Rome II: Final Version of the Joint Text

A final version of the Rome II joint text, resulting from the legal and linguistic revision, is available in all languages of the EU in the Register of the Council (doc. PE-CONS 3619/07).

According to current forecasts (see the Rome II OEIL page), the joint text should be officially approved today (25 June 2007) by the Conciliation Committee. Pursuant to Art. 251(5) of the EC Treaty, the Parliament and the Council shall adopt the Regulation in accordance with the joint text within a period of six weeks (that can be extended to eight weeks) from this approval.

Further details on the joint text and the conciliation stage are available on the Rome II section of our site.

Rome II: Provisional Version of the Joint Text Released

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

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

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

adopted in September 2006.

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

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

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

While the conflict rule governing an act of unfair competition is unchanged (application of the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected; application of the law determined pursuant to the general conflict rule of Art. 4, where an act of unfair competition affects exclusively the interests of a specific competitor: see Art. 6(1) and (2)), a more complex provision, allowing the application of the *lex fori* in case of multi-state torts, is set out by Art. 6(3) for non-contractual obligations arising out of a restriction of competition:

> *(a) The law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected.*
>
> *(b) When the market is, or is likely to be, affected in more than one country, the person seeking compensation for damage who sues in the court of the domicile of the defendant, may instead choose to base his or her claim on the law of the court seised, provided that the market in that Member State is amongst those directly and substantially affected by the restriction of competition out of which the non-contractual obligation arises on which the claim is based;*
>
> *where the claimant sues, in accordance with the applicable rules on jurisdiction, more than one defendant in that court, he or she can only choose to base his or her claim on the law of that court if the restriction of competition, on which the claim against each of these defendants relies, directly and*

substantially affects also the market of the country of that court.

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

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

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

Damages in personal injury cases and traffic accidents:

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

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

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

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

Treatment of foreign law:

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

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

Public policy and overriding mandatory provisions:

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

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

As regards overriding mandatory provisions, only the provisions of the *lex fori* are taken into account by Art. 16 (whose text is almost identical to Art. 7(2) of the Rome Convention). While the exclusion of the overriding mandatory

provisions of a law different from the *lex causae* and the *lex fori* has been criticized, problems may arise if a different compromise is finally found in Rome I (the issue is currently under debate in the Council: see the title of Council doc. n. 9765/07, not accessible to the public).

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

> *Article 27 – Relationship with other provisions of Community law*
>
> *This Regulation shall not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict of law rules relating to non contractual obligations.*
>
> *Article 28 – Relationship with existing international conventions*
>
> *1. This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict of law rules relating to non contractual obligations.*
>
> *2. However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them insofar as such conventions concern matters governed by this Regulation.*

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

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

[Update 9 June 2007: as stated on a Press release by the Council, the Presidency

will deliver an oral report about the result of the conciliation with the European Parliament in the JHA session of Wednesday 13 June 2007]

Rome I: Council's Compromise Package, Insurance Contracts, Financial Aspects Relating to Articles 4 and 5

Following our post on the note from the Luxembourg delegation relating to consumer contracts, a number of new interesting documents on the Rome I Proposal have been made publicly available on the Register of the Council.

Here's a brief presentation:

– doc. n. 8022/07 ADD 1 REV 1 of 13 April 2007, containing a **"compromise package" prepared by the German Presidency** for the JHA Council session of 19-20 April 2007 (see our related post on the Council conclusions). The text focuses on Articles 3 (Freedom of choice), 4 (Applicable law in the absence of choice) and 6 (Individual employment contracts). Art. 7 on contracts concluded by an agent is deleted; other important issues, such as contracts of carriage (art. 4a), consumer contracts (art. 5), insurance contracts (art. 5a) and overriding mandatory provisions (art. 8) do not form part of the compromise;

– doc. n. 8935/1/07 REV 1 of 4 May 2007, on **insurance contracts**. The document provides a draft text of Art. 5a, taking into account the comments submitted in March by the Member States delegations (docs. 6847/07 and ADD 1 to 12, not accessible to the public);

– doc. n. 7418/07 of 15 March 2007, from the Services of the Commission to the Council's Committee on Civil Law Matters, dealing with **certain financial aspects relating to the application of Articles 4 and 5**. The document is

divided in two parts: the first one addresses the conflict rule on contracts concluded at a financial market (Art. 4(1)(j1)), that was introduced by the Finnish presidency (see doc. n. 16353/06 of 12 December 2006) and confirmed by the German Presidency (see the French text of doc. n. 6953/07 of 2 March 2007), stressing the **importance of a specific provision on stock exchange transactions**:

> *The reason for including a specific provision for trading systems relates, in particular, to the fact that regulated markets, multilateral trading facilities and other similar trading systems need to operate under a single law. It is essential that all transactions are carried out in accordance with the governing law of the system. The application of a single governing law is an intrinsic feature of organised multilateral trading systems and necessary for legal certainty for the market participants.*
>
> *These transactions concluded within such a trading system include contracts of buying, selling, lending and other such dealings in financial instruments. Contracts for the provision of services between a financial intermediary and a client are not concluded within these trading systems.*
>
> *The transactions in question are closely connected to the market concerned and it is appropriate and, indeed, necessary that the same law governs them irrespective of the nature of the parties to the transactions (consumer/professional) and the place where the parties have their habitual residence. Any other result would mean that the systems could not operate.*

Problems arising from the **definition of "financial market"** are then addressed, in the light of the Directive 2004/39/EC (MiFID – Markets in Financial Instruments Directive), and an improved draft of the provision is proposed:

> *[T]he use of the term "financial market" in this provision leads to undesirable uncertainty. There is no definition of this concept in any community instrument. The term is used in the particular context of Article 9 of the Insolvency Regulation but it is not defined. In the framework of a general conflict of law rule in Rome I this expression would lack precision and create legal uncertainty. Given the extreme diversity and complexity of the financial sector activities, there is a need to define all relevant concepts used.*

Taking into account the universal scope of application of Rome I (Art. 2), the definition of markets and trading systems by reference to the EU regulatory categories in Directive 2004/39/EC (MiFID) has been avoided. This is because cross-reference to the MiFID concepts would limit the provisions to an EU context. Instead, the proposed draft contains a functional description of multilateral system that uses the common elements of the definitions of regulated market and multilateral trading facility in MiFID, together with the condition that such systems should be subject to a single governing law. This description will cover all the equivalent non-EU trading facilities that need to be caught.

The second part deals with **possible overlaps between the scope of application of the protective rule on consumer contracts** (Art. 5 of the Rome I Proposal) **and the legal regime of financial instruments** (rights and obligations which comprise a financial instrument, contracts to subscribe for or purchase a new issue of transferable securities, contracts concluded within the type of system falling within the scope of the above mentioned Article 4(1)(j1)):

All these issues are not covered by Art. 5 of the Rome Convention as that Article only applies to contracts for the provision of services and sale of goods. The questions […] only arise due to the enlarged scope of Article 5 of the Rome I proposal.

The proposed text does not exclude contracts for the provision of financial services generally nor does it exclude contracts for the sale of shares and bonds concluded outside the systems referred to in the draft Art. 4(1)(j1).

As regards financial instruments, on the assumption that the exclusion from the scope of the Rome I proposal of financial instrument under Art. 1(2)(d) may not be exhaustive it is absolutely necessary to provide for this exclusion since without it the actual nature of a financial instrument – the rights and obligations that constitute its essence – could change by virtue of the application of Article 5. […]

Without an amendment to this effect, the actual nature of a financial instrument and the rules of law governing it could be various and unpredictable and would depend on the habitual residence of the person holding it. This question should not be confused with contracts for the provision of financial services. For

example, when a bank sells to a consumer shares from company x it is providing a financial service. The consumer friendly rule of Article 5 of the proposal will naturally continue to apply to all these contracts that were already covered by Article 5 of the Rome Convention.

As regards the subscription for shares and units in collective investment schemes, and purchase of new issues of debt, it is important that the issuer in relation to a single issue is not faced with a risk of application of multiple laws depending on the habitual residences of investors. This would effectively prevent cross-border retail offerings of shares, debt, etc. Contractual rights and obligations in relation to the subscription for or purchase of new issues of transferable securities will not necessarily be covered by the narrowly focussed exclusion discussed above for contracts which comprise financial instruments. […]

Thus, on the assumption and to the extent that this issue is not excluded entirely from the scope of the Regulation by virtue of Art. 1(2)(f) (exclusion of contracts governed by company law) it is necessary to ensure in relation to contracts of subscription for or purchase of a new issue of shares, bonds and other transferable securities that Article 5 does not apply.

As a last point, the Services of the Commission point out another **possible inconsistency between Art. 5 of the Rome I Proposal and the MiFID Directive (2004/39/EC)**, **as regards individual investors who act as "professional clients" under Annex II to the Directive**, but may be still considered as consumers for the purposes of the protective conflict rule:

Finally, the Committee may wish to consider an amendment to the text or at least a recital in order to clarify that individuals who 'opt up' to professional status under MiFID should not be treated as consumers for the purposes of Art. 5. Annex II to MiFID allows clients of investment firms, who would otherwise be classified as "retail clients" to be treated as "professional" clients if they meet specified conditions aimed at establishing that that client is financially sophisticated and experienced in investment. However, such clients may be considered to fall within the category of "consumers" for the purposes of Art. 5. The point is important since firms would be most unlikely to let sophisticated individuals opt up to professional status if Art. 5 were to apply to their dealings,

and accordingly the objectives of the MiFID in this respect would be thwarted.

Article on Rome II – Liability for Cross-Border Torts

A very interesting article on Rome II written in German by *Thomas Thiede* and *Katarzyna Ludwichowska* (both Vienna) has been published recently in the "Zeitschrift für vergleichende Rechtswissenschaft" (106 ZVglRWiss (2007), 92 et seq.):

"Die Haftung bei grenzüberschreitenden unterlaubten Handlungen" (Liability for cross-border torts).

An abstract has kindly been provided by the authors:

> *The article is a critical analysis of a proposal to apply the law of the victim's place of habitual residence to the compensation for personal injuries arising out of tort. The proposal, which was introduced by the European Parliament in the course of work on the EU regulation on the law applicable to non-contractual obligations (Rome II), originally concerned only traffic accidents, but was later modified and extended to all personal injury cases. The authors of the article show the proposal of the European Parliament against the background of solutions accepted in Germany and England. They present the arguments given by the supporters of the proposal and then proceed to strongly criticise the parliamentary solution, inter alia by showing the negative consequences of splitting an otherwise uniform legal relationship as a result of subjecting the prerequisites of liability and part of its consequences (compensation for damage to property) to lex damni and the other part of the consequences of liability (compensation for personal injuries) to the law of the victim's place of habitual residence.*

Diana Wallis on Rome II's Agreement: "A first – in many senses"

Following the agreement on a joint text of the Rome II Regulation reached in the first meeting of the Conciliation Committee, on 15 May (see our post here), Diana Wallis MEP, Rapporteur on Rome II in the European Parliament, has held a press conference to comment the successful outcome of the negotiations.

Excerpts from Mrs Wallis' statements have been published on her website and on the website of her political group, ALDE (Alliance of Liberals and Democrats for Europe):

> *Speaking after last night's Conciliation meeting between the three EU institutions to hammer out the final text on the Rome II Regulation (the law applicable to non-contractual obligations), the European Parliament's Rapporteur, Diana Wallis MEP, proclaimed it 'a first' – in many senses.*
>
> *Diana Wallis said, "This is the first time that the EU has put into a Regulation an extensive area of private international law where there was previously no pre-existing international Convention. It is the first time that the European Parliament has had co-decision in this area of civil law – moreover certainly a first in terms of conciliation. Also, a new experience for all the institutions involved in the process – the European Parliament has left its clear mark on the final text agreed last night."*
>
> *Diana Wallis was particularly pleased with the result on road traffic accidents, often involving personal injury – the most common and frequent form of tort (non-contractual obligation) that touches the lives of many citizens as they go about their business and leisure pursuits across Europe. She went to say, "The European Parliament has underlined the right of citizens to be fully reimbursed for their loss in such cases despite the national differences in compensation levels, whatever country they come from, whilst also extracting from the*

Commission a full study in the area by 2008 that 'would pave the way for a Green paper'."

"The European Parliament has also sought to introduce some further clarity into the fuzzy thinking as to the relationship between this Regulation relating to choice of law rules and other Internal Market instruments such as the e-commerce Directive. We have certainly ended in a better position than where we started from."

Diana Wallis welcomed the fact that the Conciliation was also instructive in bringing together three different Commission departments around the table to support the same text in relation to a number of issues. "This coherent joint working across the area of civil and commercial law is to be much welcomed and better late than never."

Finally Diana Wallis concluded that: "The European Parliament has left its imprint on several other issues, including party autonomy and flexibility to the general rule. It also insisted on several studies being undertaken by the Commission, notably on defamation and the treatment of foreign law, which may leave the way open for future legislation."

Mrs Wallis' focus on the role of the European Parliament in drafting legislation in the field of judicial cooperation in civil matters has been stressed several times (on Rome II, see our posts here and here), and it is particularly meaningful since at present she is perhaps the most influential MEP involved in the legislative process of EC private international law instruments: she is shadow rapporteur, appointed by the ALDE group, for Rome I, and draftswoman on the maintenance regulation (see her Draft opinion on the Commission's proposal here).

As regards substantive law, she has been draftswoman for the Internal Market and Consumer Protection Committee (IMCO) for the opinion on the Commission Communication "European Contract Law and the revision of the acquis: the way forward", and has prepared for the JURI Committee a Draft report with recommendations to the Commission on limitation periods in cross-border disputes involving injuries and fatal accidents.

Rome II: Agreement Reached in the Conciliation Committee

As stated on press releases published by the Council and the Commission (DG Freedom, Security and Justice), **an agreement has been reached on the text of the Rome II Regulation, during the first official meeting of the Conciliation Committee that was held yesterday evening** (the Conciliation Committee had been convened, pursuant to Art. 251(3) of the EC Treaty, after the formal rejection by the Council of the Parliament's Legislative resolution at second reading: for further details on the steps of the complex procedure that has lead to the agreement, see the Rome II section of our site).

According to a statement by Diana Wallis, Rapporteur on Rome II in the European Parliament, prior to the official meeting of yesterday **the institutions** involved in the codecision procedure (Council and Parliament, the Commission playing a mediating role) **had held six informal meetings** in order to facilitate the negotiations (so called "trialogues": for an overview of the conciliation stage, see the "codecision" section of the Commission's website).

The content of the agreement is summarized as follows in the Council's press release, with particular reference to the controversial issues (that were emphasized by the Commission in its opinion on the EP Second reading):

> *As a general rule, the draft Regulation sets out that the law applicable to a tort/delict is the law of the country where damage occurred. Only in certain limited, duly justified circumstances, the general rule will be derogated from and special rules applied. The draft Regulation contains special rules in matters of product liability, unfair competition, environmental damage, infringements of intellectual property and industrial action. In the context of a global compromise package, the Conciliation Committee settled all the questions arising from the amendments adopted by the European Parliament in second reading.*
>
> *The agreement includes notably:*

Violation of privacy or rights relating to the personality:

While it was agreed that legal actions connected with those rights will be excluded from the scope of this Regulation, the Commission was asked through a review clause to present, not later than 31 December 2008, a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights to relating to personality, taking into account rules relating to freedom of the press and freedom of expression in the media. Violations of privacy resulting from the handling of personal data will be also dealt with in the Commission's study.

Damages in personal injury cases:

This question arises primarily in connection with traffic accidents which have connection with more than one State. In particular, the issue of the quantification of damages in personal injury cases was discussed. The solution agreed provides, on the one hand, for a recital with criteria for the quantification of damages to be applied by judicial authorities in accordance with national compensation rules. On the other hand, the Commission undertook to examine the specific problems resulting for EU residents involved in road traffic accidents in a Member State other than the Member State of their habitual residence and to prepare a study on all options before the end of 2008. This study would pave the way for a Green Paper.

Unfair competition and acts restricting free competition:

A compromise solution was found. It will allow for the application of one single law, while at the same time limiting, as far as possible, "forum shopping" by claimants.

Foreign law:

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

Other issues that were settled by the Conciliation Committee concern the relationship with other Community law instruments, the definition of environmental damage for the purposes of this Regulation, and a provision on

punitive damages in the context of public policy.

The consolidated text resulting from the agreement (so called "joint text") is not yet available, subject to legal linguistic revision: however, **technical details on the joint text are provided by the statement released by Diana Wallis on her website**, with specific reference to the amendments adopted by the European Parliament at second reading on the basis of the Council's common position.

Once the linguistic revision completed, the Regulation shall be endorsed by the Parliament (absolute majority of votes cast) and the Council (qualified majority voting procedure) to be adopted, within six weeks from the date of approval of the joint text, pursuant to Art. 251(5) of the EC Treaty: the Parliament's vote is scheduled in the plenary session of 10 July 2007 (see the OEIL page on Rome II).

It is entirely possible that the Regulation will be published in the Official Journal in July 2007 (following the Parliament's vote in plenary and the expected signature of its President and the Council's). If no change has been made to the provisions on the application in time, it will start to apply in early 2009 (see art. 32 of the Council's Common Position), to events giving rise to damage which occur after its entry into force (art. 31; the date of entry into force is on the twentieth day following that of the publication on the O.J., except otherwise specified).

(Many thanks to Andrew Dickinson and Janeen Carruthers for the tip-off, and to Martin George and Edouard Dirrig for providing additional information and clarifications)

French Judgements on Article

5(1)(b) of the Brussels I Regulation, Part II

In a recent post, I presented two 2006 judgements of the French supreme court for private matters (*cour de cassation*) on the application of Article 5 (1)(b) to distribution contracts. The *Cour de cassation* had held twice that the distribution contracts were Contracts for the Provision of Services in the meaning of article 5.

On January 23, 2007, the same court held in *Waeco* that another kind of distribution contract, a *concession exclusive* (exclusive concession in English?) was neither a Sales of Goods, nor a Provision of Services in the meaning of article 5(1)(b), and that, as a consequence, article 5(1)(a) had to be applied.

In *Waeco*, a distribution contract of *concession exclusive de vente* (Sale exclusive concession agreement) had been concluded in 2000 between a German seller, Waeco Int'l, and a French distributor, Waeco France. When the German party terminated the contract in December 2002, the French party decided to initiate proceedings in France. The Court of appeal of Aix-en-Provence had found that article 5 (1)(b) applied. The Cour de cassation reversed and held that article 5(1)(a) applied as exclusive concession agreements were neither sales of goods, nor provisions of services. It then went on to determine the applicable law pursuant to article 4 of the Rome convention to assess where the obligation in question was being performed. It held that the characteristic obligation was the provision of the sales exclusivity by the German seller to the French distributor, and that German law thus applied.

French judgements never mention previous cases. It is thus left to commentators to guess whether what may appear as a contradiction is not, or is. The only way to reconcile these cases that I can think of is to distinguish them on the nature of the distribution contract involved. In the 2006 cases, the distributor was not buying to resell, but was only making the sale happen: he was either facilitating the sale, or an agent. The distribution contract did not entail any sale. In *Waeco*, the distributor was buying the goods from the seller to resell them, and had the exclusivity of the sales on his commercial territory. The distribution contract involved both a sale and a service. For choice of law purposes, the Cour de cassation rules that one (sales exclusivity) is more important than the other, but

for jurisdictional purposes, it refuses to choose and comes back to the good old article 5(1)(a) rule.

German Publication on Rome I

A very interesting collection of papers held at a symposium in Bayreuth in September 2006 on the Proposal for a Regulation on the law applicable to contractual obligations ("Rome I") has recently been published: ***Ferrari/Leible*** **(eds.), Ein neues Internationales Vertragsrecht für Europa**

An English abstract has been kindly provided by the editors:

> *There is still insecurity for transborder-trade. In spite of the Brussels I-Regulation, the rules applied to a dispute within the Community cannot always be predicted. This situation is due to the fact that the national courts will determine the applicable law in different ways. They all follow the conflict rules of their forum, which can diverge. The result is that the identical claim may be submitted to a different law in Munich and in Manchester.*
>
> *To help this situation, the Member States of the EC had adopted a Convention on the law applicable to contractual obligations during a conference held in Rome in 1980. It had a considerable success in harmonizing the rules of private international law regarding contracts and contractual relationships.*
>
> *Yet the days of the so-called Rome Convention will soon be over. The Commission is planning to transform it into a regulation as part of the judicial cooperation in civil matters. It has published a "Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I)", COM (2005) 650 final, in December 2005.*
>
> *This proposal has been discussed during a conference in September 2006 in Bayreuth, Germany, which was jointly organized by Stefan Leible and Franco Ferrari. The conference united eminent specialists from Germany and other countries, as well as a representative of the Commission. Their papers, written*

in German, have now been published by Sellier. The collection is an indispensable tool for any lawyer working in the field of cross-border transactions.

The collection includes the following contributions:

- *Matthias Lehmann* (University of Bayreuth) defines in his contribution key notions regarding the scope of application, namely „contract“ and „pre-contractual relationship“ and shows that both terms – “contract” as well as “pre-contractual relationship” – have to be interpreted autonomously, which leads to the result that not all legal relationships which would be classified under German law as “pre-contractual” are exluded from the scope of the prospective Rome I Regulation.
- *Stefan Leible’s* (University of Bayreuth) contribution is dedicated to choice of law-clauses. He addresses in particular the requirements of an implicit choice of law, the question which law can be chosen as well as the rule provided for in Art.3 (5) Rome I Proposal according to which the choice of law shall be, in a case where the parties choose the law of a non-member State, without prejudice to the application of such mandatory rules of Community law as are applicable to the case.
- *Franco Ferrari* (University of Verona) attends to the law applicable in the absence of a choice of law-clause. He compares Art.4 Rome Convention with Art. 3 Rome I Proposal and examines the consequences of the new rule on particular contracts.
- *Dennis Solomon* (University of Tübingen) deals with consumer contracts and addresses in particular questions of the scope of application of Art. 5 Rome I Proposal.
- *Abbo Junker* (Zentrum für Arbeitsbeziehungen und Arbeitsrecht, Munich) addresses contracts in the field of labour law, in particular questions of the planned Regulation’s scope of application with regard to labour law, party autonomy (choice of law) as well as Art. 6 Rome I Proposal.
- *Karsten Thorn* (Bucerius Law School, Hamburg) tackles the notoriously known problem of mandatory rules. He turns in particular to the question how Art. 8 Rome I Proposal can be classified within the system of Rome I

as well as to Art. 8 (3) Rome I Proposal, which is very controversial among the Member States.

- *Ulrich Spellenberg* (University of Bayreuth) attends to contracts concluded by agents. He examines the internal relationship (between the principal and the agent) as well as the external relationship (between the principal and third parties). Further, also questions of form as well as the agent's liability for breach of warranty of authority are dealt with.

- *Eva-Maria Kieninger's* (University of Würzburg) and *Harry C. Sigman's* (Los Angeles, member of the Law Revision Committee on UCC Article 9 and member of the US delegation on the evolution of UNCITRAL recommendations on security interests) contribution is dedicated to assigment and statuatory subrogation. The first part, dealing with voluntary assignment and contractual subrogation (Art. 13) deals with Art. 13 (3) Rome I Proposal, which gives now an answer to the (so far) contentious problem which law is applicable to the question whether the assignment or subrogation may be relied on against a third party. Furthermore, it is dealt with questions such as the material scope of application of Art. 13. In the second part, the rule of Art. 14 dealing (only) with statutory subrogation is discussed, *inter alia* in view of Rome II.

- *Ulrich Magnus* (University of Hamburg) writes on multiple liability and set-off. With regard to statutory offsetting, regulated in Art. 16 Rome I Proposal, the legal situation under the Rome Convention – which does not contain a separate rule on the law applicable with regard to statutory offsetting – as well as the ECJ's case law and the scope of application of Art. 16 Rome I Proposal are illustrated. The second part deals with Art. 15 Rome I Proposal (multiple liability), in particular with questions of the provision's scope.

- *Ansgar Staudinger* (University of Bielefeld) attends to insurance contracts by describing in a first step the system of the Rome I Proposal with regard to insurance contracts which is criticised in view of the coexistence of two regimes: Rome I on the one side and directives on the other side. Thus, in a second step an alternative approach is developed according to which only the choice of law rules of the prospective Rome I Regulation should be applied.

As the contents show, the book includes contributions on the most important and most discussed issues with regard to Rome I and can therefore be highly recommended.

Further information can be found on the publisher's website, where it can also be purchased.

See also the report on the conference by *Robert Freitag* (University of Hamburg) which has been published in the latest issue of the Praxis des Internationalen Privat- und Verfahrensrecht (IPRax 2007, 269).

The Results of the JHA Council Session on Rome III, Maintenance and Rome I

Following swiftly on from our post on the JHA Council Session taking place today and tomorrow (19 – 20 April 2007), the Council have issued a **Press Release** with the main results of the council after today's deliberations. Here are their conclusions:

On **Rome III** (**Jurisdiction and applicable law in matrimonial matters**: see the related section of our site), they stated:

> *The Council discussed certain important issues of this proposal, in particular the rules regarding the choice of court by the parties, the choice of applicable law, the rules applicable in the absence of choice of law, the respect for the laws and traditions in the area of family law and the question of multiple nationality.*
>
> *A very large majority of delegations agreed on the guidelines proposed by the Presidency according to which the Regulation should contain a rule on a limited choice of court for divorce and legal separation by the spouses and on conflict-*

> *of-law rules. On this regard, the Regulation should contain, firstly, a rule giving spouses a limited possibility of choice of law for divorce and legal separation and, secondly, a rule applicable in the absence of choice. The Council took note of the position of two delegations that recalled that, in the absence of choice of law by the parties, the court seized should apply lex fori. However, such delegations underlined that they are prepared to continue the negotiations on this instrument. The Council recognised that the draft Regulation should not imply modifications of the substantive family law of the Member States with respect to divorce or legal separation. One delegation underlined however that the respect of the national legal order should not jeopardise the coherent application of Community law.*

They "gave mandate" to continue work on Rome III subject to guidelines on the *"choice of court by the parties (Article 3a)", the "choice of the applicable law by the parties (Article 20a)", the "rules applicable in the absence of choice of law (Article 20b)", the "respect for the laws and traditions of the Member State in the area of family law" and "multiple nationality".* See pages 10 – 15 of the Press Release for the full discussion of those points.

On **Jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations** (see our related posts here and here),

The Member States confirmed their "shared will" to successfully complete the project. The Council also endorsed

> *abolition of the exequatur procedure for all maintenanceobligation decisions covered by the Regulation, on the basis of the introduction of certain common procedural rules, accompanied by harmonisation of conflict-of-laws rules.*

as well as agreeing to,

> *...the principle of introducing a system for effective practical cooperation between central authorities in maintenance obligation matters, the details of which will still have to be worked out.*

For bilateral agreements by Member States with non-Member States, the

…Presidency suggests that Member State s may retain such agreements in line with the system set out in Article 307 of the Treaty and following the precedent in this area of Regulation (EC) No 44/2001 (Brussels I). It is therefore clear that such agreements should not compromise the system established by the proposed Regulation.

Rome I on the Law Applicable to Contractual Obligations (see the related section of our site). The Council discussed several key provisions:

(a) Principle of choice of law by the parties to the contract (Article 3)

As in the Rome Convention, the basic rule for the law applicable to a contract is the choice of the law of a country by the parties. This rule respects party autonomy and is particularly appropriate in the area of contractual obligations which are created and governed by the parties to the contract (Article 3). However, where all other elements relevant to the situation are located in a country otherthan the country whose law has been chosen, the choice of law does not allow parties to avoid the application of provisions of the law of that country which cannot be derogated from by agreement (Article 3(4)). Concerning rules of Community law which cannot be derogated from by agreement, the Commission proposed that those rules should prevail wherever they would be applicable to the case. However, since the majority of delegations took the view that it would be appropriate to treat rules of national law and of Community law which cannot be derogated from by agreement on an equal footing, as in the Council Common position on the Rome II-Regulation, the Council agreed to follow this approach.

(b) Law applicable in the absence of choice (Article 4)

In the absence of a choice of law by the parties, Article 4 provides essentially for two connecting factors: the habitual residence of the party who is required to effect the characteristic performance, if such performance can be determined (Article 4(1) and (2)), or otherwise the closest connection of the contract with a specific country (Article 4(4)). Delegations agreed that in order to achieve more legal certainty, some of the most typical contracts should be explicitly mentioned in Article 4(1). Where the contract does not fall under Article 4(1), in particular if it does not fall within the scope of one of the typical

contracts listed in that paragraph, the court has to apply Article 4(2). Member States also recognised the need for an "escape clause" allowing for flexibility where the connecting factors in Article 4(1) or (2) would exceptionally lead to an unsatisfactory result because it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country (see Article 4(3)). The Council confirmed the structure and the content of Article 4 as set out in the Addendum, with the exception Article 4(1)(j1) which still needs to be further discussed by the Committee on Civil Law Matters (Rome I).

(c) Individual employment contracts (Article 6)

Delegations agreed that, as in the Rome Convention, a special rule should provide for the appropriate connecting factors concerning individual contracts of employment in the absence of a choice of law. However, where a choice of law is made by the parties, the employee should not lose the protection given to him by the rules of the law of the country whose law would have been applicable in the absence of the choice and which cannot be derogated from by agreement.

The Council also agreed on the text of a number of other provisions (Articles 1 and 2, deletion of Article 7, Articles 9, 10, 14, 15, 16, 17, 19, 20 and 21).

See pages 25 – 26 of the Press Release for some general remarks on a **future common frame of reference for European contract law**. View the full Press Release **here**.

Rome II: Commission's opinion on Parliament Second Reading

On March 14th, **the Commission released its opinion** (COM(2007)126 fin.) **on the European Parliament's amendments** to the Council Common Position

on Rome II, that were adopted at second reading on 18 January 2007 (see our post here).

The guidelines of the Commission's position had been already expressed by EU Commissioner Franco Frattini during the debate that preceded the vote in the Parliament plenary session (see our resumé here): apart from a formal acknowledgment of some of the Parliament's amendments (aimed to clarify the wording of some recitals and provisions), the Commission rejects most part of the amendments on the controversial issues of the Regulation, on which an agreement could not be reached in the first two stages of the codecision procedure.

In particular, **the following provisions of the Parliament legislative resolution** (hereinafter: EP resolution) **were rejected**:

- **the introduction of a specific rule on violations of privacy and rights relating to the personality** (amendments 9, 15 and 19: new Recital 25a and new Art. 7a of the EP resolution):

> *The Commission already rejected this rule at first reading. Given the political impasse in the Council, the Commission would now prefer to exclude this tricky question from the scope of the Regulation, as in its amended proposal, especially since there is very little international litigation in this area.*

On the conflict rule on violations of privacy and rights relating to the personality, see also the letter of 28 February 2007 (Council doc. n. 6899/07) from Peter Hustinx (**European Data Protection Supervisor**) to the President of the Council, expressing some doubts and concerns on the proposed Art. 7a EP Resolution, and **risks of inconsistencies with the Directive 95/46/EC** (on the protection of individuals with regard to the processing of personal data and on the free movement of such data).

- **the possibility for the Court to "reasonably" infer a choice of law by the parties, having regard to other factors than an express clause** (amendment 10: Recital 28 of the EP Resolution):

> *The proposed form of words is not compatible with the legal certainty objective, which requires certainty as to the existence of a choice by the parties.*

- **the introduction of the *restitutio in integrum* principle in quantifying damages for personal injuries** (amendments 11 and 22: new Recital 29a and new Art. 21a of the EP Resolution):

> *While [the Commission] agrees that this is a very interesting idea for improving the situation of road traffic victims, it considers that this constitutes harmonisation of the Member States' substantive civil law which is out of place in an instrument harmonising the rules of private international law.*

- **the abolition of the specific rule relating to anti-competitive practices**:

The Parliament's vote on the conflict rule for unfair competition was quite contradictory: following the proposal put forward by the Rapporteur Diana Wallis in the Draft Recommendation for Second Reading, the rule itself (Art. 6 of the Council Common Position) has been deleted (see amendment 17). In a last minute attempt to agree on a compromise text, the Rapporteur had nevertheless proposed, a few days before the Parliament's plenary session, a number of modifications (doc. n. PE 382.964v01-00) to the provision of Art. 6 (see Amendment 31) and to the recitals dealing with it (see Amendments 28-30/Recitals 19-21).

In the Parliament's vote, some of the recitals have been adopted, which clarify the wording and the scope of the provision, but the modified text of Art. 6 has been rejected: the final outcome is that Recitals 19, 20 and 21 of the EP Resolution refer to an article which does not exist any more. The Commission emphasizes this paradoxical situation, while partially agreeing on the modifications approved by the Parliament, with a view to retain the special provision:

> *[P]reserving this specific rule boosts certainty and foreseeability in the law since it anchors the place where the loss was sustained. Moreover, the Commission fails to grasp the intentions of Parliament, which, despite this deletion [of Art. 6], would preserve and even improve the recital […] relating to the specific rule. If Parliament actually wished to preserve the specific rule, the Commission would accept the rule as proposed in amendment 31, rejected by Parliament.*

- **the introduction of a very detailed provision on the relationship between Rome II and other Community instruments containing rules having an impact on the applicable law, in particular the internal market instruments** (see Amendment 24/Art. 27):

In view of the recent developments in the European Parliament and the Council in the context of negotiations of other proposals, such a specifically tailored provision in this instrument no longer seems necessary.

As regards some **general issues of private international law theory, the Commission rejects the following amendments of the EP resolution**, that had been originally proposed by the Rapporteur Diana Wallis as autonomous provisions (see Amendment 21/Art. 15a and Amendment 22/Art. 15b of the Draft Recommendation for Second Reading) but then adopted by the Parliament in the form of recitals:

- **the introduction of a new recital allowing a litigant to raise the issue of the applicable law** (amendment 12: new Recital 29b of the EP Resolution):

The Commission already explained in its amended proposal that, while it supported the idea of easing the task of a court faced with international litigation, this was not something that could be expected of all the parties, in particular those who are not legally represented. Since it cannot accept a rule such as this, the Commission cannot accept either a mere recital, especially as this is a horizontal issue that should be addressed in a broader context. But the Commission is willing to look into the question of the application of foreign law in the courts of the Member States in the report on the application of the Regulation, as proposed in the amended proposal.

- **the express introduction of the *iura novit curia* principle, according to which the Court should determine the content of the applicable foreign law of its own motion** (amendment 13: new Recital 30a of the EP Resolution):

[The Commission] believes that in the current situation most Member States would be unable to apply such a rule as the requisite structures are not in place. But it agrees that this is an avenue well worth exploring and that special

attention should be paid to it in the implementation report.

A **partial agreement** was expressed by the Commission **on the definition clause** contained in new Recital 21a (see amendment 32, presented by the Rapporteur a few days before the Parliament's plenary session: doc. n. PE 382.964v01-00), **which clarifies the scope of the specific rule on environmental damage set out in Art. 7** of the Council Common Position, with a view to keep it in line with Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage (see. Art. 2(1) of the directive):

While the Commission is basically in favour of clarifying the scope of the specific rule on environmental damage, it regrets that the definition adopted in amendment 32 is so restrictive, confining the scope so that the rule would not apply, for instance, to air pollution. The Commission can accept a definition only if it covers all non-contractual obligations in respect of environmental damage, irrespective of the nature of the damage.

The opinion is the last official statement of the Commission's position on Rome II, prior to the Conciliation Committee that will be convened, in accordance with Art. 251(3) of the EC Treaty, after the formal rejection by the Council of the Parliament legislative resolution (the Council JHA is scheduled on April 19th 2007).