Rome II and Defamation: Diana Wallis and the Working Paper

Diana Wallis MEP is Vice-President of the European Parliament and ALDE spokesperson on the Legal Affairs Committee.

The Rome II Regulation on the law applicable to non-contractual obligations ((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 1997 L 199, p. 40.)) was left incomplete; there was a failure to arrive at a consensus over the appropriate conflict rule to deal with what in the proposal was termed obligations arising out of violations of privacy and rights relating to the personality. This part of this proposal was therefore withdrawn by the Commission at a late stage with the commitment in the review clause to requisition a comprehensive study in this area of conflicts. All the documents prepared in the codecision procedure are available from the Legislative Observatory on the website of the European Parliament.

The study promised by the Commission, the 'Mainstrat Study' ((Comparative study on the situation in the 27 Member States as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, personality, JLS/2007/C4/028, Final Report.)), has now been on the table for some time.

In the European Parliament we have begun to look at the issue again using our power under Article 252 TFEU to ask the Commission to exercise its right of initiative. We held a hearing earlier this year and I have now produced a Working Document. The debate now takes place against a patchwork of new elements. There is a rising clamour of dissatisfaction with so-called 'libel tourism' in the English courts which is criticised by media in the UK and beyond; it is not clear that national regulation alone will solve this problem. The media itself now seems more anxious for a European level solution, of course preferably one that recognises the country of editorial control. Yet this country of origin type approach was precisely what prompted the earlier withdrawal and it has now encountered severe difficulties in relation to the European Data Protection Directive.

On the other side of the balance some sort of horizontal approach might now be made easier given that the European Union has through the Lisbon Treaty committed itself to acceding to the ECHR and therefore it could be argued that all jurisdictions should approach the balancing of rights that is necessary in these cases from the same base line. This might produce a common point of departure. Then there is the Icelandic Modern Media Initiative, which is trumpeted by some as having the possibility, given Iceland's bid for EU membership, to bring a US type First Amendment right into the EU. On top of all this of course the Internet continues to develop and the possibilities for ordinary people, perhaps especially vulnerable young people to end up with a real cross-border or worldwide violation of their personality rights is all too real. Interestingly, there is a developing movement on the web in which the excesses of the certain sectors of the press are coming under attack. The question does not reduce simply to the freedom of the press versus rich litigants who would silence debate. It is a constitutional issue and the balance struck by the different national constitutions in this field differs from country to country. This is the fascinating backdrop against which we take up our discussions. The Working Document is very much a consideration of the current status. Your comments and views to feed in to our deliberations would be hugely welcomed. **Download the Working Document**.

Rome II and Defamation: Online Symposium

The focus of this online symposium, following the publication of the comparative study on the state of the laws of the Member States regarding the law applicable to non-contractual obligations arising out of violations to privacy and rights relating to personality, will be on whether the Rome II Regulation should be amended so as to cover the law applicable to such obligations. In other words, this symposium will ask whether, and to what extent, Rome II should cover choice of law in defamation.

This page will link to all of the contributions to the symposium over the next

couple of weeks (newest posts at the top of the list, so start from the bottom).

- **EPC on The Link between Brussels I and Rome II in Cases Affecting the Media (Mills Wade)**

- **Perreau-Saussine on Rome II and Defamation**

- ***Magallón on* Country of Origin Versus Country of Destination and the Need for Minimum Substantive Harmonisation**

- **Heiderhoff on Privacy and Personality Rights in the Rome II Regime – Yes, Lex Fori, Please!**

- **Boskovic on Rome II and Defamation**

- **Dickinson on Privacy and Personality Rights in the Rome II Regime – Not Again?**

- **Hartley on The Problem of "Libel Tourism"**

- **Von Hein on Rome II and Defamation**

- **Diana Wallis MEP and the Working Paper**

Rome II and Defamation: Online Symposium Beginning Monday 19th July

On Monday 19th July, **Conflict of Laws .net** will launch an online symposium on **Rome II and Defamation**.

The focus of the debate, following the publication of the comparative study on the state of the laws of the Member States regarding the law applicable to non-contractual obligations arising out of violations to privacy and rights relating to personality, will be on whether the Rome II Regulation should be amended so as to cover the applicable law for such obligations. A hearing was held earlier this year in the Legal Affairs Committee of the European Parliament (JURI), and a Working Paper has been produced by Mrs Diana Wallis MEP, Vice-President of the European Parliament, which provides a background to the debate and offers a number of potential solutions.

The symposium will be launched by Mrs Wallis MEP on Monday 19th July, together with a link to the Working Paper. We will then have responses and contributions from eminent scholars, practitioners and members of the press, including:

- Prof Louis Perreau Saussine (Nancy II)
- Prof Horatia Muir-Watt (Sciences Po)
- Mr Oliver Parker (Ministry of Justice, UK)
- Mr Andrew Dickinson (Clifford Chance; BIICL; Sydney)
- Prof Trevor Hartley (LSE)
- Prof Thomas Kadner Graziano (Geneva)
- Prof Jan von Hein (Trier)
- Ms Angela Mills (European Publishers Council)
- Prof Bettina Heiderhoff (Hamburg)

We would also like to encourage visitors to the site to comment on the Working Paper, or one of the responses; you can either leave a comment directly on the website, or email me at martin.george@conflictoflaws.net.

Rome III Reg.: Council Adopts Decision Authorising Enhanced Cooperation on the Law Applicable to Divorce

On Monday, 12 July 2010, the Council adopted a decision authorising 14 Member States (Spain, Italy, Hungary, Luxembourg, Austria, Romania, Slovenia, Bulgaria, France, Germany, Belgium, Latvia, Malta and Portugal) **to participate in the first enhanced cooperation** in the history of the European Union, **on the law applicable to divorce and legal separation** (see the provisional version of the Council's press release, doc. no. 12077/10, at p. 15).

As we reported in our previous posts, the initiative for an enhanced cooperation in the field originated in 2008, when the Council noted that there were insurmountable difficulties in reaching the required unanimity in order to adopt the Commission's proposal amending the Brussels IIa Regulation and introducing rules concerning applicable law in matrimonial matters (Rome III reg.).

The first formal steps of the procedure are summarised as follows in Council document no. 10288/10 of 1 June 2010:

> *[…] Greece, Spain, Italy, Hungary, Luxembourg, Austria, Romania and Slovenia addressed a request to the Commission by letters dated 28 July 2008 indicating that they wished to establish enhanced cooperation between them in the area of applicable law in matrimonial matters and that they expected the Commission to submit a proposal to the Council to that end. Bulgaria addressed an identical request to the Commission by a letter dated 12 August 2008 and France by a letter dated 12 January 2009. On 3 March 2010, Greece withdrew its request. Germany, Belgium, Latvia and Malta joined the request by letters dated respectively 15 April 2010, 22 April 2010, 17 May 2010 and 31 May 2010. In total, thirteen Member States have thus requested enhanced cooperation.*

On 31 March 2010 the Commission presented to the Council:

(a) a proposal for a Council Decision authorising enhanced cooperation in the area of the law applicable to divorce and legal separation [COM(2010)104 fin./2 of 30 March 2010]; and

(b) a proposal for a Council Regulation (EU) implementing enhanced cooperation in the area of the law applicable to divorce and legal separation [COM(2010)105 fin./2 of 30 March 2010: the proposed "Rome III" reg.].

The Commission assessed the legal conditions for enhanced cooperation in the explanatory memorandum to the proposal for a Council Decision authorising enhanced cooperation in the area of the law applicable to divorce and legal separation.

On 1 June 2010 the Legal Affairs (JURI) Committee of the European Parliament voted unanimously for the proposal for a Council Decision authorising enhanced cooperation in the area of the law applicable to divorce and legal separation.

The JHA Council, on 3-4 June 2010, reached a political agreement on the matter, and transmitted the draft decision to the Parliament, in order to obtain its consent to the enhanced cooperation, pursuant to Art. 329(1) of the Treaty on the Functioning of the European Union (see JHA Council's press release, doc. no. 10630/10).

On 16 June 2010 the plenary session of the European Parliament approved a legislative resolution giving its consent to the draft decision, that was finally adopted by the Council on 12 July 2010.

It is interesting to note that the Parliament in its resolution has called on the Council to adopt a decision pursuant to Article 333(2) of the Treaty on the Functioning of the European Union stipulating that, when it comes to the proposal for a Council Regulation implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, it will act under the ordinary legislative procedure (formerly known as codecision), and not under the special legislative procedure provided for in Article 81(3) of the TFEU, under which EP is merely consulted.

As regards the text of the Rome III reg., it is currently under discussion in the

Council, on the basis of the Commission's March proposal. The latest available text is contained in Council document no. 10153/10 of 1 June 2010: at their latest meeting on 4 June 2010, Justice ministers agreed on a general approach on key elements (see Council Secretariat's factsheet of 4 June 2010).

BIICL event: Private International Law – Challenges for Today's Markets

The British Institute of International and Comparative Law (BIICL) hosts an event titled "Private International Law – Challenges for Today's Markets" as part of the Herbert Smith Private International Law Seminar Series at the BIICL.

What is this event about? This conference shall offer a platform to exchange views of different industry sectors on current Private International Law problems they encounter. The speakers will deal with various issues such as the difficult new rules in the Rome I regulation on financial market contracts, current Private International law problems arising in the field of Swaps and Derivatives and in the Energy sector and will look in a more general way at the pitfalls of Private International Law for business contracts between important market players.

Date: Tuesday 9 February 2010, 17:00 to 19:00

Location: British Institute of International and Comparative Law, Charles Clore House, 17 Russell Square,London, WC1B 5JP

Chair: Lord Justice Rix, Royal Courts of Justice

Speakers: 1) Joanna Perkins, Secretary to the Financial Markets Law Committee, 2) Edward Murray, Partner, Allen & Overy London; Chair of the ISDA Financial Law Reform Committee, 3) Murray Rosen QC, Partner, Herbert Smith LLP, 4) Matthew Evans, Chief Counsel, BG Group plc

German Judgment on Rome II

Even though the decision is not really new anymore and the case has been discussed already – at least with regard to certain aspects concerning the temporal scope of Rome II – it might still be worth mentioning since it is the first judgment of the German Federal Court of Justice (Bundesgerichtshof, BGH) applying the Rome II Regulation.

The case concerns an action brought by a registered association in terms of § 4 Unterlassungsklagengesetz, UKlaG (Injunctive Relief Act) seeking an injunction to prevent an airline established in Latvia from using a particular clause in its general terms and conditions towards consumers.

With regard to the question of **international jurisdiction**, the BGH held that German courts were competent to hear the case on the basis of Art. 5 No. 3 Brussels I Regulation since the use of unfair general terms of conditions constituted a "harmful event" in terms of Art. 5 No. 3 Brussels I Regulation. In this respect, the BGH referred to the ECJ's judgment in *Henkel* (C-167/00) where the ECJ had held that "[t]he concept of 'harmful event' within the meaning of Article 5 (3) of the Brussels Convention is broad in scope […] so that, with regard to consumer protection, it covers not only situations where an individual has personally sustained damage but also, in particular, the undermining of legal stability by the use of unfair terms which is the task of associations such as […] to prevent." (ECJ, C-167/00, para. 42).

With regard to the **applicable law** concerning the claim for injunctive relief against the use of unfair terms, the BGH referred to Regulation (EC) No. 864/2007 (Rome II) and held that German law – and therefore §§ 1, 2, 4a UKlaG – was applicable in this case: According to Art. 4 (1) Rome II the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country in which the indirect consequences of that event occur. In the present context, the country in which the damage occurs or is likely to occur (Art. 2 (3) b) Rome II) is, according

to the court, the country where the unfair general terms were used or are likely to be used and therefore the country in which the consumers' protected collective interests were affected or are likely to be affected. In support of this interpretation, the BGH referred to Art.6 (1) Rome II according to which the law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where the collective interests of consumers are, or are likely to be, affected. In this respect, the BGH left the question open whether Art. 6 Rome II is directly applicable in the present context, since, according to the court, the underlying rationale – namely that consumers should be protected by the law of that country where their collective interests are affected – applied in the present context as well.

With regard to the **temporal scope of application** of Rome II – which is contentious in view of the not unambiguous provisions of Art. 31 and Art. 32 of the Regulation (see in this respect the abstracts of the articles by *Glöckner* and *Bücken* which can be found here) – the BGH seems to adopt, as it has been pointed out already by *Professor von Hein* in his recent comment, the point of view according to which the Regulation entered into force on 11 January 2009. The BGH, however, did not discuss the problems surrounding Artt. 31 und 32 Rome II.

Concerning the applicable law, the BGH emphasised that a distinction had to be drawn with regard to the law applicable to the claim for injunctive relief and the law applicable to the validity of the term in question (para. 15, 24 et seq.): In this respect, the BGH stated that according to § 1 UKlaG an injunction could be sought if general terms and conditions were used which are invalid under German law (§§ 307-309 Civil Code, BGB). Thus, injunctive relief under this provision presupposed that German law applied with regard to the validity of the terms in question. The court emphasised that the application of German law with regard to the claim for injunction did not imply that the validity of the standard term in question was governed by German law as well (para. 25). In this context, the court pointed out that this resulted from an interpretation of § 1 UKlaG and § 4a UKlaG: While an injunction under § 1 UKlaG required an infringement of German law, injunctive relief could be sought according to § 4a UKlaG in case of intra-Community infringements of laws that protect consumers' interests in terms of Art. 3 b) Regulation (EC) No. 2006/2004. Thus, according to § 4a UKlaG, claims for injunctive relief could be brought irrespective of whether German consumer

protection laws had been infringed, but rather also in cases where any other consumer protection laws – which were encompassed by § 4a UKlaG – had been violated. As a consequence, the court stated that the applicable consumer protection law had to be determined independently. The validity of general terms was governed by the law of the contract (para. 29). In this respect the court held that Latvian law had to be applied according to German PIL rules (Artt. 28 (1), 31 (1) EGBGB (German Introductory Act to the Civil Code)) with regard to the validity of the questioned standard terms since Latvia was the country the contract was most strongly connected with: According to Art. 28 (2) S. 1, 2 EGBGB – which was applicable in the absence of a special choice of law rule with regard to contracts for the carriage of passengers by air – it is presumed that the contract shows the closest connection to the country in which the party who is required to perform the duty characterising the contract has its principal establishment at the time of the conclusion of the contract. Since in case of contracts as the one in question the transport had to be regarded as the characteristic duty and the air line had its principal place of establishment in Latvia, Latvian law was applicable with regard to the validity of the standard term.

The court's further considerations on the question whether the contract is more closely connected with another country – which would have rebutted the presumption provided by Art. 28 (2) EGBGB according to Art. 28 (5) EGBGB – are of particular interest with regard to Rome I and the Brussels I Regulation: According to the court, a closer connection to another country, in particular to Germany, could neither be assumed only due to the fact that the defendant's website was directed at customers in Germany (para. 36), nor could a more closer connection to Germany be assumed on the basis that Germany was the place where the services were provided (para. 37) since in case of cross-border flights it was not possible to determine exactly in which country the characteristic performance was actually provided. In this context, the BGH referred to the ECJ's judgment in C-204/08 (*Rehder*) on the interpretation of Art. 5 No. 1 b) Brussels I Regulation.

Further, the court held that also the aim of consumer protection did not result in a closer connection to German law: Even though Art. 29 (2) EGBGB reflected this aim by stating that "in the absence of a choice of law consumer contracts […] are governed by the law of the country where the consumer has his or her habitual

residence", this provision was not applicable according to Art. 29 (4) EGBGB with regard to contracts of carriage (see para. 38). In this context the BGH referred to the Rome I Regulation and pointed out the difference between Art. 5 (2) Rome I (which was not yet applicable in this case) and Art. 29 (4) No. 1 EGBGB (i.e. Art. 5 (4) Rome Convention): While Art. 5 (2) Rome I Regulation now states that – in the absence of a choice of law – the law applicable to a contract for the carriage of passengers shall be the law of the country where the passenger has his habitual residence, provided that either the place of departure or the place of destination is situated in this country, Art. 5 (4) (a) Rome Convention (Art. 29 (4) No. 1 EGBGB) did not attribute such a significance to consumer protection.

The judgment of 9th July 2009 (Xa ZR 19/08) can be found (in German) at the website of the German Federal Court of Justice.

There are, as far as I could see, two case notes (in German) by now:

Wolfgang Hau, LMK 2009, 293079

Ansgar Staudinger/Paul Czaplinski, NJW 2009, 3375

Many thanks to Dr. Carl-Friedrich Nordmeier and Professor Jan von Hein.

Dutch Articles on Rome I (updated)

The last issue of the Dutch review of private international law (*NIPR Nederlands internationaal privaatrecht*) includes several articles on the Rome I Regulation, including four in English.

Michael Bogdan (Lund University): *The Rome I Regulation on the law applicable to contractual obligations and the choice of law by the parties*

> *The Rome Convention of 19 June 1980 on the Law Applicable to Contratual Obligations (in the following 'the Rome Convention') will be replaced on 17*

December 2009, in all Member States of the European Union except Denmark, by the EC Regulation No 593/2008 on the Law Applicable to Contractual Obligations (the Rome I Regulation) although only in relation to contracts concluded after that date. The Commission's proposal of 2005 (in the following 'The Commission's proposal'), which led to the adoption of the Rome I Regulation after a number of amendments, stated that it did not set out to establish a new set of conflict rules but rather convert an existing convention into a Community law instrument. Nevertheless, the Regulation brings about several important changes in comparison with the Rome Convention.

Luc Strikwerda (Advocate-General, Dutch Supreme Court): *Toepasselijk recht bij gebreke van rechtskeuze; Artikel 4 Rome I-Verordening*

If contractual parties have not availed themselves of the possibility to choose the law applicable to their contract (Art. 3, Rome I), the applicable law will be determined according to rules laid down in Article 4, Rome I. Similar to the equivalent provision of the 1980 Rome Convention, Article 4, Rome I is based upon the doctrine of the characteristic performance. Nonetheless, a new structure with respect to the concretization of this doctrine has been adopted, ensuring that the characteristic performance no longer functions as a presumption. Instead, Article 4 lays down the law applicable in a number of pre-determined categories (Art. 4(1)(a)-(h), Rome I). For the majority of these categories the law of the habitual residence of the party who performs the characteristic performance will be applied. These pre-determined categories form the basic structure and content of this contribution. The obvious disadvantage that this new structure leads to issues of characterisation will also be discussed.

Teun Struycken (Utrecht University and Nauta Dutilh, Amsterdam) and Bart Bierman (Nauta Dutilh, Amsterdam): *Rome I on contracts concluded in multilateral systems*.

One of the novelties of the Rome I Regulation is the special provision in Article 4(1)(h) on the law applicable to a contract entered into within a regulated market or a multilateral trading facility in the absence of a choice of a law by the contracting parties.

The authors analyse the practical significance of this provision and the relevant contracts which come into existence within a trading system. In the authors' view, the concept of contract used in Article 4(1)(h) of Rome I, encompasses transactions within a trading system that may not be true agreements under the substantive law of the Netherlands. Furthermore, many of the relevant contractual arrangements, in particular those relating to the clearing and the settlement of securities transactions on a regulated market or multilateral trading facility, fall within the scope of the special PIL provision for designated settlement finality systems pursuant to the Settlement Finality Directive.

According to the authors, legal certainty requires that all transactions on a particular trading system be subject to the same law, regardless of the nature of the parties involved. They take the view that there should be no room for a choice of a law other than the law governing the trading system. The rule in Article 4(1)(h) should in their view become applicable to each contract concluded within a multilateral trading system. The law designated by that provision should prevail over the law chosen by the parties to a transaction: such transactions should always be governed by the law governing the system.

Maarten Claringbould (Leiden University and Van Traa Advocaten, Rotterdam): *Artikel 5 Rome I en vervoerovereenkomsten*

Article 5, paragraph 1, Rome I covers contracts for the carriage of goods and paragraph 2 covers – and this is new – contracts for the carriage of passengers.

In most bills of lading, sea waybills and charter parties a choice of law clause has been inserted into the documents, although only a clause paramount in a bill of lading might not be sufficient: the Hague (Visby) Rules that are incorporated into the contract only deal with the liability of the carrier and not with such items as payment for freight or the interpretation of the contract etc. and for such bills of lading Article 5(1) will determine the applicable national law. In CMR and CIM consignment notes, bills of lading for inland navigation as well as in air waybills a clear choice of national law clause is often lacking and then Article 5(1) also determines the applicable national law, sometimes with an unexpected outcome … But first of all we have to categorise the contracts that fall under the legal term 'a contract for the carriage of goods' as mentioned in Article 5(1). We know that recital 22 considers 'single charter

parties and other contracts the main purpose of which is the carriage of goods' to be a contract for the carriage of goods. The Court of Justice in its recent judgment of 6 October 2009, ICF v. Balkenende (Case C-133/08), has interpreted this term. It concerned a contract for a shuttle train service between Amsterdam and Frankfurt for the carriage of containers. Under this contract ICF would make wagons available and it would also arrange for traction (locomotives). In my opinion this is a clear framework contract for the carriage of goods by rail as such a contract has been described in Article 8:1552 Dutch Civil Code since 2006. However, the Court of Justice (inspired by the Dutch Advocate-General Strikwerda as well as the questions formulated by the Dutch Supreme Court) started out on the wrong footing by stating in sub 2 that the contract at issue here was a charter party contract. A charter party contract means that the charterer has chartered a specifically named vessel or other means of transport (such as a truck or a complete train) including the crew. It is obvious that this was not the case for this train shuttle service: wagons were made available from time to time and ICF would arrange for traction (not mentioning specific locomotives with drivers). That is not a charter party with regard to a train; it is just a plain framework contract for the carriage of containers by rail. For that reason, the first answer by the Court of Justice should be read as merely referring to a 'contract of carriage' instead of a 'charter party'. Then the answer makes sense: 'The second sentence of Article 4(4) of the Rome Convention applies to a contract of carriage [emphasis added], other than a single voyage charter-party, only when the main purpose of the contract is not merely to make available a means of transport, but the actual carriage of goods.'

I am of the opinion that time charter parties, although under Dutch law they are considered to be contracts of carriage and now – strictly speaking – fall under the first answer by the Court of Justice as contracts of carriage, are still excluded by recital 22 from the term 'contract for the carriage of goods' as mentioned in Article 5(1). If it were otherwise, the law which is applicable to such time charters might vary from port to port, such port being 'the place of delivery agreed by the parties', Article 5(1) last sentence. That would certainly be contrary to recital 16 ('the conflict-of-law rules should be highly foreseeable'). The fact that in its first answer the Court of Justice uses – in my opinion by mistake – the term 'charter party' does not alter this.

In my opinion (and unlike Boonk and Mankowski) the contractual side of bills of lading falls under Rome I and more specifically – if a choice of law clause is lacking – under Article 5(1). That concerns cargo claims, payment for freight and other obligations under the contract of carriage which is incorporated in the bill of lading. But the questions of who may claim under the bill of lading or who is the carrier under the bill of lading fall outside the scope of Rome I and Rome II and for that reason Article 5 of the Dutch Code on Private International Law with regard to the carriage of goods has to be retained.
Article 19(2) makes the place where the agency or branch of the carrier (the carrier always being a company) is located the habitual residence of the company. In practice, contracts of carriage are often concluded by agents of branch offices of the carrier and in such cases the place of the receipt of the goods will coincide with the 'habitual residence of the carrier' making – maybe quite unexpectedly – the law of the country where the goods are received for shipment the applicable law.

For that reason I advise air carriers carrying passengers, who seldom include a choice of national law in their tickets or general conditions, to choose as the applicable law the place where the carrier has its central administration (Art. 5(2c)) and not the place where the carrier has its 'habitual residence' which will often be the place where its agent who concluded the contract is located. I finish this article by expressing the hope and the expectation that the next time the Court of Justice has to interpret Article 5(1) Rome I, it will first properly categorise the contract of carriage at issue by starting from the correct body of facts.

Jonathan Hill (Bristol University): *Article 6 of the Rome I Regulation: Much Ado about nothing*

Consumer contracts are typically standard-form contracts, the terms of which are drafted by (or on behalf of) suppliers. As the consumer has no influence over the substance of the contract, one of the perceived dangers is that a supplier may include in the contract a choice-of-law clause which selects a law which favours the interest of the supplier over those of theconsumer. This danger suggests that, in order to ensure that consumers are not deprived of the level of legal protection which they may legitimately expect, the choice-of-law rules applicable to consumer contracts should differ from those which apply to

> *contracts in general (and which are founded on the principle of party autonomy).*

Christian Heinze (Max Planck Institute, Hamburg): *Insurance contracts under the Rome I Regulation*.

> *All government, indeed every human benefit and enjoyment, every viryue, and every prudent act, is founded on compromise and barter'. these words written by Edmund Burke more then 200 years ago still seem to be a fair description of the legislative process in the democracies today. They hold particularly true at the European level where compromise is notoriously difficult, in particular if the national backgrounds are as disparate as they are in insurance law. Article 7 of the European Regulation NOo 593/2008 on the law applicable to contractual obligations (hereafter abbreviated as 'Rome I'), the rule titled 'insurance contracts', is exactly that, a compromise.*

Articles of *NIPR* can be downloaded here by suscribers.

Time to Update the Rome I Regulation

The Council has adopted a corrigendum to all versions of the Rome I Regulation to correct what appears to be an "obvious error". Art. 28, which had previously provided that the Regulation would apply to contracts concluded "after" (French: "après"; German: "nach") 17 December 2009, will now refer to contracts concluded "as from" (French: "à compter du"; German "ab") 17 December 2009, bringing it in line with Art. 29 which requires that the Regulation be applied "from" 17 December 2009. The corrigendum was first published on 8 October and itself revised on 19 October. Under the procedures for corrigenda (set out in a Council Statement of 1975), the amendment will apply unless the European Parliament took objection within 8-days (and there is no reason to believe that

this is the case). It is understood that the text of the corrigendum will appear in the Official Journal later this month.

The change would appear satisfactorily to put to bed the lacuna which had troubled the German delegation to the Council's Civil Law Committee, with the result that lawyers concluding agreements on 17 December 2009 can now rest more easily. Any legal opinions relating to such contracts can now, with confidence, be based on the Rome I Regulation (as opposed to the Rome Convention).

Unfortunately, those grappling with the Rome II Regulation do not have the same comfort. As has been highlighted on these pages, there remains a controversy as to whether the Regulation applies to events giving rise to damage "which occur after" 20 August 2007 (the Regulation's apparent entry into force date under Art. 254 EC) or those occurring "from"/"after" 11 January 2009 (the Regulation's application date) (see Arts. 31-32). The problem here is not so much the use of the word "after" in Art. 31 in contrast to the word "from" in Art. 32 (a mere trifle by comparison), but the fact that the Regulation uses different terminology ("entry into force"; "application") in these two provisions dealing with its temporal effect and does not (explicitly, at least) stipulate an entry into force date in either of them. Commentators disagree as to the correct solution, and a division of opinion has emerged (for example) in England (where the majority favour 20 August 2007 as the relevant date) and Germany (where opinion is divided, but is understood numerically to favour 11 January 2009). Member State courts will, no doubt, need to grapple with this soon. The question is: who will get there first, and which solution will they prefer?

Dublin Up on Rome I

Following the conference to take place at University College Dublin this week, details of a second conference to take place in the Irish capital on the subject of the Rome I Regulation have been announced. This conference, organised by Trinity College Dublin, is entitled "The Rome I Regulation on the Law Applicable

to Contractual Obligations: Implications for International Commercial Litigiation" and includes several of the speakers who participated in the organisers' earlier successful conference on the Rome II Regulation (for the published papers of which, see here).

The programme is as follows:

FRIDAY 9 OCTOBER

3:30 Registration
4:00 Professor Christopher Forsyth, "The Rome I Regulation: Uniformity, but at What Price?"
4:30 Connection and coherence between and among European Private International Law Instruments in the Law of Obligations
Dr. Janeen Carruthers, "The Connection of Rome I with Rome II"
Professor Elizabeth Crawford, "The Connection of Rome I with Brussels I"
5:15 Tea / Coffee Break
5:30 Professor Ronald Brand, "Rome I's Rules on Party Autonomy For Choice of Law: A U.S. Perspective"
6:00 Mr. Adam Rushworth, "Restrictions in Party Choice under Rome I and Rome II"
6:30 Conclusion of the Session

SATURDAY 10 OCTOBER

9:15 Dr. Alex Mills, "The relationship between Article 3 and Article 4"
9:45 Professor Dr. Thomas Kadner Graziano, "The Relationship between Rome I and the U.N. Convention on Contracts for the International Sale of Goods"
10:15 Professor Franco Ferrari, Article 4:Applicable Law in the Absence of Choice"
10:45 Tea / Coffee Break
11:10 Professor Jonathan Harris, "Mandatory Rules and Public Policy"
11.40 Professor Xandra Kramer, "The Interaction between Mandatory EU Laws and Rome I"
12:10 Professor Francisco Garcimartin Aflérez, "Article 6: Consumer Contracts"
12:50 Lunch
1:30 Professor Peter Stone, "Article 7: Insurance Contracts"
2.00 Professor Dr. Jan von Hein, "Article 8: Individual Employment Contracts"

2.30 Dr. Andrew Scott, “Characterization Problems in Employment Disputes”
3.00 Mr Richard Fentiman The Assignment of Debts, Articles 14 and 27: Implications for Debt Wholesalers in the Factoring and Securitisation Industries
3.30 Questions and Discussion
4.00 Conference Ends

Further details and a booking form are available on the TCD website.

Dublin Conference on Rome I and Brussels I Regulations

The Commercial Law Centre at University College Dublin has arranged a morning conference next Thursday (17 September 2009, 8:45am-1pm) dealing with the Rome I and Brussels I Regulations.

According to the conference materials on the CLC’s website:

> *The Rome I Regulation on the Law Applicable to Contractual Obligations, replacing the Rome Convention comes into effect on 17th December 2009.*
>
> *A thorough familiarity with this Regulation is essential for all professionals engaged in drafting, reviewing and litigating international commercial agreements.*
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> *At this seminar, a panel of distinguished experts will review some key elements in the Regulation:*
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> 1. *What limitations does the Regulation place on the freedom of parties to an international contract to choose the governing law?*
> 2. *Where the parties fail to select a governing law, how do courts and practitioners determine the relevant law?*
> 3. *How does Rome I apply to the difficult issue of contracts on financial instruments?*

The remainder of the seminar will focus on some key issues under Brussels I Regulation:

- *How do practitioners ensure effective choice of court agreements under Brussels I?*
- *How will the Hague Choice of Court Convention, recently signed by the European Community and which seeks to establish a global choice of court regime, interact with Brussels I.*
- *How effective are dispute resolution agreements which embody both litigation and arbitration options?*

As a consequence of increasing globalisation, the problem of concurrent international procedures is becoming more frequent. The seminar will consider the vexed question, discussed recently in Ireland in GOSHAWK DEDICATED, of whether a Brussels Regulation court as the domiciliary court of the defendant, can stay proceedings in favour of earlier proceedings begun in a non-member state court.

This seminar will provide a unique opportunity for practitioners involved in international litigation to learn about the new developments and to engage in discussion with an international panel of speakers.

As well as the author of this post, the speakers include Michael Collins SC (Chairman, Bar Council of Ireland), Michael Wilderspin (Legal Services, Commission), Dr Joanna Perkins (Financial Markets Law Committee), Geraldine Andrews QC (Essex Court Chambers) and Liam Kennedy (A&L Goodbody).