

Rome II: Provisional Version of the Joint Text Released

A **provisional version of the Rome II joint text** which was agreed upon by the European Parliament and the Council in the meeting of the Conciliation Committee held on 15 May 2007 has been made available on the Rome II page of the EP's Conciliations & Codecision website.

The text has been released only in English, and subject to further legal linguistic verification.

A first glance at the text reveals that the general rule in Art. 4, and the special rules set out in Articles 5 (Product liability), 7 (Environmental damage), 8 (Infringement of intellectual property rights), 9 (Industrial action), 10 (Unjust enrichment), 11 (Negotiorum gestio) and 12 (Culpa in contrahendo) are almost identical to the corresponding provisions of the Council's Common Position, adopted in September 2006.

The Council's text has been retained also in respect of the provision on party autonomy (Art. 14): accordingly, an *ex ante* agreement on the applicable law is allowed, "where all the parties are pursuing a commercial activity" and such an agreement is "freely negotiated". The law designated by the conflict rules on unfair competition and infringement of IP rights cannot be derogated from by the parties.

As regards the most controversial issues, on which the Parliament had proposed a number of amendments in its Legislative Resolution at Second Reading of January 2007, here's the outcome of the Conciliation:

Unfair competition and acts restricting free competition (Article 6):

While the conflict rule governing an act of unfair competition is unchanged (application of the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected; application of the law determined pursuant to the general conflict rule of Art. 4, where an act of unfair competition affects exclusively the interests of a specific competitor: see Art. 6(1) and (2)), a more complex provision, allowing the application of the *lex fori* in case

of multi-state torts, is set out by Art. 6(3) for non-contractual obligations arising out of a restriction of competition:

(a) The law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected.

(b) When the market is, or is likely to be, affected in more than one country, the person seeking compensation for damage who sues in the court of the domicile of the defendant, may instead choose to base his or her claim on the law of the court seised, provided that the market in that Member State is amongst those directly and substantially affected by the restriction of competition out of which the non-contractual obligation arises on which the claim is based;

where the claimant sues, in accordance with the applicable rules on jurisdiction, more than one defendant in that court, he or she can only choose to base his or her claim on the law of that court if the restriction of competition, on which the claim against each of these defendants relies, directly and substantially affects also the market of the country of that court.

Violation of privacy and rights relating to the personality (including defamation):

This issue, that has been by far the most controversial in the codecision procedure (a specific rule - Art. 6 - was proposed by the Commission in its initial Rome II Proposal, and strongly advocated by the Parliament, in a very different text, both in its First and Second Reading - see Art. 5 and Art. 7a respectively), has been **excluded from the material scope of application of the Regulation** (see Art. 1(2)(g)). It is dealt with in the review clause provided by Art. 30(2):

Not later than 31 December 2008, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, taking into account rules relating to freedom of the press and freedom of expression in the media, and conflict of law issues related with the Directive 95/46/EC.

Damages in personal injury cases and traffic accidents:

The issue of quantifying damages in personal injury cases (especially in, but not limited to, case of traffic accidents) has been one of the main concerns of the EP Rapporteur Diana Wallis, who supported the application of “the principle of *restitutio in integrum*, having regard to the victim’s actual circumstances in his country of habitual residence” (see Art. 21a of the EP’s Second Reading).

Due to the disagreement of the Commission and the Council, such a provision has not been inserted in the Regulation, but Recital 33 of the joint text states:

According to the current national rules on compensation awarded to victims of road traffic accidents, when quantifying damages for personal injury in cases in which the accident takes place in a State other than that of the habitual residence of the victim, the court seised should take into account all the relevant actual circumstances of the specific victim, including in particular the actual losses and cost of after-care and medical attention.

As regards the law applicable to road traffic accidents, the Regulation does not prejudice the application of the Hague Convention of 1971 on the law applicable to traffic accidents (see Art. 28): however, the review clause calls on the Commission to prepare a study on the effects of the Convention’s supremacy, that will be included in the Report on the application of the Regulation to be submitted not later than four years after its entry into force (Art. 30(1), second indent).

Treatment of foreign law:

This issue was raised by the European Parliament (see Art. 12 and 13 of the First Reading and Recital 29b and 30a of the Second Reading), but given its general relevance in a private international law system, it has not been regulated in the context of a specific instrument such as Rome II. The review clause in Art. 30(1) provides that the Report to be prepared by the Commission shall include

a study on the effects of the way in which foreign law is treated in the different jurisdictions and on the extent to which courts in the Member States apply foreign law in practice pursuant to this Regulation.

Public policy and overriding mandatory provisions:

The public policy clause (Art. 26) does not include any reference to the question of punitive damages, nor any reference to a special concept of EC public policy, in its content and vis-à-vis the application of the law of a Member State. Punitive damages are addressed in Recital 32, according to which

Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. In particular, the application of a provision of the law designated by this Regulation which would have the effect of causing non compensatory exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the court seised, be regarded as being contrary to the public policy (“ordre public”) of the forum.

As regards overriding mandatory provisions, only the provisions of the *lex fori* are taken into account by Art. 16 (whose text is almost identical to Art. 7(2) of the Rome Convention). While the exclusion of the overriding mandatory provisions of a law different from the *lex causae* and the *lex fori* has been criticized, problems may arise if a different compromise is finally found in Rome I (the issue is currently under debate in the Council: see the title of Council doc. n. 9765/07, not accessible to the public).

As a last point, **Articles 27 and 28 deal with the relationships with other provisions of Community law and with existing international conventions** (as the above mentioned Hague Convention of 1971 on the law applicable to traffic accidents, or the Hague Convention of 1973 on the Law Applicable to Products Liability), in a traditional way, if compared with the coordination clauses that were proposed in earlier stages of the procedure (see for instance Art. 1(3) and Art. 25 of the EP’s First Reading):

Article 27 - Relationship with other provisions of Community law

This Regulation shall not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict of law rules relating to non contractual obligations.

Article 28 - Relationship with existing international conventions

1. This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict of law rules relating to non contractual obligations.

2. However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them insofar as such conventions concern matters governed by this Regulation.

Pursuant to Art. 251(5) of the EC Treaty, the European Parliament (by an absolute majority of the votes cast) and the Council (by a qualified majority) must adopt the Regulation within six weeks from the date of approval of the joint text.

The vote in the European Parliament is expected in the plenary session on 9-10 July in Strasbourg (see the OEIL page on Rome II). The JHA Council, under the German Presidency, is scheduled in Luxembourg on 12-13 June.

[Update 9 June 2007: as stated on a Press release by the Council, the Presidency will deliver an oral report about the result of the conciliation with the European Parliament in the JHA session of Wednesday 13 June 2007]