems to provide an appropriate escape clause, its applicability is extremely limited.

First, its applicability is limited to situations where the applicable law is determined according to the rules of paragraph 2 of Article 12 of the Rome II Regulation. According to Article 12(2)(c), “where it is clear from all the circumstances of the case that the non-contractual obligation arising out of dealings prior to the conclusion of a contract is manifestly more closely connected with a country other than that indicated in points (a) and (b), the law of that other country.”³⁷⁷ It follows that this escape clause is not applicable whenever the law that governs *culpa in contrahendo* is determined according to paragraph 1 of Article 12 of the Rome II Regulation.

Second, its application is only possible whenever “the law applicable cannot be determined on the basis of paragraph 1.”³⁷⁸ This escape clause is only applicable whenever the *lex contractus in negotio* cannot be determined and not when the *lex contractus in negotio* appears to be loosely connected to the issue. This escape clause cannot be used to displace the *lex contractus in negotio* whenever it reaches inappropriate results.³⁷⁹ To hold otherwise would go against the wording of Article 12 of the Rome II Regulation.

The lack of escape devices provided by the Legislature leads to the quasi-exclusive application of the *lex contractus in negotio*, which can rarely be displaced.³⁸⁰ This quasi-exclusivity is further comforted by the limited applicability of paragraph 2 of Article 12 of the Rome II Regulation.

B. *The Subsidiary Application of the Laws Enumerated by Article 12(2) of the Rome II Regulation*

Article 12(2) of the Rome II Regulation provides subsidiary rules that are applicable whenever the *lex contractus in negotio* cannot be

³⁷⁶ Council Regulation 864/2007, *supra* note 37, art. 12(2)(c).

³⁷⁷ *Id.*

³⁷⁸ *Id.*

³⁷⁹ In support of this view, see PLENDER AND WILDERSPIN, *supra* note 22, at 736; Lagarde, *supra* note 33, at 592–93; DICKINSON, *supra* note 48, at 530.

³⁸⁰ Albeit through the mechanism of public policy.

determined.³⁸¹ While this provision deviates from the application of the *lex contractus in negotio*, its application will, according to B. Volders, “most probably prove superfluous in practice.”³⁸² This conclusion seems reasonable in light of the application requirement of Article 12(2) of the Rome II Regulation. Because the *lex contractus in negotio* can, in the vast majority of cases, be identified, the subsidiary rules provided by paragraph 2 of Article 12 of the Rome II Regulation will rarely apply.

1. The Structure of Article 12(2)

Article 12(2) of the Rome II Regulation provides three different rules that apply “disjunctively.”³⁸³ Unlike Articles 10 and 11 of the Rome II Regulation with which it is usually associated,³⁸⁴ Article 12(2) “does not establish a clear hierarchy of its provisions *inter se*.”³⁸⁵ Because the three rules are joined by the coordinating conjunction “or,”³⁸⁶ a literal interpretation of this provision gives courts a wide discretion as to the choice of the relevant connecting factor. Indeed, the three rules apply alternatively. Courts have the possibility to apply the law of the place of injury, the law of the common residence of the parties, or the escape clause whenever the two previous contacts seem inappropriate.

a. The Application of the Law of the Place of Injury

Article 12(2)(a) of the Rome II Regulation provides for the application of “the law of the country in which the damage occurs, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occurred.”³⁸⁷ According to this provision, the law of the place of injury governs the defendant’s precontractual liability. By inserting this provision, the European Legislature has in fact submitted *culpa in contrahendo* to the general rule applicable to torts claims, which is provided by Article 4 of the Rome II Regulation.³⁸⁸ The application of the law of the place of injury is consistent with the non-contractual characterization of *culpa in contrahendo* in the Rome II Regulation.³⁸⁹ The law of the place of

³⁸¹ Boskovic, *supra* note 244, at 97; Lagarde, *supra* note 33, at 591; Bollée, *supra* note 67, at 2164.

³⁸² Volders, *First Appraisal*, *supra* note 49, at 467.

³⁸³ Thoma, *supra* note 22, at 683.

³⁸⁴ Légier, *supra* note 63, at 145; Tubeuf, *supra* note 63, at 536.

³⁸⁵ PLENDER & WILDERSPIN, *supra* note 22, at 738; *see also* Thoma, *supra* note 22, at 683.

³⁸⁶ Thoma, *supra* note 22, at 683.

³⁸⁷ Council Regulation 864/2007, *supra* note 37, art. 12(2).

³⁸⁸ For the text of this article, see *supra* note 60. For a commentary of this article, see Symeonides, *supra* note 42.

³⁸⁹ On the non-contractual characterization of precontractual liability in EPIL, see *supra*

injury is the *normal lex delicti* applicable to non-contractual obligations. However, this *return to normalcy* can only occur whenever the *lex contractus in negotio* cannot be determined.³⁹⁰

The rule provided by Article 12 (2) (a) incurs two criticisms. First, the place of injury is usually difficult to determine in cases of precontractual liability.³⁹¹ Although this rule provides for the application of the law of the place of injury “irrespective of the country or countries in which the indirect consequences of that event occurred,”³⁹² this precision does not help avoid the difficulty of locating the place of injury.³⁹³

Second, application of the *lex loci damni* disregards other relevant contacts like the place of the conduct or the place of residence of the parties and might lead to unfair results which American courts have long sought to avoid.³⁹⁴ However, this unwanted result can be avoided because Article 12(2) of the Rome II Regulation provides flexibility and allows the application of another law whenever application of the *lex loci damni* reaches inappropriate results.

b. The Application of the Law of the Parties’ Common Residence

Article 12(2)(b) of the Rome II Regulation states that “where the parties have their habitual residence in the same country at the time when the event giving rise to the damage occurs, the law of that country”³⁹⁵ should govern the defendant’s precontractual liability. According to this provision, the law that governs the defendant’s precontractual liability is the law of the common residence of the parties at the time of the conduct.³⁹⁶ This law would still apply whenever the parties have changed residences between the time when *culpa in contrahendo* arose and the time when the injury has manifested itself.

The Legislature has chosen as a relevant date for a habitual residence the time when the event giving rise to the damage occurs. This provision deviates from the general rule provided by Article 4(2) of the Rome II Regulation, which requires that all parties have their habitual residence in the same country at the time when the damage occurs.³⁹⁷

Part I.

³⁹⁰ And the parties did not have their habitual residence in the same country at the time of conduct. See *infra* Part II(B)(2).

³⁹¹ See *supra* Part II(A)(2)(b)(i)(1).

³⁹² Council Regulation 864/2007, *supra* note 37, art. 12(2)(a).

³⁹³ See *supra* Part II(A)(2)(b).

³⁹⁴ For a commentary of this rule see Symeonides, *supra* note 42.

³⁹⁵ Council Regulation 864/2007, *supra* note 37, art. 12(2)(b).

³⁹⁶ For criticism of this rule, see Volders, *First Appraisal*, *supra* note 49, at 468.

³⁹⁷ Article 4(2) of the Rome II Regulation states “where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.” Council Regulation

It is unclear why the Legislature has chosen to depart from the general rule he has established in Article 4 of the Rome II Regulation.³⁹⁸ This change in the wording of Article 12(2)(b) does not address the difficulty of determining the relevant contacts in cases of *culpa in contrahendo*. While it is true that it is difficult to determine the exact time of injury in cases of precontractual liability,³⁹⁹ “it is, however, wrong to assume that the exact time of the event giving rise to the damage is easier to determine.”⁴⁰⁰

However, it may be argued that this rule reaches more suitable results than the rule provided by Article 4(2) of the Rome II Regulation whenever the parties have changed residences between the time when the event giving rise to the damage has occurred and the time when the injury has manifested itself. This is especially true whenever the law of the habitual place of residence at the time of conduct is more favorable to the party who has moved out between the time when the event giving raise to the damage occurs and the time when the injury arises, than the law of his place of residence at the time of injury. In this particular scenario, the party that has moved out of the state of the habitual residence has a right to rely on this law’s provisions, while the other party has no right to rely on the more favorable law of a state whose application he could not foresee at the time of conduct. The parties are expected to have relied on the law of their common residence at the time they enter into negotiations. Although an argument can be made as to the suitability of this rule, we cannot assume it reaches appropriate results every time the parties have a common habitual place of residence at the time of conduct. This is why the European Legislature has provided an escape clause in Article 12(2)(c) of the Rome II Regulation.

c. The Escape Clause

Article 12(2)(c) of the Rome II Regulation provides an escape clause whenever the applicable law according to Articles 12(2)(a) and 12(2)(b) of the Rome II Regulation is inappropriate. According to Article 12(2)(c)

where it is clear from all the circumstances of the case that the non-contractual obligation arising out of dealings prior to the conclusion of a contract is manifestly more closely connected with a country other than that indicated in points (a) and (b), the law of that other country [should apply].⁴⁰¹

This text allows for the determination of the applicable law on an *ad hoc*

864/2007, *supra* note 37, art. 4(2).

³⁹⁸ Volders, *First Appraisal*, *supra* note 49, at 468.

³⁹⁹ See *supra* Part II(B)(2)(a).

⁴⁰⁰ Volders, *First Appraisal*, *supra* note 49, at 468. See *supra* Part II(B)(2)(a).

⁴⁰¹ Council Regulation 864/2007, *supra* note 37, art. 12(2)(c).

basis each time the applicable law according to the previous two provisions of Article 12(2) is inappropriate.⁴⁰² The escape clause provided by Article 12(2) of the Rome II Regulation is worded in similar fashion to the escape clause provided by Article 4(3) of the Rome II Regulation.⁴⁰³ As such, it is subject to the same type of criticism: namely, that “it entails the risk of degenerating into a mechanical counting of physical contacts.”⁴⁰⁴ However, “this risk is reduced when the escape is correlated to the overarching principles that permeate the rules, and/or when the escape allows an issue-by-issue evaluation.”⁴⁰⁵ It would seem that the wording of this provision allows for such an optimal employment of the escape clause. However, although this escape clause helps bring flexibility to the rigid rules of Article 12(2) of the Rome II Regulation, its application can prove to be relatively rare in practice.

2. The Application Requirement of Article 12(2)

Article 12(2) of the Rome II Regulation is only applicable whenever the law that governs the defendant’s precontractual liability cannot be determined on the basis of Article 12(1) of the same Regulation. By inserting a second paragraph in Article 12 of the Rome II Regulation, the Legislature did not intend to provide courts with an escape device that allows the application of a more appropriate rule whenever the *lex contractus in negotio* leads to unwanted results. Article 12(2) of the Rome II Regulation serves as an alternative whenever it is impossible to determine the *lex contractus in negotio* on the basis of Article 12(1). In effect, courts are not allowed to use the escape clause provided by Article 12(2)(c) in order to displace the application of the *lex contractus in negotio* whenever it can be determined.⁴⁰⁶

“The circumstances in which the law cannot be determined in accordance Article 12(1) of the Rome II Regulation are not addressed in the provision”.⁴⁰⁷ The Legislature’s silence might prove to be a source of disruption as it might reintroduce diversity where the Legislature has sought to achieve uniformity. The application of this provision might entirely depend on the inclination of the judge dealing with a liability claim arising out of *culpa in contrahendo*. A court that favors the rule of Article 12(1) of the Rome II Regulation will likely find sufficiently determined contacts in a situation where another court, which favors the application of Article 12(2) of the same Regulation, would find them insufficient.

⁴⁰² Thoma, *supra* note 22, at 684.

⁴⁰³ See *supra* note 60.

⁴⁰⁴ Symeonides, *supra* note 42, at 197.

⁴⁰⁵ *Id.*

⁴⁰⁶ PLENDER & WILDERSPIN, *supra* note 22, at 736; Lagarde *supra* note 33, at 593.

⁴⁰⁷ Thoma, *supra* note 22, at 683.

Additionally, it would seem that the law that governs the defendant's precontractual liability can, in the vast majority of cases, be determined on the basis of Article 12(1) of the Rome II Regulation, thus rendering the second paragraph of the same Article rarely applicable.⁴⁰⁸

On one hand, whenever *culpa in contrahendo* has not prevented the formation of the contract,⁴⁰⁹ the law of the contract under negotiation is *the lex contractus finalis* which is, in the vast majority of cases, always determinable.⁴¹⁰ The concluded contract either contains a choice of law clause or allows the determination of the relevant contacts provided by Article 4 of the Rome I Regulation.⁴¹¹ Even in situations where the applicable law cannot be determined on the basis of Articles 4(1) and 4(2) of the Rome I Regulation, courts can, in the vast majority of cases, determine the *lex contractus finalis* on the basis of the escape clause provided by Article 4(4) of the Rome I Regulation.⁴¹² However, an issue might arise whenever the parties have decided to submit different parts of the contract to different laws.⁴¹³ It might be argued that in such a case the *lex contractus finalis* cannot be determined on the basis of Article 12(1) of the Rome II Regulation and that the defendant's precontractual liability is governed by one of the laws enumerated by Article 12(2) of the Rome II Regulation.⁴¹⁴

On the other hand, whenever *culpa in contrahendo* has prevented the formation of the contract under negotiation,⁴¹⁵ the *lex contractus putativus* is determinable on the basis of Articles 4(1) and 4(2) of the Rome I Regulation, or on the basis of Article 4(4) of the same Regulation.⁴¹⁶

First, the *lex contractus putativus* is, in most cases, determinable on the basis of Articles 4(1) and 4(2) of the Rome I Regulation.⁴¹⁷ Indeed, whenever parties enter into a negotiation, three contacts are already determined: both parties' places of residence and the subject matter of the contract. In most cases, this information helps determine the place of the habitual residence of the debtor of the characteristic performance, whose

⁴⁰⁸ In support of this view, see Volders, *First Appraisal*, *supra* note 49, at 467; Bollée, *supra* note 67; Légier, *supra* note 63, at 166; PLENDER AND WILDERSPIN, *supra* note 22, at 738; Lagarde, *supra* note 33, at 593. *Contra*, Thoma, *supra* note 22, at 68. The author provides a list of examples where the *lex contractus in negotio* cannot be determined.

⁴⁰⁹ In this case *culpa in contrahendo* has either provoked the formation of the contract or has altered some of its terms.

⁴¹⁰ DICKINSON, *supra* note 48, at 535.

⁴¹¹ See *supra* Part II(A)(1)(a).

⁴¹² DICKINSON, *supra* note 48, at 535.

⁴¹³ See *supra* Part II(A)(1)(a).

⁴¹⁴ See *supra* Part II, A, 1.

⁴¹⁵ See *supra* Part I(B)(2).

⁴¹⁶ In support of this view, see Bollée, *supra* note 67, at 2164.

⁴¹⁷ *Id.*

law is usually applicable to the contemplated contract.⁴¹⁸ It should be noted, however, that some scholars have argued that a “breakdown of negotiations at the very beginning [might] hinder the determination of the applicable law to the projected agreement, especially if the projected agreement were to be very complex.”⁴¹⁹ This might be the case, for example, in complex mergers where the debtor of the characteristic performance of the projected merger cannot be accurately determined at the start of negotiations.⁴²⁰

Alternatively, and even if the *lex contractus putativus* cannot be determined on the basis of paragraphs 1 and 2 of Article 4 of the Rome I Regulation, this law can be determined on the basis of Article 4(4) of the same Regulation.⁴²¹ Indeed, Article 4(4) provides the courts with a subsidiary rule that allows the application of the law with the closest connection to the contract whenever the rules provided by the previous paragraphs do not allow the determination of the applicable law.⁴²² By employment of this escape clause, a court will be able to *force* the localization of the country with the closest connection to the putative contract. In effect, the *lex contractus in negotio* is, in the vast majority of cases, determinable through the application of Article 4 of the Rome I Regulation.⁴²³

Whatever view is taken as to the determination of the *lex contractus in negotio*, it all depends on whether the courts will be willing to displace the rule of Article 12(1) of the Rome II Regulation. A court that favors the rule of Article 12(1) of the Rome II Regulation will likely find sufficiently determined contacts in a situation where another court, which favors the application of Article 12(2) of the same Regulation, would find them insufficient.

CONCLUSION

In conclusion, it would seem that Article 12 of the Rome II Regulation will have mitigated success. This essay has tried to show the positives as well as the negatives of the Legislature’s attempt at codification.

⁴¹⁸ *Id.*

⁴¹⁹ Volders, *First Appraisal*, *supra* note 49, at 467, 134; Lagarde, *supra* note 33, at 593; PLENDER AND WILDERSPIN, *supra* note 22, at 736.

⁴²⁰ In some instances, the target company can only be determined after lengthy negotiations that involve economic, financial, and fiscal studies. In such cases, it is hard to identify the debtor of the characteristic performance. Other examples have also been advanced. According to Plender and Wilderspin, “in very complex contracts such as joint ventures, or negotiations involving a large number of parties, it may not be possible to determine the applicable law of the putative contract, even if the negotiations are advanced.” PLENDER & WILDERSPIN, *supra* note 22, at 736.

⁴²¹ Bollée, *supra* note 67, at 2164.

⁴²² *See supra* Part II(A)(1).

⁴²³ Bollée, *supra* note 67, at 2164.

A. The Positives

Article 12 of the Rome II Regulation reaches two positive results. First, this provision has succeeded in reaching a uniform characterization of *culpa in contrahendo* in EPIL. Although the issue of the applicable law to the precontractual liability arising out of the breach of a contractual obligation remains unresolved, the contours of the category of *culpa in contrahendo* in EPIL are determined without regard to national characterization.

Second, the Legislature's choice to submit claims arising out of *culpa in contrahendo* to the *lex contractus in negotio* is laudable. The application of this law reduces the uncertainty that accompanies the application of the *lex delicti* in a situation involving precontractual liability. Furthermore, it avoids unwanted results whenever the validity of the contract under negotiations affects the defendant's precontractual liability.

B. The Negatives

The European Legislature's attempt at codification of a choice of law rule on *culpa in contrahendo* reaches six negative results.

First, the Legislature's use of vague concepts, such as "non-contractual obligations arising out of dealings prior to the conclusion of a contract" and "non-contractual obligations presenting a direct link with the dealings prior to the conclusion of a contract," in order to define the material scope of Article 12 of the Rome II Regulation are likely to reintroduce diversity where the Legislature has sought to achieve uniformity. In effect, courts of Member States will likely interpret these concepts according to national laws, which will ruin the uniformity achieved at the legislation stage.

Second, the Legislature did not provide guidelines as to the applicable law to precontractual liability that arises out of the breach of a contractual obligation. The Legislature's silence might prove to be a source of confusion whenever a Member State's court is confronted with a claim arising out of the breach of a preliminary agreement.

Third, the application of the *lex contractus in negotio* has ruined the uniformity between the European Regulations on Private International Law reached by the Legislature at the characterization stage. Indeed, *culpa in contrahendo* is characterized in EPIL as non-contractual for the purposes of choice of law and of choice of jurisdiction. However, the Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters does not provide a special rule for the choice of jurisdiction in matters relating to *culpa in contrahendo*.⁴²⁴ Therefore, the competent jurisdiction in a case of *culpa in contrahendo* is determined according to the tortious contacts provided by Article 5(3) of

⁴²⁴ Council Regulation 44/2001, *supra* note 84.

the Brussels I Regulation. Thus, the court, whose jurisdiction is established on the basis of a non-contractual connecting factor, will have to apply a law that is determined on the basis of a contractual connecting factor, which does not always coincide with the law of the forum.

Fourth, the determination of the *lex contractus in negotio* might prove to be a delicate issue. This is especially true whenever the parties have chosen to submit different parts of their concluded contract to different laws. Complications may also arise whenever the contract under negotiation has not been concluded. In this situation, the determination of the applicable law hinges on the contacts provided by the parties' contractual project which might create additional problems as to the proof of the contents of such a project.

Fifth, the rule provided by Article 12(1) of the Rome II Regulation lacks flexibility. The lack of escape devices in Article 12 of the Rome II Regulation make for a rigid rule that might be inappropriate in certain situations.

Sixth, paragraph 2 of Article 12 of the Rome II Regulation only applies whenever the applicable law cannot be determined on the basis of Article 12(1) of the Rome II Regulation. However, the Legislature did not provide a list of circumstances in which the law cannot be determined on the basis of Article 12(1) of the Rome II Regulation. The Legislature's silence might reintroduce diversity where the Legislature has aimed for uniformity. The application of this provision will most likely depend on the inclination of each court. Moreover, it would appear that, in the vast majority of cases, the *lex contractus in negotio* can be determined, thus rendering the application of Article 12(2) relatively rare in practice.

The positive as well as the negative results that stem from the application of Article 12 of the Rome II Regulation are better illustrated by its application to the examples mentioned in the introduction.⁴²⁵

Example 1: In this example, the contract has already been concluded, thus the issue of the defendant's precontractual liability is governed by the *lex contractus finalis*. In this case, the parties did not include in their contract a choice of law clause. Therefore, the *lex contractus finalis* is to be determined according to Article 4(1) of the Rome I Regulation.⁴²⁶ The defendant's precontractual liability is governed by U.S. law, which is the law of the habitual residence of the seller.⁴²⁷

In this situation, Article 12 of the Rome II Regulation reaches a positive result. Indeed, the United States have a strong interest in protecting its residents from liability arising out of the failure to disclose

⁴²⁵ See *supra* Introduction.

⁴²⁶ Council Regulation 593/2008, *supra* note 38, art. 4(1).

⁴²⁷ Although a strong argument can be made for the application of French or German law.

during the negotiations of a contract. It also has an interest in liberating the parties' conduct at the negotiation stage in order to encourage commercial initiatives. It is also the law of the debtor of the characteristic performance whose application is, arguably, foreseeable to the plaintiff. In addition, this situation raises the issue of the validity of the concluded contract, in which case the application of the *lex contractus in negotio* reaches favorable results.

Example 2: In this example, there are two issues that need to be addressed. The first issue is the existence of the contract. According to Article 10(1) of the Rome I Regulation, "the existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid."⁴²⁸ It follows that the law that governs the existence of the contract is determined on the basis of Article 4 of the Rome I Regulation and is the law of the habitual residence of the seller of shares. It follows that the existence of the contract is governed by French law, which considers that the revocation of the offer prevents the formation of the contract.⁴²⁹ The second issue is the defendant's precontractual liability. Because the applicable law to the existence of the contract considers that the revocation of the offer has prevented the formation of the contract, the defendant's precontractual liability is to be governed by the *lex contractus putativus*. This law is also determined on the basis of Article 4 of the Rome I Regulation and is the law of the habitual residence of the seller of shares. It follows that the issue of defendant's precontractual liability is also governed by French law, which does not allow the defendant to freely revoke his offer without incurring liability.⁴³⁰

In this example, the issues of the existence of the contract and of the defendant's precontractual liability are intertwined. Application of Article 12 of the Rome II Regulation reaches a positive result by submitting the two issues to the same law, and avoids unnecessary *dépeçage* in order to achieve a coherent result.⁴³¹

Example 3: In this example, the contract for the sale of goods has not been concluded, thus, the issue of the defendant's precontractual liability is to be governed by the *lex contractus putativus*, which is the law of the habitual residence of the seller. Application of the rule provided by Article 12(1) of the Rome II Regulation leads to the application of French law to the defendant's precontractual liability. This result has mitigated success. While it may be argued that the *lex contractus in negotio* is appropriate in order to resolve a true conflict situation, one may argue that the application

⁴²⁸ Council Regulation 593/2008, *supra* note 38, art. 10(1).

⁴²⁹ See *supra* note 11 and accompanying text.

⁴³⁰ See *id.*

⁴³¹ See *supra* Part II(A)(2)(a)(i).

of French law in this situation is “neither fair nor efficient as it creates legal obstacles to the initiative of the parties to engage in contractual negotiations.”⁴³²

Example 4: In this example, the contract for the sale of land has not been concluded. Thus, the issue of the defendant’s precontractual liability is to be governed by the *lex contractus putativus*. Because the parties’ contemplated contract is a contract for the sale of land, this law is determined on the basis of Article 4(1)(c) of the Rome I Regulation and is the “law of the country where the property is situated.”⁴³³ Thus, according to German law, the defendant is liable for breaking off the negotiations in bad faith.⁴³⁴

The result reached by Article 12(1) of the Rome II Regulation is inappropriate and should be avoided.⁴³⁵ However, Article 12 of the Rome II Regulation does not expressly provide the courts with appropriate escape devices that would allow them to displace the *lex contractus in negotio* in order to reach more appropriate results.

In light of this appraisal, it would seem appropriate to suggest that the Commission’s report on the application of the Rome II Regulation, scheduled to be submitted to the European Parliament, the Council and the European Economic and Social Committee in 2012, include the following:

- i. A definition of the concept of non-contractual obligations, in general, and more specifically, a definition of the concept of non-contractual obligations arising out of dealings prior to the conclusion of a contract;
- ii. The determination of the material scope of Article 12 of the Rome II Regulation. The Commission’s report should address, in particular, the issue of the applicable law to preliminary agreements and sollicitation;
- iii. The circumstances in which the *lex contractus in negotio* cannot be determined, which would trigger the application of Article 12(2) of the Rome II Regulation; and
- iv. The proposal to include an escape clause that allows the courts to displace the *lex contractus in negotio* whenever its application reaches inappropriate results. It should be noted that the inclusion of an escape clause in Article 12 of the Rome II Regulation does not contradict the Legislature’s aim of achieving uniformity between the different member states. Likewise, the need for legal certainty does not justify the lack of an escape clause in Article 12(1) of the Rome

⁴³² Thoma, *supra* note 22, at 682. See also *supra* Part II(A)(2)(a).

⁴³³ Council Regulation 593/2008, *supra* note 38, art. 4(1).

⁴³⁴ Banakas, *supra* note 16; Musy, *supra* note 16.

⁴³⁵ See *supra* Part II(A)(2)(a).

II Regulation. Indeed, the European Legislature has inserted escape clauses in several provisions of the Rome I and Rome II Regulations in order to introduce flexibility and allow “the court seized to treat individual cases in an appropriate manner.”⁴³⁶ No reason should preclude the Legislature from providing an appropriate escape clause that allows departure from the application of the *lex contractus in negotio*.

While it can be presumptuous to hope that all the issues addressed in the present essay will be resolved by the end of 2012, we hope that the Commission’s report will at least identify the most glaring shortcomings of the rule provided by Article 12 of the Rome II Regulation.

⁴³⁶ Council Regulation 864/2007, *supra* note 37, para. 14.