

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 Litigation” 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.

At this seminar, a panel of distinguished experts will review some key elements in the Regulation:

- 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).

Brussels I Regulation - The UK Parliament has its say

The House of Lords' influential European Union Committee (chaired by Lord Mance) has published a report on the Commission's Green Paper on the Brussels I Regulation. The report scrutinises the Green Paper, in light of evidence presented by representatives of the UK Ministry of Justice (Lord Bach and Oliver Parker) and Richard Fentiman of Cambridge University, and considers all of the topics raised by the Commission (and discussed on these pages). The evidence is appended at the back of the report.

The Committee's conclusion (in contrast, for example, to its view on the proposed Rome II Regulation) is favourable:

We very much welcome the Commission's initiative in producing the Report and the proposals outlined in the Green Paper. While the Regulation has been successful, in particular by introducing clear common rules, there have undoubtedly been areas where some of the rules have, in practice, opened up the possibility for abuse contrary to the interests of justice. This opportunity should be taken to reform the rules with the aim of minimising abuse and to make other useful reforms. We hope the Commission will, following the conclusion of its consultation, move quickly to bring forward proposals to amend the Regulation.

The report is an important contribution to the debate surrounding the proposed reforms to the Brussels I Regulation, and emphasises the need to extend the consultation process beyond any Proposal by the Commission to allow all stakeholders to contribute to the improvement of this, the central instrument of European private international law.

New Book on Rome II

Brill / Martinus Nijhoff has recently published *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations: A New International Litigation Regime*. The book is edited by John Ahern and William Binchy of Trinity College Dublin. Full details of the book are available [here](#). It can be ordered through this [link](#) from the publisher or web sites like Amazon.

The book is the result of a conference held in Dublin in June 2008. It contains fifteen chapters by authors from across Europe and North America.

Swiss Institute of Comparative Law: First Book on the Rome I Regulation in French

✖ The contributions presented at the **20th Journée de droit international privé**, jointly organised in March 2008 in Lausanne by the Swiss Institute of Comparative Law (ISDC) and the Centre de droit comparé, européen et international (CDCEI) of the Law Faculty of University of Lausanne and dedicated to the Rome I Regulation, have been published by Schulthess under the editorship of *Eleanor Cashin Ritaine* and *Andrea Bonomi*: “**Le nouveau règlement européen ‘Rome I’ relatif à la loi applicable aux obligations contractuelles**”.

Here's the table of contents (available as a .pdf file):

Avant-propos (*Andrea Bonomi / Eleanor Cashin Ritaine*);

Première partie: Panorama introductif et principes généraux

- Le Règlement Rome I: la communautarisation et la modernisation de la Convention de Rome (*Michael Wilderspin*);
- La nouvelle synergie Rome I / Rome II / Bruxelles I (*Eva Lein*);
- The New Rome I Regulation on the Law Applicable to Contractual Obligations: Relationships with International Conventions of UNCITRAL, the Hague Conference and UNIDROIT (*Caroline Nicholas*);
- Choice of the Applicable Law (*Stefan Leible*);
- La loi applicable à défaut de choix (*Bertrand Ancel*);

Deuxième partie: Quelques contrats particuliers et mécanismes spécifiques

- Insurance Contracts in “Rome I”: Another Recent Failure of the European Legislature (*Helmut Heiss*);
- Consumer Contracts under Article 6 of the Rome I Regulation (*Peter Mankowski*);
- New Issues in the Rome I Regulation: the Special Provisions on Financial Market Contracts (*Francisco J. Garcimartín Alférez*);
- Les règles applicables aux transferts internationaux de créance à l’aune du nouveau Règlement Rome I et du droit conventionnel (*Eleanor Cashin Ritaine*);
- Le régime des règles impératives et des lois de police dans le Règlement «Rome I» sur la loi applicable aux contrats (*Andrea Bonomi*).

Title: **Le nouveau règlement européen “Rome I” relatif à la loi applicable aux obligations contractuelles. Actes de la 20e Journée de droit international privé du 14 mars 2008 à Lausanne**, edited by *Andrea Bonomi* and *Eleanor Cashin Ritaine*, Schulthess (Série des publications de l’ISDC, vol. 62), Zürich, 2009, 251 pages.

ISBN/ISSN: 978-3-7255-5799-8. Price: CHF 75,00. Available at *Schultess*.

(Many thanks to Prof. Andrea Bonomi)

Articles on Rome II and Hague Convention on Choice of Court Agreements

The current issue (Vol. 73, No. 1, January 2009) of the *Rabels Zeitschrift* contains inter alia two interesting articles on the Rome II Regulation and the Hague Convention on Choice of Court Agreements:

Thomas Kadner Graziano: “The Law Applicable to Non-Contractual Obligations (Rome II Regulation)” – the English abstract reads as follows:

As of 11 January 2009, 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) will be applicable in twenty-six European Union Member States. The Rome II Regulation applies to events giving rise to damage which occur after its entry into force on 19 August 2007 in proceedings commenced after 11 January 2009. This Regulation provides conflict of law rules for tort and delict, unjust enrichment and restitution, negotiorum gestio and culpa in contrahendo. It has a wide scope covering almost all issues raised in cases of extra-contractual liability.

*The majority of the rules in the Rome II Regulation are inspired by existing rules from European countries. Others are pioneering, innovative new rules. Compared to many of the national systems of private international law of non-contractual obligations, Rome II will bring significant changes and several new solutions. The Rome II Regulation introduces precise, modern and well-targeted rules on the applicable law that are well adapted to the needs of European actors. It provides, in particular, specific rules governing a certain number of specific torts (e.g. product liability, unfair competition and acts restricting free competition, environmental damage, infringement of intellectual property rights, and industrial action). The provisions of the Regulation will considerably increase legal certainty on the European scale, while at the same time giving courts the freedom necessary to deal with new or exceptional situations. This contribution presents the rules designating the applicable law set out in the Rome II Regulation. The *raisons d’êtres* behind these rules are explored and*

ways in which to interpret the Regulation's provisions are suggested. Particular attention is given to the interplay between Rome II and the two Hague Conventions relating to non-contractual obligations. Finally, gaps and deficiencies in the Regulation are exposed, in particular gaps relating to the law applicable to violations of privacy and personality rights and traffic accidents and product liability continuing to be governed by the Hague Conventions in a number of countries, and proposals are made for filling them.

Rolf Wagner: "The Hague Convention of 30 June 2005 on Choice of Court Agreements" – the English abstract reads as follows:

In 1992 the United States of America proposed that the Hague Conference for Private International Law should devise a worldwide Convention on Enforcement of Judgments in Civil and Commercial Matters. The member states of the European Community saw in the US proposal an opportunity to harmonize the bases of jurisdiction and also had in mind the far-reaching bases of jurisdiction in some countries outside of Europe as well as the dual approach of the Brussels Convention which combines recognition and enforcement of judgments with harmonization of bases of jurisdiction (double convention). Despite great efforts, the Hague Conference did not succeed in devising a convention that laid down common rules of jurisdiction in civil and commercial matters. After long negotiations the Conference was only able to agree on the lowest common denominator and accordingly concluded the Convention of 30 June 2005 on Choice of Court Agreements (Choice of Court Convention). This Convention aims to do for choice of court agreements what the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards has done for arbitration agreements.

The article provides an overview of the negotiations and explains in detail the content of the Choice of Court Convention. In principle the Convention applies only to exclusive choice of court agreements. However an opt-in provision allows contracting states to extend the rules on recognition and enforcement to non-exclusive choice of court agreements as well. The Convention is based on three principles. According to the first principle the chosen court in a contracting state must hear the case when proceedings are brought before it and may not stay or dismiss the case on the basis of forum non conveniens. Secondly, any court in another contracting state before which proceedings are

brought must refuse to hear the case. Thirdly, a judgment given by the chosen court must be recognized and enforced in principle in all contracting states. The European instruments like the Brussels I Regulation and the Lugano Convention will continue to apply in appropriate cases albeit with a somewhat reduced scope. The article further elaborates on the advantages and disadvantages of the Choice of Court Convention and comes to the conclusion that the advantages outweigh the disadvantages. The European Community has exclusive competence to sign and ratify the Convention. The author welcomes the proposal by the European Commission that the EC should sign the Convention. Last but not least the article raises the question what has to be done in Germany to implement the Convention if the EC decides to ratify the Convention.

III International Seminar on Private International Law

The III International Seminar on Private International Law, coordinated by Professors José Carlos Fernández Rozas and Pedro de Miguel Asensio, took place at the Faculty of Law, Universidad Complutense de Madrid, on the 5th and 6th February. The Seminar, entitled “Self-regulation and unification of international contract law”, was divided into five sessions dedicated to offering a different perspective on the leitmotif of the encounter. Each session involved a general introduction, followed by communications from researchers and professionals of law. The seminar was rich in contents, and also a good opportunity for the meeting and discussion of academics and lawyers from different parts of Spain, as well as from European and Latin American countries.

As was only to be expected, the recent Rome I Regulation was the main topic of the first session. The general introduction was given by the Spanish representative in the negotiations, Professor Garcimartín Alferez, who highlighted

the main features of the text and explained the reasons that led to them. His intervention was followed by five papers on specific aspects of the new instrument. First, Professor Asin Cabrera, from La Laguna, focused on International maritime labour contracts, and in particular on the difficulties in determining the law applicable to them with the criteria laid down by art. 8 of the Rome I Regulation. Professor Gardeñes Santiago, from Barcelona (Universidad Autonoma), also referred to Art. 8 of the Regulation, this time from a general point of view, regretting the missed opportunity to change the orientation of the article: that is, correcting its logic of proximity in order to transform it into a rule with substantive guidance. After him, Rosa Miquel Sala, from Bayreuth, presented art. 7, which incorporates insurance contracts into the Regulation. Alberto Muñoz Fernandez, from the University of Navarra, reflected on legal representation as a phenomenon partially excluded from the Regulation. Finally, Paula Paradela Areán, from Santiago de Compostela, summarized the Spanish courts practice on the Rome Convention throughout its 15 years of life.

The second session, entitled “Substantive Unification and international trade: universal dimension”, was held on Thursday afternoon. Professor Sánchez Lorenzo, from Granada, took charge of the general introduction. He was followed by Professor M.J. Bonell, from La Sapienza (Italy), who focused on the UNIDROIT principles and their possible contribution to a global law of contracts. Professor Garau Juaneda, from the University of Palma de Mallorca, exposed the problems of the retention of title in today’s international trade. Professor Espiniella González, from the University of Oviedo, explained the dual role of the place of delivery in international contracts: for the determination of the applicable law, and as a criterion of international jurisdiction. Speaking from his own experience in international arbitration, Alfredo de Jesús O. referred to the arbitrator’s role as an agent to promote internacional self-regulation. Professor Otero García, from the Complutense University of Madrid, referred to standards in international trade regulation, highlighting the efforts undertaken by stakeholders in their harmonization. Professor Carmen Vaquero from Valladolid talked about the legal treatment of the delay to comply with obligations. The session ended with the intervention of Professor Boutin, from Panama, with an entertaining account of the history of the freedom of choice of the applicable law in Latin American countries.

The first session on Friday morning dealt with international unification from a

European perspective. The general introduction, given by Professor Pedro de Miguel, discussed the need for standardization at the European level in parallel to the UNIDROIT Principles; his presentation brought up points like the scope of standardization and how it could be carried out. Professor Leible, of Bayreuth, addressed the question of whether the common frame of reference can be chosen by the parties to a contract as applicable law: a question that raised an interesting debate between Professor Leible and Professor M.J. Bonell. Marta Requejo Isidro, from Santiago de Compostela, made reference to the relationship between the harmonization of consumer protection through Directives, and art. 3.4 of the Rome I Regulation. Professor D. Pina, from Lisbon, then alluded to the influence of competition rules on private contracts, and finally, Cristian Oró from Barcelona (Universidad Autonoma) reflected on art. 9 of the Rome I Regulation and its implications for competition rules as mandatory provisions.

The fourth session, on the new trends on international contracts, also took place on Friday morning. The general introduction this time was presented by Professor Forner Delagüa (University of Barcelona). He was followed by A. Boggiano, from Buenos Aires, who recalled the traditional dispute centered on the choice of *lex mercatoria* as the law applicable to an international contract. Professor Juan José Álvarez Rubio from the University of País Vasco spoke about international maritime transport in the Rome I Regulation, indicating the continuity with respect to the Rome Convention, and highlighting divergences from the UN Draft of 2007. Professor Nicolás Zambrana Tévar, from University of Navarra, presented some of the main issues that determine the character of the indirect holding system; the exposition paid special attention to the transaction mechanism of financial instruments. José Heriberto García Peña, from the Instituto Tecnológico de Monterrey, closed the meeting with a paper centered on the difficulties in determining the law applicable to on-line contracts, especially in the absence of choice of law.

The final session, held on Friday afternoon, focused on Latin America, with the attendance of Professor Lionel Perez Nieto, from the UNAM of Mexico, who explained the evolution of international uniform (conventional) law in Latin American countries, differentiating the experience of Mexico and Venezuela from that of the other States. Professor Roberto Davalos, from Havana, made an entertaining description of the cultural and legal features of China, emphasizing those that, from his experience, make it difficult to contract with partners from

this Asian country. Hernán Muriel Ciceri, from Sergio Arboleda University in Bogota, offered a comparison between the Rome I Regulation and the Convention of Mexico of 1994. Finally, Iñigo Iruretagoiena Aguirrezabalaga (University of País Vasco) referred to investment arbitration, underlining the characteristics that make it different from the paradigm of contractual arbitration.

The seminar was brought to a close by Professor Ms Elisa Pérez Vera, now a member of the Spanish Constitutional Court. All the presentations and papers will soon be published in the *Anuario Español de Derecho Internacional Privado*.

Many thanks to Paula Paradela Areán and Vesela Andreeva Andreeva.

Rome I: Commission Decision on the UK's Opt-In Published in the OJ - Response to the UK Government's Consultation

Following the publication in the OJ (no. L 10 of 15 January 2009, p. 22) of the formal **Commission Decision of 22 December 2008 on the request from the United Kingdom to accept the Rome I reg.** (see our previous post on the Commission opinion), **the UK government has published the response to the public consultation** launched in April 2008.

There were 37 responses to the consultation (see the detailed list in Annex A to the document), from the academic sector (5), commercial, financial and insurance organisations (18), consumer organisations (2), the legal sector (11) and the transport sector (1). **The overwhelming majority of the respondents (95%) agreed that the UK should participate in the Regulation.**

Here's an excerpt from the conclusion (see also, on pp. 16-38, the article-by-article analysis, with the points raised by the respondents and the government

response, as well as the comments on various issues relating to EC action in PIL matters, such as the UK's position in future EU dossiers, the role of the ECJ and the Danish government's ambition to put its opt-outs to a referendum):

104. The majority of respondents to the consultation were of the view that, given the satisfactory outcome of the negotiations, there was an advantage to British business if the rules determining the governing law were uniform throughout the EU. Aligning UK law in this respect to that in the rest of the EU would reduce legal expense and transaction costs. In addition, some respondents expressed the view that our original decision to opt out of the Regulation had helped to achieve the final positive result. However, they also made the point that if the UK did not participate in Rome I now, having achieved such a good result, it could significantly weaken the effectiveness of our right to not participate in future and damage our negotiating strength in relation to other EU dossiers.

105. [...] The European Commission adopted a decision to extend the application of the Rome I Regulation to the United Kingdom on 22 December 2008. The Ministry of Justice, the Department for Finance & Personnel (Northern Ireland) and the Scottish Executive will shortly progress implementation planning for the Regulation. The UK will be required to implement the Regulation by 17 December 2009.

106. By opting in to the Regulation, it shall be binding and directly applicable to the UK. The Regulation will apply to the UK (England, Northern Ireland, Scotland and Wales) and also to Gibraltar. The UK's participation in the Regulation does not, however, undermine the UK's future use of the Protocol to Title IV of the EC Treaty.

(Many thanks to Federico Garau, Conflictus Legum blog, and to Andrew Dickinson)

Special Issue Rome II Netherlands Internationaal Privaatrecht

The latest issue of the Dutch PIL journal *Nederlands Internationaal Privaatrecht* (2008, no. 4 – published in December) is dedicated to the Rome II Regulation. It includes the following eleven contributions:

M. Wilderspin, The Rome II Regulation; Some policy observations, p. 408-413

Xandra Kramer, The Rome II Regulation on the Law Applicable to Non-Contractual Obligations: The European private international law tradition continued. Introductory observations, scope, system, and general rules, p. 414-424

Thomas Kadner Graziano, The Rome II Regulation and the Hague Conventions on Traffic Accidents and Product Liability – Interaction, conflicts and future perspectives, p. 425-429

Andreas Schwartze, A European regime on international product liability: Article 5 Rome II Regulation, p. 430-334

Timo Rosenkranz and Eva Rohde, The law applicable to non-contractual obligations arising out of acts of unfair competition and acts restricting free competition under Article 6 Rome II Regulation, p. 435-439

Dick van Engelen, Rome II and intellectual property rights: Choice of law brought to a standstill, p. 440-448

Aukje van Hoek, Stakingsrecht in de Verordening betreffende het recht dat van toepassing is op niet-contractuele verbintenissen (Rome II) , p. 449-455 (includes English abstract)

Stephen Pitel, Choice of law for unjust enrichment: Rome II and the common law , p. 456-463

Bart Volders, Culpa in contrahendo in the conflict of laws: A first appraisal of Article 12 of the Rome II Regulation, p. 464

Herman Boonk, De betekenis van Rome II voor het zeerecht, p. 469-480 (includes English abstract)

Tomas Arons, 'All roads lead to Rome': Beware of the consequences! The law applicable to prospectus liability claims under the Rome II Regulation, p. 481-487

In case you are interested in contributing to this journal, please contact Xandra Kramer (kramer@frg.eur.nl) (editor-in-chief).