ROME I AND ROME II IN PRACTICE

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INTERSENTIA

One cannot reasonably maintain that 'the choice shall be ... clearly demonstrated by the terms of the contract or the circumstances of the case' and at the same apply Article 11, which may potentially lead to the application of a rule requiring that this agreement be concluded in writing or in notarial deed. This is at the same time irreconcilable with the very concept of uniform EU private international law, which aims to establish uniform criteria of validity for the choice-of-law clauses.[47] It is also misleading because it may suggest that the formal requirements for the choice-of-law agreement are the same as those established by Article 11 Rome I for the main contract.

[47] See for example the judgment of the Court of Appeal in Katowice of 21 July 2016, case V ACa 938/15, V ACz 1269/15.

THE APPLICATION OF THE ROME I AND ROME II REGULATIONS IN PORTUGAL

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1. INTRODUCTION

This chapter analyses how Portuguese courts are applying two European Regulations on the conflict of laws – the Rome I Regulation on the law applicable to contractual obligations; and the Rome II Regulation on the law applicable to non-contractual obligations.

Some preliminary clarifications are required.

Firstly, this study does not consider all rulings of Portuguese courts. In fact, decisions of lower courts are not available to academics in a digital format nor organised by subject matter; therefore, the lower court rulings analysed were obtained by directly contacting the courts, which means not all the case law

of lower courts could be considered. Furthermore, regarding superior courts (Courts of Appeal and the Portuguese Supreme Court of Justice),[1] not all verdicts are available on the Internet or in Court reports published by the Ministry of Justice, only the most significant and consequential judgments are selected.[2] As for arbitration awards, no are data publicly available, making it impossible to find out how the Rome I and Rome II Regulations are applied.

This means that there are no accurate public data on the application of these Regulations by the clear majority of Portuguese courts, which may weaken the conclusions drawn in this chapter.

Secondly, Portuguese law does not provide any national rules facilitating the application of the Rome I and Rome II Regulations; in fact, since the direct application of European Regulations is established in the Portuguese Constitution,[3] the courts have simply replaced the use of previous national conflict-of-laws rules with the European rules.

Thirdly, some national rules on the general problems of private international law must be stressed, since they influence the way Portuguese courts apply European conflict-of-laws rules.[4] The most decisive are the rules on characterisation and application of foreign law.

On characterisation, the Portuguese Civil Code includes a rule establishing the autonomous interpretation of conflict-of-laws norms and prescribing

1 In Portuguese: Courts of Appeal – Tribunais da Relação; and Supreme Court of Justice – Supremo Tribunal de Justiça.

2 The Portuguese Ministry of Justice publish Court Reports – *Boletim do Ministério da Justiça* – available via <http://www.gddc.pt/actividade-editorial/actividade-editorial.html>. However, the online reports consist of only a selection of court decisions depending on their significance.
Additionally, superior courts release their decisions via <www.dgsi.pt>. Nevertheless, the rapporteur for each case decides if the judgment is sufficiently important to be available online, which means only some rulings are available via the Internet.

3 Cf. Article 8(3) of the Portuguese Constitution: 'The norms issued by the competent organs of international organisations to which Portugal belongs come directly into force in Portuguese internal law, on condition that this is laid down in the respective constituent treaties'.

4 Cf. Luís de Lima Pinheiro, *Direito Internacional Privado*, Vol. I, Introdução e Direito de Conflitos – Parte Geral, 3rd edition, Almedina, Coimbra, 2014, p. 237; Geraldo Ribeiro, 'A Europeização do Direito Internacional Privado e Direito Processual Internacional: Algumas Notas sobre o problema da interpretação do âmbito objectivo dos regulamentos comunitários', *Julgar*, no. 23, 2014, pp. 263–293, p. 271; Jan von Hein and Giesela Rühl, 'Towards a European Code on Private International Law', *Cross-border activities in the EU – Making life easier for citizens*, Directorate General for Internal Policies, European Parliament, Brussels, 2015, pp. 8–53, pp. 14 and 21 ff.; Hans Jürgen Sonnenberger, 'Eingriffsnormen', *Brauchen wir eine Rom 0-Verordnung?*, Stefan Leible and Hannes Unberath, Jenaer Wissenschaftliche Verlagsgesellschaft, Jena, 2013, pp. 429–444, pp. 429 ff.; Wolfgang Wurmnest, 'Ordre public', *Brauchen wir eine Rom 0-Verordnung?*, Stefan Leible and Hannes Unberath, Jenaer Wissenschaftliche Verlagsgesellschaft, Jena, 2013, pp. 445–478, pp. 445 ff.

lege causae characterisation,[5] in harmony with the guidelines of the Court of Justice of the European Union.[6]

Regarding the application of foreign law, within the Portuguese system it must be acknowledged *ex officio* by the courts – *iura novit curiae*.[7] This means there is no risk of endangering the objective of international uniformity of decisions, since the applicable law is *ex officio* sought and employed by national judges, even if the parties do not plead it and do not prove its content.[8]

5 Article 15 of the Portuguese Civil Code: 'The reference made by a conflict-of-laws rule to a certain legislation relates only to the norms which report to the subject of that rule, considering their content and purpose within the legal system they belong to'.

6 In fact, it is now clear that the CJEU discourages characterisation *lege fori* and instructs that concepts should be interpreted autonomously. Therefore, the characterisation method contained in Article 15 of the Portuguese Civil Code matches the one prescribed by European case law, even in the absence of a 'Rome 0 Regulation'. Cf. Luís de Lima Pinheiro, 'The methodology and the general part of the Portuguese Private International Law Codification: a possible source of inspiration for the European Legislator?', *Yearbook of Private International Law*, Vol. XIV, 2012–2013, pp. 153–172, p. 155 ff.; Benedetta Ubertazzi, 'La legge applicabile alle obbligazioni contrattuali nel Regolamento "Roma I"', *Diritto Internazionale Privato e Cooperazione Giudiziaria in Materia Civile – Trattato di Diritto Privato dell'Unione Europea, Vol. XIV*, Andrea Bonomi, Giappichelli Editore, Turin, 2009, pp. 345–408, p. 351; Christian Heinze, 'Bausteine eines Allgemeinen Teils des europäischen Internationalen Privatrechts', *Die richtige Ordnung – Festschrift für Jan Kropholler zum 70. Geburtstag*, Dietmar Baetge, Jan von Hein and Michael von Hinden, Mohr Siebeck, Tübingen, 2008, pp. 105–127, p. 108 ff.; Helmut Heiss and Emese Kaufmann-Mohi, '"Qualifikation" – Ein Regelungsgegenstand für eine Rom 0-Verordnung?', *Brauchen wir eine Rom 0-Verordnung?*, Stefan Leible and Hannes Unberath, Jenaer Wissenschaftliche Verlagsgesellschaft, Jena, 2013, pp. 181–199, p. 197; Andrea Bonomi, 'Il diritto internazionale privato dell'Unione europea: considerazioni generali', *Diritto Internazionale Privato e Cooperazione Giudiziaria in Materia Civile – Trattato di Diritto Privato dell'Unione Europea, Vol. XIV*, Andrea Bonomi, Giappichelli Editore, Turin, 2009, pp. 1–54, p. 35 ff.; Rafael Arenas García, 'La distinción entre obligaciones contractuales y obligaciones extracontractuales en los instrumentos comunitarios de derecho internacional privado', *Anuario Español de Derecho Internacional Privado*, Vol. VI, 2006, pp. 393–415, p. 414; Helène Gaudemet-Tallon, 'Le nouveau droit international privé européen des contrats (Commentaire de la convention C.E.E. no. 80/934 sur la loi applicable aux obligations contractuelles, ouverte à la signature à Rome le 19 juin 1980)', *Revue Trimestrielle de Droit Européen*, Vol. 17, 1981, pp. 215–285, p. 258; Geraldo Ribeiro, n. 4 above, p. 271.

7 Article 348 of the Portuguese Civil Code. Cf. António Ferrer Correia, *Lições de Direito Internacional Privado*, Almedina, Coimbra, 2000, p. 427; Luís de Lima Pinheiro, n. 4 above, p. 648; António Marques dos Santos, 'A Aplicação do Direito Estrangeiro', *Estudos de Direito Internacional Privado e de Direito Público*, Almedina, Coimbra, 2004, pp. 33–53, p. 45; Trevor C. Hartley, 'Pleading and Proof of Foreign Law: the Major European Systems Compared', *International and Comparative Law Quarterly*, Vol. 45, 1996, pp. 271–292, p. 275; Afonso Patrão, 'Poderes e deveres de Notário e Conservador na Cognição de direito estrangeiro', *Cadernos do CENoR – Centro de Estudos Notariais e Registais*, no. 2, 2014, pp. 9–38, pp. 13 ff.

8 In fact, the *iura novit curiae* maxim is the only system that prevents the undermining of the purposes of European unification of the conflict-of-laws rules. Cf. Luís de Lima Pinheiro, n. 6 above, p. 171; Stefan Leible and Michael Müller, 'A General Part for European Private International Law?', *Yearbook of Private International Law*, Vol. XIV, 2012–2013,

In addition, it must be underlined that the position on *renvoi* in the Rome I and Rome II Regulations is different from the system of private international law. In fact, internal rules establish a pragmatic system on *renvoi*, accepting it only when it ensures international uniformity of decisions.[9]

2. APPLICATION OF ROME II

2.1. THE NATIONAL LANDSCAPE

To my knowledge, there are very few judicial rulings by Portuguese courts directly concerning the application of the Rome II Regulation – I identified only seven verdicts.[10] Additionally, there are other rulings discussing whether

pp. 137–152, p. 149; Urs Peter Gruber and Ivo Bach, 'The Application of Foreign Law – A progress report on a new European project', *Yearbook of Private International Law*, Vol. 11, 2009, pp. 157–169, p. 167; José Luis Iglesias Buhigues, 'Luces y sombras de la cooperación judicial en materia civil en la UE', *Entre Bruselas y la Haya: Estudios sobre la unificación internacional y regional del Derecho internacional privado – Liber Amicorum Alegría Borrás*, Joaquin Forner Delaygua, Cristina González Beilfuss and Ramón Viñas Farré, Marcial Pons, Madrid, 2013, pp. 535–552, p. 551; Rainer Hausmann, 'Pleading and Proof of Foreign Law – a Comparative Analysis', *The European Legal Forum*, Vol. 8, no. 1, 2008, pp. 1–13, p. 13; Aurelio López-Tarruella Martínez, '¿Constituye la aplicación de la lex fori en defecto de prueba del Derecho extranjero designado por una norma de conflicto unionista un incumplimiento del Derecho de la Unión Europea?', *Nuevas Fronteras del Derecho de la Unión Europea – Liber amicorum José Luis Iglesias Buhigues*, Carlos Esplugues Mota and Guillermo Palao Moreno, Tirant lo Blanch, Valencia, 2012, pp. 537–554, p. 552.

9 Articles 16–18 of the 1966 Portuguese Civil Code. The Portuguese system, as a principle, excludes *renvoi* (Article 16). However, *renvoi* is accepted in cases in which harmony of decisions can be achieved: if the foreign law makes a *renvoi* to a third state that would apply its own law (Article 17(1)), and if the foreign law makes a *renvoi* to Portuguese internal law (Article 18(1)).
The system is more complex regarding the law applicable to personal status, in which the system accepts *renvoi* only when the most relevant legislation (nationality and habitual residence) agree on the law applicable – Articles 17(2) and 18(2) of the Portuguese Civil Code. For further explanations, João Baptista Machado, *Lições de Direito Internacional Privado*, Almedina, Coimbra, 1999, pp. 178 ff.; António Ferrer Correia, n. 7 above, p. 256 ff.; Luís de Lima Pinheiro, n. 4 above, pp. 542 ff.; Helena Mota, 'A autonomia conflitual e o reenvio no âmbito do Regulamento (UE) no. 650/2012, do Parlamento Europeu e do Conselho, de 4 de Julho de 2012', *Revista Electrónica de Direito*, no. 1, 2014, available via <www.cije.up.pt/revistared>, p. 17 (comparing the Portuguese *renvoi* rules with Article 34 of Regulation 650/2012).

10 Judgment of the Lisbon Court of Appeal of 10 July 2013, case 3774/12.2TJLSB-A.L1-7 (available via <http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/d0306eb0c5b0994980257bc200692f35?OpenDocument&Highlight=0,3774%2F12.2TJLSB-A.L1-7>); Judgment of the Guimarães Court of Appeal of 29 October 2013, case 225/12.6TBAMR.G1 (available via <http://www.dgsi.pt/jtrg.nsf/86c25a698e4e7cb7802579ec004d3832/296884764e6120cb80257c28003d756b?OpenDocument&Highlight=0,225%2F12.6TBAMR.G1>); Judgment of the Supreme Court of Justice of 1 April 2014, case 1061/12.5TVLSB.L1.S1 (available

the Rome II Regulation should be applicable, in terms of when it entered into force.[11] However, it is not certain that these are the only decisions applying the Rome II Regulation: on the one hand, there is no central place of publication of lower courts' decisions; on the other hand, there may exist more rulings of the superior courts on the Rome II Regulation that were not selected for publication.

Surprisingly, the decisions where the Rome II Regulation (specifically its rule that the Regulation applies to events that occurred after 11 January 2009) has been applied wrongly in Portugal are not judgments that apply national rules on the law applicable to torts in cases that should be subject to the Rome II Regulation: I found none of these. Rather, I found judgments where the Rome II Regulation was wrongly applied to events that occurred *before* its entry into force. These decisions were made by lower courts and then amended by the Supreme Court of Justice.[12]

The European rules on torts are not very different from the national set of norms, which may explain the fact that not many discussions have arisen on the application of the Rome II Regulation. In fact, Portuguese internal conflict-of-laws norms already contained an exception clause allowing for the setting aside

via <http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/e29fb62bf946e5d980257cad004f7726?OpenDocument&Highlight=0,1061%2F12.5TVLSB.L1.S1>); Judgment of the Court of Póvoa do Varzim (Lower Court) of 7 June 2016, case 406/14.8TBMAI; Judgment of the Court of Póvoa do Varzim (Lower Court) of 15 June 2016, case 21/14.6TBSTS; Judgment of the Court of Póvoa do Varzim (Lower Court) of 30 August 2016, case 461/13.8TBPVZ.

11 Cf. Judgment of the Supreme Court of Justice of 1 March 2012, case 186/10.6TBCBT.S1 (available via <http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/a26b538186b9c0df802579bc004147a2?OpenDocument&Highlight=0,186%2F10.6TBCBT.S1>) and Judgment of the Supreme Court of Justice of 11 April 2013, case 186/10.6TBCBT.S2 (available via <http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/d04217db6aaf52b980257b5000354078?OpenDocument&Highlight=0,186%2F10.6TBCBT.S2>). In these cases, the event giving rise to damage occurred *before* the entry into force of the Rome II Regulation, even though the claim was only filed after that date. The Supreme Court of Justice declared that the Rome II Regulation was not applicable, amending the lower court decisions and determining that the national set of rules on tort law was applicable (Article 45 of the Portuguese Civil Code).
The application in time rules are also discussed in Judgment of the Lisbon Court of Appeal of 29 October 2015, case 2691/13.3TCLRS.L1-2 (available via <http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/794ce7c47b07215b80257f0a00439624?OpenDocument&Highlight=0,2691%2F13.3TCLRS.L1-2>) and in Judgment of the Coimbra Court of Appeal of 9 January 2012, case 1473/10.9T2AVR.C1 (available via <http://www.dgsi.pt/jtrc.nsf/c3fb530030ea1c61802568d9005cd5bb/43eafe5d809eb893802579950059b777?OpenDocument&Highlight=0,1473%2F10.9T2AVR.C1>): they both concerned a road accident that occurred in Spain (the first one on 28 March 2008; the second one on 27 August 2007) in which one of the parties set aside the application of the Rome II Regulation, but the arguments were not accepted by the courts.

12 Cf. n. 11 above.

of the general rule if there was a common habitual residence of both the person claimed to be liable and the person sustaining the damage.[13] Additionally, the national set of rules on the law applicable to tort had already established an escape clause in favour of *lex loci damni* in cases in which the general rule (*lex loci delicti commissi*) did not provide for compensation.[14]

Therefore, just like in most Member States, the main distinction between the Rome II Regulation (*lex loci damni*) and national private international law rules (*lex delicti commissi*) is the general criterion: previously, the law applicable to torts was *lex loci delicti commissi*, whereas now the European conflict-of-laws rule elects *lex loci damni*. Hence, the aspect of the Rome II Regulation that has been most often considered by the national courts is the determination of the place where the damage occurred. In fact, Article 4(1) and Recital 17, which deal with the determination of the place of the *direct consequences* of the tort, are the most commonly applied rules of the Rome II Regulation.

The other main difference is the existence in the Rome II Regulation of party autonomy. However, no case has come before the Portuguese courts in which the parties had chosen the law applicable to tort.

2.2. RELEVANT CASES

Most of the cases decided by Portuguese courts that apply the Rome II Regulation have concerned traffic accidents that occurred in Spain, causing damage to persons with habitual residence (or central administration) in Portugal. In these cases, it has been discussed *what damages* were relevant to establish the *country in which the damage occurred*. These rulings have used two different solutions, one of them clearly undermining the purpose of the Rome II Regulation via the erroneous application of Article 4.

To show the tendencies of Portuguese courts as regards the interpretation of Article 4(1) of the Rome II Regulation, I highlight three cases on traffic

13 Cf. Article 45(3) of the Portuguese Civil Code. Internal rules on the conflict of laws also admitted the overlook of the general rule if both parties had the same nationality: 'If, however, the person claimed to be liable and the person sustaining damage both have the nationality of the same country or their habitual residence in the same country, and were occasionally abroad, the law of that country shall be applicable, without prejudice of the mandatory provisions of the law of the country where the event occurred'.

14 Unlike the one in Article 4(3) of the Rome II Regulation, this escape clause has a substantive purpose, overriding the general rule not because of the existence of a closer connection but to fulfil a goal (compensation of damages) when the *lex loci delicti commissi* did not hold the person liable. Emphasising the contrast, cf. Rui Moura Ramos, *Estudos de Direito Internacional Privado da União Europeia*, Imprensa da Universidade de Coimbra, Coimbra, 2016, p. 117.

collisions: two correct decisions and the one in which, in my understanding, the court wrongly applied the European rules.

The first case came before the Lisbon Court of Appeal and concerned a traffic accident in Spanish territory, in which a car driven by a Spanish citizen (with habitual residence in Spain) caused damage to a truck owned by a Portuguese company governed from Portugal.[15] In court, the Portuguese company (the legal person sustaining the damage) claimed compensation for the *time the truck was stopped for repairs* and not being used in the company's activity. Thus, it was argued that the 'country where the damage occurred' was Portugal (Article 4(1)) and, therefore, there was no ground for exemption from liability, since Portuguese law establishes a limitation period of three years (which had not been exhausted). On the other hand, the Spanish driver argued that there were grounds for exemption: he claimed the damage was *the harm done to the truck in Spain* and, therefore, Spanish law would be applicable, with its one-year limitation period (which had already been exhausted).

Similarly, in the second case,[16] a Portuguese driver with habitual residence in Portugal sustained damage as a result of a road accident that occurred in Spain and claimed liability of a Spanish driver with habitual residence in Spain. The Portuguese driver asked for compensation for the costs of repairing the car, a service which had taken place in a garage in Portugal. Thus, the person sustaining the damage argued that Portuguese law was applicable (with its three-year limitation period), since the costs were incurred in Portugal. The person claimed to be liable, however, argued that the only relevant damage was the *direct harm to the car*, thus contending that Spanish law and its limitation period of one year applied.

In both cases, the court was required to interpret the concept of the relevant 'damage', in order to determine the *place where the damage occurred*: the victims argued for the relevance of 'the location from which reparation was demanded in court'; while the persons claimed to be liable held that what was relevant was the *first consequence of the event*. On this matter, both the Lisbon Court of Appeal as the Supreme Court of Justice decided, referring to Recitals 16 and 17, that the relevant damage is the first consequence of the event – the place where people were injured or the property was damaged – notwithstanding its indirect

15 Judgment of the Lisbon Court of Appeal of 11 January 2013, case 3774/12.2TJLSB-A.L1-7 (available via <http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/d0306eb0c5b0994980257bc200692f35?OpenDocument>).

16 Judgment of the Supreme Court of Justice of 1 April 2014, case 1061/12.5TVLSB.L1.S1 (available via <http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/e29fb62bf946e5d980257cad004f7726?OpenDocument&Highlight=0,1061%2F12.5TVLSB.L1.S1>).

consequences. Therefore, Spanish law was established as being applicable to the tort.[17] In my understanding, these rulings show a correct application of the Rome II Regulation.[18]

A very different solution – and, in my view, an incorrect decision – was given by the Guimarães Court of Appeal in a similar case concerning a road accident that occurred in Spain between a person with habitual residence in Portugal (the person sustaining the damage) and a Spanish citizen living in Spain.[19] In this case, the court established that the relevant damage was the cost of repairing the car, which had been carried out in a garage in Portugal. Therefore, the court established that Portuguese law was applicable and, in my opinion, contradicted Recitals 16 and 17.[20]

17 In these cases, even though the parties had different interpretations of Article 4 of the Rome II Regulation, no preliminary ruling was requested from the CJEU. Regarding the first case (the one from the Lisbon Court of Appeal), perhaps the national court decided not to refer the case because there was a judicial remedy under national law (according to Article 672 of the Portuguese Civil Procedure Code). However, in the case decided by the Supreme Court of Justice, no judicial remedy existed. Therefore, it was possibly assumed that 'the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved' and that, consequently, 'the national court or tribunal [may] refrain from submitting the question to the court of justice and take upon itself the responsibility for resolving it' – Case 283/81, *CILFIT* [1982] ECR 3415, Recital 16.
In fact, the absence of preliminary ruling cannot be explained by the existence of a previous decision of the CJEU on the interpretation of Article 4(1) of the Rome II Regulation, since the only verdict was given in Case C-350/14, *Florin Lazar*.

18 Other good examples must be stressed. Firstly, the Judgment of the Coimbra Court of Appeal of 9 January 2012, case 1473/10.9T2AVR.C1 (available via <http://www.dgsi.pt/jtrc.nsf/c3fb530030ea1c61802568d9005cd5bb/43eafe5d809eb893802579950059b777?OpenDocument>). In this case, although the court decided that the Rome II Regulation was not applicable (since the road accident occurred on 27 August 2007), the judges highlighted the concept of *direct damage* as the place where persons were injured or property was harmed. Secondly, a decision from a lower court (Judgment of the Court of Póvoa do Varzim of 30 August 2016, case 461/13.8TBPVZ), between a Spanish citizen living in Spain and a Portuguese citizen living in Portugal, concerning a road accident which took place in Portugal. The court decided in favour of the application the law of the country where the road accident occurred (Portugal), thus holding that the *direct damage* was the relevant fact to be ascertained.

19 Judgment of the Guimarães Court of Appeal of 29 October 2013, case 225/12.6TBAMR.G1 (available via <http://www.dgsi.pt/jtrg.nsf/86c25a698e4e7cb7802579ec004d3832/296884764e6120cb80257c28003d756b?OpenDocument>).

20 Again, just like in the judgment referred to in n. 17 above), although the parties had different interpretations of Article 4 of the Rome II Regulation, no preliminary ruling was requested from the CJEU. It is not clear whether the court decided not to make such a reference because it thought there was a judicial remedy under national law (according to Article 672 of the Portuguese Civil Procedure Code). However, because this interpretation contradicts the opinion of the CJEU in Case C-350/14, *Florin Lazar*, the Portuguese court should have referred the case for a preliminary ruling if it was not intending on following the CJEU's interpretation.

Beyond the interpretation of Article 4(1), I identified a judgment where Article 4(2) was used – applying the law of common habitual residence of both the person claimed to be liable and the person sustaining damage. The case concerned a traffic collision that occurred in Portugal between two Ukrainian citizens living in Portugal; the court applied Portuguese law because it was the law of the country of the habitual residence of both the parties.[21] Although this rule did not lead to a different solution (since the general rule of *lex loci damni* already indicated Portuguese law), this is an example of the use of this special norm.

Beyond traffic accidents, I identified only one decision on tort given by a lower court. It concerned the professional liability of a Portuguese notary in not having informed the buyer of a property located in Portugal (a Spanish citizen living in Spain) of the existence of a real security right over the property bought in the notary's office (in Portugal). In this case, the court submitted the case to Portuguese law, without giving much of an explanation. It seems that the court believed the *direct damage* was the harm to the assets of the person sustaining the damage at the moment he purchased the building bearing a real security right.[22]

2.3. ISSUES NOT COVERED IN CASE LAW

As can be seen, most aspects of the Rome II Regulation have not been dealt with by Portuguese courts. In fact, there is no case in which the parties chose the law applicable to torts (Article 14) and no judgment concerning *lois de police* (whether of the *lex fori* or of third countries). The application of overriding mandatory provisions of third countries is, however, broadly debated by legal doctrine when there is no rule on its treatment (like in Article 16 Rome II Regulation).[23]

21 Cf. Judgment of the Court of Póvoa do Varzim (Lower Court) of 15 June 2016, case 21/14.6TBSTS.

22 Cf. Judgment of the Court of Póvoa do Varzim (Lower Court) of 7 June 2016, case 406/14.8TBMAI.

23 Rui Moura Ramos, *Da Lei Aplicável ao Contrato de Trabalho Internacional*, Almedina, Coimbra, 1990, p. 719, argues the equal treatment of *lois de police* of the *lex fori* and of third countries prompts uniformity of decisions. However, António Marques dos Santos, *As Normas de Aplicação Imediata no Direito Internacional Privado – Esboço de uma Teoria Geral*, Vol. II, Almedina, Coimbra, 1991, pp. 1046 and 1047, and *Direito Internacional Privado*, Vol. I, Introdução, Associação Académica da Faculdade de Direito de Lisboa, Lisbon, 2001, p. 300; Nuno Andrade Pissarra, 'Normas de Aplicação Imediata e Direito Comunitário', *Normas de Aplicação Imediata, Ordem Pública Internacional e Direito Comunitário*, Almedina, Coimbra, 2004, pp. 9–140, p. 46; Dário Moura Vicente, *Da Responsabilidade Pré-Contratual em Direito Internacional Privado*, Almedina, Coimbra, 2001, p. 637, and 'Método Jurídico e Direito Internacional Privado', *Direito Internacional Privado – Ensaios*, Vol. II, Almedina, Coimbra, 2005, pp. 7–37, p. 30, all hold that the *lois de police* of third countries can only be applied if there is a special rule on that matter.

I found no case using Rome II's special rules on product liability, unfair competition, environmental damage, intellectual property rights or industrial action, no judicial decisions on either unjust enrichment or *negotiorum gestio;* no case in which overriding mandatory provisions were applied or even considered; no ruling referencing rules of safety and conduct (Article 17); no ruling applying the escape clauses; and no case invoking *ordre public.*

3. APPLICATION OF ROME I

3.1. THE NATIONAL LANDSCAPE

Compared to the Rome II Regulation, the application of the Rome I Regulation is noticeably more frequent. In fact, within the selection of publicly available court rulings, dozens of decisions can be found. Some of these decisions discuss only the Regulations rule on application in time (Article 28), declaring that contracts concluded before 17 December 2009 are subject to the 1980 Rome Convention on the Law Applicable to Contractual Obligations.[24]

According to Luís de Lima Pinheiro, 'Apontamento sobre as normas de aplicação necessária perante o direito internacional privado português e o artigo 21.º do Código Civil de Macau', *Revista da Ordem dos Advogados*, Year 60, Vol. I (January), 2000, pp. 23–48, p. 41, there must be a rule of *lex fori* indicating a certain category of norms of some foreign legislation which could be considered if they are *lois de police* i.e. you can only give preference to foreign *lois de police* if national law provides a rule explicitly allowing it (Luís de Lima Pinheiro, n. 6 above, p. 162, and n. 4 above, pp. 296 and 308 ff.).

24 Cf. Judgment of the Évora Court of Appeal of 4 November 2013, case 202/11.4TBLLE.E1 (available via <http://www.dgsi.pt/jtre.nsf/134973db04f39bf2802579bf005f080b/54d2598ebd97112980257de10056fc2a?OpenDocument&Highlight=0,202%2F11.4TBLLE.E1>), concerning a contract concluded in London on 17 June 2009 between two British citizens; Judgment of the Porto Court of Appeal of 29 May 2015, case 529/13.0TTOAZ.P1 (available via <http://www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/4c304f5b3a31e5fd80257e7c00481136?OpenDocument&Highlight=0,529%2F13.0TTOAZ.P1>), concerning an individual employment contract concluded on 9 February 2009; Judgment of the Porto Court of Appeal of 29 May 2014, case 254/05.6TBVLP.P1, (available via <http://www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/de1d31c36619152480257cf2004e6fda?OpenDocument&Highlight=0,254%2F05.6TBVLP.P1>), concerning a sales contract concluded on 18 November 2004; Judgment of the Porto Court of Appeal of 5 May 2014, case 525/09.2TTPRT.P1 (available via <http://www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/4eb265e1211558b280257cd9003eb679?OpenDocument&Highlight=0,525%2F09.2TTPRT.P1>), concerning an individual employment contract concluded on 17 March 2003; Judgment of the Lisbon Court of Appeal of 11 April 2015, case 2998.14.2TTLSB.L1-4 (available via <http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/55018aca6d94e18c80257efa003ac208?OpenDocument&Highlight=0,2998.14.2TTLSB.L1-4%20>) concerning an individual employment contract concluded on 1 December 2005; Judgment of the Lisbon Court of Appeal of 18 April 2012, case 914/09.2TTLSB.L1-4 (available via <http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/cbdd4c5052a0ecaf802579ec00450e55?OpenDocument&Highlight=0,914%2F09.2TTLSB.L1-4>), concerning an individual employment contract concluded in July 2007 between a Portuguese employee and a Dutch company; Judgment of the Lisbon Court of Appeal of 16 June 2011, case 6422/06.6TVLSB.L1-2 (available via <http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/084161208851801a802578cc003d497f?OpenDocument&Highlight=0,6422%2F06.6TVLSB.L1-2>) concerning a contract on the sale of goods concluded in 2005 between a company with central administration in Portugal and a company with central administration in Spain; Judgment of the Supreme Court of Justice of 12 May 2016, case 2998/14.2TTLSB.L1.S1 (available <http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/b89a5ec177e3159e80257fb2003d31e2?OpenDocument&Highlight=0,2998%2F14.2TTLSB.L1.S1>), concerning an individual employment contract concluded on 1 December 2005; Judgment of the Supreme Court of Justice of 12 May 2016, case 2998/14.2TTLSB.L1.S1 (available via <http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/b89a5ec177e3159e80257fb2003d31e2?OpenDocument&Highlight=0,2998%2F14.2TTLSB.L1.S1>), concerning an individual employment contract concluded on 9 February 2009; Judgment of the Porto Court of Appeal of 2 June 2014, case 930/08.1TTPRT.P2 (available via <http://www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/bdb6210bbadf9a9780257cfb0045f055?OpenDocument&Highlight=0,930%2F08.1TTPRT.P2%20>), concerning an individual employment contract concluded on 20 October 2005; Judgment of the Coimbra Court of Appeal of 20 April 2016, case 234/10.0TTCTB.C1 (available via <http://www.dgsi.pt/jtrc.nsf/c3fb530030ea1c61802568d9005cd5bb/0d990c317ee7dbb380257fa20049854d?OpenDocument&Highlight=0,234%2F10.0TTCTB.C1>), concerning an individual employment contract concluded on 5 March 2008.

25 However, with regard to contracts concluded before 11 December 2009, I identified one ruling where a lower court determined the applicable law by using national rules on the conflict of laws, instead of following, as it should have, the 1980 Rome Convention (which has been in force in Portugal since 1 January 1994, since Portugal acceded via the 1992 Funchal Convention on the Accession of the Kingdom of Spain and the Portuguese Republic to the Rome Convention on the Law Applicable to Contractual Obligations). Cf. Judgment of the Penela Lower Court of 17 March 2014, case 51/11.0TBPNL. In this decision, the court debated the validity of a contract between two British citizens with habitual residence in Portugal concluded on 17 March 2008. The court established that the Rome I Regulation was not applicable (Article 28 Rome I) and used the national set of rules on the conflict of laws, instead of following, as it should have, the 1980 Rome Convention.

26 In fact, Article 41 of the Portuguese Civil Code establishes that contracts shall be governed by the law chosen by the parties, explicitly or tacitly.

27 Article 41(2) of the Portuguese Civil Code. For a comparison of both systems, cf. Rui Moura Ramos, n. 14 above, p. 81.

I have not found any case where the Rome I Regulation was overlooked by the national courts: in all cases concerning contracts involving a conflict of laws concluded after its entry into force, the Rome I Regulation was applied.[25]

The European rules on contractual obligations have two important differences from the national set of norms (Articles 41 and 42 of the Portuguese Civil Code), although the national conflict-of-laws rules already establish party autonomy (allowing express or tacit choice of the law applicable to contracts).[26]

The first difference is the generosity of party autonomy under the Rome I Regulation. The national rules only allowed the choice of the laws of countries that had a connection to the contract or of laws the application of which served a rightful interest of the parties.[27] In addition, the possibility of choosing a law applicable to only part of the contract and of having interchangeable laws governing the contract was not explicitly legally authorised.

The second main difference is the determination of the law applicable in the absence of choice. The national rules did not provide different criteria depending on the type of contract: in the absence of choice, *all contracts* were to be submitted to the law of the country of habitual residence of both parties. If the parties had habitual residence in different countries, contracts in which only one of the individuals could be deemed a beneficiary were submitted to the law of the country where the sponsor had habitual residence; in all other cases, the *lex loci celebrationis* rule applied. In addition, it must be emphasised that no escape clause was provided, making these rules mandatory.

However, with the 1980 Rome Convention having come into force in Portugal on 1 January 1994,[28] the national rules on the conflict of laws had already been relegated to contracts concluded before that date.

3.2. RELEVANT CASES

Although most cases dealt with by the Portuguese courts have concerned the law applicable to individual employment contracts, there are decisions on most of the Rome I Regulation's rules. Therefore, I have decided to select just a few, in order to show how these rules are being interpreted by Portuguese judges.

3.2.1. Implicit Choice of Law

When the parties expressly choose the law applicable to the contract, determining it is unproblematic.[29] More interesting are the judgments in which one of the parties argued for the existence of an *implicit* choice of law with the opposition of the other (who claimed that there had been no choice of law and, therefore, asked for the application of Article 4 of Rome I Regulation).

The courts' criteria for the determination of an implicit choice of law were not developed from the Rome I Regulation, since both the national set of rules and the 1980 Rome Convention already granted the possibility of tacit *professio iuris* – case law which it seems will still be used within the scope of the Rome I Regulation. Within previous conflict-of-laws rules, Portuguese courts decided that a tacit choice of law could be determined by the existence of allusions to

28 Portugal acceded to the 1980 Rome Convention via the 1992 Funchal Convention on the Accession of the Kingdom of Spain and the Portuguese Republic to the Rome Convention on the Law Applicable to Contractual Obligations.

29 It must be stressed that the Rome I Regulation's solution to the impossibility of choosing rules that are not in force in any country (like the *lex mercatoria*) as the *lex contractus* is strongly criticised, among Portuguese authors, by Luís de Lima Pinheiro, 'Rome I Regulation: Some Controversial Issues', *Grenzen überwinden – Prinzipien bewahren: Festschrift für Bernd von Hoffmann*, Herbert Kronke and Karsten Thorn, Ernst und Werner Gieseking, Bielefeld, 2011, pp. 242–257.

collective labour agreements, by the existence of a choice of court, and by the legal style in which the contract was written. On the other hand, the nationality of the parties and the currency established in the contract were seen as irrelevant for determining an implicit *professio iuris*.[30]

Within the scope of the Rome I Regulation, I identified only one ruling that added new criteria for determining an implicit choice of law: Portuguese courts decided the *language in which the contract was written* could not be used as a relevant circumstance for declaring a tacit choice of law.[31]

3.2.2. General Rules on the Applicable Law in the Absence of Choice

There are some cases determining the law applicable to contracts by using the Rome I Regulation's general rules in the absence of choice. Most of them are

30 Cf. Judgment of the Porto Court of Appeal of 29 May 2015, case 529/13.0TTOAZ.P1 (available via <http://www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/4c304f5b3a31e5fd80257e7c00481136?OpenDocument&Highlight=0,529%2F13.0TTOAZ.P1>). In this ruling, the court decided – in relation to an individual employment contract submitted to the 1980 Rome Convention on the Law Applicable to Contractual Obligations – that there had been an implicit choice of Portuguese law because the contract mentioned specific rules of a Portuguese collective labour agreement and because the parties made an agreement giving Portuguese courts exclusive jurisdiction.
In the same direction, in the Judgment of the Supreme Court of Justice of 12 May 2016, case 2998/14.2TTLSB.L1.S1 (available via <http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/b89a5ec177e3159e80257fb2003d31e2?OpenDocument&Highlight=0,2998%2F14.2TTLSB.L1.S1>), the court decided – in relation to an individual employment contract submitted to the 1980 Rome Convention – that there had been an implicit choice of Portuguese law was made because the contract mentioned specific rules of a Portuguese collective labour agreement, because the parties gave Portuguese courts exclusive jurisdiction, and because the contract explicitly established the employee should take the national holidays of the place in which the employee carried out his work (and not Portuguese national holidays), a clause interpreted by the court within a tacit assumption that, in its absence, Portuguese law would define the holidays and was therefore applicable to the contract.
It is not clear whether the courts used these criteria cumulatively or not. It seems the conclusion on the existence of an implicit choice of law was a result of the cumulative verification of all facts, which implies that the presence of just one of the criteria would not be enough.
Additionally, Judgment of the Coimbra Court of Appeal of 20 April 2016, case 234/10.0TTCTB.C1 (available via <http://www.dgsi.pt/jtrc.nsf/c3fb530030ea1c61802568d9005cd5bb/0d990c317ee7dbb380257fa20049854d?OpenDocument&Highlight=0,234%2F10.0TTCTB.C1>) determined that the nationality of the parties and the currency used in the contract were not relevant circumstances to justify an implicit choice of law. In this ruling, the court seemed to find that the legal style in which contract was written could be a relevant indicator for an implicit choice of law; however, because the contract related to Portuguese law and to Santomean law (which are very similar), that criterion could not be used.

31 In fact, in the Judgment of the Lisbon Court of Appeal of 19 November 2015, case 604/12.9TCFUN.L1-6 (available via <http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/720e4cdff38aafca80257f10003ea1d6?OpenDocument&Highlight=0,604%2F12.9TCFUN.L1-6>), the court held that the fact the contract was written in Italian did not imply an implicit choice of law.

simple, applying the law of the country where the central administration of the seller was located.[32] In other cases, it was discussed whether the relevant connecting factor was the central administration of the company or the place of its branch, agency or establishment (Article 19(2)).[33] I identified only one case concerning the law applicable to a contract relating to a right *in rem* in immovable property situated in Portugal, for which the parties did not choose the applicable law.[34]

An interesting verdict, discussing which criterion of Article 4 was appropriate, concerned a contract concluded in France between an Italian citizen with habitual residence in Italy and a company with central administration in Portugal, through which the Italian citizen engaged the Portuguese company to rent his flat in Monaco. The contract was written in Italian, but the court decided that the language of the contract did not imply an implicit choice of law; consequently, it discussed whether the law applicable to that kind of contract was the law of the country where the immovable property was situated (Article 4(1)(c)), or the law of the country of the landlord's habitual residence (Article 4(1)(d)), or the law of the country where the service provider had its habitual residence (Article 4(1)(b)). The applicable law depended on the characterisation of the contract: it mattered whether the contract was considered a *contract relating a right in rem in immovable property*, or a *tenancy of immovable property for temporary use for a period of no more than six consecutive months*, or a *contract for the provision of services*.

The court decided, against the argument of the Italian citizen, that it was a *contract for the provision of services*, since none of the parties used the flat and because the Portuguese company could rent the flat to any tenant and decide the

32 Cf. Judgment of the Porto Court of Appeal of 3 October 2014, case 693/10.0TVPRT.C1.P1 (available via <http://www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/a8cb2fdd8bde561480257ca2004cb3b5?OpenDocument&Highlight=0,693%2F10.0TVPRT.C1.P1>); Judgment of the Supreme Court of Justice of 26 February 2015, case 693/10.0TVPRT.C1.P1.S1 (available via <http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/3b5d7150f7a5535480257df8005e3e87?OpenDocument&Highlight=0,693%2F10.0TVPRT.C1.P1.S1>).

33 Judgment of the Guimarães Court of Appeal of 9 June 2016, case 4085/15.7T8GMR-A.G1 (available via <http://www.dgsi.pt/jtrg.nsf/86c25a698e4e7cb7802579ec004d3832/165b5a6cfe92c24f80258014004a4039?OpenDocument&Highlight=0,4085%2F15.7T8GMR-A.G1>).

34 Cf. Decision of Technical Council of the Institute of Notariats and Registries of 26 May 2011 (available via <http://www.irn.mj.pt/sections/irn/doutrina/pareceres/predial/2010/p-r-p-223-2010-sjc-ct/downloadFile/file/RP223-2010.pdf?nocache=1318328677.59>). The decision was not given by a court *stricto sensu*, but by the Legal Advisory Board of the National Institute on Land Registry, which settles appeals from land registrars' decisions. Within the Portuguese legal system, one can challenge decisions of registrars in court or by appealing to the President of the Institute of Notariats and Registries; in the latter case, the President's decision will be made, taking into account an opinion of the Legal Advisory Board of the Institute of Notariats and Registries. An analysis of the case law shows that in every single case the President's decision acknowledged the opinion of this council, which grants it almost the same authority as a court decision.

duration of each rental; therefore, Portuguese law was applicable, since it was the law of the country of habitual residence of the service provider.[35]

3.2.3. *Specific Rules on the Law Applicable to Individual Employment Contracts and to Contracts of Carriage*

Although many rulings of Portuguese courts have used specific European rules on the law applicable to individual employment contracts, all decisions concerned contracts submitted to the 1980 Rome Convention: in these cases, Portuguese courts compared the rules of the chosen law and the law applicable in the absence of choice, affording the employee the protection of the last.[36] This case law will probably be taken as a reference in cases concerning employment contracts submitted to the Rome I Regulation; however, I found no decisions on disputes arising from contracts concluded after 17 December 2009.

Beyond rulings on individual employment contracts, I found a single decision concerning a contract for the carriage of goods, in which the court submitted the contract to the law of the country of the habitual residence of the carrier.[37]

3.2.4. *Overriding Mandatory Provisions*

Portuguese courts apply often a mandatory provision of the *lex fori* concerning the law applicable to individual employment contracts, namely a rule of the Portuguese Constitution prohibiting dismissal without fair cause,[38] which is

35 Cf. Judgment of the Lisbon Court of Appeal of 19 November 2015, case 604/12.9TCFUN.L1-6 (available via <http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/720e4cdff38aafca80257f10003ea1d6?OpenDocument&Highlight=0,604%2F12.9TCFUN.L1-6>).

36 Cf. Judgment of the Supreme Court of Justice of 12 May 2016, case 2998/14.2TTLSB.L1.S1 (available <http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/b89a5ec177e3159e80257fb2003d31e2?OpenDocument&Highlight=0,2998%2F14.2TTLSB.L1.S1>), concerning an individual employment contract concluded on 1 December 2005 between a Portuguese employee with habitual residence in Portugal and a Spanish company, in which Spanish law had been explicitly chosen. The court compared the provisions of the chosen law and of the law applicable in the absence of choice and gave the employee the protection afforded by Portuguese law (applicable in the absence of choice).
The same solution was provided in Judgment of the Porto Court of Appeal of 2 June 2014, case 930/08.1TTPRT.P2 (available via <http://www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/bdb6210bbadf9a9780257cfb0045f055?OpenDocument&Highlight=0,930%2F08.1TTPRT.P2%20>): even though the parties had expressly chosen French law, the court compared the provisions on dismissal of French law with Portuguese law (applicable in the absence of choice) and gave the employee the protection afforded by Portuguese law.

37 Cf. Judgment of the Torres Vedras Lower Court of 11 March 2013, case 293447/11.1YIPRT.

38 Cf. Article 53 of the Constitution of Portuguese Republic: 'Workers are guaranteed job security, and dismissal without fair cause or for political or ideological reasons is prohibited'.

deemed to be an implicit *loi d'application immédiate* of Portuguese law.[39] The concept of *overriding mandatory provisions* traditionally used by the courts is similar to the definition provided by Francescakis, since it is used by Portuguese legal authors. The courts define such provisions as those 'which, by the essentiality of their commands, transcend the spatial competence of the system in which they are integrated, applying directly to international situations, taking precedence over the law of the country designated by the conflict-of-laws rule'.[40] However, none of these cases concerned contracts within the temporal scope of the Rome I Regulation. Additionally, I found no case dealing with the application of *lois de police* of third countries.

3.2.5. *Formal Validity of Contracts and Characterisation Issues*

There is a very interesting decision regarding the characterisation of provisions on the formal validity of contracts when those norms are established to ensure the contract's *substantive validity.* The decision was not addressed by a court but

39 Cf. Judgment of the Porto Court of Appeal of 5 May 2014, case 525/09.2TTPRT.P1 (available via <http://www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/4eb265e1211558b280257cd9003eb679?OpenDocument&Highlight=0,525%2F09.2TTPRT.P1>); Judgment of the Lisbon Court of Appeal of 11 April 2015, case 2998.14.2TTLSB.L1-4 (available via <http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/55018aca6d94e18c80257efa003ac208?OpenDocument&Highlight=0,2998.14.2TTLSB.L1-4%20>); Judgment of the Supreme Court of Justice of 30 September 1998, case 98S131 (available via <http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/782a5a05901e6e7b802568fc003bb047?OpenDocument&Highlight=0,98S131>); Judgment of the Supreme Court of Justice of 7 November 2012, case 377/07.7TTFUN.L1.S1 (available via <http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/43918af5a031701080257a3d002d3a73?OpenDocument&Highlight=0,98S131>); Judgment of the Lisbon Court of Appeal of 20 February 2013, case 3319/07.6TTLSB.L3-4 (available via <http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/4fcfba3d6a3f79d680257bc2004d67cf?OpenDocument&Highlight=0,3319%2F07.6TTLSB.L3-4>).

40 Judgment of the Porto Court of Appeal of 5 May 2014, case 525/09.2TTPRT.P1 (available via <http://www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/4eb265e1211558b280257cd9003eb679?OpenDocument&Highlight=0,525%2F09.2TTPRT.P1>). The concept is developed by Rui Moura Ramos, n. 23 above, p. 672; António Marques dos Santos, 'Alguns Princípios de Direito Internacional Privado e de Direito Internacional Público do Trabalho', *Estudos de Direito Internacional Privado e de Direito Público*, Almedina, Coimbra, 2004, pp. 93–130, p. 105; António Marques dos Santos, n. 23 above, p. 940; António Ferrer Correia, n. 7 above, p. 161; António Ferrer Correia, 'Considerações sobre o método do Direito Internacional Privado', *Estudos em Homenagem ao Prof. Doutor J. J. Teixeira Ribeiro*, Vol. III, Coimbra, 1983, pp. 1–92, p. 85; António Ferrer Correia, *Direito Internacional Privado – Alguns Problemas*, Almedina, Coimbra, 1997, p. 60; João Baptista Machado, *Âmbito de Eficácia e Âmbito de Competência das Leis* (reimpressão), Almedina, Coimbra, 1998, p. 279; Maria Helena Brito, 'Os Contratos Bancários e a Convenção de Roma de 19 de Junho de 1980 sobre a lei aplicável às obrigações contratuais', *Revista da Banca*, no. 28, 1993, pp. 75–124, p. 118.

by the Legal Advisory Board of the National Institute on Land Registry, which settles appeals from land registrars' decisions.[41]

In a contract relating to a right *in rem* in immovable property situated in Portugal (for which the parties did not choose the applicable law), concluded in California, Portuguese law was established as the *lex contractus* (Article 4(1)(c) of the Rome I Regulation) but the formal validity was debated. The contract satisfied the formal requirements of the *lex loci celebrationis* (California), since it was concluded in a private document before a witness (a common-law notary). However, if Portuguese law were applicable, the contract would be found invalid; in fact, Portuguese law establishes that contracts concerning rights *in rem* in immovable property are formally valid only if concluded by an authentic instrument or by authenticated private documents (where a civil law notary or other official certifies the substantive legality of the contract); if not, the contracts are declared *substantively invalid*, since those are requirements *ad substantiam* and not only *ad probationem.*[42]

The problem dealt with was the characterisation of those requirements of Portuguese law: if they were taken to be *formal requirements*, the contract would be valid, since Article 11(1) of the Rome I Regulation established the sufficiency of the form prescribed in Californian law; however, if the *ad substantiam* requirement of an authentic instrument – since it is meant to ensure the fulfilment of *lex contractus* – was characterised as a requirement for the substantive validity of the contract, Portuguese law would be applicable (because the contract was submitted to Portuguese law) and the nullity of contract should be declared.

It was decided that the *ad substantiam* requirement of Portuguese law for an authentic instrument was intended to prevent the substantive invalidity of the contract and, therefore, was a validity requisite of *substance* and not of *form.* Accordingly, because Portuguese law was the *lex contractus*, the nullity of the contract was declared. This ruling followed the opinion of most Portuguese legal authors on the characterisation of those provisions.[43]

41 Cf. Decision of Technical Council of the Institute of Notariats and Registries of 26 May 2011 (available via <http://www.irn.mj.pt/sections/irn/doutrina/pareceres/predial/2010/p-r-p-223-2010-sjc-ct/downloadFile/file/RP223-2010.pdf>). Cf., on the authority of this council, n. 34 above.

42 This means that overlooking those requirements of form give rise to the *substantive invalidity* of the contract – Article 220 of the Portuguese Civil Code.

43 Cf. João Baptista Machado, n. 9 above, p. 357; Luís de Lima Pinheiro, *Direito Internacional Privado*, Vol. II, Direito de Conflitos – Parte Especial, 3rd edition, Almedina, Coimbra, 2009, p. 159; Afonso Patrão, 'A aplicação internacionalmente ampliada das regras de notariado latino nos negócios imobiliários', *Estudos em Homenagem ao Conselheiro Presidente Rui Moura Ramos*, Vol. II, Tribunal Constitucional, Lisbon, 2016, pp. 551–609, p. 557.

3.2.6. *Escape Clause*

There are no cases I know of the effectively use the escape clauses of the Rome I Regulation. There are, however, rulings in which the court searched for relevant elements to determine a country more closely connected with the contract other than the national law indicated in Article 4.[44] Additionally, there are court decisions that apply the escape clause of the 1980 Rome Convention, using criteria which will probably be employed within the scope of the Rome I Regulation: the court used it when the parties had the same nationality, belonged to the same family, and spoke the language of the country of both parties' nationality.[45]

4. CONCLUSION

As has been seen, the case law of Portuguese courts does not cover all the issues relating to the Rome I and Rome II Regulations. As regards the Rome I Regulation, there is no case on overriding mandatory provisions of third states, no judgment applying specific rules on consumer contracts or insurance contracts, and no verdict applying the *lex fori* because of the inconsistency of foreign law with international *ordre public*.

Regarding the Rome II Regulation, the situation is even worse. The publicly available judgments applying the Rome II Regulation are scarce; as a result, I found no case in which the parties chose the law applicable to torts; no verdict applying specific conflict-of-laws rules to product liability, unfair competition, environmental damage, intellectual property rights or industrial action; no judicial decisions on either unjust enrichment or *negotiorum gestio;* no case in which overriding mandatory provisions were applied or even considered; and no ruling referencing rules of safety and conduct (Article 17).

Although this collection of judicial rulings is not enough to draw any conclusions, the lack of cases in which the parties had designated the law

44 Cf. Judgment of the Porto Court of Appeal of 10 January 2015, case 588/13.6TVPRT.P1 (available via <http://www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/03469e2b51f3065480257edc004a3748?OpenDocument&Highlight=0,588%2F13.6TVPRT.P1>).

45 Judgment of the Lisbon Court of Appeal of 18 April 2012, case 914/09.2TTLSB.L1-4 (available via <http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/cbdd4c5052a0ecaf802579ec00450e55?OpenDocument&Highlight=0,914%2F09.2TTLSB.L1-4>) concerning an individual employment contract concluded in July 2007 between a Portuguese employee and a Dutch company. In this contract, the court used the exception clause of Article 6 (2) of the 1980 Rome Convention on the Law Applicable to Contractual Obligations, considering the fact that both the employee and the administrator of the Dutch company were Portuguese citizens and from the same (Portuguese) family, the labour orders were given in Portuguese, and the employee was in the Netherlands only during the execution of the contract.

applicable to torts could perhaps be expected: if the parties could agree on the applicable law, the dispute may have been solved out of court.

Considering exclusively the existing case law, I must address some interesting issues on the application of these Regulations, which could identify both difficulties and virtues of the European rules on the conflict of laws.

The first issue concerns the characterisation of rules on the formal validity of a contract. Despite not being addressed in Article 12 of the Rome I Regulation, I believe that the Portuguese authorities decided correctly in assuming that the rules of the *lex contractus* on form, which are intended to ensure the substantive validity of the contract (by having a notary or other public official oversee it), are to be employed if their infringement would cause the *substantive invalidity* of the contract. In fact, in notarial systems where the conveyancer assumes a *preventive role*, ensuring a superior degree of legal certainty, these rules on form concern the substantive validity of the contract.

The second conclusion concerns Article 4(1) of the Rome II Regulation, which was wrongly interpreted once in Portugal, which could suggest a certain lack of clarity. In fact, even though most decisions of Portuguese courts are correct in this respect (applying the law of the country where the first damage arose), it must be emphasised that in most cases there was a discussion between the parties on the analysis of Article 4(1). As aforementioned, I found one incorrect decision where it was held that the law of indirect consequences of the event was applicable. Therefore, for the sake of clarity, the inclusion of the criteria of Recitals 16 and 17 into the text of Article 4 could be considered.

The third conclusion concerns the disappearance of *renvoi* in the Rome I and Rome II Regulations, *vis-à-vis* the internal rules of Portuguese law (in which *renvoi* was pragmatically oriented, having only been accepted as it achieved international consistency of decisions).[46] In contrast to what might have been expected, no judgment was found that applied the Regulations gave rise to inconsistency of decisions; in fact, all cases exclusively concerned Member States, which means international consistency was achieved in the fields of contractual and non-contractual obligations, even without a *renvoi* system. This proves that the unification of conflict-of-laws rules at the European level is a successful way of promoting international stability.

46 Cf. Articles 16–18 of the Portuguese Civil Code.