The Scope of ‘Non-Contractual Obligations’

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A. Introduction

The material scope of the Rome II Regulation\(^1\) is defined in two ways: first, by reference to nature of the legal relationship in issue, namely non-contractual obligations, secondly by reference to the context in which such relationships arise, namely civil and commercial matters. This paper focuses on the nature of the relationships that attract the Regulation’s application. Two interesting and important issues arise. First, which relationships are ‘non-contractual’ and how do the answers to this question relate to those found elsewhere in Community private international law? Second, what is an ‘obligation’ and is the answer affected by a claim’s dependence on pre-existing rights such as those of contract or property, the type of remedy sought, or the obligation’s characterisation as equitable? Underlying the resolution of these issues is a more fundamental matter regarding the Regulation’s approach to characterisation questions. This matter is considered first.

B. Characterisation Questions

1. What is Characterised and How: Data and Definition

Questions of characterisation, like other questions regarding the Regulation’s meaning, are questions of legislative interpretation. The Regulation’s application is not dependent on the forum’s characterisation of a claim or disputed issue as one relating to tort, or unjust enrichment and so on. The Regulation applies to all matters within its scope.

The Regulation applies to ‘non-contractual obligations’. It neither refers to non-contractual claims, nor non-contractual issues, matters or disputes. Its choice

of law rules look to the events out of which those obligations arise. They do not refer to a claim’s purpose or object. Since the Regulation focuses on obligations and the events out of which they arise, these provide the data for characterisation. The Regulation looks at nothing else. Given the questions asked by the Regulation’s rules and concepts, such data must include an obligation’s nature, incidents and the constitutive elements of the event from which they arise. It is submitted that the only law that can provide these data is the law by reference to which the claimant pleads his claim.²

However, whilst data used in the characterisation process are derived from the law by reference to which the claimant pleads his claim, this does not mean that that law’s characterisation is adopted. For example, if a claim is brought to enforce obligations arising under the principle in *Hedley Byrne v. Heller & Partners*, the obligations alleged may not attract the Regulation’s rules. Although English law classifies those obligations as tortious, they arise, under that law, from voluntary assumptions of responsibility and can be disclaimed or varied by the defendant’s contrary intention. The incidents and constitutive elements of the obligations under English law would take them outside of the Regulation’s scope if, for example, the autonomously defined concept of ‘non-contractual’ excludes obligations arising consensually.

Equally, where obligations are pleaded to arise under laws foreign to the forum, regard must be had to those laws when acquiring the data to which the