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Fitting the Estonian Notions of Contractual and Non-contractual Obligations under the European Private International Law Instruments^{*1}

1. Introduction

After the entry into force of the Estonian Law of Obligations Act^{*2} (LOA) in 2002, Estonian courts have been faced with the need to distinguish among various contractual and non-contractual obligations, of which some, such as the non-contractual obligation related to the public promise to pay (LOA, §1009) or the obligation to present a thing (LOA, §1014), were previously not even known in Estonian substantive law of obligations. Although the distinctions among various obligations in Estonian substantive law have become clearer and clearer as the case law has evolved, it is still unclear how the Estonian notions of contractual and non-contractual obligations should fit within the framework of the private international law instruments applicable in the Estonian courts.^{*3} So far, the characterisation of contractual and non-contractual obligations has attracted undeservedly little attention in Estonian literature on private international law^{*4}, although such disputes are at the heart of international trade and commerce.

The need to deal with the problem of characterising contractual and non-contractual matters became more pressing when the Republic of Estonia joined the European Union, in 2004. It is well known that the terms found in the European private international law instruments should be interpreted autonomously and independently of any national laws in order to guarantee that such instruments are applied uniformly

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² *Võlaõigusseadus*. – RT I 2001, 81, 487; RT I 8.7.2011, 2 (in Estonian). English text available at <http://www.just.ee/23295> (most recently accessed on 1.4.2013).

³ These instruments may be international conventions, European private international law regulations or the Estonian Private International Law Act. For the latter act, see *rahvusvahelise eraõiguse seadus* [‘Private International Law Act’]. – RT I 2002, 35, 217; 2009, 59, 385 (in Estonian). English text available at <http://www.just.ee/23295> (most recently accessed on 1.4.2013).

⁴ For a general reference, see I. Nurmela. *Rahvusvaheline eraõigus* [‘Private International Law’] Tallinn: Juura 2005, pp. 113–151 (in Estonian).

across all member states of the European Union.⁵ Therefore, it is possible for the terms ‘contractual’ and ‘non-contractual’ matters to refer to something quite different in Estonian national law than the same terms do in European private international law. However tempting such a solution would be, Estonian judges should not limit themselves to characterising contractual and non-contractual matters strictly in accordance with Estonian substantive law when faced with the need to apply European private international law instruments.

The purpose of the present article is to analyse how the Estonian notions of contractual and non-contractual matters, as recognised in Estonian substantive law, accord with the relevant provisions of European private international law instruments. The European instruments referred to in this connection are the Brussels I Regulation⁶, which provides for special rules of jurisdiction for matters relating to ‘contract’ and matters relating to ‘tort, delict or quasi-delict’, and the Rome I Regulation⁷ and the Rome II Regulation⁸, which, respectively, provide for the choice-of-law rules for contractual and non-contractual obligations. The aim of this article is to map the most problematic areas of Estonian law of obligations where contradictions of characterisation could arise between Estonian substantive law, on one hand, and European private international law, on the other. On account of the relevant case law of the Court of Justice of the European Union (CJEU), it is proposed that not all matters dealt with as ‘contractual’ or ‘non-contractual’ under Estonian substantive law could be regarded in the same way under the European private international law instruments.

2. The ‘matters relating to contract’ and ‘contractual obligations’ in European private international law and Estonian national law

The private international law elements relating to contractual matters have been dealt with by the European legislator in the Brussels I Regulation and the Rome I Regulation. Under the Brussels I Regulation Article 5 (1) (a), a person domiciled in a Member State may, in another Member State, be sued in ‘matters relating to contract’⁹, in the courts for the place of performance of the obligation in question. Correspondingly, the applicable law in such cases would usually¹⁰ be determined by a judge of a court of the Member State under the Rome I Regulation, which applies, in situations involving a conflict of laws, to ‘contractual obligations’¹¹ in civil and commercial matters. The terms ‘matters relating to contract’ and ‘contractual obliga-

⁵ Unless, of course, specific reference is made to a particular national law in the European instrument itself. See for example Article 59 (1) of the Brussels I Regulation, which refers to a national law of the court for determination of whether a party is domiciled in the Member State whose courts are seized of the matter. For the Brussels I Regulation see Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. – OJ L 012, 16.1.2001, pp. 1–23.

⁶ Note that the Brussels I Regulation is soon to be replaced with the Brussels I Regulation (recast), which will be applied from 10 January 2015. See Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast). – OJ L351, 20.12.2012, pp. 1–32.

⁷ Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). – OJ L 177, 4.7.2008, pp. 6–16.

⁸ Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II). – OJ L 199, 31.7.2007, pp. 40–49.

⁹ In the Estonian version of the Brussels I Regulation, the term ‘matters relating to contract’ is referred to as ‘matters relating to contracts’ (*lepingutega seotud asjad*). This difference does not, however, change the meaning of the term.

¹⁰ The word ‘usually’ is used here because sometimes the law applicable may be determined under other choice-of-law instruments, depending on the time of conclusion of a particular contract or its type. For example, if the contract was concluded before 17 December 2009, the court may need to turn to the Rome Convention or to its national private international law provisions in order to determine the law applicable to a particular contract. For the Rome Convention, see 80/934/EEC: Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (consolidated version), CF 498Y0126(03). – OJ L266, 9.10.1980, pp. 1–19.

¹¹ In the Estonian version of the Rome I Regulation, the term ‘contractual obligations’ (*lepingulised võlasuhted*) refers not to contractual obligations in their strict sense (*lepingulised kohustused*) but to the relationships giving rise to such obligations. This is a correct translation, as the applicable law to be determined under the Rome I Regulation is not limited to determining various aspects of contractual obligation in its strict sense and, instead, also covers such questions as the interpretation or consequences of nullity of the contract. See Article 12 (1) of the Rome I Regulation.

tions' as used in the Brussels I Regulation and the Rome I Regulation should be interpreted autonomously and independently from any national laws.^{*12} Therefore, the concepts of 'contract', 'contractual claims' and 'contractual obligations' as recognised in any national laws cannot be more than mere starting points for a judge when determining international jurisdiction or applicable law in a particular dispute.

Although the CJEU has not yet had time to provide a comprehensive definition for 'contractual obligations' as used in the relatively new^{*13} Rome I Regulation, the corresponding term in the Brussels I Regulation (i.e., 'matters relating to contract') has been scrutinised extensively by the CJEU.^{*14} Most importantly, according to the case-law of the CJEU, the term 'matters relating to contract' cannot cover a situation where there is no obligation freely assumed by one party towards another.^{*15} For example, in a case in which the manufacturer of a product sells the product to a retailer who, in turn, sells that product to a buyer, the buyer's claim against the manufacturer should not be considered as falling under the Brussels I Regulation Article 5 (1) (a) even if it would be regarded as contractual under the applicable law or under the national law of the court hearing the claim. Although the CJEU has several times stressed the need to avoid interpreting the exceptions to the general rule of jurisdiction, including the Brussels I Regulation Article 5 (1) (a), in a way going beyond the situations envisaged by the Brussels I Regulation^{*16}, the terms 'matters relating to contract' and 'contractual obligations' should not be given overly strict interpretation. For example, according to the CJEU, the plaintiff can invoke the jurisdiction of the court of the place of performance of the contract under Article 5 (1) (a) even when the existence of the contract on which the claim is based is in dispute between the parties.^{*17} Thus, the Brussels I Regulation Article 5 (1) (a) can be relied upon even if the claim has arisen because of the invalidity of a contract, although the claim is not directly based on the contract.^{*18} Similarly, if the applicable law was determined under the Rome I Regulation, such law would, based on Article 12 (1) (e) of the Rome I Regulation, also cover the consequences of nullity of the contract. Hence, the terms 'matters relating to contract' and 'contractual obligations' can also refer to situations where the existence of the contract itself is disputed by one of the parties or where the plaintiff's claim is based on the restitution of an invalid contract.

The idea of a contract as covering a situation where someone has freely assumed an obligation toward another person corresponds perfectly with the notion of a contract under Estonian substantive law. Conclusion of a contract under Estonian substantive law requires the existence of a 'will' of a party (*tahe*) and an 'expression of such will' (*tahteavaldus*)^{*19}, which are distinguished from the motives (*motiiv*) and bases for concluding the contracts (*lepingu alus*).^{*20} However, under Estonian substantive law, a characterisation problem may arise in relation to certain obligations, which have been assumed freely towards another person, but are not necessarily based on a contract, although they have a similar nature to contractual relationships. These are the so-called obligations of courtesy (*viisakuskohustused*) and the imperfect obligations

¹² On the autonomous interpretation of the term 'matters relating to contract', see the Judgment of the Court of Justice of the European Communities of 22 March 1983, Case 34/82, *Martin Peters Bauunternehmung GmbH v. Zuid Nederlandse Aannemers Vereniging*, para. 9. – ECR 1983, p. 987. On the autonomous interpretation of the term 'contractual obligations', see R. Plender, M. Wilderspin. *The European Private International Law of Obligations*. Third edition. London: Thomson & Reuters 2009, pp. 47–48; G.-P. Calliess (ed.). *Rome Regulations Commentary on the European Rules of the Conflict of Laws*. The Netherlands: Kluwer Law International 2011, p. 38.

¹³ According to Article 28 of the Rome I Regulation, said regulation shall apply to contracts concluded 'as from' 17 December 2009. See Corrigendum to Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). – OJ L 309, 24.11.2009, p. 87.

¹⁴ Note, however, that, to simplify matters for the reader, the references made by the Court of Justice to the Brussels Convention (which was a preceding instrument to the Brussels I Regulation) have been treated in this article as references to the old Brussels I Regulation. For the Brussels Convention, see 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters. – OJ L 299, 31.12.1972, pp. 32–42.

¹⁵ *Jakob Handte & Co. GmbH v. Traitements Mécano-chimiques des Surfaces SA*, para. 15. – ECR 1992, p. I-03967.

¹⁶ See for example, the Judgment of the Court of Justice of the European Communities of 17 June 1992, Case C-26/91, *Jakob Handte & Co. GmbH v. Traitements Mécano-chimiques des Surfaces SA*, para. 14.

¹⁷ Judgment of the Court of Justice of the European Communities of 4 March 1982, Case 38/81, *Effer SpA v. Hans-Joachim Kantner*. – ECR 1982, p. 825, para. 8.

¹⁸ See, further, U. Magnus, P. Mankowski (eds). *European Commentaries on Private International Law Brussels I Regulation 2nd Revised Edition*. Munich: Sellier European Law Publishers 2012, pp. 130–131.

¹⁹ The making, altering, and other aspects of such expressions of will are regulated by the General Part of the Civil Code Act (GPCA). See tsiviilseadustiku üldosa seadus ['General Part of the Civil Code Act']. – RT I 2002, 35, 216; RT I, 6.12.2010, 1 (in Estonian). English text available at <http://www.just.ee/23295> (most recently accessed on 1.4.2013).

²⁰ P. Varul *et al.* *Võlaõigusseadus I. Üldosa (§§ 1–207) Kommenteeritud väljaanne* ['Law of Obligations Act I. General Part']. Tallinn: Juura 2006, p. 38 (in Estonian).

(*mittetäielikud kohustused*), which cannot be enforced.^{*21} For example, such would be the moral obligations or the obligations arising from gambling. Although these obligations may sometimes be based on contracts, they might also be based on agreements that are not considered to be contracts in the strict sense, if the parties to said agreements lack the will to be legally bound. In this case, an Estonian judge might question the application of the Brussels I Regulation Article 5 (1) (a) and the Rome I Regulation when determining jurisdiction or applicable law in relation to such obligations, as such obligations would not necessarily be considered contractual under Estonian substantive law. However, treating such obligations as contractual under the European private international law instruments could be justified, since the notion of imperfect obligations could vary in different Member States and it is possible that these obligations could be treated as enforceable obligations in some other Member States or under the applicable law.^{*22} Of course, such characterisation would not mean that the performance of these obligations could be enforced if Estonian substantive law were to be applicable in the given dispute. In addition, if the performance of the obligations regarded as imperfect under Estonian law is requested in an Estonian court under the applicable foreign law, the Estonian judge could refuse to apply foreign law, which would enforce such obligations on the basis of the public-policy clause found in Article 21 of the Rome I Regulation.

3. The matters relating to ‘torts, delicts and quasi-delicts’ and ‘non-contractual obligations’ in European private international law and Estonian national law

3.1. Torts, delicts and quasi-delicts

The Brussels I Regulation Article 5 (3) refers to ‘torts, delicts and quasi-delicts’, which, according to the case law of the CJEU, is an autonomous term intended to cover all actions which seek to establish the liability of a defendant and which are not related to ‘contract’ within the meaning of Article 5 (1) of the Brussels I Regulation.^{*23} Thus, the relationship between the ‘contractual matters’ and ‘matters relating to torts, delicts and quasi-delicts’ is mutually exclusive and a judge is first required to ascertain whether a certain issue could be characterised as contractual before he can move on to the analysis of the Brussels I Regulation Article 5 (3).

It is clear that the term ‘matters relating to torts, delicts and quasi-delicts’ within the meaning of the Brussels I Regulation Article 5 (3) would cover all the ‘delicts’ referred to in Chapter 53 of the LOA, such as the damage caused by a major source of danger (LOA, §1056), damage caused by death (LOA, §1045 (1) 1)), damage caused by bodily injury (LOA, §1045 (1) 2)), and damage caused by violation of a personality right of the victim (LOA, §1045 (1) 4)).^{*24} However, the term ‘matters relating to torts, delicts and quasi-delicts’ as used in Article 5 (3) of the Brussels I Regulation could, potentially, also cover certain other non-contractual obligations, which are characterised in Estonian substantive law not as ‘delicts’ but, rather, as non-contractual obligations based on unjust enrichment or *negotiorum gestio*. For example, if a person incurs costs with regard to an object of another person without legal basis, he may, on certain conditions, under Estonian substantive law of unjust enrichment (LOA, §1042), claim compensation for the costs to the extent to which the person on whose object the costs are incurred has been enriched thereby. Under Estonian substantive law, his claim would be characterised not as tort but, instead, as a claim based on unjust enrichment.^{*25} However, since, in essence, his action against the defendant would seek to establish the liability of a defendant and such claim would not be related to contract between the parties, his claim would, in the

²¹ On the treatment of such obligations in Estonian contract law, see also I. Kull *et al.* *Võlaõigus I. Üldosa* [‘Law of Obligations I. General Part’]. Tallinn: Juura 2004, pp. 27–28 (in Estonian).

²² See also Dickinson, who proposes characterisation of fiduciary obligations under English law in the context of the Rome Regulations as ‘contractual’ if attached to a contractual relationship between the parties but not otherwise: A. Dickinson. *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations*. Oxford: Oxford University Press 2008, p. 195.

²³ Judgment of the Court of Justice of the European Communities of 27 September 1988, Case 189/87, *Athanasios Kalfelis v. Bankhaus Schröder, Münchmeyer, Hengst and Co. and Others*. – ECR 1988, p. 5565, para. 18.

²⁴ Note, however, that the latter are excluded from the scope of the Rome II Regulation by its Article 1 (2) (g). Of course, this exclusion does not affect the characterisation of such obligations as non-contractual.

²⁵ See also T. Tampuu. *Lepinguväliste võlasuhete õigus* [‘Law of Non-Contractual Obligations’]. Tallinn: Juura 2007, pp. 85–88 (in Estonian).

context of the Brussels I Regulation Article 5, most probably be characterised as a matter relating to ‘tort, delict and quasi-delict’. Similarly, the claim for compensation for damage to the *negotiorum gestor* (LOA, §1025) could be characterised as relating to ‘tort, delict and quasi-delict’ within the meaning of the Brussels I Regulation Article 5 (3), although such a claim would not be characterised as ‘delict’ under Estonian substantive law. The same should hold true for a claim for compensation for the value of the violation of a right (LOA, §1037), which under Estonian substantive law would be characterised as a claim based on unjust enrichment.^{*26}

In contrast with the Brussels I Regulation, the Rome II Regulation distinguishes among various types of non-contractual obligations. The autonomous^{*27} term ‘non-contractual obligations’ within the meaning of the Rome II Regulation is defined in Article 2, according to which, for the purposes of the Rome II Regulation, damage shall cover any consequence arising out of tort/delict, unjust enrichment, *negotiorum gestio*, or *culpa in contrahendo*. Thus, in the context of the Rome II Regulation, the examples given above (i.e., those of claims referred to in the LOA’s §§ 1025, 1037, and 1042) would not be characterised as something similar to ‘torts’, but instead as claims for damage arising out of unjust enrichment or *negotiorum gestio*. This corresponds to the characterisation of such claims under Estonian substantive law.

3.2. Unjust enrichment

Under Estonian substantive law, all claims based on unjust enrichment are characterised as non-contractual.^{*28} Such non-contractual obligations give rise, for example, to the claims for compensation relating to spending on someone else’s property (LOA, §1042) and the claims relating to the fulfilment of someone else’s obligation (LOA, §1041) but also to the claims for the return of contractual performance if the contract has been deemed to be void or invalidated *ab initio* (LOA, §1028).^{*29} However, as is explained in the first section of the present article, the latter claims would not be characterised as claims based on non-contractual obligations within the meaning of European private international law instruments. This is because the terms ‘matters relating to contract’ and ‘contractual obligations’ as used in the Brussels I Regulation Article 5 (1) (a) and the Rome I Regulation, correspondingly, are intended to cover also the situations where the claim is based on the initial voidness of the contract. As the authors of the commentary on the Brussels I Regulation put it, ‘the reason why the contractual exchange failed should not be decisive for the characterisation of the claim aiming at the return of the already exchanged’^{*30}. Hence, a claim for the return of the performance of a contractual obligation, which under Estonian substantive law is characterised as a claim based on unjust enrichment, would be treated as a contractual claim in the context of European private international law.^{*31} This should hold true also in the case of claims based on unjust enrichment in situations where the performance has been rendered by a debtor to a third party if the contract was concluded in favour of the third party (LOA, §1030) or if the creditor instructed the debtor to render performance to the third party (LOA, §1029), as such claims are fundamentally related to contracts.

Other types of non-contractual obligations based on unjust enrichment that are recognised in Estonian substantive law (LOA, §§ 1037–1042) could be characterised in theory as ‘quasi-delicts’ within the meaning of the Brussels I Regulation Article 5 (3)^{*32} and as ‘non-contractual obligations’ of ‘unjust enrichment’ in the sense of Article 10 of the Rome II Regulation. However, in the context of Article 5 (3) of the Brussels I Regulation, such characterisation would require that it be possible to identify a ‘harmful event’ giving rise to damage as required by Article 5 (3) of the Brussels I Regulation. In the context of the Rome II Regulation,

²⁶ For further details, consult the work of T. Tampuu (see Note 25), pp. 79–82.

²⁷ The autonomous nature of the term ‘non-contractual obligations’ is stressed by Recital 11 of the Rome II Regulation.

²⁸ In the LOA, obligations based on unjust enrichment are dealt with in Chapter 52 (titled ‘Unjust Enrichment’), which is found in Part 10 of the LOA (under the title ‘Non-Contractual Obligations’). See also P. Varul *et al.* *Võlaõigusseadus III. Kommenteeritud väljaanne* [‘Law of Obligations III. Commented Edition’]. Tallinn: Juura 2009, p. 545 (in Estonian). See also the Estonian Private International Law Act (see Note 3), §48¹, titled ‘Unjust enrichment’. The exact scope of application of this provision, however, is unclear, as it has rarely been applied in Estonian case law.

²⁹ LOA, §1028.

³⁰ U. Magnus, P. Mankowski (see Note 18), pp. 130–131.

³¹ See also A. Dickinson (see Note 22), p. 496.

³² However, Mankowski and Magnus warn against over-extending the term ‘quasi-delict’ to cases of unjust enrichment and *negotiorum gestio*. U. Magnus, P. Mankowski (see Note 18), p. 235.

such characterisation would require that the claim, in its essence, be for damages^{*33}, which makes it hard to distinguish between non-contractual obligations based on tort and obligations based on unjust enrichment within the meaning of the Rome II Regulation.^{*34} It would be hard to present an argument as to, for example, why a claim by a person who has fulfilled someone else's obligation, which is characterised as a claim based on unjust enrichment under Estonian substantive law (LOA, §1041), should be treated as non-contractual obligation based on unjust enrichment within the meaning of the Rome II Regulation or as related to 'tort, delict or quasi-delict' within that of the Brussels I Regulation Article 5 (3). In this case, it is hard to conclude that any harmful event has occurred in the meaning of the Brussels I Regulation Article 5 (3) and it is debatable also whether the claim of such a person could be treated as a claim for damages as Recital 29 of the Rome II Regulation requires.

3.3. *Negotiorum gestio*

Similarly to claims based on unjust enrichment, claims based on *negotiorum gestio* are, under Estonian substantive law, always characterised as non-contractual.^{*35} It is not problematic to distinguish such obligations from contractual obligations within the meaning of Estonian substantive law and European private law. However, one can question whether all the non-contractual obligations based on *negotiorum gestio* as recognised in Estonian substantive law could be treated as matters relating to 'tort, delict or quasi-delict' within the meaning of the Brussels I Regulation Article 5 (3) or as 'non-contractual obligations' under the Rome II Regulation. As is the case with claims based on unjust enrichment, in order for such claims to fall under the Brussels I Regulation Article 5 (3) or the Rome II Regulation, they must relate to certain 'harmful events', as required by Article 5 (3) of the Brussels I Regulation and have to be made in relation to situations where 'damage' was caused by an act of *negotiorum gestio* as is required by Recital 29 of the Rome II Regulation. An example in which a claim of a *negotiorum gestor* could theoretically fall under these regulations would be a situation where the *negotiorum gestor* claims compensation under the LOA's §1025—namely, if he makes a claim against the principal for compensation for damage which was created as a result of a risk characteristic to the prevention of imminent significant danger to the principal.

3.4. Pre-contractual obligations and *culpa in contrahendo*

Estonian substantive law distinguishes between two types of pre-contractual obligations. The first is related to various duties in the carrying out of pre-contractual negotiations: the duty to conduct negotiations in good faith, the duty to facilitate the effective conduct of negotiations, the duty to refrain from disclosing information to any third parties, and so on. These duties can be derived from the general good-faith clause in the Estonian law of obligations (LOA, §6 (1)) or from the special provision in the LOA that deals only with pre-contractual negotiations—namely, §14 requires the persons who engage in pre-contractual negotiations to take reasonable account of another's interests and rights; to exchange accurate information in the course of preparing to enter into contract; and to inform each other of all circumstances with regard to which the other party could, given the purpose of the contract, have an identifiable essential interest. It is still unclear whether liability upon the breach of such duties would, under Estonian substantive law, be characterised as contractual or non-contractual, although the prevailing opinion in Estonian legal literature seems to favour the former, since these obligations have been regulated by the legislator alongside contractual obligations.^{*36} However, such characterisation cannot automatically be carried over into private international law. In the context of the Brussels I Regulation, claims for damages based on the breach of pre-contractual

³³ See Rome II Regulation's Recital 29, which refers to rules for those cases where 'damage' is caused by an act other than a tort/delict, such as unjust enrichment, *negotiorum gestio*, or *culpa in contrahendo*.

³⁴ For example, according to Dickinson, if the claimant can frame his claim to reverse the defendant's enrichment without relying on the defendant's tort/delict, that claim, being independent of the 'wrong', could fall under Article 10. See A. Dickinson (Note 22), p. 496.

³⁵ Chapter 5 of the LOA (titled 'Negotiorum Gestio') is found in Part 10 of the LOA, which is entitled 'Non-Contractual Obligations'.

³⁶ P. Varul *et al.* (see Note 20), p. 58. However, also see J. Lahe. Lepingueelsete kohustuste ning eellepingu rikkumisest tulenev tsiviilõiguslik vastutus [Civil Law Liability Pursuant to the Infringement of Pre-contractual Obligations and Preliminary Contracts]. – *Juridica* 2004/10, p. 682 (in Estonian).

duties could be characterised as ‘matters relating to contract’ only if there was a special agreement between the parties as to the conduct of such negotiations. As the CJEU has explained, in the situation where there is no obligation freely assumed by one party toward another on the occasion of negotiations with a view to the formation of a contract but where there is a breach of rules of law—in particular, the rule that requires the parties to act in good faith in such negotiations—an obligation founded on the pre-contractual liability of the defendant is not a ‘contractual matter’ within the meaning of the Brussels I Regulation Article 5 (1) (a) and should instead be considered a matter relating to ‘tort, delict or quasi-delict’ within the meaning of Article 5 (3) of the same regulation.^{*37} Correspondingly, the law applicable to such obligations would be determined under Article 12 of the Rome II Regulation, which is intended to cover violation of the duty of disclosure and the breakdown of contractual negotiations.^{*38}

The second type of pre-contractual duties recognised under Estonian substantive law involves the duties relating to the obligation to conclude the main contract. Such duties can arise only in very limited situations where there is prior agreement between the parties on the conclusion of the main contract in the future.^{*39} Since the law requires the existence of a prior agreement (*eelleping*)^{*40} between the parties in order for such duties to arise, the duties arising between the parties in relation to such agreement should be characterised as ‘contractual’ under Estonian substantive law.^{*41} This solution is consistent with the view in European private international law in which ‘matters relating to contract’ require the existence of an obligation freely assumed by the parties. Hence, the jurisdiction and applicable law in relation to such obligations should be determined under the Brussels I Regulation Article 5 (1) (a) and the Rome I Regulation correspondingly.

3.5. Other non-contractual obligations

The LOA recognises certain other types of non-contractual obligations, which are not specifically referred to in the European private international law instruments. These are the non-contractual obligations of competition (LOA, §§ 1009–1013), the non-contractual obligation relating to the public promise to pay (LOA, §1009), and the non-contractual obligation to present a thing (LOA, §1014). While the non-contractual obligations of competition and the non-contractual obligation relating to the public promise to pay both presume that the unilateral obligation has been assumed voluntarily by the obliged party and could, therefore, be characterised as contractual within the meaning of the European private international law instruments^{*42}, the non-contractual obligation to present a thing does not seem to fit anywhere under Article 5 (1) of the Brussels I Regulation or under the Rome II Regulation. Since the jurisdiction in the cases involving such obligations could still be determined under the general rule found in Article 2 (1) of the Brussels I Regulation, it is not necessary to locate such obligations under Article 5 of the Brussels I Regulation. However, the exclusion of such obligations from the scope of application of the Rome Regulations means that the applicable law would have to be determined under the Estonian Private International Law Act (PILA), which, similarly to the Rome Regulations, does not contain any provision for the non-contractual obligation to present a thing. Under the PILA, such an obligation would have to be fitted either under the provision dealing with delicts (§50), unjust enrichment (§48¹), *negotiorum gestio* (§49), or property rights (§18), although the last solution seems to be ruled out by the case law of the Estonian Supreme Court.^{*43}

³⁷ Judgment of the Court of Justice of the European Communities of 17 September 2002, Case C-334/00, *Fonderie Officine Meccaniche Tacconi SpA v. Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS)*, para. 27. – ECR 2002, p. I-07357.

³⁸ Recital 30 of the Rome II Regulation.

³⁹ On the distinction between such agreements and other pre-contractual arrangements, see the Judgment of the Estonian Supreme Court of 8 May 2006, Case 3-2-1-32-06.

⁴⁰ LOA, §33 (1).

⁴¹ This is the prevailing opinion in Estonian legal literature. See P. Varul *et al.* (Note 20), p. 118. For a minority opinion, see T. Tampuu. Sissejuhatus lepinguväliste võlasuhete õigusesse: üldprobleemid, tasu avaliku lubamise ja asja ettenäitamise õigus [Introduction to tort law: general problems, public promise to pay and producing thing]. – *Juridica* 2002/4, p. 232 (in Estonian); J. Lahe (see Note 36), p. 686.

⁴² The Court of Justice has affirmed that the Brussels I Regulation’s Article 5 (1) (a) could cover unilateral promises made by one party to another, in a Judgment of the Court of Justice of the European Communities of 20 January 2005, Case C-27/02, *Petra Engler v. Janus Versand GmbH*. – ECR 2005, p. I-481.

⁴³ In a relatively recent case involving a foreign element, the Supreme Court seems to have affirmed the right of the parties to agree upon the applicable law in relation to such obligation. Because Estonian private international law does not provide for any party autonomy for the law applicable to property rights, doing so only in relation to the law applicable to non-contractual

4. Conclusions

As a general rule, the terms found in the European private international law instruments have to be interpreted autonomously and independently of any national laws. Consequently, the characterisation of contractual and non-contractual obligations under Estonian substantive law can only be a starting point for the Estonian judge resolving cases with an international element. In many instances, the Estonian and European notions of non-contractual obligations differ from each other. Sometimes the obligations characterised as non-contractual under Estonian substantive law would be dealt with as contractual in the context of European private international law instruments and *vice versa*, and sometimes a non-contractual obligation recognised under Estonian substantive law cannot be located under the European choice-of-law instruments at all. However, characterising contractual and non-contractual obligations under Estonian substantive law should not be decisive for the characterisation of such obligations under the European private international law instruments.

obligations, it seems that such obligation should be characterised as non-contractual rather than proprietary. See the Judgment of the Estonian Supreme Court of 17 January 2011 in the civil case denoted as No. 3-2-1-108-10.