# Symeonides on Rome II: a Missed Opportunity (and other works on tort conflicts)

*Symeon C. Symeonides* (Dean, College of Law – Willamette University) has posted **Rome II and Tort Conflicts: A Missed Opportunity** (forthcoming on the *American Journal of Comparative Law*, Vol. 56, 2008) on SSRN. Here is the abstract:


*This article reviews the European Union's new Regulation on tort conflicts ("Rome II"), which unifies and "federalizes" the member states' laws on this subject. The review accepts the drafters' pragmatic premise that a rule-system built around the lex loci delicti as the basic rule, rather than American-style "approaches," was the only politically viable vehicle for unification. Within this framework, the review examines whether Rome II provides sufficient and flexible enough exceptions as to make the lex loci rule less arbitrary and the whole system more workable.*

*The author's answer is negative. For example, the common-domicile exception is too broad in some respects and too narrow in other respects. Likewise, the "manifestly closer connection" escape is phrased in exclusively geographical terms unrelated to any overarching principle and is worded in an all-or-nothing way that precludes issue-by-issue deployment and prevents it from being useful in all but the easiest of cases. The review concludes that, although attaining a proper equilibrium between legal certainty and flexibility is always difficult, Rome II errs too much on the side of certainty, which ultimately may prove elusive.*

*On the whole, Rome II is a missed opportunity to take advantage of the rich codification experience and sophistication of modern European conflicts law. Nevertheless, Rome II represents a major political accomplishment in unifying and equalizing the member states' laws on this difficult subject. If this first step is followed by subsequent improvements, Europe would have achieved in a relatively short time much more than American conflicts law could ever hope for.*

An interesting comparison can be made with two previous works by Prof. Symeonides, commenting the Rome II Commission's Proposal and the EP Rapporteur's Draft: **Tort Conflicts and Rome II: a View from Across** (published in the *Festschrift für Erik Jayme*) and **Tort Conflicts and Rome II: Impromptu Notes on the Rapporteur's Draft**. Both are available for download on Diana Wallis' website (Rome II seminars' page), together with other works by prominent scholars.

Prof. Symeonides has posted a number of interesting articles on tort conflicts on SSRN (see the complete list of his available works on the *author page*), among which: The Quest for the Optimum in Resolving Product-Liability Conflicts; Territoriality and Personality in Tort Conflicts; Resolving Punitive-Damages Conflicts.

*(Many thanks to Prof. Lawrence B. Solum – Legal Theory Blog – for pointing out Prof. Symeonides' latest article on Rome II)*

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# Rome I – Agreement Reached by EP and Council?

The EP's Committee on Legal Affairs (JURI) adopted in its meeting of 20 November 2007 a **Draft Legislative Resolution on the Rome I Proposal** on the law applicable to contractual obligations, on the basis of a **new set of 62 "final" compromise amendments** presented by the rapporteur, Ian Dumitrescu.

According to the Rome I page of Diana Wallis' website (who acts as an EP shadow rapporteur in the Rome I codecision procedure, after her successful work on Rome II Regulation), **the final amendments**, which modify a substantial part of the recitals and provisions of the Regulation, **have been drafted by the rapporteur following a series of informal trialogues with the Council Presidency and the Commission** (thus adopting a different approach from the one taken in the Rome II procedure, in which an agreement could be found by the

institutions only in the last-resort Conciliation Committee).

The vote on the Draft Legislative Resolution at first reading by the Parliament's plenary session is scheduled on 29 November 2007. According to the Rome I OEIL page, the text will be then examined by the Council in its meeting of 6 December 2007: given the agreement reached in the trialogues, it is entirely possible that the text will gain at least political agreement in the Council, thus making the adoption of the act far more imminent than previously expected (see Council's document no. 15325/07 of 19 November 2007 – currently not accessible, whose title reads "Approval of the final compromise package with a view to a first reading agreement with the European Parliament").

Further information on the evolution of the codecision procedure will be posted as soon as it is available.

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# German Article on Rome II

On 11 July 2007, Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations (Rome II) has been adopted.

*Stefan Leible* and *Matthias Lehmann* (both Bayreuth) have now written an article on Rome II which has been published in the German legal journal „*Recht der Internationalen Wirtschaft*" (RIW 2007, 721 et seq.):

**"Die neue EG-Verordnung über das auf außervertragliche Schuldverhältnisse anzuwendende Recht ("Rom II")"**

In their article, *Leible* and *Lehmann* give an overview of the scope of application and functioning of the new Regulation and comment on the most important rules by means of several examples.

In principle, the authors welcome Rome II for establishing a uniform measure on the law applicable to non-contractual obligations and creating more legal certainty. Nevertheless, it is criticised that non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation

are excluded from the scope of application according to Art. 1 (2) (g) Rome II. However, according to Art. 30 (2) Rome II, the Commission shall submit a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality no later than 31 December 2008. Thus, there is still an option that Community rules on the law applicable to non-contractual obligations arising out of violations of rights relating to personality and in particular press offences will be adopted in the future.

*See also our previous posts on the adoption of Rome II and on the publication in the Official Journal.*

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# Rome I: EP Rapporteur's Compromise Amendments and Council's Working Text

In the first meeting held by the **European Parliament's JURI Committee** after the summer break (10/11 September), the Rapporteur for Rome I, *Cristian Dumitrescu*, presented a **new set of 43 compromise amendments** to the initial Commission's Proposal, to be discussed within the Committee in order to adopt a final text of the Report for the Parliament's plenary session. While taking into account the previous works of the JURI Committee on Rome I (see our post here), the Rapporteur drafted these new amendments in view of the final text of the Rome II Regulation and the current discussion on Rome I in the Council (see below). As he states in the justification to amendment n. 2,

> *[t]he proposed compromise amendments set out in this paper have several aims. First, they are intended to bring the Regulation more closely into line with Rome II as adopted. Secondly, they seek to introduce changes already accepted in the Council working group and hence aim at reaching an agreement with the Council. Thirdly, they propose solutions in areas where the*

*Council has not yet been able to reach agreement. Fourthly, they are designed to facilitate ecommerce by positing solutions lying outside the area of private international law to difficulties which conflict-of-laws rules cannot resolve in themselves. Lastly, the amendments are intended to bring into the public domain, and hence make available for public debate in a democratic assembly, technical changes discussed so far only within the Council. The rapporteur has presented them in order to foster debate within the Committee and negotiations with the Council.*

As regards the conflict rules, see compromise amendments n. 21 (Art. 3), n. 22 (Art. 4), n. 23 (**new Art. 4a on contracts of carriage**), n. 26 (a new, complex **Art. 5a dealing with insurance contracts**) and n. 27 (Art. 6 on individual employment contracts). **Art. 7 on contracts concluded by an agent is deleted** (see amendment n. 28).

**Consumer contracts** (Art. 5) are dealt with in the new package only as regards the scope of the exclusions (Art. 5(3): see amendments nn. 24 and 25), but the whole provision was redrafted by the Rapporteur in a separate compromise amendment presented in June (compromise amendment n. 1: see our post here). However, the Rapporteur remains quite sceptical as regards the effectiveness of the protection afforded by a conflict rule, and he states in new Recital 10a (compromise amendment n. 14) that

*[w]ith […] reference to consumer contracts, recourse to the courts must be regarded as the last resort. Legal proceedings, especially where foreign law has to be applied, are expensive and slow. The introduction of a mechanism to deal with small claims in cross-border cases is a step forward. However, the protection afforded to consumers by conflict-of-laws provisions is largely illusory in view of the small value of most consumer claims and the cost and time consumed by bringing court proceedings. It is therefore considered that, particularly as regards electronic commerce, the conflicts rule should be backed up by easier and more widespread availability of appropriate online alternative dispute resolution (ADR) systems. The Member States are encouraged to promote such systems, in particular mediation complying with Directive …/…, and to cooperate with the Commission in promoting them.*

As it was the case for Rome II, some controversial issues have been moved by the

Rapporteur in the Recitals accompanying the Regulation: see for instance compromise amendments nn. 5 and 6 (new Recitals 7a and 7b) on the choice of non-State bodies of law as the applicable law, and compromise amendment n. 19 (Recital n. 15) on the relationship between the Regulation and Community law.

**On the Council's side, a complete text of the Rome I Regulation has been recently made publicly available in the Register** (doc. n. 11150/07 of 25 June 2007). It was drafted in June by the outcoming German Presidency and the Portuguese Presidency on the basis of the meetings of the Committee on Civil Law Matters during the first semester 2007 and the comments made by delegations.

It contains the text of the compromise package agreed by the Council in April 2007 (doc. n. 8022/07 ADD 1 REV 1: see our post here) and a proposed wording for the provisions that were left over. The latter include Art. 4a on contracts of carriage – three options are proposed as regards carriage of passengers -, Art. 5 on consumer contracts, Art. 5a dealing with insurance contracts, Art. 8 on overriding mandatory provisions, Art. 13 on voluntary assignment and contractual subrogation.

For better readability, the compromise package is presented in italics; a number of footnotes completes the text, highlighting doubts raised by the delegations and provisions which need further discussion or clarification.

The adoption of the Report on the Rome I Proposal is expected in the EP's JURI Committee in one of the forthcoming meetings. According to current forecasts (subject to frequent changes: please refer to the Rome I OEIL page), the vote at first reading in the Parliament's plenary session is scheduled on 28 November 2007; a political agreement on common position is expected in the Council in the last JHA session under the Portuguese Presidency, on 6 December 2007.

# ROME I & ROME II Conference

The conference website informs: This conference to be held in Lisbon, 12-13 November 2007, is organised by the Portuguese Presidency of the EU, in conjunction with the preceding German and the subsequent Slovenian Presidencies, and ERA. The conference will provide participants with an in-depth analysis of the future Rome I Regulation and the Rome II Regulation. The objective of the seminar is to promote a far-reaching and thorough debate concerning the most important or complex issues inherent to the regulations regarding law applicable to contractual and non-contractual obligations.

Concerning Rome I, the seminar will highlight in particular: (a) scope of application, (b) choice of law and applicable law in the absence of choice, (c) consumer contracts, (d) employment contracts, and (e) assignment. In case the legislation process in view of the Rome I Regulation will not be completed by 2007, the following Slovenian Presidency will be able to use the conclusions of this conference in the further adoption procedure.

Furthermore, the Rome II Regulation (OJ L 199/40 of 31 July 2007) will be presented. It shall apply from 11 January 2009. The discussion will concentrate on the following topics: (a) general rules, (b) product liability, (c) the violation of the environment, (d) unfair competition, and (e) infringement of intellectual property rights.

The seminar will provide a forum for debate between legal practitioners, namely judges and lawyers, experts in member states' ministries and EU legislators on the practical implementation of these two instruments of European private international law.

The conference programme can be downloaded from the conference website.

# Magnus/Mankowski's European Commentary on Brussels I Regulation

A new commentary on Brussels I Regulation has been recently published by Sellier – European Law Publishers, as the first volume of a new series "European Commentaries on Private International Law". It is edited by *Prof. Peter Mankowski* and *Prof. Ulrich Magnus* (both Hamburg) and has been written by a team of scholars from all over Europe. As the editors write in the preface:

> *Legal writing on the Brussels system is thorough and virtually uncountable throughout Europe. Yet no-one has so far taken the effort of completing a truly pan-European commentary mirroring the pan-European nature of its fascinating object. The existing commentaries clearly each stem from certain national perspectives and more or less deliberately reflect certain national traditions. The co-operation across and bridging borders had not truly reached European jurisprudence in this regard. This is why the idea of this commentary was conceived. This commentary for the first time assembles a team of very prominent and renowned authors from total Europe.*

Here's an excerpt of the blurb from the publisher's website:

> *This commentary is the first full scale article-by-article commentary in English ever to address the Brussels I Regulation. It is truly European in nature and style. It provides thorough and succinct indepth analysis of every single article and offers most valuable guidance for lawyers, judges and academics throughout Europe. It is an indispensable working tool for all practitioners involved in this field of law. […]*
>
> *A true first:*
> *– The first truly European commentary on the Brussels I Regulation, the fundamental Act for jurisdiction, recognition and enforcement throughout Europe*
> *– The first commentary on the Brussels I Regulation written by a team from all over Europe*

*– The first article-by-article commentary on the Brussels I Regulation in English*

*This new series will comment on the Brussels I Regulation and the Brussels IIbis Regulation and as soon as they are enacted on the Rome I and the Rome II Regulation. For the first time this will be done by a team of leading experts from almost all EU member states. The close cooperation among them will initiate a new specific European style of commenting on European enactments merging the various and thus far nationwide differing methods of Interpretation of legislative acts. It goes without saying that the new commentaries will pay particular tribute to the practice of the European Court of Justice but to relevant judgments of national courts as well. Moreover, the needs of practitioners and the requirements of the practice will receive particular attention.*

*The series is intended to be continued by further volumes on existing and future European enactments in the field of private and procedural law.*

And this is the authors' list:

Introduction: *Ulrich Magnus;* Art. 1: *Pippa Rogerson;* Arts. 2-4: *Paul Vlas;* Art. 5: *Peter Mankowski;* Arts. 6-7: *Horatia Muir Watt;* Arts. 8-14: *Helmut Heiss;* Arts. 15-17: *Peter Arnt Nielsen;* Arts. 18-21: *Carlos Esplugues Mota/Guillermo Palao Moreno;* Art. 22: *Luis de Lima Pinheiro;* Art. 23: *Ulrich Magnus;* Art. 24: *Alfonso Luis Calvo Caravaca/Javier Carrascosa González;* Arts. 25-26: *Ilaria Queirolo;* Arts. 27-30: *Richard Fentiman;* Art. 31: *Marta Pertegás Sender;* Arts. 32-33: *Patrick Wautelet;* Art. 34: *Stéphanie Francq;* Arts. 35-36: *Peter Mankowski;* Art. 37: *Patrick Wautelet;* Arts. 38-45: *Konstantinos Kerameus;* Arts. 46-52: *Lennart Pålsson;* Arts. 53-58: *Lajos Vékás;* Arts. 59-60: *Paul Vlas;* Arts. 61-76: *Peter Mankowski.*

A TOC can be downloaded from the publisher's website. It provides a useful list of the principal works on Brussels I Regulation and an additional bibliography. A short extract of the volume is also available for download.

Title: **Brussels I Regulation – European Commentaries on Private International Law –** Edited by *Peter Mankowski*, *Ulrich Magnus*. July 2007 (XXVIII, 852 pages).

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# Austrian Article on Rome II

A critical article on the Rome II Regulation has been written by *Helmut Koziol* and *Thomas Thiede* (both Vienna) and is published in the latest issue of the *Zeitschrift für vergleichende Rechtswissenschaft* (ZVglRWiss 106 (2007), 235 et seq.):

**"Kritische Bemerkungen zum derzeitigen Stand des Entwurfs einer Rom II-Verordnung"**

*Koziol* and *Thiede* criticise the general rule provided in Art.5 of the Proposal (COM(2006) 83 final (now Art.4 of the Regulation)) for focusing solely on the interests of the injured party by designating the law of the country in which the damage arises or is likely to arise and not taking into account the interests of the liable party sufficiently.

The authors argue that this rule neglected the basic principles of liability law, the main purpose of which is the compensation of the damage suffered by the injured party. Since – according to the rule of *casum sentit dominus* – everybody has to bear the risk within one's own sphere, a special justification was necessary to transfer liability to others. This was only the case if the other party is "closer" to the damage. Thus, not only the interests of the injured party, but also the interests of the liable party should be taken into account and should be balanced. Further, special rules derogating from the general rules in a large number of cases, as provided in Art.5 (2) and (3) of the Proposal (now Art.4 (2) and (3) of the Regulation), are not regarded as desirable since those might result in the consequence that either the general rule was applied in cases not included in the special rules without good reason or that the special rules were applied analogously which might lead to the result that the general rule is not applied anymore.

Therefore, the authors conclude that a general rule which designates in principle

the law of the country in which the event giving rise to the damage occured – except cases where the occurrence of the damage could have been foreseen by the liable party – would have been preferable. As an alternative, which is more similar to the existing rule, the authors suggest a rule which designates the law of the country where the damage occurs, providing for an exception for cases where the damaging effects were not foreseeable for the tortfeasor.

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# French Conference on Rome II

Burgundy University in Dijon will host a conference on the Rome II Regulation on September 20th, 2007.

Speeches will be delivered in French. The speakers will be mostly French academics, but will also include a member of the European commission. The program can be found here.

The conference will take place in the castle of Saulon-la-Rue, in the vicinity of Dijon.

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# French Judgment on Article 5 (1) b of the Brussels I Regulation, Part III

On March 27, 2007, the French supreme court for private matters (*Cour de cassation*) delivered yet another judgment on Article 5 (1) b of the Brussels I Regulation (for previous judgments on the issue, see here and here). In *SA ND Conseil v. Le Méridien Hotels et Resorts World Headquarters*, the *Cour de*

*cassation* held that, first, the combination of the conception, the making and the delivery of documents could be regarded as a single operation, and that, second, the operation had to be characterised as a provision of service.

In *SA ND Conseil v. Le Méridien Hotels et Resorts World Headquarters*, English company Le Meridien Hotels had hired French advertisement company ND Conseil. Under the contract, which had been concluded on June 5, 2002, ND Conseil was to promote the Le Meridien hotel chain by designing and making advertisement documents to that effect, to be delivered to Le Méridien Hotel company. The judgment of the *Cour de cassation* is not very detailed on the facts, nor on the arguments of the parties, but it seems that it was argued that the design of the documents took place in France, while the delivery took place in England. Eventually, Le Méridien Hotel terminated the contract, and ND Conseil sued for wrongful termination before French courts.

The first instance court (the commercial court of Nanterre, in the suburbia of Paris) retained jurisdiction in a judgment of December 2004. The Court of appeal of Versailles reversed and declined jurisdiction in March 2006. ND Conseil appealed to the *Cour de cassation*.

The *Cour de cassation* confirmed the judgment of the court of appeal and held that French courts did not have jurisdiction under the article 5 of the Brussels I Regulation. The judgment of the French highest court can be summarized as follows. First, ND Conseil had undertaken to perform two series of obligations. On the one hand, designing the documents. On the other hand, making them physically and delivering them. Second, under the contract, the making and the delivery of the documents were not only ancillary to their design, but also intertwined with it. As a consequence, there was one single contractual operation. Third, this operation was a provision of service in the meaning of article 5. Fourth, this service was provided in London.

The case raises many issues. As usual, the judgment of the *Cour de cassation* is so short that it could be interpreted in many ways. Here are a few of them.

First, no explanation is clearly given as to why the single operation is a provision of services, and not a sale of goods, or neither of the above. Indeed, one would have rather expected, after recent decisions of the court, that it would easily find that a given contract was neither a provision of services, nor a sale of goods. The

judgment could be interpreted as meaning that the court is of the opinion that it should be a provision of services because the sale was ancillary to the services.

Second, the judgment insists on the fact that the operation was a single one under the contract. This may mean that the architecture of the contract will matter, but again this is unclear.

Third, no explanation is given on why the global service was performed in London.

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# Final Round for Rome II: Adoption by the Council, Commission's Statements on the Review Clause and Parliament's Report on the Joint Text

**The Council**, in the meeting held by the "Environment" configuration in Luxembourg on 28 June 2007, **has adopted the Rome II joint text** approved by the Conciliation Committee, **with the Latvian and Estonian delegations voting against** (see the concerns regarding the conflict rule on industrial action – art. 9 – that these Member States had expressed in a joint declaration issued in the Council's vote on the Common position).

An addendum to the minutes of the Council's meeting contains **three statements by the Commission on the studies regarding the controversial issues** that were set aside in the conciliation (violations of privacy and rights relating to personality, level of compensation awarded to victims of road traffic accidents, treatment of foreign law), to be submitted in the frame of the review clause of Art. 30. These statements will be published in the Official Journal with the legislative act.

The **Parliament's vote** on the joint text, that will formally end the codecision procedure by adopting the Rome II Regulation, is scheduled **on 9 July 2007**. With a view to the final vote, **Rapporteur Diana Wallis** has prepared a **Report of the EP Delegation to the Conciliation Committee**, summarizing the legislative procedure and presenting to the Parliament's plenary the agreement reached with the Council.

Here's a substantial part of the EP's Report (for further details on the previous stages of the procedure, see the Rome II section of our site):

> ***The codecision and conciliation procedure***
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> *The Commission submitted on 22 July 2003 a proposal for a Regulation on the Law Applicable on Non-Contractual Obligations. Following Parliament's first reading on 6 July 2005 (54 amendments adopted) the Council adopted its common position on 25 September 2006. Parliament then concluded its second reading on 18 January 2007 adopting 19 amendments to the Council's common position. The main issues at stake were: violation of personality rights ("defamation"); road traffic accidents; unfair competition; the definition of "environmental damage" the relationship with other Community instruments; the treatment of foreign law; the review clause.*
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> *The Council informed with letter from 19 April 2007 that it could not accept all of Parliament's amendments and that conciliation was necessary. Conciliation was then formally opened on 15 May 2007. […]*
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> *Three trilogues held between 6 March and 24 April 2007 […], followed by subsequent meetings of the EP Delegation […], lead to provisional agreement on 5 amendments. The Conciliation Committee met then in the evening of 15 May 2007 in the European Parliament with a view to formally opening the conciliation procedure and possibly reaching agreement on the outstanding issues. After several hours of deliberations an overall agreement was reached at midnight. It was unanimously confirmed by the EP Delegation with 17 votes in favour.*
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> *The main points of the agreement reached can be summarised as follows:*
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> ***Road traffic accidents***

*[…] One of the EP Delegation's main priorities was […] to ensure that the individual victim's actual circumstances are taken into consideration by the court seized when deciding on the level of the compensation to be awarded.*

*For the short term, the EP Delegation succeeded in including a reference in the recitals of the Regulation whereby judges when quantifying personal injuries will take account of all relevant actual circumstances of the specific victim, including in particular the actual losses and cost of after-care and medical attention.*

*For the long term, the EP Delegation succeeded in securing a public commitment by the Commission for a detailed study on all options, including insurance aspects, on the specific problems faced by victims of cross-border road traffic accidents. The study will be presented by 2008 the latest and would pave the way for a Green Paper. […]*

***Unfair competition***

*On the EP Delegation's insistence the Council agreed to the Commission's proposal for a specific rule on unfair competition that respects the principle of the application of one single national law (an important point for judges and lawyers) while at the same time limiting to a large extent the danger of "forum shopping" (the possibility for plaintiffs to raise their law suit in the Member State of their choice).*

***Environmental damage***

*The EP Delegation succeeded in obtaining a definition on "environmental damage" – a term used but not defined in the common position. The definition is in line with other EU instruments, such as the Directive on Environmental Liability.*

***Violation of personal rights ("defamation")***

*In view of an overall compromise the EP Delegation had to withdraw its amendments on the inclusion of rules on the violation of personal rights, particularly defamation in the press. Though Parliament managed to overcome the national differences and various conflicts of interests and to adopt its amendments by a large majority, the Member States were unable until the very*

*end to agree on a common approach. The issue however is considered as a "left-over": as part of the review of the Regulation the Commission will draw up a study by 2008 on the situation in this specific field. The findings of the study can serve as a basis for the adoption of relevant rules at a later stage.*

***Relationship with other Community instruments***

*On the controversial issue of the relationship between the "Rome II" Regulation and other provisions of Community law it was agreed that the application of provisions of the applicable law designated by the rules of this Regulation should not restrict the free movement of goods and services as regulated by Community instruments such as the e-Commerce Directive.*

***Treatment of foreign law***

*The issue of the treatment of foreign law by national courts – especially how often and how well national courts apply the law of another country – is also settled on the basis of a detailed study to be carried out by the Commission as part of its report on the application of the Regulation. […]*

***Review clause***

*On the insistence of the EP Delegation the review clause was split into a special section with a shorter timetable by 2008 as regards violation of privacy rights ("defamation") and a general section with the standard timetable whereby the Commission will present a report on the application of the Regulation four years after its entry into force. As part of the general review clause the Commission will also carry out a study on the treatment and application of foreign law by the courts of the Member States and a second study on the effects of Article 28 of the Regulation ("Relationship with existing international conventions") with regard to the Hague Convention of 4 May 1971 on the law applicable to traffic accidents.*

*[Update: following a comment by M. Winkler on a previous item on Rome II,* ***Mrs Wallis has posted on our site a reply*** *providing some clarifications on the Parliament's approach to the conflict rule* ***on environmental damage****. Any further comment, on this or other provisions of the Regulation, is welcome]*