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, Alfedro de Jesús O. referred to the arbitrator's role as an agent to promote internacional self-regulation. Professor Otero García, from the ComplutenseUniversity of Madrid, referred to standards in international trade regulation, highlighting the efforts undertaken by stakeholders in their harmonization. Professor Carmen Vaquero from Valladolidtalked about the legal treatment of the delay to comply withobligations. 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 Delaygua (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 Vascospoke 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 Tecnologico deMonterrey, 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 Nederlands 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).

AG Opinion on the Interpretation of Art. 5 (1) Brussels I Regulation

Yesterday, *Advocate General Trstenjak`s* opinion in case C-533/07 (*Falco Privatstiftung und Rabitsch*) was published.

This case is of particular interest since it concerns the interpretation of the notion of "services" (Art. 5 (1) (b) second indent Regulation (EC) Nr. 44/2001 (Brussels I Regulation)) which has not been interpreted by the ECJ in the context of the Regulation so far. Further, with Art. 5 (1) Brussels I Regulation, the case concerns the interpretation of a provision which has been highly discussed in the course of the transformation of the Brussels Convention to the Regulation.

I. Background

The case concerns – briefly worded – proceedings between two plaintiffs, the first being a foundation managing the intellectual property rights of the late Austrian singer "Falco" established in Vienna (Austria), the second being a natural person domiciled in Vienna as well and a defendant domiciled in Munich (Germany) who are arguing about royalties regarding DVDs and CDs of one of the late singer's concerts: While a licence agreement was concluded between the plaintiffs and the defendant concerning the distribution of the DVDs in Austria, Germany and Switzerland, the distribution of the CDs was not included by this agreement. In

the following, the plaintiffs sued the defendant for payment – based, with regard to the DVDs, on the licence agreement and with regard to the CDs on the infringement of their intellectual property rights.

The first instance court in Austria (*Handelsgericht Wien*) assumed its international jurisdiction according to Art. 5 (3) Brussels I Regulation arguing that it had jurisdiction with regard to the infringement of intellectual property rights since the respective CDs were sold inter alia in Austria. Due to the close connection between the claim based on the licence agreement and the claim based on the infringement of intellectual property rights, the court assumed jurisdiction for the contractual claim as well.

The court of second instance *(Oberlandesgericht Wien*), however, held that it had no jurisdiction with regard to the claim based on the licence agreement arguing Art. 5 (1) (a) Brussels I Regulation was applicable. Since the principal contractual obligation was a debt of money, which had to be fulfilled under German law as well as under Austrian law at the debtor's domicile (Munich), German (and not Austrian) courts had jurisdiction. According to the *Oberlandesgericht Wien*, jurisdiction could not be based on Art. 5 (1) (b) Brussels I Regulation either, since the licence agreement did not involve the "provision of services" in terms of the Regulation.

Subsequently, the plaintiffs appealed to the Austrian Supreme Court of Justice (*Oberster Gerichtshof*).

II. Reference for a Preliminary Ruling

Since the *Oberste Gerichtshof* had doubts on the interpretation of Art. 5 (1) Brussels I, it referred the following **questions** to the ECJ for a preliminary ruling:

> *1. Is a contract under which the owner of an incorporeal right grants the other contracting party the right to use that right (a licence agreement) a contract regarding 'the provision of services' within the meaning of Article 5(1)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Brussels I Regulation)?*
>
> *2. If Question 1 is answered in the affirmative:*

2.1. Is the service provided at each place in a Member State where use of the right is allowed under the contract and also actually occurs?

2.2. Or is the service provided where the licensor is domiciled or, as the case may be, at the place of the licensor's central administration?

2.3. If Question 2.1 or Question 2.2 is answered in the affirmative, does the court which thereby has jurisdiction also have the power to rule on royalties which result from use of the right in another Member State or in a third country?

3. If Question 1 or Questions 2.1 and 2.2 are answered in the negative: Is jurisdiction as regards payment of royalties under Article 5(1)(a) and (c) of the Brussels I Regulation still to be determined in accordance with the principles which result from the case-law of the Court of Justice on Article 5(1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the Brussels Convention)?

III. Opinion

1. First Question

In her extensive opinion, AG *Trstenjak* first clarifies that the referring court basically aims to know with regard to the first question whether Art. 5 (1) (b) second indent Brussels I Regulation has to be interpreted to that effect that a contract under which the owner of an incorporeal right grants the other contracting party the right to use that right (a licence agreement) constitutes a contract regarding the "provision of services" within the meaning of this provision – and thus whether a licence agreement can be regarded as a contract on the provision of services in terms of Art. 5 (1) (b) second indent Brussels I Regulation (para. 46).

With regard to this question, the AG states in a first step, that "licence agreement" has to be understood in this context as a contract under which the owner of an incorporeal right grants the other contracting party the right to use that right (para. 48 et seq.).

In a second step, the AG turns to the notion of "services" in Art. 5 (1) (b) second indent Brussels I which does not provide for an explicit definition of this term

(para. 53 et seq.). Here, the AG stresses that – due to the lack of an express definition and the fact that the ECJ has not interpreted the meaning of services in the context of the Brussels I Regulation so far – starting point for an interpretation has to be on the one side the general meaning of this term while on the other side, an analogy to other legal sources might be taken into consideration. With regard to an abstract definition of "services", the AG regards two elements to be of particular significance: First, the term of "services" requires some kind of activity or action by the one providing the services. Secondly, the AG regards it as crucial that the services are provided for remuneration (para. 57).

On the basis of this general definition, the AG holds that a licence agreement cannot be regarded as a contract having as its object the provision of services in terms of Art. 5 (1) (b) second indent Brussels I Regulation (para. 58) since the licensor does not perform any activity by granting the licence. The lincensor's only activity constitutes the signing of the licence agreement and the ceding of the licence's object for use. This, however, cannot, in the AG's view, be regarded as "service" in terms of this provision.

In the following, the AG also turns to primary law in order to examine whether the term of "service" used in primary law can be transferred to the Brussels I Regulation (para. 60 et seq.). This, however, does not lead to a different assessment since, according to the AG, the definition of "services" cannot be transferred to the Brussels I Regulation without restrictions due to the fact that the objectives of the Regulation have to be taken into account – and they differ significantly from the purposes underlying the broad interpretation of "services" in terms of Art. 50 EC aiming at establishing a common market (para. 63).

Of particular interest is the AG's reference to Regulation (EC) No. 593/2008 (Rome I Regulation) (para. 67 et seq.) which is used as an additional argument supporting her opinion: She stresses that – by interpreting the notion of "services" – also the Rome I Regulation has to be taken into consideration in order to prevent an interpretation being contrary to the aims of Rome I since Recital No. 7 of the Rome I Regulation states: "The substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/2001 […]". Here, the AG shows with a view to the origin of the Rome I Regulation that an interpretation including licence agreements into the notion of "services" would run counter to the aims of Rome I (para. 69).

2. Third Question

Due to the fact that the AG answers the first question in the negative, she does not deal with the second question, but turns directly to the third question by which the Austrian court basically aims to know whether Art. 5 (1) (a) Brussels I *Regulation* has to be interpreted in continuity with Art. 5 (1) Brussels *Convention* (para. 78 et seq.).

With regard to this question, the AG argues – after explaining in detail the changes Art. 5 has passed through from the Convention to the Regulation (para. 80 et seq.) – that Art. 5 (1) (a) Brussels I Regulation has to be – in view of Recital No. 19 of the Brussels I Regulation according to which "[c]ontinuity between the Brussels Convention and [the Brussels I] Regulation should be ensured […]" – interpreted in the same way as Art. 5 (1) Brussels Convention (para. 87). This approach is supported by the identical wording of both provisions as well as historical arguments (para. 94). Here, the AG pays particular attention to the fact that by means of Art. 5 (1) (b) Brussels I *Regulation* a special provision with regard to contracts concerning the sale of goods and the provision of services was established, while with regard to all other contracts the wording of the first part of Art. 5 (1) Brussels *Convention* was maintained in Art. 5 (1) (a) Brussels I *Regulation* (para. 85).

3. The Advocate General's Conclusion

Thus, AG *Trstenjak* suggests that the Court should answer the questions referred for a preliminary ruling as follows:

1. With regard to the first question, the AG suggests that Art. 5 (1) (b) second indent Brussels I Regulation has to be interpreted as meaning that a contract under which the owner of an incorporeal right grants the other contracting party the right to use that right (licence agreement) does not constitute a contract regarding 'the provision of services' in terms of this provision.

2. With regard to the third question, the AG suggests that Art. 5 (1) (a) and (c) Brussels I Regulation has to be interpreted to the effect that jurisdiction for proceedings related to licence agreements has to be determined in accordance with the principles which result from the ECJ's case law regarding Art. 5 (1) Brussels Convention.

(Approximate translation of the German version of the AG's opinion.)

AG Trstenjak's opinion can be found (in German, French, Italian and Slovene) at the ECJ's website. The referring decision of the Austrian Supreme Court of Justice of 13 November 2007 can be found here under 4Ob165/07d (in German).

Italian Conference on the Rome I Reg.: "La nuova disciplina comunitaria della legge applicabile alle obbligazioni contrattuali"

A very interesting conference on the Rome I Regulation will be hosted by the University of Venice "Ca' Foscari" on Friday 28 November 2008: "**La nuova disciplina comunitaria della legge applicabile alle obbligazioni contrattuali**" (The new EC regime on the law applicable to contractual obligations). The symposium is organised in the frame of a research project carried on by several Italian universities (Milan, LUISS-Guido Carli of Rome, Cagliari, Venice and Macerata) and cofinanced by the Italian Ministry of Research and University (MIUR). Here's an excerpt of the programme (*our translation; the sessions will be held in Italian, except otherwise specified*):

Welcome and opening remarks: *Pierfrancesco Ghetti* (Rector, University "Ca' Foscari" of Venice); *Carmelita Camardi*, (Director, Department of Law, University "Ca' Foscari" of Venice); *Mauro Pizzigati* (President of the Bar Council of Triveneto).

PROBLEMI GENERALI (GENERAL PROBLEMS) (9:30 – 13:00)
Chair: *Nerina Boschiero* (University of Milan)

- *Paul Lagarde* (University of Paris I – Sorbonne): Introduction. Considérations de méthode *(in French)*;
- *Fabrizio Marrella* (University "Ca' Foscari" of Venice): Funzione ed oggetto dell'autonomia della volontà: il problema della mancata "delocalizzazione" (Function and Object of Party Autonomy: the Issue of "delocalization");
- *Nerina Boschiero* (University of Milan): I limiti al principio di autonomia derivanti dalle norme imperative, dall'ordine pubblico e dal diritto comunitario derivato (Limits to Party Autonomy: Mandatory Provisions, Public Policy and Secondary EC Law);
- *Ugo Villani* (University LUISS-Guido Carli of Rome): La legge applicabile in mancanza di scelta dei contraenti (Applicable Law in the Absence of Choice);
- *Andrea Bonomi* (University of Lausanne): Le norme di applicazione necessaria (Overriding Mandatory Provisions);
- *James Fawcett* (University of Nottingham): UK Perspective on Rome I Regulation *(in English)*.

Debate.

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QUESTIONI SPECIFICHE (SPECIFIC ISSUES) (14:30 – 16:00)
Chair: *Laura Picchio Forlati* (University of Padova)

- *Paolo Bertoli* (University of Insubria): Ambito di applicazione e materie escluse: in particolare, la responsabilità precontrattuale (Scope of Application and Excluded Matters: in particular, Precontractual Liability);
- *Paola Piroddi* (University of Cagliari): I contratti di assicurazione (Insurance Contracts);
- *Francesco Seatzu* (University of Cagliari): I contratti conclusi con i consumatori e i contratti individuali di lavoro (Consumer Contracts and Individual Employment Contracts);
- *Gianluca Contaldi* (University of Macerata): I contratti di trasporto (Contracts of Carriage);
- *Angelica Bonfanti* (University of Milan): Le relazioni con le convenzioni internazionali in vigore (Relationships with Existing International Conventions).

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SHORTER REPORTS (16:10 – 16:50)

- *Francesca Villata* (University of Milan): I contratti relativi a strumenti finanziari (Contracts on Financial Instruments);
- *Zeno Crespi Reghizzi* (University of Milan): Le conseguenze della nullità del contratto (Consequences of Nullity of the Contract);
- *Nerina Boschiero* (University of Milan): I contratti di proprietà intellettuale tra Roma I e Roma II (Contracts on Intellectual Property Rights between Rome I and Rome II Regulations).

Debate.

Concluding remarks: *Tullio Treves* (University of Milan; Judge, ITLOS).

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Due to organisational issues, participation to the conference is restricted to a limited number of invited scholars. Anyway, **the sessions will be recorded and made available afterwards on the website of the Italian Society of International Law** (SIDI), so that interested parties unable to attend may follow the conference. In addition, **the papers presented at the colloquium will be published both in English and Italian edition**. Further information will be provided on our site as soon as available.

(Many thanks to Prof. Nerina Boschiero)

Weintraub on Rome II: Simple and Predictable, Consequences-Based,

or Neither?

Prof. Russell J Weintraub (University of Texas at Austin, School of Law) has published an interesting article on the Rome II Regulation in the latest issue of the *Texas International Law Journal* (Summer 2008): "**The Choice-of-Law Rules of the European Community Regulation on the Law Applicable to Non-Contractual Obligations: Simple and Predictable, Consequences-Based, or Neither?**" (43 Tex. Int'l L.J. 401).

The introductory paragraph reads as follows:

> *The European Community Regulation on the Law Applicable to Non-Contractual Obligations ("Rome II") will take effect on January 11, 2009. This regulation is part of a widespread effort to draft new choice-of-law rules. For example, in 2007 a new conflict-of-laws code took effect in Japan. China is drafting a comprehensive civil code, which includes choice-of-law rules. What should be the objectives of these drafting projects? Should the new rules, as law-and-economics scholars urge, be simple and afford clearly predictable results? Or should choice-of-law rules endeavor to select the jurisdiction that experiences the consequences when the chosen law is applied? A third possibility is to draft rules that provide substantial predictability and are likely to be consistent with a consequences-based approach. Rome II falls into this third category: reasonably predictable results that are likely to give effect to the policies of the jurisdiction that will experience the consequences when the chosen law is applied.*
>
> *There is now an extensive law-and-economics literature devoted to choice of law. Sections II and III summarize this economics approach to drafting conflicts rules and evaluate Rome II under this perspective. Sections IV and V outline a consequences-based approach to choice-of-law and appraise the extent to which Rome II is consistent with this methodology.*

And here's the conclusion:

> *Rome II provides reasonably foreseeable answers to choice-of-law issues. The various exceptions to the regulation's rules create the major predictability problems: (1) the cryptic "more closely connected" exception that appears in*

the general rule of article 4 and in several other articles, (2) the "public policy" exception of article 26, and (3) the "mandatory provisions" exception of article 16. The uncertainty caused by these exceptions can be alleviated by (1) replacing the "more closely connected" language with a reference to the country that will experience the consequences if its law is not applied; (2) providing that if a court refuses on "public policy" grounds to apply the law that Rome II selects, the court is not to seize this excuse to apply its own law, but is to dismiss without affecting the plaintiff's ability to sue elsewhere; and (3) giving some guidance as to what can qualify as internationally "mandatory" forum law.

The common residence exception to application of the law of the place of damage is partially, but insufficiently, consequences oriented. Rome II gets high marks for including time limitations and burden of proof within the scope of its rules. If it is to achieve its main purpose of making the result independent of the forum, Rome II should clearly indicate that quantification of damages is also within its scope.

The article can be downloaded from the Journal's website.

Another interesting article on Rome II has been written by *Prof. Weintraub* at an earlier stage of the regulation's legislative procedure, and was presented at a seminar hosted in March 2005 by the European Parliament's Rapporteur *Diana Wallis*: "**Discretion Versus Strict Rules in the Field of Cross-Border Torts**". It is available for download, along with papers by other prominent scholars who took part in the seminar, on Diana Wallis' website (Rome II seminars' page).

A slightly revised version, under the title "Rome II and the Tension between Predictability and Flexibility", has been also published in *Rivista di diritto internazionale privato e processuale* (2005, no. 3, p. 561 ff.).